*Gibbons v. Seventh Koror State Legislature*, 13 ROP 156 (2006)

**IBEDUL YUTAKA M. GIBBONS, DAIZIRO NAKAMURA, VIVIANA UCHERBELAU, KOROR STATE GOVERNMENT, JOHN C. GIBBONS, in his official capacity as Governor of Koror State,**
**Appellants,**

**v.**

**SEVENTH KOROR STATE LEGISLATURE, YOSHITAKA ADACHI, PAUL UEKI, TIMOTHY UEHARA, KAZUKI SUNGINO, IDESONG SUMANG, UCHEL SECHEWAS, IGNACIO RENGULBAI, NISHIM REMOKET, MILAN ISAK, IGNATIO MOREI, JOSHUA BLESAM, and NGIRATECHOEBOET EBERDONG,**
**Appellees.**

CIVIL APPEAL NO. 05-040
Special Proceeding No. 04-012

Supreme Court, Appellate Division
Republic of Palau

Argued: July 7, 2006
Decided: August 8, 2006
⊥157
Counsel for Appellants: Oldiais Ngiraikelau

Counsel for Appellees: Raynold Oilouch

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

PER CURIAM:

## BACKGROUND

This case arises out of a law passed by the Koror State Legislature, KSPL No. K7-145-2004 (hereinafter "the statute" or "the law"), establishing a new procedure for selecting members of the Koror State Public Lands Authority ("KSPLA") Board of Trustees. The statute vests in the Governor the power to appoint all seven members of the Board. Previously, one seat on the Board was reserved for the High Chief Ibedul, who had the authority to choose three additional members (with the Governor appointing the final three members). The statute provides that the current members of the Board would continue to serve until at least five new members of the Board had been nominated and approved by the legislature.

Following passage of the statute, the incumbent members of the KSPLA Board sued the legislature and the Governor seeking a declaration that the statute was unconstitutional and an injunction barring the Governor from appointing new members to the Board. On September 9, 2004, after the Governor indicated that he agreed that the law was unconstitutional and that he had no plan to remove or replace the current board members, the Trial Division dismissed the action as unripe. *Ngiraelbaed v. Gibbons*, Civil Action No. 04-169 (Order dated Sept. 9, 2004). Subsequently, the legislature and several of its members filed the present action seeking a writ of mandamus ordering the Governor to carry out the law and appoint seven members to the Board. The current members of the KSPLA Board then intervened.

Plaintiffs and Intervenors brought cross-motions for summary judgment. Plaintiffs argued, *inter alia*, that the Koror Legislature had the authority to pass legislation regarding the composition of the KSPLA Board and that, in doing so, the legislature did not impair the role or function of the traditional leadership. In response, Intervenors disputed the propriety of obtaining a writ of mandamus via a motion for summary judgment and urged that, in any event, Plaintiffs had not made the requisite showing for issuance of a writ of mandamus. Additionally, Intervenors brought their own "contingent" motion for summary judgment, in which they argued that, if anything, summary judgment should be granted in their favor, insofar as the statute: (1) violates the Palau Constitution by revoking the traditional role of the Ibedul in choosing the members of the KSPLA Board; (2) violates the Koror State Constitution by attempting to remove officers that the legislature had no power to appoint; and (3) interferes with the vested ⊥158 rights of the current KSPLA Board members to finish their terms.

The Trial Division, Associate Justice Miller presiding, granted summary judgment in favor of the legislature. For the reasons set forth below, we affirm.

## STANDARD OF REVIEW

We review the trial court's entry of summary judgment *de novo*, employing the same standards that govern the trial court and giving no deference to the trial court's findings of fact. *ROP v. Reklai*, 11 ROP 18, 20-21 (2003) (citing *Akiwo v. ROP*, 6 ROP Intrm. 105, 106 (1997)). A motion for summary judgment should only be granted when the pleadings, affidavits, and other papers show that no genuine issue of material fact remains, and the moving party is entitled to judgment as a matter of law. ROP R. Civ. P. 56(c).

## ANALYSIS

Appellants raise three main issues. They maintain that KSPLA No. K7-145-2004: (1) violates both the Palau Constitution and the Koror State Constitution by attempting to revoke the traditionally and customarily recognized role and function of traditional leadership; (2) infringes on the vested rights of the current KSPLA Board members to complete their terms in office; and (3) represents an unconstitutional legislative encroachment on the executive power to appoint public officials. The Court will discuss these issues in turn.

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## I. Constitutional Protection of Customary Role and Function of Traditional Leaders

The Traditional Rights Clause, Article V, Section 1 of the Palau Constitution, prohibits the government from taking any action "to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with this Constitution . . ." Palau Const. art. V, § 1. [1] Appellants argue that the control and allocation of use rights in public lands (or chutem buai) has traditionally been governed by the traditional council of chiefs of each village. Thus, Appellants urge that the statute violates the Traditional Rights Clause of both the Palau and Koror State Constitutions, insofar as it strips from the Ibedul his customary role in deciding and allocating use rights with respect to public lands in Koror. In support of this argument, Appellants have presented evidence that, by tradition and custom, the traditional leadership exercised control over the use of public lands. *See, e.g.*, *PPLA v. Salvador* , 8 ROP Intrm. 73, 75 n.2 (1999) ("Traditionally, mangrove swamps, the reef, and the sea were considered public domain, usually under the control of the appropriate village klobak, and members of the village could use the area. Persons not from the village could, with permission of the klobak, also use public domain areas.") (citing Shigeru Kaneshiro, *Land Tenure in the Palau Islands*, *in* 1 *Land Tenure Patterns: Trust Territory of the Pacific Islands* , at 296 (Office of the High Commissioner, Trust Territory of the Pacific Islands, 1958)); *Ngiraingas v. Isechal*, 1 ROP Intrm. 34, 39 (Tr. Div. 1982) ("In aboriginal Palau, land was divided into public domain and clan lands. The former was controlled generally by the village council."); ⊥159 *Ngiramelkei v. Sechelong*, 7 T.T.R. 119, 121 (Tr. Div. 1974) ("Land which is village or public land is held by the title holder for the village . . .").

This Court has had few occasions to elaborate on the full meaning and implication of the Traditional Rights Clause with respect to the structure of state governments. The Trial Division took a narrow view of the Clause in *Becheserrak v. Koror State Gov't* , Civil Action No. 166-86 (decision and order dated May 16, 1995), *rev'd on other grounds*, 6 ROP Intrm. 74 (1997), which involved a Guarantee Clause challenge to an earlier version of the Koror State Constitution. Specifically, the plaintiffs contended that the Koror Constitution violated the Guarantee Clause of the Palau Constitution [2] by vesting too much power in the House of Traditional Leaders. [3] In response to the defendants' contention that an interpretation of the Guarantee Clause requiring a reduction in the role of the traditional leaders would violate the Traditional Rights Clause, the court held that the two clauses could be reconciled:

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[1] The Koror State Constitution also contains a traditional rights clause. Koror Const. art. V, § 1 [sic]. In light of the identical language in the two clauses, the Court will analyze them together.

[2] The Clause provides that the "structure and organization of state governments shall follow democratic principles, traditions of Palau, and shall not be inconsistent with this Constitution." Palau Const. art. XI, § 1. In *Teriong v. State of Airai* , 1 ROP 664 (1989), this Court held that the 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." *Id.* at 681.

[3] At the time, the Koror Constitution declared the House of Traditional Leaders to be "the supreme authority of the State of Koror." Among the powers granted the HOTL by the Constitution were an unoverridable veto over proposed legislation, the power to serve as the sole voice of the State in its dealings with other states, the national government, and foreign governments and approval power over the appointment of administrative department heads. *Becheserrak v. Koror State Gov't*, Civil Action No. 166-86 (Decision dated May 17, 1995, at 9).

> In the Court's view, [the Traditional Rights Clause], is best understood as stating the principle that traditional leaders should not be disqualified from playing a governmental role because of their status. That is to say, there is no restriction on anyone running for office, or being appointed to a position simply because he or she is a traditional leader. This principle is obviously not at odds with the Guaranty Clause principle, as stated in *Teriong*, that key state officials must be elected. While the Guaranty Clause may prohibit the establishment of a traditional leader as a "key state official" simply because of his or her status, Article V ensures that, notwithstanding that status, he or she may attain that office in the same manner as any other citizen.

*Becheserrak*, Civil Action No. 166-86 (decision and order dated May 16, 1995, at 8).

In reconciling these two constitutional provisions, the *Becheserrak* court focused on the second half of the Traditional Rights Clause, which provides "nor shall [the government] prevent a traditional leader from being recognized, honored, or given formal or functional roles at any level of government." Palau Const. art. V, § 1. As for the first ⊥160 portion of the clause, [4] the court held that its preservation of the role and function of traditional leaders, "as recognized by custom and tradition," was not being threatened: "whatever form the government of Koror State may hereinafter take, this Court will have done nothing to prohibit or revoke the role of Koror's traditional leaders *as recognized by custom and tradition*. It is trite but perhaps necessary to point out that [none of the traditional leaders] has, by *tradition*, a function or role in the *constitutional* government of Koror [or] in the *constitutional* government of Palau." *Id.* at 4.

The Appellate Division adopted this more limited conception of the Traditional Rights Clause in *Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't*, 6 ROP Intrm. 198 (1997). There, after concluding that the Guarantee Clause did not speak to or require the courts to specify the exact division of governmental powers between elected and traditional leaders, the court held that the Traditional Rights Clause did not compel a different result:

> Having found that the current Airai Constitution is not invalid under Article XI, § 1 of the Palau Constitution, we do not believe that any different result is compelled by Article V, § 1. We see little reason to believe that the Framers, having directly addressed the issue of state governments in Article XI, intended to address the same issue in Article V. In particular, we do not believe that in preserving the role of traditional leaders "as recognized by custom and tradition," the Framers meant to address, much less mandate, the role that such leaders should play in the constitutional governments to be established by each state. If that were the intent of the first phrase of Article V, § 1, there would have been no need for the second phrase preserving the right of traditional leaders to be "given formal or functional roles at any level of government."

*Ngara-Irrai Traditional Council of Chiefs*, 6 ROP Intrm. at 204.

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[4] "The government shall take no action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with this Constitution . . ." *Id.*

In the present case, the trial court relied on this interpretation of the Traditional Rights Clause in upholding the statute. Noting that the traditional leadership had no traditional and customary role in selecting the members of the statutorily-created KSPLA Board, the court found that any argument that the traditional leadership clause enshrined in the chiefs all of their traditional and customary powers ran headlong into the Guarantee Clause's commitment to democratic principles. In addition, the court noted that, even acknowledging the chiefs' traditional role with respect to public lands, the lands administered by the KSPLA are not the traditional chutem buai over which the traditional leadership had authority, but rather lands that are public because they were appropriated during the Japanese Administration and later administered by the Trust Territory and Palau Public Lands ⊥161 Authority before being transferred to the KSPLA.[5]

Turning first toward the latter of these holdings, we disagree with the trial court's conclusion that none of the land administered by the KSPLA consists of chutem buai over which the chiefs traditionally had authority. The trial court reached this conclusion by reference to the Palau National Code's definition of "public lands" as "those lands situated within the Republic which were owned or maintained by the Japanese Administration or the Trust Territory Government as government or public lands . . ." 35 PNC § 101. In doing so, however, the court appears to have overlooked the last provision of section 101, which includes within the definition "such other lands as the national government has acquired or may hereafter acquire for public purposes." *Id.* Thus, this definition does not exclude the possibility that KSPLA has jurisdiction over land originally community-owned prior to the foreign occupation of Palau. And indeed, in past cases, the various public land authorities have asserted jurisdiction over land which they claimed to have originally been chutem buai. *See, e.g.*, *PPLA v. Ngiratrang,* Civil App. No. 05-034 (opinion dated Apr. 19, 2006 at 10 n.5) (PPLA raised possibility that land was originally chutem buai, and had not been seized by Japanese, in defense of a return of public lands claim); *Omenged v. UMDA* , 8 ROP Intrm. 232 (2000) (title to chutem buai held by Melekeok State Public Lands Authority). Moreover, as Appellants point out, there is a possibility that some of the land seized by foreign occupying powers had previously been classified as chutem buai and that other public lands later came under the control of various municipalities. *See, e.g.* Shigeru Kaneshiro, Land Tenure in the Palau Islands, 308 (1958) ("The German administration evidently considered all lands not occupied or cultivated to be government lands . . ."); *Rurcherudel v. PPLA*, 8 ROP Intrm. 14 (1999) (upholding award to PPLA of land formerly belonging to Ngeong Village); *Airai Municipality v. Rebluud* , 4 TTR 75, 77-78 (Tr. Div. 1968) (community land assigned by German Administration to Airai Village). As a result, there exists an issue of material fact regarding whether the KSPLA has within its jurisdiction land originally classified as chutem buai.

Nevertheless, the Trial Division's entry of summary judgment is proper based on its more general conclusion that the traditional leadership had no customary and traditional role in selecting members of the KSPLA Board. As Appellants concede, the KSPLA is a statutory

[5] As to the distinction between chutem buai and other public lands, see *PPLA v. Ngiratrang*, Civil Appeal No. 05-034 (opinion dated Apr. 19, 2006, at 9-10 n.5); Palau Conservation Society, *State and Traditional Legal Authority in Palau*, PCS Rep. 99-03 at 12-17 (1999).

creation. *See* 35 PNC § 215. Thus, insofar as Article V, Section 1 (and likewise Article IV, Section 2 of the Koror Constitution) protects the roles and functions of traditional leaders *as recognized by custom and tradition*, it does not protect their role with respect to the KSPLA Board, a part of the *constitutional* government of Koror, for, as the Trial Division noted, there was and is no customary role or function of traditional leaders in the constitutional government.

In the past we have noted that "state public land authorities are designed not to be part of state government, but are hybrid identities including both state and traditional representatives." *Ngara-Irrai*, 6 ROP Intrm. ⊥162 at 202; *KSPLA V. Diberdii Lineage*, 3 ROP Intrm. 305, 308 (1993). We have also recognized, however, that this "hybrid" system was a creation of statute, not constitutional mandate. *Ngara-Irrai*, 6 ROP Intrm. at 202 (discussing the "deliberate balance mandated by the legislature in adopting § 215(b)"). Indeed, shortly after our decision in *Ngara-Irrai*, the OEK amended the national statute governing the creation of state public land authorities. The original statute authorizing the creation of the state public lands authorities, 35 PNC § 215, provided that:

> Each state authority shall be governed by a board of trustees consisting of the paramount hereditary chief of the state, the chief executive officer of the state, three persons to be appointed by the chief executive officer with the advice and consent of the state legislature, and three persons to be appointed by the chief with the advice and consent of his traditional chiefs' council.

In contrast, the amended statute allotted the states greater flexibility in determining the membership of the land authority boards: "Each state authority shall be governed by a board of trustees established by state law." 35 PNC § 215(b). It was pursuant to this law that the Koror State Legislature created the KSPLA Board, in which Ibedul had the power to appoint the majority of the Board members. Thus, while Ibedul and his appointees have served on the KSPLA Board, they did so by operation of state and national law, not "by custom and tradition."[6]

This approach comports with the Framers' intention to "to leave the choice of structure of local government to each municipality." *Ngara-Irrai*, 6 ROP Intrm. at 203 (citing Palau Constitutional Convention, Standing Committee Report No. 34 at 3 (March 5, 1979)). *See also Koror State Gov't v. Becheserrak*, 6 ROP Intrm. 74, 77 (1997). States have exercised this discretion by adopting government structures with varying degrees of involvement and power delegated to the traditional leadership. The Airai State Constitution, for example, grants the Council of Chiefs the power to "advise the Governor on matters concerning traditional laws, customs, and their relationship to the Constitution and the laws of Airai State." Airai Const. art. VI, § 6. The Ngardmau State Constitution, on the other hand, establishes a relatively larger role for the traditional chiefs, providing that any bill "relating to agreement between Ngardmau State and other states in Palau, or agreement with foreign nations, or relating to traditional customs shall require approval of the full membership of the Council of Chiefs of Ngardmau State." Ngardmau Const. art. VII, § 6. So long as the individual states allow their populations a voice in

[6] For this reason, the statute does not violate Article XI, Section 3 of the Koror State Constitution, which provides that "[c]ustom and tradition may only be amended in accordance with the traditional law of the State of Koror."

the process of structuring their government, this Court will not interfere.

Regardless of their traditional and customary role in governing the use of chutem buai and other public land, the traditional leaders have no such role with respect to the KSPLA Board. For this reason, we affirm the ⊥163 Trial Division's entry of summary judgment with regards to Appellants' claim under the Traditional Rights Clauses of the Palau and Koror State Constitutions.

## II. Right of KSPLA Board Members to Complete Their Terms

Appellants also claim that the statute is invalid because it interferes with the vested rights of the current KSPLA Board members to finish their terms. They urge that under United States common law, applicable in Palau pursuant to 1 PNC § 303, [7] "each Plaintiff has a vested right to complete his term while the KSPLA continues to exist, and the Legislature is prohibited from removing any Plaintiff for political reasons, or otherwise, except by complete abolition of the KSPLA board of trustees as a matter of substance, as opposed to form." Appellant's Opening Brief at 12. In making this argument, however, Appellants ignore the fact that the general rule in the United States allows a legislature to abolish a public office during the term of an incumbent. *See, e.g.* , 63C Am. Jur. 2d *Public Officers and Employees* § 47 (1997) ("Absent any express constitutional limitation, a legislative body has full and unquestionable power to abolish an office of its creation or to modify the terms of the office, in the public interest, even though the effect may be to curtail an incumbent's unexpired term."); *Corn v. City of Oakland* , 415 N.E.2d 129, 132 (Ind. Ct. App. 1981) ("[A]bsent some constitutional prohibition, an office created by the legislature may be abolished by the legislature during the term of an incumbent."); *Lyons v. City of Pittsburgh* , 586 A.2d 469, 471 (Pa. Commw. 1991) ("The law is well settled that public officers possess no vested right to a public office and a legislature or governing body may abolish a public office and oust the office holder prior to the completion of his term.").

Besides being a century old, the bulk of the cases cited by Appellants do not hold that a public office holder has a vested right in the completion of his term. Rather, these cases merely apply a presumption that where a legislature acts to abolish a law or office, and later re-enacts the law or office with minimal alterations, the latter acts to neutralize the initial repeal – allowing the initial office holder to retain their office. *Taylor v. Cowen*, 117 N.E. 238, 239 (Ohio 1917) ("In the construction of legislation of this character the legal principle has become well established that when the amendatory or re-enacted law substantially re-enacts the existing law, the latter is held to be in effect continuous and undisturbed, and in contemplation of law the amendatory measure is not a repeal, but merely a reaffirmance of the former law."); *Sayer v. Brown*, 46 S.E. 649, 652 (Ga. 1904) ("It has often been held that where one statute expressly declares that an existing statute is repealed, and at the same time re-enacts its provisions, . . . the re-enactment neutralizes the repeal, so far as the old law is continued in force."). Importantly, these decisions are rooted not in the rights of the incumbent office holders, but rather in the

[7] "The Rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law . . . or customary law . . ."

intent of the legislature. *Taylor*, 117 N.E. at 239 ("The question is: What was the legislative intent? To abolish the office the intention of the competent authority to abolish such office must be clear."). In the present ⊥164 case, the Koror State Legislature's intent to replace the incumbent members of the KSPLA Board was clear.

Appellants cite only one case, *Abbott v. Beddingfield* , 34 S.E. 412 (N.C. 1899), holding that a public officer has a vested right in his office that would be violated by the abolishment of the office prior to the completion of his term. As the Trial Division noted, however, the North Carolina Supreme Court later reversed the case on which *Abbott* relied, holding that its conclusion "stands without support in reason . . . opposed to the uniform unbroken current of authority in both state and federal courts." *Mial v. Ellington* , 46 S.E. 961, 963 (N.C. 1903) (discussing *Hoke v. Henderson* , 15 N.C. 1). Thus, Appellants reliance on U.S. common law, pursuant to 1 PNC § 303, is misplaced, and the Court is left with the conclusion that the incumbent members of the KSPLA Board have no right to complete their terms.

## III. Separation of Powers

Finally, Appellants urge that KSPL No. K7-145-2004 infringes on the Governor's power to appoint public officers under the Koror State Constitution. Although the statute does not purport to grant the legislature the power to appoint members to the KSPLA Board, Appellants maintain that it nevertheless violates the separation of powers set forth in the Koror Constitution by removing the incumbent members of the Board. This argument is problematic in two respects. First, Appellants have not supported this argument with citation to any legal authority, other than the general statement that Article VII, section 4(a) [sic] of the Koror Constitution grants the Executive the primary power to "execute the laws." In light of this failure to adequately brief the issue, we need not even consider the issue. *Ngirmeriil v. Estate of Rechucher*, 13 ROP 40, 47 (2006) (discussing the court's "reluctance to hear claims not fully briefed by the parties"). Additionally, as the trial court discussed, the statute here actually increases the appointment power of the Governor, allowing him to appoint all seven members of the KSPLA Board, rather than merely three. Thus, it is untenable to suggest that the statute somehow represents an infringement of this power.

## CONCLUSION

For the reasons set forth above, we affirm the Trial Division's entry of summary judgment in favor of the Koror State Legislature.

NGIRAKLSONG, Chief Justice, concurring:

I concur with the opinion. I, however, write separately because I believe we could also affirm the constitutional issue based on applicable rules of statutory and constitutional interpretation. In so doing, we would avoid deciding constitutional issues in the absence of sufficiently developed facts before us.[8]

[8] Constitutional provisions relied upon or mentioned in this case are the "traditional rights clauses," Koror Const. Article IV, sec. 2 and Palau Const. Article V, sec.1, "the supremacy clause," Koror

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⊥165 At issue is the constitutionality of KSPL No. K7-145-2004 ("the statute"). I need not repeat the history of this statute except to say that it has its enabling genesis on the Secretarial Order of the Department of Interior, statutes of the Palau District Legislature, ordinances of Koror Municipal Government, and statutes of the National Congress of the constitutional government. The statute is strictly a creation of statutes and ordinances and is not an enabling act pursuant to a specific constitutional provision.

The immediate predecessor of this statute was KSPL No. K6-90-98. The composition of the Board of Trustees of the Koror State Public Lands Authority ("the Board") of the then law included 3 members appointed by Chief Ibedul with the consent of the House of Traditional Leaders ("HTL") and 3 members appointed by the Governor with the advice and consent of the Legislature. Chief Ibedul served as chairman of the Board in perpetuity.

The statute before us made significant changes on the membership of the Board. The

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Const. Article VI, sec. 1, and the "guarantee clause" of the national constitution, Palau Const. Article XI, sec. 1. Of these constitutional provisions, this Court has interpreted the "guarantee clause' of the national constitution more than the other provisions. A little update status of the "guarantee clause" may not hurt.

In *Teriong*, the Court stated that to comply with an important democratic principle of the guarantee clause, a state constitution must provide for election of "key state officials." *Teriong v. State of Airai*, 1 ROP 664, 681 (1989). The *Teriong* Court did not say "all" or "some" key public officials: neither did it say who shall be "key" public officials. In giving deference to the states to decide their constitutions, *Teriong* left these detailed questions for each state to decide. When the *Bechesserak* case came around, trial courts had been reading "key public officials" to mean all key public officials.

In *Bechesserak*, the majority opinion stated that it would be unreasonable to read *Teriong* to require that all key public officials are to be elected as there are key officials who are not elected and should not be in even model democratic governments, such as military officials and judges in the United States. *Koror State Government v. Bechesserak* , 6 ROP Intrm. 74, 77 (1997). As such, the then-Koror State Constitution with elective legislative body met the minimum democratic principle as announced in *Teriong*.

So, what was the constitutional infirmity in the Koror State Constitution before the *Bechesserak* Court? It was not the Constitution itself. The HTL unlawfully blocked a lawful attempt to amend the Constitution via a resolution by the Legislature. In *Teriong*, we stated that this right to periodically vote for key public officials to represent the people in running their government includes the right to vote to amend or change their constitution, at 680. The then Koror State Constitution provided for methods of amending the Constitution in Article XI, sec. 1. Amendments to the Constitution may be proposed by either a petition by certain percentage of registered voters or an adoption of a resolution by ¾ of the members of the Legislature.

Resolution 43 was just such a proposed amendment to the Constitution which the HTL did not have a pocket veto over it. The *Bechesserak* Court held that Resolution 43, a proposed amendment to the Constitution, is not subject to the HTL's approval before it goes to a referendum as explicitly stated in Article XI, sec. 1 of the Koror State Constitution. The *Bechesserak's* ruling paved the way for the people to exercise their right to vote to amend their constitution. The Koror State Constitution itself has been in compliance with the "guarantee clause" and *Teriong* since day one. This Constitution may also be amended as provided in the Constitution.

seven members are appointed by the Governor with the advice and consent of the Koror State Legislature. All members serve for a term. Members select their chairman. Chief Ibedul's permanent chairmanship and his authority to appoint three members were eliminated.

⊥166 Appellants argue that by eliminating Chief Ibedul's chairmanship and authority to appoint three members of the Board, KSPL No. K7-145-2004 violates the "traditional rights clauses" of both the Koror State Constitution and the National Constitution (Koror Const. Article IV, sec. 2 and Palau Const. Article V, sec. 1 respectively). The identical constitutional provisions prohibit the government from taking any action "…to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with this Constitution . . . ." Appellants further argue that the statute also violates the "supremacy" of the "HTL" in Koror Const. Article VI, sec. 1.

Specifically, appellants argue that the statute takes away the chiefs' traditional control over public lands. There was, however, no evidentiary hearing at the trial court. Before us are either insufficient evidence [9] or at most disputed facts of what the chiefs' traditional powers and corresponding responsibilities are over traditional public lands.

I would uphold the constitutionality of the statue, KSPL No. K7-145-2004, because there are insufficient facts presented on the chiefs' traditional powers over public lands. Without this set of facts, the inquiry to the constitutionality of the statute should not even begin. There are no facts to overcome the statute's presumed constitutionality. 16A Am. Jur. 2d *Constitutional Law* § 166 (1998).

Courts should not formulate rules on constitutional law in the absence of "precise facts to which it is to be applied." *Id.* at § 128. *See also Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 465, 462 (1945) where that Court declined to "decid[e] . . . the constitutionality of a state statute . . . without [,among other things,] some precise set of facts . . . ."

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[9] The existence of a claimed custom must be proven by clear and convincing evidence . *Saka v. Rubasch*, 11 ROP 137, 141 (2004). One "piece of evidence" introduced at trial on the traditional chiefs' powers with respect to public land was the affidavit of Sebastian Andreas, a member of the Koror State Constitutional Convention, who stated that "[i]t was understood and agreed that supreme authority would include participation and control over such fundamental matters as land within the boundaries of Koror State." The trial court did not like this way of reading the Constitution. I believe, however, there is no known rule of statutory or constitutional interpretation that infers intent of statute or constitution from comments from individual members of the legislature or convention. I asked counsel for appellants at oral argument if he knew such rule of interpretation existed and he did not. The Court in *Maxwell v. Dow*, 176 U.S. 581, 601-02 (1900), had this to say about this mysterious "rule" of statutory and constitutional interpretation: "[w]hat individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it." "The law as it passed is the will of the majority of both houses, and *the only mode in which that will is spoken is in the act itself* . . . ." *Conroy v. Aniskoff,* 507 U.S. 512, 519 (1993) (J. Scalia concurring) (emphasis added and citation omitted). I would give no credit, evidentiary or otherwise, to the Andreas Affidavit.

There is also the "doctrine of strict necessity" which is based on the separation of powers principle and other rules developed ⊥167 under the court's power of judicial review. The doctrine cautions against ruling on constitutionality of a statute unless it is necessary, the issue is squarely presented before the court, and no other alternatives exist to sustain the statute's constitutionality. 16A Am. Jur. 2d *Constitutional Law* § 114-15, 117. (1998).

Finally, even if a case is made for the chiefs' power over public lands, that would not necessarily render the statute unconstitutional. The people of each state can, in exercising their right to amend their constitution, choose to place the role of traditional leader either in the constitutional government or in an advisory role to the constitutional government. *Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't*., 6 ROP Intrm. 198, 204 (1997).