

ROP v. Ngatpang State, 13 ROP 297 (Tr. Div. 2006)
REPUBLIC OF PALAU,
Plaintiff,

v.

NGATPANG STATE,
Defendant.

CIVIL ACTION NO. 99-205

Supreme Court, Trial Division
Republic of Palau

Decided: December 27, 2006

ARTHUR NGIRAKLSONG, Chief Justice:

At issue is the constitutional sufficiency of Article IX of the Ngatpang Constitution on amendment to the Constitution. The hearing was held on November 13, 2006.¹ The Court orally ¶298 announced its decision on December 22, 2006 and this written decision follows.

Article IX of the Ngatpang State Constitution provides the only way to amend the Constitution. It reads:

This Constitution may be amended every four (4) years by a Proposal adopted by eight (8) of the members of the NGAIMIS including all members of the Board of Executive and ratified by a majority of the votes cast in a state referendum.

Of all the 16 state constitutions, the Ngatpang Constitution is the only one that has a single way to amend its constitution. Under that provision, eight (8) members of the Ngaimis must consent to any amendment or there can be no amendment to the Constitution. The first Airai Constitution had a similar amending provision which depends entirely on the consent of the chiefs who were not elected. There were also no other ways to amend the Airai Constitution. The Airai Constitution was struck down as unconstitutional because the Constitution did not allow the people of Airai to exercise their right to vote for key public officials or vote to change their constitution. *Teriong v. Airai State Government*, 1 ROP Intrm. 664, 666, 674-75, 680 (1989).

¹ Before the hearing, Special Prosecutor Everett Walton representing the National Government, and Mr. Johnson Toribiong and Mr. John K. Rechucher, representing the Ngatpang State Government, filed a stipulation to vacate the hearing and allow the parties to work on their proposed amendments. *See* Stipulation filed on November 1, 2006. The Court rejected their stipulation and expressed its concern that the most important person, a voter of Ngatpang State, was not being adequately represented. The Court is now assured that the voters in Ngatpang are being represented by Mr. Raynold B. Oilouch in the companion case, *Ngirngetrang v. Palau Election Commission*, Civil Action No. 06-297.

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The necessary background of this issue is provided in the Court's decision issued on March 7, 2003. Briefly, the Special Prosecutor's office filed this case alleging that the Ngatpang State Government violates the "Guarantee Clause" of the National Constitution which requires that state constitutions must follow "democratic principles." Palau Const. Article XI, § 1.² Specifically the allegation asserts – citing *Teriong*, 1 ROP Intrm. at 664, 675, *Koror State Government v. Becheserrak*, 6 ROP Intrm. 74 (1997), and *Ngara-Irrai Council of Traditional 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.

There is only one elected official in the entire government of Ngatpang State Government. The title of the position is Executive Officer. In analyzing the functions of this office, the Court concluded that such an office does not qualify the occupier to be a "key public official" as required by *Teriong*. *ROP v. Ngatpang State*, 13 ROP 290, 292 (Tr. Div. 2003). Executive Officer of the Ngatpang State Government is a token key public official. There is no elected key public official.

The Court, however, in its 2003 decision found an important difference between the Airai Constitution in *Teriong* and the Ngatpang Constitution. There had been three referenda, November 30, 1999, June 20 2000 and November 7, 2000, in Ngatpang to change the Constitution. A choice for an elective executive and legislative branches was provided in each of the referendum. The people of Ngatpang by a majority vote expressed their choice to stay with the current structure of Ngatpang State Government.

¶299 This Court concluded, given the three opportunities to amend the Ngatpang Constitution in one year time, that "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." *ROP v. Ngatpang State*, 13 ROP at 294 (emphasis added).

On November 2, 2004, a referendum was held in which the voters of Ngatpang were asked one question: Do you want to change the Ngatpang State Constitution to change its present form? This time, of the 142 who voted, 94 voted "yes" and 42 voted "no."³

What has happened since the voters have expressed their choice for amendment to the Constitution on November 2, 2004?

The Ngatpang State Convention was created by NSPL 24-04 on May 20, 2004. That

² "The structure and organization of state governments shall follow democratic principles, traditions of Palau, and shall not be inconsistent with this Constitution." Palau Const. Article XI, § 1.

³ The Palau Election Commission certified the official results of the November 2, 2004, referendum on whether the voters prefer to change the current government on November 17, 2004. Amazingly, neither counsel of the Ngatpang State Government nor the National Government filed the results of that referendum with the Court. The Court only learned about the results of this referendum at the hearing on November 13, 2006, two years after the referendum.

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Convention drafted proposed amendments (Con Con proposed amendments or draft) to the Constitution and submitted them to the Ngaimis on May 29, 2006. The draft calls for elective governor and legislators. The Ngaimis approved the Con Con draft for a referendum pursuant to Article IX of the Constitution. Ngatpang State Council enacted NSPL. 43-06 setting the referendum on the Con Con draft for September 29, 2006. Under section 1 on statement of purpose, Ngaimis stated: “The Ngaimis noted several typographical errors, the poor Palauan translation, and minor conflicts between several sections in the proposed amendments. However, these minor defects may be corrected by the Post Constitutional Convention Committee so that the proposed amendments could be submitted to the people of Ngatpang State without further delay.”

Then on the eve of the referendum date, September 28, 2006, Ngatpang State Council enacted NSPL. 45-06 repealing the law setting the referendum on the Con Con proposed amendment for September 28, 2006, the next day. NSPL. 45-06 also declared that the Ngaimis will review all future proposed amendments to the Constitution. The referendum was rescheduled to December 29, 2006. The Con Con draft will not be on the ballot. Two choices on the ballot rescheduled for December 29, 2006, are the Ngaimis Draft and the current Ngatpang State Government which the majority of the voters rejected at the November 2, 2004, referendum. Either way a voter chooses, he ends up with either the Ngaimis’ Draft amendment or the current Ngatpang State Government. There was no third choice for “none or neither” of the two. When Mr. John K. Rechucher, one of the three counsel to the Ngatpang State government, was asked on the witness stand at the hearing in the *Ngirngetrang v. Palau Election Commission*, Civil Action 06-297, a companion case, if he saw anything wrong with omitting the Con Con draft from the **L300** ballot and limiting the choices to the Ngaimis Draft and the current government which the majority of the voters rejected in the November 2, 2004, referendum, Mr. Rechucher said he did not see anything wrong with the choices. If this is the view of the Ngaimis, then Mr. Rechucher and his clients must have the most unflattering view of the intelligence of the people of not only Ngatpang, but people in Palau.

It has been two years since a majority of the voters in Ngatpang expressed a desire to change their government. They have been waiting to exercise their right to vote for key public officials and vote to change their Constitution for the last two years.

The Ngaimis has been preventing the people from voting to change their government. This is similar to the House of Traditional Leaders of the former Koror State Government that attempted to pocket-veto a resolution by the Legislature that would allow amendments to the Koror State Constitution and Government. *See Becheserrak* . Any attempt to prevent the fundamental right of the people to vote for key public officials and change their government can not be upheld.

The Court gave the Government of Ngatpang three years to comply with the “Guarantee Clause” requiring the right of the people to vote for some key public officials as well as the right to change their constitution. When the majority of the voters expressed their choice on November 2, 2004, for a change in the Constitution and the Government, the people’s right to vote for some key public officials and to change their government became immediate and imperative. The

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Ngaimis has failed to provide these rights, relying on Article IX of the Constitution that gives them the sole power to decide what should be voted on and what should be kept out like the Con Con Draft. When a fundamental right is subject to the whim of eight (8) people, it stops being a fundamental right. It becomes a gratuity from the eight (8) Ngaimis to be dispensed with when and if they wish.

The Court declares Article IX of the Ngatpang State Constitution unconstitutional both on its face and as it has been relied upon by the Ngaimis. The Court after three years now declares the Ngatpang State Constitution and Government unconstitutional for not providing the right of the people to vote for some key public officials and to change their Constitution and Government. The Ngatpang Constitution and Government are not in compliance with the “Guarantee Clause” of the National Constitution.

The Court retains jurisdiction on this matter.