Obeketang v. Sato, 13 ROP 192 (2006)

TAKAO OBEKETANG, THOMAS O. REMENGESAU, PKOI ULECHONG, YOSKO MINER, and KYOKO NGOTEL,
Appellants,

v.

SINGICHI SATO, NGARCHELONG STATE ASSEMBLY, ABRAHAM OSIMA, CALEB TEREKIU, JAMES ULTIRAKL, ULITECH NGIRAKEBOU, ONGINO IKESIIL,
Appellees.

CIVIL APPEAL NO. 05-041
Civil Action No. 05-017

Supreme Court, Appellate Division
Republic of Palau

Argued: September 19, 2006
Decided: September 21, 2006
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Counsel for Appellants: J. Roman Bedor

Counsel for Appellees: Salvador Remoket

BEFORE: LARRY W. MILLER, Associate Justice; ALEX R. MUNSON, Part-Time Associate Justice; J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

The present action is the most recent in a long-running dispute over the title "Tet ra Ollei" of Techiwod Clan in Ngarchelong. Appellants, members of the Ngarchelong State Assembly, brought the present action challenging the Assembly's recognition of Appellee Singichi Sato as Tet ra Ollei. The Trial Division granted summary judgment in favor of Appellees, on the ground that the issue constitutes a nonjusticiable political question. Appellants argue that the trial court erred in applying the political question doctrine. For the following reasons, we affirm the Trial Division's entry of summary judgment.

BACKGROUND

The title of Tet has remained vacant since the last Tet passed away in 1979. In 1985, the Trial Division heard a case involving three men who each claimed to be the rightful holder of the title. *Tet Ra Ollei Uehara v. Obeketang* , 1 ROP Intrm. 267 (Tr. Div. 1985). Following a three-month trial, the court held that to obtain the title, Palauan custom required a nominee to obtain

the approval of the three lineages of Techiwod Clan – Ngerbad, Olleb, and Ukall. Finding that none of the three claimants had obtained such approval, the court concluded that the position of Chief Tet remained vacant. None of the claimants filed a timely appeal to this decision.

⊥194 Subsequently, in *Sato v. Ngerchelong State Assembly* , 7 ROP Intrm. 79 (1998), Appellee Singichi Sato brought suit against the Ngarchelong State Assembly, seeking a declaratory judgment requiring the Assembly to pay him an honorarium or allowance due to him as Chief Tet.[1] Sato claimed that he had been appointed Tet by Orakidil Skesuk, an *ourrot* of Olleb Lineage. The Appellate Division upheld the Trial Division's holding that Sato was collaterally estopped from challenging the *Uehara* court's holding that appointment as Chief Tet required approval of all three lineages of Techiwod Clan. In doing so, the court noted that although not a party to *Uehara*, Sato was in privity with his brother Inao Sebaklim, a named defendant in the earlier case.

On October 19, 2004, the Ngarchelong State Assembly adopted Resolution No. 12-04 ("the Resolution") to grant Sato a seat in the Assembly as Tet. The Resolution cited the appointment and confirmation of Sato as Tet by the ranking women of Ukall Clan, as well as his acceptance by the "Ngara Derbei" (or Council of Chiefs) of Ollei Hamlet. Six members of the Assembly voted in favor of the Resolution, with five members voting against.

Following passage of the Resolution, Appellants brought suit challenging the Assembly's recognition of Sato as Tet on the ground that he had not obtained the approval of the three lineages of Techiwod Clan, as required by *Tet Ra Ollei Uehara v. Obeketang* , 1 ROP Intrm. 267 (Tr. Div. 1985). The trial court subsequently granted partial summary judgment in favor of Appellants on the ground that the doctrine of collateral estoppel barred Sato from challenging the *Uehara* court's findings that, having failed to obtain the approval of all three lineages of Techiwod Clan, he had not been properly appointed Tet. Because it had not been party to the earlier case, however, the court held that the Assembly was not bound by this earlier ruling. Moreover, the court held that the Assembly's decision to seat Sato as Tet constitutes a nonjusticiable political issue to be resolved solely by the Assembly according to the Ngarchelong State Constitution. On this basis, the court granted summary judgment in favor of Appellees.

STANDARD OF REVIEW

This Court reviews a trial court's grant of summary judgment *de novo*. *Mesubed v. ROP*, 10 ROP 62, 64 (2003). As part of this review, "all evidence and inferences are viewed in the light most favorable to the nonmoving party, to determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law." *Gibbons v. Seventh Koror State Legislature* , 11 ROP 97, 104 (2004) (quoting *Dalton v. Borja*, 8 ROP Intrm. 302, 303 (2001)).

ANALYSIS

[1] The Ngarchelong State Constitution provides that Chief Tet ra Ollei is a member of the State Assembly. Art. VIII, § 2(a) [sic].

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Appellants contend that the trial court erred in holding that this case presents a nonjusticiable political question. Specifically, they urge that the Assembly exceeded its authority in seating Singichi as Tet pursuant to a standard different from that set forth by this court in *Uehara* and *Sato*.[2]

⊥195 A controversy is nonjusticiable – *i.e.*, it involves a political question -- where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . ." *Baker v. Carr* , 369 U.S. 186, 217 (1962). *See also Francisco v. Chin* , 10 ROP 44, 49 (2003). Here, the Court is presented with the question of whether the Sole Judge Clause [3] of the Ngarchelong State Constitution represents such a textual commitment to the Assembly of Singichi's qualification as Chief Tet. Whether the Clause represents such a commitment, or whether, if so, the Assembly exceeded whatever authority it has been committed, are themselves issues this Court must decide. *Francisco*, 10 ROP at 49 (quoting *Baker*, 369 U.S. at 211); *Powell v. McCormack*, 395 U.S. 486, 521 (1969).

In considering these questions with respect to the national Constitution, this Court has held that while the Sole Judge Clause empowers the legislature to make a final factual determination concerning a member's qualifications for membership, the courts retain the power to interpret constitutional provisions regarding membership qualifications. Thus, while the legislature's factual determinations regarding membership are themselves unreviewable, this Court will intervene to ensure that the legislature does not exceed its authority by applying the wrong constitutional standard for membership. In *Francisco*, for example, the Senate refused to seat Senator-elect Camsek Elias Chin after concluding that he did not meet the five-year residency requirement found in Article IX, Section 6 of the Constitution. In an earlier decision, the Appellate Division had found that Chin met the residency requirement after determining that a "resident" was "a person who maintains a residence in Palau for an unlimited or indefinite period, and to which the person intends to return, whenever absent, even if absent for an extended period of time." *Ngerul v. ROP* , 8 ROP Intrm. 295, 298 (2001). The Senate subsequently passed a resolution refusing to seat Chin on the grounds that he failed to meet the residency requirement. In the resolution, the Senate concluded that the requirement "means that a citizen must have maintained actual residence in the Republic of Palau for not less than five (5) years immediately preceding the election, except for short, temporary, and intermittent

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[2] Appellants also urge that the Resolution seating Sato in the Assembly violated their vested right, as members of Techiwod Clan, to participate in the appointment of the Tet title. However, having failed to raise this claim before the trial court – either in their complaint or elsewhere – it is waived. *Tulop v. Palau Election Comm'n* , 12 ROP 100, 106 (2005) ("[A]rguments not mentioned at all before the trial court are waived and may not be raised on appeal.").

[3] The language of the Sole Judge Clause in the Ngarchelong State Constitution ("The Assembly shall . . . judge the qualifications of its members . . .") differs slightly from that found in the Palau Constitution ("Each House of the Olbiil Era Kelulau shall be the *sole* judge of the election and qualifications of its members . . .") (emphasis added). Neither party has suggested that this slight linguistic difference signifies a difference in the meaning of the two clauses. On this point, it is notable that the Sole Judge Clause in the U.S. Constitution contains language similar to that of the Ngarchelong State Constitution. U.S. Const. art. 1, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .").

absences." *Francisco*, 10 ROP at 46. In holding that the Sole Judge Clause did not preclude review of the Senate's refusal to seat Chin, the Court concluded that the Clause granted the Senate the power "to determine which candidates were elected and whether those candidates were qualified . . . [but not] ⊥196 to pass judgment on what the eligibility requirements set forth in the constitution were." *Id.* at 49. The Court continued, "[w]hile the Sole Judge Clause empowers the Senate to make a final factual determination, it does not divest this Court of its role as the ultimate interpreter of the meaning of the age, residency, and citizenship requirements set forth in Article IX, Section 6." *Id.* at 50.

U.S. courts have similarly recognized this distinction between a factual finding made on an issue constitutionally committed to a non-judicial branch of government and a conclusion as to the nature of constitutional requirements within which that finding must be made. In *Powell v. McCormack*, 395 U.S. 486 (1969), the U.S. Supreme Court considered a suit challenging the constitutionality of a resolution excluding a member-elect for a seat in the House of Representatives. In doing so, the Court considered whether the Sole Judge Clause represented a textually demonstrable constitutional commitment of the power to seat or refuse to seat a member-elect and whether the exercise of that power is subject to judicial review. The Court allowed that "[i]f examination of [the Clause] disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine." *Id.* at 520. Finding that the Clause "is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution," however, the Court concluded that Congress "is limited to the standing qualifications prescribed in the Constitution." *Id.*

Both the *Francisco* and *Powell* courts rely on the existence of express constitutional membership requirements in holding that the Sole Judge Clause does not represent a textually demonstrable constitutional commitment of the issue to the legislature. The *Francisco* court wrote: "The fact that we can resolve the instant dispute with resort to interpretation of an independent constitutional provision (the residency qualifications set forth in Article XI, Section 6) strengthens our conclusion that the issue is not a textually demonstrable commitment to the Senate." *Francisco*, 10 ROP at 51. Similarly, the U.S. Supreme Court has subsequently explained that its conclusion in *Powell* that the Sole Judge Clause of the U.S. Constitution did not represent a textual commitment of unreviewable authority to the House was rooted in the very existence of Constitutional membership qualifications. After concluding that these qualifications are "of a precise, limited nature, and *unalterable by the legislature*," the Court explained:

> Our conclusion in *Powell* was based on the fixed meaning of "[q]ualifications" set forth in Art. I, § 2. The claim by the House that its power to "be the Judge of the Elections, Returns and Qualifications of its own Members' was a textual commitment of unreviewable authority was defeated by the existence of this separate provisions specifying the only qualifications which might be imposed for House membership.

U.S. Term Limits, Inc. v. Thornton , 514 U.S. 779, 796 (1995) (quoting *Nixon v. United States* , 506 U.S. 224, 237 (1993)).

⊥197 The Ngarchelong State Constitution differs in one significant respect from those at issue in *Francisco* and *Powell*. The Ngarchelong State Constitution contains no express requirements with respect to those Assembly members seated in their role as chief. In contrast, the Palau and U.S. Constitutions contain express requirements for membership in the OEK and Congress. The Palau Constitution, for example, provides a number of eligibility requirements for election to the OEK, including that a person must be a citizen, not less than twenty-five years old who had resided within the Republic for five years preceding the election and in the district which he or she wishes to represent for at least one year. Palau Const. art. IX, § 6. Similarly, the U.S. Constitution provides that a person must be at least twenty-five years of age and have been a U.S. citizen for at least seven years to be eligible to serve in Congress. U.S. Const. art. I, § 2. For its part, the Ngarchelong State Constitution requires a person to be at least twenty-five years old in order to be eligible to serve in the Assembly. This age requirement, however, applies only to elected members of the Assembly. Ngarchelong State Const. art. VII, § 2(c) ("To be eligible to serve as an *elected* member of the State Assembly, a person must be at least twenty-five (25) years of age."). With respect to the representatives serving in the Assembly in their role as a traditional chief, the Constitution contains no age or other requirement for membership.[4]

In the present case, the Assembly seated Sato as Tet despite the fact that he had not met the qualifications set forth by the Trial Division in *Uehara* and subsequently adopted by this court in *Sato*. Unlike the residency requirement in *Francisco*, however, the qualifications for the holder of the Tet title were set forth by the courts not as a matter of constitutional mandate, but rather as a matter of custom. *Sato*, 7 ROP Intrm. at 80 ("In order to render its judgment, the *Uehara* court had to resolve the issue of what is required under custom for a person to be installed as the bearer of the title of Tet."); *see also Francisco* , 10 ROP at 51 ("In contrast, this Court has already determined that resolution of Chin's eligibility required construction of the term 'resident' in Article IX, Section 6(3), and it therefore fell 'squarely within the Court's constitutional authority to say what the law is' concerning an independent constitutional provision."). The Ngarchelong State Constitution itself contains nothing regarding the qualifications or process for choosing the rightful holder of the Tet title. ⊥198 The Sole Judge Clause of the Ngarchelong State Constitution thus represents a "textually demonstrable

[4] Article XI, section 1(d) of the Ngarchelong State Constitution does provide that: "In the event that the seat of any of the eight (8) traditional chiefs becomes vacant, it shall remain vacant until a new chief is appointed according to custom." One could argue that this provision represents a constitutional standard for the seating of Singichi in the Assembly as Tet. Such an interpretation would, in effect, read the Constitution to incorporate our holdings regarding the method of appointing an individual as Tet in *Uehara* and *Sato*. The Court rejects this interpretation on two grounds. First, Appellants have not cited this section as a constitutional standard for the appointment of Tet, nor argued that the provision in effect constitutionalizes our previous decisions. *See Ngirmeriil v. Estate of Rechucher* , 13 ROP 40, 47 (2006) ("Appellate courts generally should not address legal issues that the parties have not developed through proper briefing."). Second, such an interpretation reads too much into a provision that, standing alone, merely states that new chiefs will be appointed according to custom. This provision does not appear in the article of the Constitution pertaining to the legislative branch, nor does the context otherwise suggest that the provision was intended in anything other than a descriptive sense.

constitutional commitment" to the Assembly of the authority to seat a traditional chief. As a result, our prior holdings regarding the qualifications for appointment as Chief Tet are not binding on the Assembly.[5]

Salii v. House of Delegates , 3 ROP Intrm. 351 (Tr. Div. 1989), cited by Appellants, does nothing to alter this analysis. *Salii* involved a suit brought by a member of the House of Delegates challenging his expulsion from that body on due process grounds. The House of Delegates defended on the basis that the Sole Judge Clause of the Palau Constitution represented a "textually demonstrable constitutional commitment" of the issue to the House of Delegates barring judicial review. The court rejected this argument in light of the plaintiff's constitutional due process claim:

> Had there not been an allegation of constitutional violation by the House of Delegates, this court would have agreed with the defendants [that the case involved a nonjusticiable political question]. But where as here, plaintiff Salii alleges that House Resolution No. 02-0080-205 was adopted in derogation of his due process right to a notice and an opportunity to be heard, it is the decision of this court that political question does not bar judicial review.

Salii, 3 ROP Intrm. at 358. Here, Appellants did not claim in the Trial Division that the Assembly committed any *constitutional* violations. For this reason, *Salii* not only does not help Appellants, it actually is detrimental to their claim that the political question doctrine does not apply in the present case.

Nor does *Eklbai Clan v. Imeong* , 13 ROP 99 (2006), assist Appellants. *Eklbai Clan* involved a dispute over the chief Iyechadrechemai title of Eklbai Clan. In a lawsuit involving, *inter alia*, two competing claimants to the title, this Court held that the trial court had erred in viewing the House of Traditional Leaders' acceptance of a purported title-holder as conclusive evidence that those who appointed him were the true *ourrot* of the clan. In citing *Eklbai*, Appellants state "It is clear that the court did not consider the acceptance and sitting of [the purported title-holder] by the House of Traditional Leaders . . . as a non-justiciable issue." This is true. Unlike the present case, however, in *Eklbai* the House of Traditional Leaders did not act pursuant to a Sole Judge Clause or other constitutional grant of authority. For this reason, the case is inapplicable here.

It is true that this Court is the "ultimate interpreter of the Constitution . . . with the duty to 'say what the law is.'" *Francisco*, 10 ROP at 49 (quoting *Becheserrak v. Koror State* , 3 ROP Intrm. 53, 55 (1991)). Nevertheless, where a coordinate branch of government acts pursuant to a "textually demonstrable constitutional ⊥199 commitment" of authority, this Court will not intervene absent evidence or allegation of a constitutional violation. Here, Appellants urge that the Assembly exceeded its authority under the Ngarchelong State Constitution by seating Sato as

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[5] As the trial court noted, these prior cases did not prohibit the Assembly from seating Sato, nor otherwise discuss the requirements for seating an individual in the Assembly as a traditional chief. As a result, the court concluded that the doctrine of *res judicata* did not operate to bar the Assembly from seating Sato. Appellants do not challenge this conclusion.

Tet in violation of qualifications set forth not by the state or national constitutions, but by custom as established by case law. Because the Assembly acted pursuant to authority granted it by the Sole Judge Clause of the Ngarchelong State Constitution, and because Appellants have not alleged any constitutional violations in the seating of Sato, the political question doctrine precludes our review of the Assembly's action.

Appellants' remedy at this point is political, not legal. Following recent elections in Ngarchelong State, a new Assembly is about to be seated and Appellants can urge the Credentials Committee to reconsider its conclusion that Sato is Tet and/or propose a second resolution on this issue. In the longer term, Appellants can organize themselves and their constituents to choose different representatives to the Assembly during the next bi-annual election. Regardless of whether and to what extent Appellants make use of the political avenues available to them, this controversy is nonjusticiable under the Sole Judge Clause of the Ngarchelong State Constitution.

CONCLUSION

For the reasons set forth above, the Trial Division's entry of summary judgment is affirmed.