Gibbons v. Etpison, 3 ROP Intrm. 385A (Tr. Div. 1992)

IBEDUL YUTAKA M. GIBBONS, et al.
Plaintiffs,

v.

NGIRATKEL ETPISON,
President of the Republic of Palau, et al.
Defendants.

SENATE OF THE THIRD OLBIIL ERA KELULAU, et al.
Plaintiffs,

v.

NGIRATKEL ETPISON,
President of the Republic of Palau, et al.
Defendants,

PETITIONERS, Rep. by the Committee on Constitutional Amendment by Popular Initiative et al.
Intervenors.

CIVIL ACTION NOS. 285-92 and 287-92 (consolidated)

Supreme Court, Trial Division
Republic of Palau

Trial decision
Decided: October 8, 1992

NGIRAKLSONG, Acting Chief Justice:

PROCEDURAL BACKGROUND

On April 14, 1992, a group of voters called the Popular Initiative to amend the Constitution presented a Petition proposing a Constitutional amendment to the President, the Third Olbiil Era Kelulau (OEK) and the Election Commission (hereafter, the "Petition"). The Petition was submitted pursuant to Article XIV, ⊥385B sec. 1(b) and Article XV sec. 11 of the Palau Constitution and proposes a Constitutional amendment which would purportedly remove inconsistencies between the Constitution and the Compact of Free Association. In essence the amendment would lower the approval requirement for the Compact of Free Association from 75% to a simple majority. The Petition requested that the President and the OEK "insure that a voting date is scheduled so that the registered voters of Palau vote upon [the] proposed amendment to the Constitution not more than 90 days after" the date of the Petition.

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In response to Petitioners' request, on April 23, 1992, the President transmitted a proposed bill to the President of the Senate which purportedly established procedures and an appropriation to carry out the referendum called for by the Petition. On May 8, 1992, the President issued Executive Order No. 111 which provided funding, set the referendum for July 13, 1992, and gave the Election Commission the power to govern the election, prepare the ballot, and promulgate rules and regulations to certify the election.

On July 7, 1992 plaintiffs Ibedul Yutaka M. Gibbons et al. moved this court to issue a temporary restraining order and preliminary injunction to enjoin the President and Chairman of the Election Commission from conducting the referendum proposed by the petition. On July 8, 1992, the Senate of the OEK et al. filed a similar motion. The cases were consolidated and a hearing was held on the requests for preliminary injunction on July 9, 1992.

On July 9, 1992, the Court preliminarily enjoined defendants ⊥385C from conducting the July 13 referendum, or any future referendum, pursuant to Executive Order or any other mechanism not authorized by the Constitution or statute.

Subsequent to the granting of the preliminary injunction, Petitioners, the Committee on Constitutional Amendment by Popular Initiative et al. intervened in the consolidated actions (*See*, August 4, 1992 Order).

Thereafter, in response to the Petition, RPPL 3-76 was signed into law on August 20, 1992. It was enacted:

> "To provide for a referendum to amend the Constitution and for a plebiscite on the Compact of Free Association as called for by Petition; to establish dates and procedures for the referendum and plebiscite; to provide for a program of political education; to appropriate funds for the election; and for other purposes."

Pursuant to RPPL No. 3-76, a referendum called for by the Petition was scheduled for November 4, 1992.

The Senate of the Third OEK and Peter Sadang then dismissed Civil Action No. 287-92 on September 23, 1992. The plaintiffs Gibbons, et al. did not however dismiss Civil Action No. 287-92, and a trial on the merits was calendared for October 3, 1992.

Prior to trial, on September 16, 1992, defendants filed a Motion for Summary Judgment and a hearing was held on October 3, 1992. Plaintiffs Gibbons, et al. were represented by the firm of Ngiraikelau, Dengokl & Ridpath. Defendants were represented by Assistant Attorney General Mark L. Driver and Intervenors were represented by John Rechucher.

⊥385D At the outset of the hearing, the parties stipulated on the record that Count One of the Complaint is moot because the Court had already granted plaintiffs a preliminary injunction, and that Counts Four, Five, Seven and Nine had been rendered moot by the passage of RPPL 3-76. Plaintiffs stated that they wished to dismiss Count Ten without prejudice, but the Court denied

their request. This left Counts Two, Three, Six and Ten remaining at issue. The Motion for Summary Judgment on these Counts was then argued and taken under submission by the Court. Trial then commenced on the same date.

Count Two alleges that the Election Commission is the body which ultimately certified the validity of the petition submitted, but that neither it, nor any other person or body, has constitutional, statutory or other authority to do so. Count Three alleges that no person or entity has properly verified the authenticity of the signatures on the petition and that in the absence of a proper verification, the proposed constitutional amendment cannot be submitted to the people for a vote. Count Six alleges that the language of the English and Palauan versions of the alleged official referendum ballot contain material variances. The vagueness, ambiguity and confusion caused by these alleged variances preclude those relying upon the Palauan version the right to cast a meaningful vote and therefore infringes on their right to vote. Count Ten alleges that any referendum must be held simultaneously with a vote on the Compact of Free Association "as voters would otherwise have no way of knowing the content of the ⊥385E Compact that is being accommodated by way of the proposed Constitutional amendment." Plaintiffs seek, among other things, to enjoin the referendum vote currently set for November 4, 1992 by RPPL No. 3-76.

At trial, plaintiffs called three witnesses from the Office of Public Affairs, Thomas Bechab, Moses Derbai and David Ngirmidol, to testify about the process that was used to determine whether the names and signatures on the petition were those of registered voters and whether there were a sufficient number of qualified petitioners to meet the Article XIV, Section 1(b) requirement of twenty-five percent. Mr. Ngirmidol testified under oath that he supervised the determination process and that it was carried out by checking the printed names that appear on the petition against the 1991 list of registered voters and then counting only those petitioners who were on the list and whose printed names had a corresponding signature on the petition. No attempt was made to verify the genuiness of the signatures on the petition by comparing them to the signature obtained from each petitioner when they registered to vote.

After Mr. Ngirmidol testified, the parties filed a stipulation with the court providing that the parties agree that the procedure testified to was in fact the procedure followed, and that certain documents be admitted into evidence. The parties also orally stipulated that the entire record, including witness testimony from the preliminary injunction hearing, could be considered by the Court.

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⊥385F ANALYSIS

I. THE RIGHT OF PETITIONERS TO PROPOSE AN INITIATIVE TO AMEND THE CONSTITUTION

The right of petitioners to bring an initiative to amend the Constitution in set forth in Article XIV, Section 1(b) of the Palau Constitution. The pertinent provisions of Article XIV of the Constitution state:

> Section 1. An amendment to this Constitution may be proposed by a Constitutional Convention, popular initiative, or by the Olbiil Era Kelulau, as provided herein:
>
> (b) by petition signed by not less than twenty-five percent (25%) of the registered voters. . . .

The power to call a referendum is not one that is granted to the people by their government: it is a power reserved by them. It is one of the most precious rights of our democratic process and it is the duty of the court to jealously guard it. *Nome v. Town of San Anselmo*, 260 Cal. Rptr. 205 (1989). It is one of the most precious rights of the democratic process and it has long been judicial policy to liberally construe this power in order that it not be improperly annulled. *Id*, 206; *See also, Yenter v. Baker*, 248 P.2d 311 (1952). "'If doubts can be reserved in favor of this reserve[d] power, courts will preserve it.'" *Id, citing, Building Industry Assn. v. City of Camarillo*, 718 P.2d 68 (1986), *citations omitted*.

This right, and the right of all citizens of Palau to vote on such an initiative, is also protected by the provisions of 23 PNC ⊥385G 102 *et seq.*, the Voting Rights Act. The Supreme Court's role in ensuring that the peoples' rights are protected is set forth in 23 PNC 106(c), which provides:

> "The Supreme Court may issue any order, suspend any election, void any election, reorganize any procedures for elections or take any actions excluding reapportionment as may be necessary to insure conformity with the requirements of this chapter."

A. Counts Two and Three

The thrust of plaintiffs' Counts Two and Three is that the citizens of Palau cannot exercise their reserved power to propose a constitutional amendment by initiative unless: 1) there is a proper delegation of authority to some person or body to "accept and verify signatures upon voters petitions proposing amendments to the Constitution (Complaint, p. 6); and 2) that such body verify the authenticity of the signatures on the petition. (Complaint, p. 6) Stated another way, before the people can set the initiative process in motion, their elected officials must have enacted enabling legislation ironing out every detail of the process from precisely who or what body should be delegated authority to count the signatures and how they should be counted.

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A. Delegation of Authority

Plaintiffs assert that it is clear that the framers of the Constitution intended that the OEK enact enabling legislation to establish all procedures regarding popular initiatives, including the delegation of authority to some person or body to count and ⊥385H check petition names to determine whether an initiative petition contains the requisite number of registered voters. They essentially argue that Article XIV, Section 1(b) is not self- executing in any manner and therefore requires the enactment of enabling legislation before an initiative petition can even be reviewed to determine whether petitioners can exercise their initiative rights.

Article XIV, sec. 1(b) does not expressly state whether it is self-executing. "In the absence of [an] express provision, the question of whether a constitutional provision is self-executing is one of construction." *Ngeluul Kiuluul et al. v. Charles Obichang* , Civ. Action No. 379-90, (Tr. Div. Sept. 1990), *aff'd*, 2 ROP Intrm. 201 (1991), *citing, Clark v. Harris*, 144 P. 109 (1914) and 16 Am. Jur. 2d *Constitutional Law* , 139-149. The most important test for determining whether a constitutional provision is self-executing is the intent of the framers who drafted the provision:

> A provision is self-executing when it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated to render it operative, and when there is a manifest intention that it should go into immediate effect, and no ancillary legislation is necessary. . . .

Ngeluul Kiuluul et al., v. Charles I. Obichang, supra, citing, Catting v. Cordell , 172 P.2d 397, 399 (1946).

The Palau Constitutional Convention Committee on General Provisions Standing Committee Report No. 31 (SCR No. 31) states the intent of the framers regarding whether Article XIV, Sec. 1(b) is self-executing. In discussing the relevant language of Proposal ⊥385I 252, which became Article XIV, the Committee Comments provide:

> Proposal No. 252, as originally drafted, would empower the National Assembly to establish the mechanics and requirements for proposal of amendments by initiative or by the National Assembly. The Committee has rejected this approach, in favor of specifying the precise number of signatures required on an initiative petition. . . . (emphasis supplied)

The Committee goes on to state:

> The Committee further felt that the specific requirements of the initiative, including the time period [of] collecting signatures; and the contents of the initiative should be established by the National Assembly, and that the Constitution should not be burdened with the details of the procedures.

SCR No. 31, pp. 3-4.

It is clear from this language that the framers intended that the right of the people to initially bring an initiative to propose a Constitutional amendment be self-executing. They rejected a proposal which would have left to the National Assembly the task of establishing the "mechanics and requirements" of making their proposal known. The manifest intent of the framers is that no ancillary legislation should be required for the people to submit a qualifying Petition to set their rights in motion. Necessarily included within the ambient of submitting a qualifying petition is the ministerial function of determining whether there are sufficient signatures to constitute twenty-five percent of registered voters.

Plaintiffs' argument that there must be ancillary legislation delegating authority to some person or body to carry out the function of counting and checking signatures to determine whether a petition meets the Constitutional requirements of twenty-five ⊥385J percent is hyper-technical and contrary to the intent of the framers. If plaintiffs' view were to prevail, the right of the people to make their proposal known could be delayed, and thereby possibly quashed by the OEK's failure to enact legislation to appoint a person or body to determine whether a petition has sufficient qualified names.[1]

Moreover, the authority to oversee the election process in general has already been delegated to the President of the Republic as the "Election Commissioner." 23 PNC 103(b) and 1201(a). In carrying out his duties, the Commissioner has authority to assign election duties and functions to persons and boards. 23 PNC 1202. To the extent that the President issued directives to the Office of Public Affairs to count and check the Petition signatures via letter or Executive Order No. 111, he was within his general authority as Election Commissioner pursuant to 23 PNC 101 et seq. No ancillary legislation was required to grant him this authority.

In contrast, the attempt of the President to establish additional procedures for the funding and carrying out of the ⊥385K initiative election via Executive Order No. 111 was a violation of the separation of powers doctrine. The intent of the framers as expressed in S.C.R. No. 31 was that the OEK establish such procedures.

B. The Counting And Verification Of The Petition Names

"There is a presumption that petitions that have been circulated, signed, and filed are valid, and that the burden of proof to show their invalidity rests upon those protesting against them." 42 Am. Jur. 2d *Initiative and Referendum* , sec. 54, *citing, Re Initiative Petition* , 127 P 303 (1912); *Woodward v. Barbur* , 116 P. 101 (1911). "The presumption places on those who

[1] It is equally clear from S.C.R. No. 31 that the framers intended that details beyond making a proposal for a popular initiative known by the submission of a qualifying petition, be provided by ancillary legislation. In other words, Article XIV, Section 1(b) is self-executing to the point of setting Petitioners' rights in motion, but it is not self-executing beyond this point as it does not provide the mechanics for carrying out and funding a vote once a qualified petition has been brought. By stipulating that the enactment of RPPL No. 3-76 has rendered moot Counts Four, Five, Seven, Eight and Nine of the Complaint, plaintiffs herein have either conceded or waived any claim that RPPL No. 3-76 does not provide all mechanics necessary to carry out a vote on the proposed initiative beyond those encompassed by Counts Two, Three and Six. The Court is therefore is not required to address any such issues.

seek to invalidate signatures on a petition the burden of producing evidence sufficient to overcome the presumption. In the absence of such evidence, the presumption must prevail." *Id. citing, Re Initiative Petition No. 260*, 298 P.2d 753 (1956).

Plaintiffs failed to produce a scintilla of evidence to overcome this presumption and thus meet their burden of proof. They did not produce a single person whose name improperly appears on the petition and who was also counted by Mr. Ngirmidol and his staff. Instead, plaintiffs focused their arguments of the alleged lack of a more rigorous formal procedure for determining whether the names and signatures counted were in fact those of registered voters.

⊥385L Mr. Ngirmidol's uncontroverted testimony was that the procedure followed is checking the Petition was the same procedure his office followed in checking prior petitions submitted for different purposes: the printed names on the Petition were checked against the 1991 voter registration master list to determine whether the name is that of a registered voter, and if it was, and a signature also appeared along with the printed name, the voter was counted toward the number needed. He also testified, under oath, that under this procedure he believes that no names of non-registered voters were counted and that no names of registered voters were counted more than once.

In other jurisdictions, a variety of means are used to determine whether the names and signatures that appear on an initiative petition should be counted. These range from comparing the names to the master voter registration list to checking each signature against that listed on a voter registration affidavit. *See*, 42 Am. Jur. 2d *Initiative and Referendum* , sec. 38 and cases cited therein; 38 Cal Jur 2d *Initiative and Referendum*, secs. 48 and 49; *Allan v. Rasmussen*, 117 P.2d 287 (1941); *Bowe v. Secretary of Commonwealth* , 167 ALR 1447 (1946). In most jurisdictions some administrative official either conducts the count or reviews the work of others and then submits either an affidavit, verification, certification or some other document attesting to the fact that he or she believes there are a sufficient number or qualified names on the petition. *See, Id*, sec. 38.

⊥385M If, however, the person charged with the duty to check and count the signatures fails to carry out his duties, his failure does not preclude operation of the Petition. *See*, 42 Am Jur 2d *Initiative and Referendum* , sec's. 37 and 38 and cases cited therein. The reasoning for this proposition stands clear. The people generally exercise their reserved power of popular initiative because their elected officials have not carried out their will. It would be disturbingly ironic if this sacred right could be thwarted by the incompetence or refusal to act of a person who does not generally stand for election and who carries out a ministerial duty.

Although the Court sympathizes with plaintiffs and agrees that the procedure employed to verify the Petition herein could be improved, it also finds that it was sufficient for the Election Commission to certify the Petition and set the peoples' initiative rights in motion. The ultimate proof that it was sufficient under the circumstances is plaintiffs inability to show a defect in the procedure by producing any evidence to show that it resulted in the counting of persons who are not eligible to vote. Plaintiffs cannot escape their failure to meet their burden of proof by simple argument that the procedure should be better.

II. THE BALLOT: COUNT SIX

Plaintiffs allege in Count Six that there are material differences between the Palauan and English versions of the ⊥385N "official ballots" and that these variances make the ballot fatally defective. To prove this claim, plaintiffs offered the testimony of Sylvester Alonz which was given at the preliminary injunction hearing, and noted that the Court could determine for itself the alleged variance between the two versions. It is, however, premature for the Court to determine whether the two versions of the alleged "official ballot" are fatally defective because no complete official ballot has yet been printed in its entirety.

Section 3 of RPPL No. 3-76 sets forth the language to be used on the Palauan and English forms of the ballot. It also provides that: "There shall be included on the ballot a brief, impartial, explanatory provision drafted by the Political Education Committee pursuant to Section 7 of this Act." Until the official ballots are printed, including the explanatory provision, the Court cannot determine whether any alleged variance between the Palauan and English versions is fatally defective or whether any alleged variance is cured by the explanatory provision. Moreover, plaintiffs' claims of potential injury arising from ballots which have not been finally prepared for an election that has yet to take place is mere speculation.

III. COUNT TEN

After the Court denied plaintiffs' request to dismiss Count Ten without prejudice, plaintiffs offered no evidence or argument to prove their claim that any referendum based on the Petition must ⊥385O be conducted simultaneously with a finally negotiated Compact of Free Association. Any argument would have been fruitless, however, as *Fritz, et al., v. Salii et al.* , 1 ROP Intrm. 521, (1988) dispositively holds that neither a finally negotiated nor ratified Compact is a condition precedent to the exercise of rights under Article XIV of the Constitution. Pursuant to *Fritz, Id.*, plaintiffs cannot prevail on this claim as a matter of law.

CONCLUSION

The framers of the Palau Constitution intended that the right of the people to seek to amend the Constitution by popular initiative pursuant to Article XIV, Section 1(b) not be encumbered or restricted by requiring that legislation be passed to delegate authority to a person or body to determine whether a petition contains the requisite number of registered voters. Moreover, 23 PNC 101 et seq. already vests the President, as the Election Commissioner, with general authority over elections and no delegation of authority was necessary. The provisions of 23 PNC 101 et seq. did not, however, vest the President with plenary authority to establish further procedures regarding an initiative because the intent of the framers was that such procedures be adopted by the OEK.

The Court agrees that the procedure employed by those to whom the Election Commissioner delegated authority to check and count the names that appear on the Petition could be improved. However, ⊥385P it also finds that plaintiffs failed to meet their burden of

proving that it resulted in the counting of a single ineligible name.

Plaintiffs allegations regarding Count Six are not ripe for adjudication and the Court therefore reaches no decision on this Count.

Plaintiffs cannot prevail on Count Ten as a matter of law.

Plaintiffs' prayer for injunction, and all other relief is DENIED.