



PALAU - CHALLENGE TO THE RULE OF LAW IN MICRONESIA

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The International Commission of Jurists (ICJ), established in 1951, is concerned with the observance of the rule of law and respect for human rights and the independence of the judiciary. It has been supported for many years by annual subventions by the Australian Government. There is an active Australian section whose President was, until recently, Mr John Dowd MP (now New South Wales Attorney General). The Commission itself is based in Geneva. There are up to 40 Commissioners, most of them senior judges, from all regions of the world. One of the present Commissioners is Justice Michael Kirby, President of the New South Wales Court of Appeal.

In January 1988, a mission was sent by the ICJ to the Republic of Palau in Micronesia, for the purpose of investigating complaints about threats to the rule of law and interference in the independence of the judiciary. The mission included Justice Kirby. The other members were Mr William Butler, Chairman of the Executive Committee of the ICJ and Judge George Edwards of the United States Court of Appeals for the Sixth Circuit. In late April 1988, the report of the

mission was published in New York. This note summarises its main points.

Palau is a group of islands on the western perimeter of Micronesia, not far from the Philippines. After successive periods of Spanish, German and Japanese colonial rule, Palau came under the authority of the United States of America in September 1944. It was occupied at that time as part of the "island hopping" policy for the defeat of Japan. In 1947, a trusteeship agreement was entered by the United States of America and the Security Council of the United Nations, to include Palau. By 1980, the relevant trust territory had been divided into four political entities, one of which was Palau. Palau still has strategic importance in the Pacific. Reports that it is under consideration by the United States as an alternative site for naval bases presently in the Philippines have been denied.

In April 1979, a constitutional convention in Palau adopted a federal constitution. Following concern expressed about the fate of the Micronesian people of Bikini, the proposed constitution included a limitation on the use, testing, storage or disposal in Palauan territory of "harmful substances such as nuclear, chemical, gas or biological weapons". This constitution was approved at referendum by 92% of the population of Palau. However, the new constitution was opposed by the United States which was concerned that it might cut across the policy of that country not to admit or deny the existence of nuclear materials on its naval vessels. The High Court of the Trust Territory set aside the constitutional

referendum on a technical point. A new draft constitution was then submitted in October 1979 omitting the "nuclear clause". However, this constitution was rejected by 70% of the people. In July 1980, by a third referendum, the original constitution was reaffirmed. It contains in Article XIII, section 6 a prohibition on the use, testing, storage or disposal within Palau of (relevantly) nuclear weapons without the express approval of not less than three-fourths of the votes cast in a referendum submitted on that specific question.

Following the adoption of the new constitution, negotiations took place between the government of Palau and the government of the United States, which remains the Administering Power under the trusteeship. The purpose was to establish the post trusteeship relationship between the two countries. Under Article 76 of the United Nations Charter, the Trustee has a duty to advance the "progressive development" of the trust territory "towards self government or independence" in compliance with the "freely expressed wishes of the peoples concerned". Other parts of the former trust territory have moved towards the status of independent republics. So-called "Compacts of Free Association" with the United States have been entered by the Federal States of Micronesia and the Marshall Islands. Other islands in the former trust territory have opted for, or moved towards, "Commonwealth status" (the Northern Marianas and Guam). The compacts all give the United States rights to use the territory concerned for military purposes.

The negotiated compact, with its contemplation of the entry of United States vessels, possibly carrying nuclear materials, has been submitted in a series of referenda to the people of Palau for the purpose of securing general approval of the compact and specific approval of section 314 in it relating to the use of "radioactive" materials. Although in five referenda significant majorities favoured the proposal, in none did the majority reach 75%. The last such referendum was held in June 1987.

The report of the ICJ mission outlines the events which followed the defeat of the June 1987 referendum. These events included steps taken to propose an amendment to the constitution by a two stage procedure: to allow the compact to be adopted by a simple majority of those voting and then to submit it for approval by such a simple majority; the standing down of large numbers of government employees upon the basis that without the compact, funds to pay their salaries were running out; a challenge to the constitutional validity to the two stage procedure for the amendment of the constitution; violence and intimidation brought to bear upon the litigants who had mounted that challenge; and the attempted intimidation of the judiciary involved in hearing the challenge.

The two stage move by referendum to permit the compact to be approved by a simple majority of the people of Palau was duly held. The compact was then purportedly approved in this way. Two legal challenges were thereupon mounted in the Supreme Court of Palau. The first, in August 1987, was brought

by the Ibedul, the paramount Chief of Palau under the traditional law. However, in return for an arrangement made with the President of Palau, the Ibedul consented to the dismissal of his proceedings. Shortly afterwards a number of Palauan women filed a suit, raising precisely the same points of constitutional challenge as had been pleaded in the Ibedul's action. It was this suit (Ngirmang v Salii) which was to initiate the ICJ mission.

The response to the suit brought by the Palauan women was an outbreak of violence vividly described in the ICJ mission report. The father of the main plaintiff was murdered and her house was firebombed; most of the plaintiffs were threatened with violence and the homes of some of them were fired upon; a committee of furloughed workers surrounded the Supreme Court demanding that the court dismiss the case; and letters were written by the committee to the Chief Justice directly, protesting about his alleged partiality. Soon after receiving such letters the Chief Justice reversed an earlier order he had made, disqualified himself from further hearing the matter and assigned the case to Judge Hefner, a Judge of the Supreme Court of Palau who is normally resident in the Northern Marianas.

When Judge Hefner arrived in Palau he was immediately faced by a request of the women plaintiffs to withdraw their suit. On 9 September 1987 he made an important statement in court recording the "indications that the dismissal was brought about by intimidation through the use of violence". He concluded his statement:-

"The courts are established to allow anyone to have their case heard and decided by an impartial tribunal. Even the so-called little person or the underdog is entitled to have his/her day in Court no matter how unpopular his or her cause may be. If in this case any one of the plaintiffs have been denied that right, it is tragic... The justice system has failed the plaintiffs."

The ICJ mission report record its findings as above. It is highly critical of the Bar of Palau for failing to defend the independence of the judiciary and the right of parties to litigate their disputes in the courts. It records the appearance of intimidation which arises from the order of the Chief Justice vacating his previous orders and disqualifying himself after receiving threatening letters from the Committee of Furloughed Workers. It urges that the United States, as Administering Power, should not terminate its trusteeship until the issue raised in the litigation challenging the constitutional validity of the approval of the Compact is determined in the Supreme Court of Palau. The ICJ mission report asserts that the certificates of the Executive Government of Palau and of the President of the United States that constitutional process has been duly observed are not conclusive at least in the light of the evidence that proceedings in the Supreme Court of Palau were withdrawn under threat and intimidation. The report recommends that if the women plaintiffs recommence their proceedings they should be protected by the government of Palau which should also investigate and bring to justice those responsible for the acts of violence and intimidation described. The report concludes with a recommendation that steps should be taken to educate the people of Palau concerning the rights of the citizens

guaranteed by their constitution, including the right to an independent judiciary and to observance of the rule of law.

Shortly after the ICJ mission report was released and concurrent enquiries were underway before committees of the United States Congress, it was announced in Palau that the women plaintiffs would recommence their proceedings in the Supreme Court of Palau. Furthermore, proceedings in the United States Congressional Committees made it apparent that, until the Supreme Court of Palau has determined the issues raised by the women Plaintiffs, Congress will not approve the termination of the trusteeship and thus the conclusion of direct United States involvement in responsibility for Palau.

International Commission of Jurists, Palau: A Challenge to the Rule of Law in Micronesia, report of a Mission, New York, April 1988.