

Teriong v. Government of State of Airai, 1 ROP Intrm. 664 (1989)
**HARUMI TERIONG and DANIEL NGIRCHOKEBAI, for themselves and all others
similarly situated,
Appellees,**

v.

**GOVERNMENT OF THE STATE OF AIRAI, ROMAN TMETUHL, GOVERNOR OF
THE STATE OF AIRAI and THE LEGISLATURE OF THE STATE OF AIRAI,
Appellants.**

CIVIL APPEAL NO. 6-88
Civil Action No. 100-88

Supreme Court, Appellate Division
Republic of Palau

Appellate decision and order
Decided: September 15, 1989

Counsel for Appellants: Johnson Toribiong

Counsel for Appellees: Douglas F. Cushnie

BEFORE: ARTHUR NGIRAKLSONG, Associate Justice; ROBERT A. HEFNER,¹ Associate Justice; EDWARD C. KING,² Associate Justice.

NGIRAKLSONG, Associate Justice:

BACKGROUND

The Sixth Palau District Legislature in Public Law No. 6-55-1 created and mandated the Palau Constitutional Convention **L665** to draft a national constitution. Constitutional Delegates were popularly elected and the Convention convened on January 28, 1979, and adjourned on April 2, 1979. The draft constitution by the Convention took effect on January 1, 1981, after it was subject to two referenda, first on July 9, 1979, and second on July 9, 1980.

Airai State is one of the 16 states under the Palau Constitution. Prior to the adoption of the National and state constitutions, Airai, like the other present states, was a chartered municipality. Airai's charter was issued by the High Commissioner on February 18, 1963.

The Airai Constitution was not drafted by a constitutional convention or through “[a]n ordinance providing for the drafting of a state constitution by the people” 5 PNC § 103(b).

¹ The Honorable Robert A. Hefner is the Presiding Judge of the Superior Court of the CNMI.

² The Honorable Edward C. King is the Chief Justice of the Supreme Court of the FSM.

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The Constitution was drafted under the direction of Mr. Roman Tmetuchl by Professor Thomas Gladwin and Father Felix Yaoch, S.J. [uncontradicted affidavit of Evasio Marino, last magistrate of Airai Municipality, in support of appellants' motion to dismiss]. Mr. Tmetuchl was then Acting Chief Ngiraked of Airai.

The draft constitution was "presented" to the residents of Airai on December 22, 1980. Affidavits on file place the number of people who attended the meeting at Airai Elementary School from 100 to 400. It was in this meeting, the Appellants claim the people of Airai "assented" to the adoption of the draft constitution. No actual voting on the draft constitution took place.

On January 5, 1981, the Constitutional Government of Airai was inaugurated. Speeches were given and food was served.

1666 THE AIRAI CONSTITUTION

Article 3, Section 1 of the Airai Constitution establishes a Legislature composed of 14 members from 6 villages. Irrai, the capital of Airai, is divided traditionally into four quarters. From each of the quarters, the ranking clan selects 1 person as its representative to the Legislature. With the other 5 villages, two ranking clans in each village consult and select one representative to the Legislature.

The members of the Legislature may be removed or replaced by the clan that selected them. The Legislature may recommend that a clan remove or replace its representative. There is, however, no prescribed term of office for Legislators.

Article 3, Section 2 provides for the Executive Branch of the Government. The Governor is selected from among the members of the Legislature by consensus and if not, by majority vote of the members. The Constitution does not provide for a way to remove the Governor, nor does it prescribe his term of office.

Article 5, Section 1 provides that the Constitution may be amended at any time by 12 of the 14 members of the State Legislature. This is the only way to amend the constitution. No referendum for constitutional amendment is provided in the Constitution.

POWERS OF STATE GOVERNMENTS UNDER THE ROP CONSTITUTION

The powers of the state governments under the National Constitution consist of those which are expressly delegated to **1667** them and those which are expressly denied to the National Government. Some of the powers and responsibilities of state governments are:

- a) to impose taxes [Article XI, Section 3];
- b) to borrow money for public purposes, subject to the approval of the Olbiil Era Kelulau³ [Article XI, Section 4];

³ Hereafter designated as OEK [the National Legislature].

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- c) to make investments pursuant to law [Article XII, Section 4];
- d) to share with the National Government in block grants and foreign aid, except as dictated by the terms of a specific grant [Article XII, Section 5];
- e) to receive all revenues derived from all living and non-living resources within 12 miles of their traditional baselines [Article XII, Section 6(a)]; and
- f) to share with the National Government all revenues derived from the licensing of foreign vessels to fish for highly migratory fish [Article XII, Section 6(c)].

The states under the ROP Constitution have substantially more powers and responsibilities than their predecessor municipal governments.

THE POSITIONS OF THE PARTIES

Appellees are citizens of Palau who are also residents and eligible voters of the state of Airai. Appellants are the Government of the State of Airai, its Legislature, and Airai Governor Roman Tmetuchl.

Appellees contend that the Airai State Constitution and the government pursuant thereto are null and void for basically two reasons. First, the Airai Constitution has never been approved 1668 in a referendum by the majority of votes cast, as required by 5 PNC § 105. The supposed mass adoption of the Airai Constitution on December 22, 1980, was legally insufficient to meet the requirements of 5 PNC § 105. Second and independent of the first reason, the Airai Constitution violates the “guaranty clause” of the ROP Constitution, which requires that state constitutions be based on “democratic principles”. An 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. Without such voting, the Airai Legislators and Governor, for all practical purposes, serve for life.

Appellants contend that the meeting of December 22, 1980, was akin to a “town hall” meeting as existed in early American history. Since the people of Airai adopted their Constitution by such a process, “democratic principles” were utilized, which satisfies the requirements of the ROP Constitution [Article XI, Section 1] and 5 PNC § 105. Further, the Airai Constitution is based on Palauan traditions, in which Palauan leaders govern by a consensus approach that necessarily reflects the wishes of the governed. As such, the Airai Government pursuant to its Constitution is “inherently democratic.” The Airai Constitution, therefore, conforms to “democratic principles.”

Appellants also argue that neither the ROP Constitution nor the Palau National Code requires that there be elections for state officials or a referendum for the people to approve or amend their state constitution. Absent such constitutional or 1669 statutory mandates, a state constitution does not have to provide for election of public officials or for referenda to approve

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and amend state constitutions. From this it follows that the American concept of one-man-one-vote, derived from the “equal protection” clause, is not an issue in this case. There being no right to vote, the equal protection clause does not even apply. There is not even a “classification” to subject to the equal protection clause scrutiny.

ACTION IN THE TRIAL COURT

Appellees filed their suit as a class action on June 5, 1986. Appellants responded with a motion to dismiss, alleging that Appellees lacked standing, that the case did not present a “case or controversy,” and that the Airai Constitution had been confirmed pursuant to 5 PNC § 105. The Trial Court denied the motion. It found standing under Article X, Section 5 of the Palau Constitution, and that the case did present a “case or controversy.” It declined to rule on whether the Airai Constitution had been confirmed pursuant to 5 PNC § 105.

Appellees then moved for summary judgment. Appellants opposed this motion and filed a cross-motion for summary judgment. The Trial Court at first denied both motions, then reopened them and requested supplemental briefs. It held a hearing on these motions on January 23, 1987, and issued its decision and order on March 16, 1988.

The Trial Court granted and denied in part both motions. It ruled that the Airai Constitution has not been confirmed as **1670** required by 5 PNC § 105. It found, based on the affidavits filed by both parties, that no referendum was held in the State of Airai on the constitution. The Trial Court further found that no vote was taken at either of the “village meetings” on December 22, 1980, or January 5, 1981, which would possibly be construed as a referendum on the Airai Constitution.

The Trial Court declined to rule on whether the Airai Constitution is based on “democratic principles”, concluding that the inquiry is “nonjusticiable” and rightfully belongs to the legislature. Ancillary to this decision, the Trial Court decided that the right to vote for public officials must come either from the Palau Constitution or from statutes enacted by the OEK or a state legislature.

Having decided the referendum and “guaranty clause” issues, the Trial Court issued the following orders:

1. that the incumbent Governor of Airai and the Legislature submit to the Court legislation for a referendum to be held on the Airai Constitution no later than September 1, 1988;
2. that such legislation include voters qualifications, a political education program, notice of the referendum, location of polling places and protection of each citizen’s right to vote;
3. that in the event the Airai Constitution fails confirmation at the referendum, the incumbent Governor and the Legislature were to call for a constitutional

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convention; and

4. that the incumbent government was to continue to conduct the business of the State of Airai until further order of the Court or the Airai Constitution was approved by the referendum.

In compliance with the Court's order, Appellants submitted to the Court Airai State Public Law 1988-1, calling for a **L671** referendum on the Constitution. Appellees first raised objections, then withdrew them, allowing the referendum to take place on August 31, 1988.

The voters of Airai rejected the Airai State Constitution in the referendum held on August 31, 1988. On October 4, 1988, the Trial Court issued the following orders:

1. that the Airai State Government is declared to be a caretaker government with functions limited to those "necessary to carry out the routine . . . tasks necessary to maintain the status quo . . .";
2. that the government and its officials and employees are not to take any action resulting in any permanent grant of title, change of status or investiture of authority to or for any person, entity or other body possessed by legal existence . . .";
3. that no new legislation shall be enacted or executive orders issued except where they relate to efforts to create and adopt a new constitution;
4. that the traditional leadership is also to follow this order;
5. that the caretaker government is to plan a constitutional convention and a referendum to follow for approval of the draft constitution; and
6. the bill calling for a constitutional convention shall be submitted to the Court for its review and approval prior to its passage.

Complying with the Court's orders, Appellants submitted to the Court on December 8, 1988, a bill calling for the convening of a Constitutional Convention, ratification of the Constitution in a popular referendum, and providing for installation of the Constitutional Government.

The Trial Court issued an order on December 20, 1988, in which it stated: "After consultation with counsel and due **L672** deliberation, the Court now Orders the following alternatives, deletions and additions to Bill No. 1988-03 and approves the Bill as amended by the Court . . ."

The notice of appeal was filed by the Appellants on April 15, 1988. On February 6, 1989, the parties stipulated that the transcript of the proceedings be waived, that the Appellate Division

Teriong v. Government of State of Airai, 1 ROP Intrm. 664 (1989) in its April, 1989 session could consider the appeals without the transcript and that the motion for stay be granted. The Trial Court granted these motions on stipulations on the same date.

The issues presented on appeal are:

1. Whether the Airai Constitution is valid under the Palau Constitution and National Statutes?
2. Whether plaintiffs have standing to challenge the validity of the Airai Constitution?

LEGAL ANALYSIS

1. ADOPTION OF STATE CONSTITUTIONS

We begin with consideration of the applicable statute, from Title 5 of the Palau National Code:

A state government shall be deemed organized and established when:

(b) The people of the state approve the state constitution in a referendum by a majority of the votes cast 5 PNC § 103 (emphasis added).

If, prior to the effective date of this chapter, an ordinance which became effective was adopted by the government of a state providing for the drafting of a state constitution, or a state constitution was drafted pursuant to an adopted ordinance, or a state constitution took effect, 1673 prior to the effective date of this chapter, such act is hereby confirmed, provided that a constitution is approved in a state referendum by a majority of the vote cast. 5 PNC § 105 [emphasis added].

We see this statute as clearly requiring that state constitutions be approved in a referendum by a majority of the votes cast. There are no vagueness problems with the statute as to present possible conflicting or varying interpretations of the legislative intent and mandate. The statutory requirements were complied with by the other 15 states of Palau. We see 5 PNC § 105 as precisely applicable to the Airai Constitution, which took effect prior to the enactment of the statute. We can find no constitutional defects in the application of this statute to the Appellants. Therefore, we affirm the Trial Court's decision that the Airai Constitution is invalid since it was not confirmed in a referendum by a majority of the votes cast.

JUSTICIABILITY

The Trial Court, after a review of some U.S. caselaw on apportionment, concluded that the issue of whether the Airai Constitution meets the requirements of "democratic principles" in Sec. 1, Article XI of the Palau Constitution is "nonjusticiable" and one that belongs to the Legislature. We disagree.

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The issue presented is whether the Airai Constitution “conforms” to Article XI, Section 1 of the Palau Constitution. It is a constitutional issue properly presented to the Court.

5 PNC § 104(b) states that the Court shall be the sole ¶674 authority to determine whether a state constitution “conforms” to the ROP Constitution. Appellees have stated a justiciable issue and it is our role to say what the law is. We hold that the Trial Court erred in holding that whether the Airai Constitution conforms to “democratic principles” in Article XI, Section 1 is a nonjusticiable issue.

SUFFRAGE AND GUARANTY CLAUSE

We now go to the merits. We again disagree with the Trial Court’s conclusion that there is no constitutional or statutory requirement that state constitutions provide for election of state public officials to make public policies and run state governments as representatives of the governed. Article VII of the ROP Constitution reads:

A citizen of Palau eighteen (18) years of age or older may vote in national and state elections. The Olbiil Era Kelulau shall prescribe a minimum period of residence and provide for voter registration for national elections. Each state shall prescribe a minimum period of residence and provide for voter registration for state elections. A citizen who is in prison, serving a sentence for a felony or mentally incompetent as determined by court may not vote. Voting shall be by secret ballot. [emphasis added].

This Article of the Constitution began as proposal No. 421 at the Palau Constitutional Convention. The Committee on General Provisions in its Standing Committee Report No. 18 states in part:

Your committee felt that it was appropriate to include a provision in the Constitution guaranteeing the right to vote in both national and state elections. Under Proposal No. 421, all citizens of Belau who have attained the age of 18, are guaranteed the right to vote in both national and state elections. [emphasis added].

¶675 The committee realizes that some restrictions are necessary on the right to vote.

These restrictions are that a person in prison serving a sentence for a felony, or one who has been declared mentally incompetent by a court is not eligible to vote. The state may impose different residency requirements for voting. These are the only restrictions.

It is intended that the listed limitations are exclusive and that no others may be established by the National Assembly or the State Legislatures.

Id. A guarantee of a right to vote means that eligible voters shall not be denied the right to vote for key public officials. We find that the Founding Fathers looked at the right to vote as a

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fundamental right. We therefore hold 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.

This guaranteed right to vote is further protected in that voting is specifically required to be done by secret written ballot. An acclamation in a mass meeting will not suffice.

Section 1, Article XI, the Guaranty Clause, states partially: “[t]he structure and organization of state government shall follow democratic principles, traditions of Palau, . . .”
What is required for the Airai Constitution under this Clause?

Reading Article VII with the Guaranty Clause, we hold that a right to vote is a minimum democratic principle required to be present in a state constitution. Without the right to vote, a state constitution does not conform with the minimum requirement **¶676** of “democratic principles”.

We further find that the right to vote as a fundamental democratic principle is supported by two U.S. Supreme Court cases.

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

James P. Wesberry v. Carls. Sanders, 376 U.S. 1, 84 S.Ct. 526, 535 (1964.)

The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. [emphasis added].

B.A. Reynolds, et al v. Sims et. al. , 377 U.S. 533, 84 S.Ct 1362, 1378, 1381 (1963). These two cases, however, deal with a “debasement” of the right of suffrage. In this case, we deal with the total absence or denial of the right of suffrage in the Airai Constitution.

THE VOTING RIGHTS ACT

We now turn to the Voting Rights Act, 23 PNC § 101, et seq. Sections 102 and 105 of this statute state the purpose, and the relevant sections of the statute as follow:

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¶677 Section 102. Legislative findings and purposes. The Olbiil Era Kelulau hereby finds and declares the public policy of the nation to be, as follows:

(a) The right of suffrage is a fundamental right in a free and democratic society, particularly since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic fundamental and political rights.

(b) Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

(c) Under the Constitution of the Republic it is within the power of the national government to prescribe and define elector qualifications for the participation of citizens in all elections, provided that states may establish minimum periods of residency for state elections.

(d) The purpose of this chapter is to prevent any activity by the national, state or other political subdivision or government from denying or acting in such a way as to have the effect of denying any qualified citizen, on account of race, creed, clan, color, status, financial circumstance, political affiliation or sex from exercising the right to vote.

Section 105. Voting rights.

(a) All citizens of the Republic who are otherwise qualified by a law to vote at national elections shall be entitled and allowed to vote at all state _____, municipal or other political or territorial subdivision elections without distinction of race, sex, color, financial circumstance, clan, custom, literacy, residency except as otherwise provided by this chapter, religion, or previous condition of servitude within the state, municipality or other political or territorial subdivision in which they reside; any constitution, charter, ordinance, law, custom, usage or regulation of any state or other political subdivision to the contrary notwithstanding.
[emphasis added].

23 PNC 101, et seq., began its legislative history as H. ¶678 Bill No. 1-0124-35. In reporting the bill out during the First OEK, the House of Delegates' Committee on Judiciary and Governmental Affairs stated in Standing Committee Report No. 161:

The Committee is of the mind that this bill is both timely and necessary. As the several states and the national government looks forward [sic] to the numerous elections required for the organization of the states, it is necessary that the rights of all voters are protected irrespective of any political or social affiliation.

All citizens of Palau who are eligible to vote in national elections are permitted to

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vote in the states and municipalities of their domicile, provided they meet a
minimum standard of residency as is established by the states [emphasis added].

We hold that the OEK clearly intended the state governments to have elections for public officials as representatives of the governed to run their government. We see no equivocation of that clear intent in the statute. We further hold that the OEK by this statute states expressly that the right to vote is a fundamental democratic principle. We agree with this view.

II. STANDING

Appellants' second issue on appeal is the standing of the Appellees to bring this lawsuit. Appellants contend that since the Trial Court held that inquiry into whether the Airai Constitution conforms with "democratic principles" is "nonjusticiable", this case should be dismissed. We do not follow the Appellants' contention, given the fact that the Trial Court found standing and justiciability on the confirmation of the Airai Constitution and held against the Appellants. That **¶679** issue and the Court's decision is independent of the "guaranty clause" issue.

We, however, understand Appellants' argument that there being no right to vote, the Appellees have not suffered any injury. Without injury, they have no standing. Without standing, this case should be dismissed.

The injury the Appellees suffered is that they were deprived of their right to approve the Airai Constitution in a referendum, and have been deprived of their right to vote for public officials as their representatives to run the state government. The injury here is not just a "debasement" of the right to vote, but the total absence or deprivation of that guaranteed right to vote. We find that the Appellees have standing to sue. [*Santos, et al, v. Salii, et al* , App. 21-87, Civil Action No. 104-87, 1987]; *Gibbons, et al. v. Salii, et al* , 1 ROP Intrm. 333, 336 (App. Division. Sept. 1986).

VACATING TRIAL COURT'S ORDERS

While we hold that inquiry of whether the Airai Constitution conforms with ROP Constitution is justiciable and that it is our role to determine what the Constitution says, the formation of a state Constitution is for the people of each state to decide. Similarly, the conduct of a state election, be it for a referendum or for public office, is the responsibility of the Election Commission as provided by statute.

Accordingly, we hold that the Trial Court exceeded its judicial domain and discretion by getting involved in the drafting of a bill calling for an Airai Constitutional **¶680** Convention. It is also not the role of the Court to conduct a referendum or election or to tell the state what should be in a legislation.

We hereby vacate that part of the Trial Court's order issued on October 4, 1988, requiring that a bill calling for a Constitutional Convention be submitted to the Court for its "review and approval". We vacate the bill as amended by the Trial Court in its December 20, 1988 order.

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These orders are inconsistent with the Trial Court's own decision that determination of what are "democratic principles" is nonjusticiable.

Our opinion will require a renewed effort to promulgate a constitution for the State of Airai. This effort and the end result must conform with the ROP Constitution and specifically incorporate the democratic principles discussed herein.

Given the fact that the current Airai Constitution has been rejected in the 1988 referendum, it is imperative that the new Constitution be in place at the earliest possible time. The people of Airai have the right to a legitimate constitutional government.

CONCLUSION

We hold that the Airai Constitution is invalid because it failed confirmation in a referendum by a majority of the votes cast. The eligible voters of Airai have a right to approve a draft Constitution in a referendum. The corollary of this is that the people have the right to vote on an amendment or change to their constitution in a referendum.

¶681 We further hold that Article VII and Section 1, Article XI of the Constitution require 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.

The Trial Court's JUDGMENT is AFFIRMED AND REVERSED consistent with this Decision.

This matter is remanded to the Trial Court for further proceedings consistent with this Decision.

IT IS SO ORDERED.