

ROP v. Ngatpang State, 13 ROP 292 (Tr. Div. 2003)
REPUBLIC OF PALAU,
Plaintiff,

v.

NGATPANG STATE,
Defendant.

CIVIL ACTION NO. 99-205

Supreme Court, Trial Division
Republic of Palau

Decided: March 7, 2003

ARTHUR NGIRAKLSONG, Chief Justice:

This case presents a constitutional challenge to the Ngatpang State Constitution. The Special Prosecutor's Office¹ filed this action alleging that the Ngatpang Constitution violates the "Guarantee Clause" of the national Constitution, which requires that state constitutions shall, among other things, follow "democratic principles." Palau Const. art. XI, § 1. ² Specifically, the complaint asserts -- citing *Teriong v. State of Airai*, 1 ROP Intrm. 664, 675, (1989); *Koror State Government v. Becheserrak*, 6 ROP Intrm. 74 (1997), and *Ngara-Irrai Traditional Council of Chiefs v. Airai State Government*, 6 ROP Intrm. 190 (1997) -- that one of those democratic principles is the right to vote for some key public officials. The Court finds and so holds that the people of Ngatpang State have not yet been deprived of their right to vote, because they have not been deprived of their right to amend their Constitution to provide for their suffrage. In fact, they have **L293** exercised their right to amend their Constitution three times since 1999.

¹ Unlike the *Teriong*, *Becheserrak*, and *Ngara-Irrai* cases (*i.e.*, the controlling case law), not a single voting citizen of Ngatpang is a party plaintiff in this case. The Special Prosecutor's Office filed this lawsuit on behalf of the national government. Although the defendant raised the issue of standing, defendant did not present the issue sufficiently for the Court to decide.

Despite the Court's request for supplemental briefs from the parties in support of their cross-motions for summary judgment, their counsel failed to sufficiently address the material issues of fact between this case and the *Teriong*, *Becheserrak* and *Ngara-Irrai* cases.

Another discomfoting matter that should be mentioned is that the parties submitted a proposed settlement to the Court which declares the Ngatpang Constitution unconstitutional for failing to comply with the requirements of the "Guarantee Clause." The parties withdrew the proposed settlement when the Court did not approve it. The Court believes that the parties here cannot by themselves stipulate to basically amend the Ngatpang Constitution. The people of Ngatpang at a referendum have the final say as to any such amendment.

² "The structure and organization of state governments shall follow democratic principles, traditions of Palau, and shall not be inconsistent with this Constitution. The national government shall assist in the organization of state government."

BACKGROUND

The Ngatpang Constitution was drafted by a Constitutional Convention in 1981, and approved in a referendum on January 10, 1982, by over 90% of the voters of the State of Ngatpang.

Article IV, section I of the Ngatpang Constitution vests “[a]ll powers of the state government in the “Ngaimis,” a body consisting of ten traditional chiefs who are not subject to any election. Rekemesik, the second-ranking chief, is the Governor by virtue of his title. He and the top four chiefs form a “Board of Executive,” which basically functions as the governing body of the executive branch. Rebelkuul, the top chief, is “the head of the State of Ngatpang and the presiding officer of the Ngaimis.” Ngatpang Const. art. V, § 1. He and the other Ngaimis members form the “legislative” branch of the government.

The sole elected official under the Ngatpang Constitution is the Executive Officer, whose job is to supervise “the day to day administrative functions ... of the state government... as may be assigned ... by the Board of Executive.” Ngatpang Const. art. VI, § 3. The Executive Officer is under the immediate supervision of the Governor. *Id.* It appears that the Executive Officer is akin to a Chief of Staff to the Governor.

ANALYSIS

In *Teriong v. State of Airai*, 1 ROP Intrm. 664 (1989), the Appellate Division held that the Guarantee Clause “require[s] that key state officials be elected and that the electorate be given the opportunity periodically to determine whether to retain or replace those officials through elections.” *Teriong*, 1 ROP Intrm. at 681. In that case, the Appellants argued that there was no constitutional requirement whatsoever to conduct elections for public offices. *Id.* at 668-669. The Court disagreed, stating that “the right to vote for key public officials at both the national and state governments is an essential democratic principle. . . .” Accordingly, the *Teriong* Court held that because the Airai Constitution then in place did not provide for the election of any key government officials, it was in violation of article XI, section 1.

This Court notes, as an initial matter, that the election of the Executive Officer under the current Ngatpang Constitution is not, by itself, sufficient to satisfy the *Teriong* court’s requirement that “key” public officials be elected. A key public official’s responsibilities should include policy-making matters. The Executive Officer, though elected, plays a role similar to that of a Chief of Staff to the Governor and does not have significant input as to government policy. Further, the Executive Officer serves under the direct supervision of the Governor, who is not himself elected. The Executive Officer is not answerable to the people like an elected Governor or Legislator; rather, the Board of Executive and the Governor make policies and the Executive Officer executes them. Because the Executive Officer has no policy-making responsibilities, he is not a “key” public official within the meaning of the *Teriong* court’s decision.³

³ The Court does not rule out the possibility that one key elected state government official with

¶294 This Court's analysis cannot end there, however. Several important factors distinguish the instant controversy from that faced by the *Teriong* court. To begin with, there are significant differences, as well as similarities, between the Ngatpang Constitution and the Airai Constitution that was before the *Teriong* court. As for similarities, the members of Ngaimis and members of the former Airai government are all traditional chiefs not subject to election. The Ngatpang Constitution requires as an initial step eight of the ten members of the Ngaimis to adopt a proposed amendment to the Constitution; while the then-Airai Constitution required twelve of the fourteen members of the legislature to pass such an amendment. The similarity ends with the almost identical number of voting members necessary to in Ngatpang adopt a constitutional proposal and in Airai to adopt a constitutional amendment.

The differences are more striking. Unlike Ngatpang's Constitution, the Airai Constitution before the *Teriong* court was not drafted by representatives of the people and was not voted upon by the people at a referendum. The *Teriong* court was thus faced with a state constitution that neither had been ratified by the people in a duly-called election, nor provided for any popular vote for state officials. Further, Ngatpang's Constitution states that the Constitution may be amended every four years. The Airai Constitution was silent as to the time period for amendment, which silence may reasonably be read to mean that amendment is completely at the discretion of the twelve traditional chiefs.

Another important difference concerns the ability of the people to participate in the amendment process. After the Ngaimis adopts a proposed amendment to the Constitution, that proposal goes to the people to vote on at a referendum. This was not the case with the Airai Constitution before the *Teriong* court. In fact, all the state constitutions, except Airai's former constitution, require any constitutional amendment to be approved by the people in a referendum. Under the first Airai Constitution, once the twelve out of fourteen unelected traditional chiefs without term limit in the Airai legislature agree on an amendment to the Constitution, that Constitution is amended. The *Teriong* court stated the importance of the people's right to change their constitution:

We hold that the Airai Constitution is invalid because it failed confirmation in a referendum by a majority of the votes cast. The eligible voters of Airai have a right to approve a draft Constitution in a referendum. The corollary of this is that the people have the right to vote on an amendment or change to their constitution in a referendum.

Teriong, 1 ROP Intrm. at 680.

policy-making responsibilities could satisfy the Guarantee Clause, provided that the people's ability to amend their constitution is viable both on the face of the constitutional provision and in practice. (Any amendment to the constitution must not be limited to the will of a body consisting of unelected members, for if, unlike the Ngaimis, that body decides not to propose any constitutional amendment, the people's right to vote is denied and it becomes unclear whether the government serves the will of the governed or the rulers. *Teriong*, 1 ROP Intrm. at 681. A constitution must at least allow proposed amendment by popular initiative and ratification by the people at a referendum.)

In the instant case, the people of Ngatpang State not only approved their constitution by vote, but their vote also serves as an opportunity to accept or reject any proposed amendments. 1295

The differences do not end there. Not only were the people of Airai excluded from participation under the letter of the Constitution, they were also foreclosed in practice, because the Constitution had never been amended from when it took effect in 1981 until the *Teriong* court declared it unconstitutional in 1989. Under the former Airai government, there was a “total absence or deprivation of . . . [the] right to vote.” *Id.* Likewise, the constitutional defect found in the case of *Koror State Government v. Becheserrak*, 6 ROP Intrm. 74 (1997), was that the people of Koror could not exercise their right to amend their Constitution as a practical matter. Under the Koror Constitution considered by the *Becheserrak* court, the people elected seventeen members of the legislature with policy-making responsibilities, a right to vote that satisfied the “key public officials” requirement of *Teriong*. Nevertheless, the problem with the former Koror State Constitution was that the citizens of Koror could not amend their constitution in fact because the House of Traditional Leaders blocked their attempts. Their right to amend their constitution, though technically provided in the constitution, was illusory.⁴ *Id.* at 78-79.

In contrast to the situation before the *Teriong* and *Becheserrak* courts, the Ngaimis has on three different occasions adopted a proposal to change their constitution and each of them was voted on by the people at a referendum. Even though Ngatpang’s Constitution states that the Constitution may be amended every four years, the Ngaimis adopted a first proposal to amend their constitution voted upon in a referendum in November 9, 1999, followed by the second referendum on a proposed constitutional amendment in June of 2000, and the third referendum on a proposed constitutional amendment in November 7, 2000. At least, they have had three referenda since 1999 on proposed amendments to Ngatpang’s Constitution. There is no evidence that Ngaimis has resisted any attempts by registered voters of Ngatpang to propose amendments to the Constitution. In fact, the last referendum may have been initiated by the Court’s “request” on October 4, 1999, that Ngaimis adopt a proposal to amend their Constitution. (*See also* submission of proposal to amend Constitution filed on October 15, 1999).

What is perhaps most significant about each of the three proposed amendments to the Ngatpang State Constitution since 1999 is that 1296 they all provide for an elected Governor and

⁴ Koror Constitution, Article XI, amendment, states:

Section 1. PROPOSAL. Any amendment to this Constitution may be proposed by popular initiative or by the Legislature as herein provided:

(1) By a petition filed by not less than twenty-five percent (25%) of the registered voters of the State of Koror; or

(2) By a resolution adopted by not less than three-quarters (3/4) of the members of the Legislature of the State of Koror.

Section 2. RATIFICATION. Any proposed amendment to this Constitution shall become effective when approved in a State-wide referendum by a majority of the votes cast on that amendment.

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legislative branch. The results of the referenda are:

November 30, 1999: 101 votes cast
35-YES, 66-NO

June 20, 2000: 82 votes cast
37-YES, 49 NO

November 7, 2000: 140 votes cast
64-YES, 73-NO

The people of Ngatpang have not been deprived of their right to vote to change their constitution to include suffrage for some key elected officials. They have exercised that right three times in the last three years. It has not been illusory.

In the instant case, the ability to amend the constitution is a greater right than the right to vote for some key public officials, because the former has encompassed the right to choose whether to adopt the latter. The Court believes that as long as the people of Ngatpang continue to have and exercise periodically their ability to amend their constitution to include some key elected officials, their constitution is not as yet in violation of the “Guarantee Clause” of the National Government.

This case is not an “extreme” case as was the first Airai Constitution before the *Teriong* court and the Koror Constitution before the *Becheserrak* court that justified those courts to step in to restore to the citizens of the respective states their right to vote for their constitution and constitutional amendment. *Ngara-Irrai*, at 203.

The Court is also mindful that even where violations of the Guarantee Clause were found, the proper remedy was never for the judiciary to rewrite the state’s constitution. The *Teriong* court vacated the trial court’s orders that would have involved the trial court in the formation of the new Airai Constitution, stating that “... the formation of a state constitution is for the people of each state to decide.” *Teriong*, 1 ROP Intrm. at 679. Similarly, the *Becheserrak* court vacated the trial court’s orders instituting procedure to revise the then-Koror State Constitution and allow the people of Koror and their leaders to make those decisions.

Leaving the formation of the state constitution to the people of each state is clearly the intent of the framers of the national Constitution. Standing Committee Report No. 34, relating to the Structure and Organization of Local Governments, which was adopted by the Palau Constitutional Convention, states:

The Committee concluded that it had two options: 1) recommend a model with some detail or 2) give just minimal guidelines. The Committee chose the second option....

By adopting the general guideline approach, this Committee intends to leave the

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choice of the structure of local government to the people of each municipality. The people in each municipality are permitted to adopt the present system, a more traditional system, a combination of the two or any system of government that they think is suitable to their local needs and resources.

Palau Const. Conv. Standing Comm. Rep. No. **1297** 34, at 3 (Feb. 26, 1979). The Guarantee Clause was not intended to oust the people of Ngatpang from their role in determining the structure of their own government.

In any event, the Ngaimis has adopted three proposed amendments to Ngatpang's Constitution each of which was voted upon by the people. Ngaimis appears to be governing by being responsive to the ever-changing will of the people. In this sense, Ngaimis, in playing its best traditional role, is governing in a way that some say "democratic."

CONCLUSION

The ability of the people of Ngatpang to change their constitution and election of key public officials are means of ascertaining and responding to the changing will of the governed. As long as the will of the governed is periodically determined by way of referendum and responded to, the people of Ngatpang's right to vote has not been denied. On the contrary, they have exercised their right to vote perhaps more than the people of most states in the last three years.

However, since the will of the people of Ngatpang is not static, it is imperative that they exercise their right periodically at a referendum to assess what they want in their state constitution and government. The Court urges the Ngaimis and the people of Ngatpang to go to the polls to make those determinations preferably no later than November of 2004.

The Court retains jurisdiction over this matter.