

The Ngaimis v. ROP, 16 ROP 26 (2008)

**THE NGAIMIS,
Appellant,**

v.

**REPUBLIC OF PALAU & REMOKET NGIRNGETRANG,
Appellees.**

CIVIL APPEAL NO. 07-045
Civil Action Nos. 99-205 and 06-297 (consolidated)

Supreme Court, Appellate Division
Republic of Palau

Decided: November 11, 2008¹

Counsel for Appellant: Moses Uludong

Counsel for ROP: Attorney General, Jeffrey Beattie

Counsel for Ngirngetrang: J. Roman Bedor

BEFORE: KATHLEEN M. SALII, Associate Justice, LOURDES F. MATERNE, Associate Justice, ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

This is an appeal of a decision of the Trial Division declaring Article IX of the Ngatpang State Constitution inconsistent with the Guarantee Clause of the Constitution of the Republic of Palau. Appellant also appeals orders issued by the trial court to place proposed constitutional amendments drafted by the Ngatpang State **p.27** Constitution Convention onto a ballot and to validate the adoption of those amendments, once they were voted for by the people of Ngatpang.

BACKGROUND

Briefly, the issue before the trial court was whether the Ngatpang State Constitution conflicted with the requirement that “[t]he structure and organization of state governments shall follow democratic principles...” PALAU CONST. Art. XI, § 1.² Under the Ngatpang Constitution, the state government was controlled by a traditional council of ten chiefs, known as “the

¹Appeal considered on the briefs, pursuant to ROP R. App. Pro. 34(a).

²This statement is known as the Guarantee Clause of the Palau National Constitution and will be referred to as such in this opinion.

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Ngaimis.” Members of the Ngaimis comprised the entire legislative branch of the state government and the entire executive branch, with the exception of one elected figure, the “executive officer,” who served as a chief of staff, managing day-to-day administration under the supervision of the (unelected) Governor. Importantly, the Ngatpang State Constitution included a provision that all constitutional amendments, including those changing the structure of government, be approved by eight of the ten Ngaimis.

A complaint, alleging that the Ngatpang Constitution did not follow democratic principles, was filed in 1999 by a special prosecutor. The trial court heard the case in 2003 and found that the Ngatpang Constitution was not yet in violation of the Guarantee clause, but had potential to be. This decision was based on the fact that the people of Ngatpang had three times voted down a referendum to change the structure of government; so there had been no interference with that right as of yet. However, in 2004, a referendum to change the structure of the Ngatpang government passed and a constitutional convention was created to draft amendments. The drafted amendments would have removed much of the Ngaimis’ power and provided for elected legislators and an elected governor. The night before the draft amendments were to be voted on, the Ngaimis canceled the vote. The Ngaimis then made changes to the convention’s draft amendments, so that the Ngaimis’ control of the government was preserved. The amendments, as changed by the Ngaimis, provided for some elected officials, but retained Ngaimis control over the legislature, ensured that the Ngaimis legislators could outvote the elected legislators and overrule any veto of the elected governor, and kept any future constitutional changes subject to the approval of eight (8) Ngaimis members. The Ngaimis then rescheduled the vote, with only their revised amendments or the *status quo* as choices on the ballot.

In 2006, immediately prior to the rescheduled date of the vote, the trial court found that the Ngaimis were using Article IX of the Ngatpang Constitution to deny the people of Ngatpang their fundamental right to vote and that Article IX violated the Guarantee Clause both on its face and as used by the Ngaimis. The court struck down Article IX and ordered that the constitutional convention’s proposed amendments appear on the ballot, alongside the Ngaimis’ proposed amendments. The voters chose the constitutional convention’s amendments. The trial court ordered that the changes described in those amendments go into p.28 effect, bypassing the Ngaimis approval required by Article IX. Elections were held and the elected legislature of Ngatpang took office in April 2007.³

ANALYSIS

The Ngaimis appeals the Court’s decisions on the grounds that 1) the court was mistaken in determining that Article IX conflicted with the Guarantee Clause; 2) the court should not have allowed the convention’s amendments onto the ballot, because they were not eligible by the terms of the Ngatpang State Constitution; and 3) the newly adopted amendments should not have been allowed to take effect, because the court’s order had struck the entire Ngatpang Constitution, leaving nothing to “amend.”

³As of August 27, 2007, no gubernatorial candidate had managed to garner a majority of the registered voters of Ngatpang, as required for election under the new Ngatpang Constitution.

A. Standard of Review

The trial court's factual determination that the Ngaimis had successfully interfered with the amendment process to prevent regime change is reviewed under a standard of clear error. *Lin v. ROP*, 13 ROP 55, 57 (2006). The legal conclusions drawn from that fact, that the Ngatpang Constitution is constitutionally deficient and must be altered, are reviewed *de novo*. *Id.*

B. Striking Down Article IX of the Constitution

After evaluating the text of the Palauan and Ngatpang Constitutions, as well as analyzing the two major cases on the Guarantee Clause's requirements for state governmental structure, it is clear that Article IX conflicted with the Guarantee Clause, in that it made the people's ability to change their government entirely subject to the wishes of the Ngaimis.

Appellant argues that the people's right to vote and choose their government was never unconstitutionally restricted because under either the convention draft, or the Ngaimis' draft, for constitutional changes, the people would have been able to vote for certain key officials. However, Palauan precedent shows that the Guarantee Clause protections are not as narrow as the election of a few key officials. In *Teriong v. State of Airai*, the Appellate Division determined the constitutionality of the Airai State Constitution, which had never been voted on by the people of Airai, did not provide for the election of state officials, and provided no mechanism for popular amendment of the constitution. 1 ROP Intrm. 664 (1989). In finding that the Airai Constitution was invalid, the Appellate Division held that "the right to vote for key public officials at both the national and state governments is an essential democratic principle that is guaranteed under Article VII of the Constitution." *Id.* at 675.

The *Teriong* holding was followed and clarified in *Koror State Government v. Becheserrak*, 6 ROP Intrm. 74 (1997). The *Becheserrak* court explicitly rejected an interpretation of *Teriong* that would require ALL state officials to be elected to comply with the Guarantee Clause. 6 ROP at 76. The absence of any provision to elect officials was the constitutional defect in *Teriong*, but the larger democratic principle was not the election of p.29 officials, as much as "the right of the people of each state to select their own system of government." *Id.* at 77. In *Teriong*, the absence of elected officials prevented the people from participating in or choosing their own government. In *Bechesserrak*, the court noted that the presence or absence of elected officials did not alone indicate if a government met democratic principles;⁴ the court determined that constitutional amendments were not subject to the approval

⁴The *Bechesserak* court noted that unelected traditional leaders can have a substantive role in a government that nonetheless meets democratic principles. *Id.* at 77, n.4. See also *Ngara-Irrai v. Traditional Council of Chiefs v. Airai State Government*, 6 ROP Intern. 198, 203 (1997) (rejecting "a rigid interpretation of the constitutional requirements of Article XI, § 1, that would require the court to specify exactly how the States are to divide governmental positions between elected and traditional leaders.")

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or disapproval of the unelected House of Traditional Leaders (“HTL”) under the Koror State Constitution. *Id.* at 77-78. In partial concurrence, Justice Beattie wrote:

Because the Koror State Constitution provides the People of Koror with the non-illusory ability to amend their constitution to remove the unelected HTL members and...to restrict their powers, I agree with the Court’s holding that the Koror State Constitution does not violate the Guaranty Clause of Article XI by the fact that the HTL members are not elected to office.

Id. at 82 (Beattie, J., concurring in part and in the judgment).

The trial court in this case interpreted the above precedent and determined that “the ability to amend the constitution is a greater right than the right to vote for some key public officials, because [in the case of Ngatpang] the former has encompassed the right to choose whether to adopt the latter.” 13 ROP 292, 296 (2003). The court noted that the possibility of changing the constitution was voted on three times by the people of Ngatpang in the preceding three years. *Id.* Accordingly, the people’s right to amend the Constitution of Ngatpang was not illusory. By 2006, when the Court again reviewed the constitutionality of the Ngatpang Constitution, the situation in Ngatpang had changed: the voters had indicated their desire to change their government and, according to the trial court, “[t]he Ngaimis had been preventing the people from voting to change their government.” *Id.* at 300.

The factual background, as described by each party, makes clear that the Ngaimis had interfered with the amendment process, with the result that people were prevented from voting on the proposed amendments drafted by the constitutional convention. Appellant argues that its actions were merely an attempt to prevent an amendment from reaching the people without proper public education and with clerical errors unfixed. This argument is disingenuous as the changes made by the Ngaimis are clearly substantive and not clerical.

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The legal conclusions of the trial court do not receive the same deference as findings of fact. However, the trial court’s interpretation of Palauan precedent is compelling; the *Teriong* and *Bechesserak* decisions establish that the right to change one’s constitution and government as one chooses is fundamental to achieving democratic principles. The Ngatpang Constitution, even with the elected officials provided for in the Ngaimis’ draft amendments, did not provide that right. The trial court noted, correctly, that “when a fundamental right is subject to the whims of eight 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.” 13 ROP 297, 300 (2006). Article IX of the Ngatpang Constitution made the fundamental right of amending the constitution subject to the whims of the Ngaimis and thus violated the Guarantee Clause. The trial court did not err in striking down Article IX of the Ngatpang State Constitution.

C. Altering the Ballot

Appellant also argues that the court erred in ordering that the convention’s proposal be placed on the ballot, alongside the Ngaimis’ proposal. Appellant asserts that the convention’s

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proposal was not eligible to be placed on the ballot because it had not met the requirements of the Ngatpang Constitution. Specifically, because it had not been adopted by eight members of the Ngaimis, as required by Article IX of the Ngatpang Constitution.⁵

Appellant ignores the fact that the court invalidated the requirements of Article IX as putting an unconstitutional burden on the amendment process. Instead, Appellant argues that any change to a constitution must be through the amendment procedure as defined in the constitution. This argument overlooks the court's authority to strike unconstitutional portions of a state constitution. The Palau National Code states clearly that "[t]he Supreme Court and the National Court shall be the sole authorities to determine whether a state constitution conforms to the Constitution of the Republic." 5 PNCA § 104(b). Implicit within this grant of authority is the power to strike unconstitutional elements of a state constitution and take acts, as necessary, to ensure that a state constitution conforms to the Palauan Constitution. 4 PNCA § 101 ("Each court of the Republic shall have power to...do all acts...as may be necessary for due administration of justice."). The trial court was correct and within its authority in striking Article IX of the Ngatpang Constitution; the requirement of Article IX, that the Ngaimis approves of any **p.31** constitutional amendment, no longer applied to the constitutional convention proposed amendments placed on the ballot by the trial court.

D. Validating the Amendment

Finally, Appellant argues that after the people of Ngatpang voted for the constitutional amendments drafted by the constitutional convention, the court erred in validating those amendments as part of the Ngatpang State Constitution. This approach is based partly on the argument, rejected above, that the draft amendments were not eligible to be placed on the ballot, and partly on the argument that, when the trial court invalidated part of the Ngatpang State Constitution, it invalidated the entire constitution, such that there was no constitution to be amended.

This is essentially a procedural argument, which is not supported by the record. The decision of the trial court invalidates the Ngatpang State Constitution only to the extent that it conflicts with the National Constitution, mentioning only Article IX. Appellants rely on a broad statement in the trial court opinion⁶ to argue that the court voided the entire Ngatpang State

⁵Appellant notes that, in describing the factual background of the case, the trial court erroneously stated that, when the convention proposal was first submitted to the Ngaimis on May 29, 2006, the Ngaimis approved the draft, before later acting to prevent its appearance on the ballot. See 13 ROP 297 at 299. Even if the trial court misstated that element of the factual background, it does not affect the trial court's justification for its decision, or the correctness of that decision. The convention proposal was eligible for the ballot, not because of Ngaimis approval, but because the convention proposal was the product of the legally appointed Ngatpang State Constitution Convention. The convention proposal would have been presented to the voters of Ngatpang on a referendum without any involvement of the courts, were it not for the unconstitutional interference of the Ngaimis.

⁶"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 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." *ROP v. Ngatpang State*, 13 ROP 297, 300 (Tr. Div.

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Constitution. Read in the larger context of the court's discussion and conclusions, it is clear that the trial court intended only to void Article IX of the Ngatpang Constitution.

Additionally, unlike the *Teriong* decision, in which problems with the adoption process made the entire Airai State Constitution susceptible to invalidation, in this case only Section IX of the Ngatpang State Constitution was before the trial court. Accordingly, it would have been improper and inconsistent with the principle of judicial restraint to invalidate elements of the Ngatpang State Constitution that were not immediately before the trial court. Appellant's argument that the entire Ngatpang State Constitution was invalidated by the trial court cannot succeed.

CONCLUSION

For the foregoing reasons, the decision of the trial court is **AFFIRMED** in its entirety.