

Koror State Government v. Becheserrak, 6 ROP Intrm. 74 (1997)

**KOROR STATE GOVERNMENT,
Appellant,**

v.

**KATSUTOSHI BECHESERRAK,
et al.,
Appellees.**

CIVIL APPEAL NO. 19-95
Civil Action No. 166-86

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: February 6, 1997

Counsel for Appellant: Antonio L. Cortes, Derek J. Simmons

Counsel for Appellees: Michael W. Dotts, William L. Ridpath.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; R. BARRIE MICHELSEN, Associate Justice

NGIRAKLSONG, Chief Justice:

INTRODUCTION

This appeal involves the constitutionality of the Koror State Constitution. The basic issue is whether the Constitution complies with the Guaranty Clause of the national Constitution, Article XI, § 1, which provides that the state constitutions shall follow democratic principles and traditions of Palau. Plaintiffs contended that the Koror Constitution fails to follow democratic principles set forth in the Guaranty Clause of the national Constitution because the Koror Constitution invested significant powers in the unelected House of Traditional Leaders (“HTL”), and the trial court agreed. We reverse the trial court’s holding that *Teriong v. State of Airai*, 1 ROP Intrm. 664 (1989) construed Article XI, § 1 to require that every key governmental official be popularly elected. Further, we find that the amendments proposed by the state legislature are not subject to approval or disapproval of the House of Traditional Leaders of Koror State, and must be submitted to the electorate. Therefore we reverse and remand to the Trial Division.

¶75 PROCEDURAL HISTORY

Plaintiffs commenced this action by filing a complaint containing two counts.¹ In the first count, plaintiffs alleged that the HTL had illegally refused to place Resolution 43, a resolution adopted by the Koror State Legislature, on the October 21, 1986 general election ballot. Resolution 43, if adopted, would have changed the Koror State Constitution significantly. If Resolution 43 were adopted, the HTL would only have veto power over bills that substantially affect the traditions of Koror State, rather than its current veto power over all bills passed by the Legislature. Further, Resolution 43 would replace the State Executive, who is appointed by the HTL, with a Governor, who would be popularly elected by the people. In the second count, plaintiffs alleged that the Koror State Constitution violates the Guaranty Clause of the Palau Constitution, Article XI, § 1, because the HTL were unelected officials.

Plaintiffs moved and defendants cross-moved for summary judgment. The trial court granted plaintiff's motion for summary judgment, reasoning that the structure of the government of the State of Koror diverged from the principles embodied in the Guaranty Clause of the Constitution. The trial court held that the Constitution requires the election of all key state officials. The court found that the members of the HTL were "key state officials" that were not elected, and the Koror State Constitution therefore violated the Guaranty Clause. Thus, the trial court ordered Koror State to hold a constitutional convention to restructure its government.

The trial court further ruled that count one of the plaintiffs' complaint, concerning the referendum on Resolution 43, was moot because (1) the constitutional convention would be likely to eliminate the issue of whether the HTL could veto constitutional amendments proposed by the legislature, and (2) plaintiffs indicated to the court at oral argument that their preferred remedy would be a constitutional convention. Plaintiffs, however, continued to request that Resolution 43 be placed on the ballot as an alternative remedy to a constitutional convention.

¶76 DISCUSSION

I. THE TERIONG DECISION

In holding that the Koror State Constitution violates the Palau Constitution, the trial court was guided by *Teriong v. State of Airai*, 1 ROP Intrm. 664 (1989). The court noted that *Teriong* held that the Guaranty 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." 1 ROP Intrm. at 681. The Court found that the HTL was analogous to a multi-member, and extremely powerful, executive branch, and therefore members of the HTL are 'key state officials,' who must be elected.²

¹ The complaint was later amended to add a third count, which is not currently at issue.

² The trial court further found that the Executive Administrator of the Koror State Government, who is appointed solely by the HTL, is also arguably a key state official. The court, however, recognized that a state system in which the executive and administrative powers are placed in an unelected manager does not necessarily violate the Palau Constitution, if those selecting the manager are themselves elected and accountable to the voters. Decision at 10, fn. 8.

This Court does not believe that *Teriong* should be construed so broadly. The *Teriong* court was faced with a state constitution that neither was ratified by the people in a duly--called election nor made provision for any popular vote for state officials:

[A]n essential democratic principle is the right to vote for public officials to represent the people in making policies and running the government. The Airai Constitution makes no provision for such voting.

1 ROP Intrm. at 668. The Appellants in *Teriong* argued that there was no constitutional requirement to provide for the election of public officials. *Id.* at 668-669. The Court disagreed. “[T]he right to vote for key public officials at both the national and state governments is an essential democratic principle”³

¶77 So for *Teriong*, the absence of any provision for the election of key government officials was the constitutional defect. The *Teriong* court did not hold that a constitution that failed to provide for the election of every key government official would be in violation of Article XI, section 1.

It would be untenable to read *Teriong* to hold that democratic principles can only be realized by a system of government in which all key or public officials are elected. Every democratic society has key officials that are not subject to election, such as members of the cabinet, heads of the military and executive agencies, judges, and many others. Requiring every key official in the state governments of Palau to be elected is clearly unnecessary to effect the principles of democracy. Moreover, it would impermissibly limit the right of the people of each state to select their own system of government.⁴ Therefore, the trial court erred in holding that the Koror State Constitution fails to comply with the national Constitution, simply because not all Koror officials are elected. Accordingly, we must extend our inquiry to address the question that the trial court deemed to be moot: whether Resolution 43, which was passed by the Koror State legislature and could have resulted in an amended Constitution, should have been placed on the ballot to be put to a vote, despite the failure of the HTL to approve it.

³ The Court also stated that:

[T]he Constitution 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. We agree with the intent of the Voting Rights Act that the right to vote for public officials is an essential democratic principle applicable to the state governments.

Id. at 681.

⁴ A constitutional requirement that every key state official be popularly elected would prohibit the states from giving traditional leaders more than a ceremonial role in the state government, a limitation not dictated by the Palau Constitution. The Guaranty Clause, Article XI, provides that “[t]he structure and organization of state governments shall follow democratic principles, traditions of Palau, and shall not be inconsistent with this Constitution.”

II. AMENDING THE KOROR STATE CONSTITUTION

Article XI, § 1, of the Koror State Constitution provides that:

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

¶78 (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.

Furthermore, “[a]ny 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.” On its face, all that is required to amend the Koror State Constitution is either petition by 25% of the voters or a resolution by 75% of the Legislature and approval by the majority of voters on the referendum. The requirements of Article XI concerning constitutional amendment are independent of any other requirements of the Koror State Constitution. Based on Article XI, approval of the HTL is unnecessary for a constitutional amendment.

Article VI, § 2(2), of the Koror State Constitution, which provides that the HTL “may approve or disapprove any bill or resolution transmitted to it by the Legislature for consideration,” does not change our analysis. That section of the Koror State Constitution states that a bill must first be submitted to the HTL and that a bill must be approved by the HTL to become law. It does not require a resolution to amend the Constitution to be approved by the HTL. Thus, reading Article VI, § 2(2) in its entirety leads to the inescapable conclusion that the HTL’s approval is only necessary for legislative bills, not constitutional amendments, to become law.⁵

¶79 We therefore hold that Koror State was required by its own Constitution to place Resolution 43 before the voters of Koror for consideration.

⁵ Article VI, § 2(2) provides, in full, that the HTL

may approve or disapprove any bill or resolution transmitted to it by the Legislature for consideration. A bill must first be transmitted to the House of Traditional Leaders for consideration and action, and if approved, shall become law. A bill approved by the House of Traditional Leaders shall become law when signed by the Head of the House of Traditional Leaders. If the House of Traditional Leaders disapproves a bill, it shall be returned to the Legislature within twenty (20) calendar days with a statement of reasons for the disapproval. A bill not signed, disapproved, or returned to the Legislature within twenty (20) calendar days of the presentation to the House of Traditional Leaders shall become law. The House of Traditional Leaders may reduce or delete an item in an appropriations bill.

CONCLUSION

Accordingly, the we REVERSE the trial court's order to institute the process of revising the Koror State Constitution, and REMAND this action to the trial court to set a date as soon as practicable by which Resolution 43 must be put to a vote.

BEATTIE, Justice, concurring in part and concurring in the judgment:

I join in part II of the Court's opinion. Although I agree that the trial court erred in holding that the Koror State Constitution violates Article XI because unelected HTL members are given significant powers, I write separately because I cannot agree with the Court's reading of *Teriong* nor with the construction of Article XI set forth in Part I.

A.

In *Teriong* we were faced with a state constitution which provided that some traditional chiefs of Airai, because of the titles they bore, were the members of the Airai legislature and that the governor was elected by those chiefs. Stating that "the issue presented is whether the Airai Constitution conforms to Article XI, Section 1 of the Palau Constitution", 1 ROP Intrm. at 673, we held that these "key public officials" must be elected — "we . . . hold that . . . the constitution require[s] that key state officials be elected. . . ." 1 ROP Intrm. at 681.

Every trial court which has had occasion to apply *Teriong*⁶ has read it to mean exactly what it says. Judging from the fact that, after *Teriong*, and attempting to obey its command, Airai adopted a constitution which provides that its governor and all members of 180 its legislature are elected, the framers of the Airai constitution read *Teriong* the same way -- that the constitution requires that these key public officials be elected.

Today, the Court, wishing neither to follow nor to overrule *Teriong*, arrives at the conclusion that because *Teriong* did not say "all" key state officials must be elected, that it means only "some" must be elected. This heretofore unknown rule of language interpretation -- that if the Court does not say "all", then it means "some" -- gives birth to a new jurisprudence that has no relation to the principle of construing words according to their plain, ordinary meaning, a principle that we have consistently followed until today. The mischief made by this type of jurisprudence, I fear, may spread beyond this case and cast some of our other decisions in the wrong light.⁷

This is not to say, however, that I agree with *Teriong's* construction of Article XI, for I do not read Article XI as requiring that key state officials be elected. I would hold that *Teriong's*

⁶ In addition to the trial court's decision in this case, see *Ngara-Irrai v. Airai State Government*, Civ. No. 170-90 (July 22, 1994) (appeal pending).

⁷ One may now wonder, for example, when we say that criminal defendants have the right to a fair trial, whether that means that only some do.

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analysis of Article XI was wrong and overrule it. Although the Court, too, distances itself from *Teriong* in today's holding, it does so by means of a strained reading of the case, born of a linguistic legerdemain which is alien to the ordinary rules of discerning meaning from plain and unambiguous language.⁸ Not only is there jurisprudential harm in the holding, as noted, but it presents a construction of Article XI with which I cannot agree.

B.

The Court now construes Article XI to require that at least some public officials be elected. If that had been the intent of the framers of the constitution, however, they could have stated **L81** that state governments must be structured so that some public officials are elected. When the framers of the constitution intended a rigid structure of government, such as the requirement that officials be elected or that some be elected, they said so. This is apparent when one examines the constitutional provisions regarding the structure and organization of the national government. Those provisions specify how each official assumes his office -- by election or appointment -- and the manner of appointment, the term of office, etc. See Palau Constitution, Art. VIII, §§ 4 - 6; Art. IX, § 2. On the other hand, when addressing the structure and organization of state governments, the constitution provides no specificity, but rather requires only that they be structured following democratic principles and the traditions of Palau.

The striking difference in the amount of specificity contained in the constitutional provisions regarding the structure and organization of the state and national governments manifests the framers' intention that states be given maximum flexibility in organizing their governments. This recognizes and accommodates the fact that there may be differences among the states in the role and importance of both custom and government--the government of Koror State may have a much bigger role in the affairs of its residents than the government of Tobi does in the affairs of its residents; tradition may be more important in Kayangel than in Peleliu.

This conclusion is supported by the records of the Palau Constitutional Convention. 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

⁸ To support its reading of *Teriong*, the Court observes that “[r]equiring every key official in the state governments of Palau to be elected is clearly unnecessary to effect the principles of democracy.” This is nothing more than saying that, no matter what the plain language of *Teriong* may be, it would be erroneous to construe Article XI as requiring that key state officials be elected, so *Teriong* could not have done so. *Teriong* contains no legal analysis in support of a construction of Article XI as requiring only “some” key officials to be elected. If that really were its holding, one would expect *Teriong* itself to make the observation that requiring every key state official is not necessary to effect democratic principles.

Koror State Government v. Becheserrak, 6 ROP Intrm. 74 (1997) intends to leave the 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.

The Framers did not, however, intend to give the states **182** unlimited leeway in structuring their governments. The basic democratic principle that the government and those officials who are responsible for making policy and running the government be responsive to the changing will of the people is essential. This conclusion, arising out of the “democratic principles” guaranty of the Guaranty Clause, is supported by the same Committee Report, which states that “The Committee believes in government of, by, and for the people and democracy at the most basic level.”

Democracy at the most basic level must include the right of the people of the state to adopt in the first instance, and, if they desire, to change, the structure and organization of the government. Further, the opportunity to replace those who run the government is essential to a representative government. The opportunity may be given through elections for public office, the non-illusory right to amend the state constitution so as to remove those officials who obtain their office through means other than elections, or both. But no matter which of these paths the states may choose to follow, the government must be a representative one so that the people can remove and replace their representatives in government if they deem it desirable to do so. If, like the members of the HTL in Koror, the officials hold office by reason of their traditional title rather than by winning an election, essential democratic principles are satisfied if the people have a non-illusory ability to amend their constitution to insert provisions allowing them to replace the officials.

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, as in the case of Resolution 43, 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 reason of the fact that the HTL members are not elected to office. Therefore, I concur with the Court’s holding that the trial court erred in declaring the Koror State Constitution invalid and ordering that a constitutional convention be held to draft a new constitution.⁹

183 CONCLUSION

Whether one follows what the Court imagines *Teriong* to say or what *Teriong* actually says, I believe it presents an erroneous construction of what Article XI requires in the structure and organization of state governments. Although I welcome the Court’s retreat from *Teriong*, the Court today adopts an unduly cramped view of the leeway states are allowed in structuring their governments.

⁹ There was, of course, no flaw in the trial court’s analysis of the case before it. Were my view to prevail, the error would stem only from the overruling of *Teriong*, the holding which was the sole support for the trial court’s decision.