

Olikong v. ROP, 8 ROP Intrm. 250 (2000)
**SANTOS OLIKONG, LUCIUS MALSOL,
ALAN R. SEID, and ELIA TULOP,
Appellants,**

v.

**REPUBLIC OF PALAU,
Appellee.**

CIVIL APPEAL NO. 00-14
Civil Action No. 99-137

Supreme Court, Appellate Division
Republic of Palau

Argued: December 13, 2000
Decided: December 19, 2000

Counsel for Appellant Olikong: Johnson Toribiong

Counsel for Appellants Malsol, Seid, and Tulop: Antonio L. Cortes

Counsel for Appellee: Michael J. Rosenthal

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

MICHELSEN, Justice:

In this case, the Trial Division held that those members of the Olbiil Era Kelulau (OEK) who were simultaneously holding other public positions were not in compliance with Article IX, Section 10, of the Palau Constitution, which provides in pertinent part: “A member may not hold any other public office or public employment while a member of the Olbiil Era Kelulau. Upon due consideration of the arguments of the Appellants, we believe the Trial Division’s opinion fully and completely reflects our view on that issue, and we therefore adopt and incorporate its decision, attached as Appendix A to this opinion. 1251

In addition to the issues addressed in the Trial Division’s opinion, several additional matters raised by the appeal merit comment.

1. Mootness

Following the issuance of the trial court’s decision, four of the defendants appealed and two did not. None of the Appellants will be members of the 6th Olbiil Era Kelulau, which begins January 1, 2001. This raises the question of whether the appeal is thus moot, at least as of

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January, 2001, when the terms of office of the members of the 5th Olbiil Era Kelulau expire. As of this date, all Appellants still are members of the OEK and although the regular session is completed, it is possible that a special session could be called.¹

None of the parties presently urge the Court to dismiss the appeal, and since it is decided before the end of the terms of the Appellants, the case still presents a live controversy.

2. *The Special Prosecutor's Act*

In addition to their arguments concerning the interpretation of Article IX, section 10 of the Constitution, the Appellants challenge the constitutionality of the Special Prosecutor's Act; 2 PNC § 501, *et seq.* They request that we reconsider our holding in *Kotaro v. ROP*, 7 ROP Intrm. 57 (1998).

The *Kotaro* Court rejected the arguments then ripe for review and upheld the constitutionality of the Act. In *Kotaro*, the Appellant challenged the following provisions of the Act: § 503(a), the Special Prosecutor's authority to investigate and prosecute "any and all allegations" of violations of the Republic's laws; § 503(b), giving the Special Prosecutor the "greatest degree of independence" consistent with the President's authority, directing the President not to countermand or interfere with the Special Prosecutor's decisions or actions, and allowing the Special Prosecutor to determine what information the President will receive; and § 502, preventing the President from removing the Special Prosecutor except for cause and only with the consent of the President of the Senate and the Speaker of the House. The Court examined all of these provisions on their merits, save one, and determined that they did not violate the principle of separation of powers. *Id.* at 59-60. The only challenge that the Court did not address was the provision requiring that the President obtain agreement from the President of the Senate and the Speaker before removing the Special Prosecutor. The Court held that it was not ripe for decision. *Id.* at 60 n.2.

Having thoroughly reviewed the arguments and authority presented by Appellants, we reaffirm the holding in *Kotaro* in all respects. We also believe that the issue reserved in *Kotaro*, namely whether the President needs legislative concurrence before terminating the Special Prosecutor, is not presented on these facts. As we said in *Kotaro*:

First, appellant has made no suggestion that the President had ever attempted to remove the Special Prosecutor who prosecuted this case, nor that the OEK prevented or **1252** impeded such removal. Second, 2 PNC § 506 states that "[i]f any provision of this chapter ... is held invalid, the invalidity does not affect other provisions ... and to this end the provision of this chapter are severable." Therefore, even were this aspect of the law ultimately to be found unconstitutional, the remainder of the law would remain in effect.

¹ We take judicial notice of the fact that the House met for a special session on November 20th, as did the Senate on November 21st, and special sessions are scheduled for the week of December 17.

Id. at 60.

Appellants also challenge the constitutionality of that sentence of 2 PNC § 502 that would require the Court to amend its rules to allow the Special Prosecutor a five-year waiver before having to pass the Palau bar exam.² This is not an issue in this case. The Special Prosecutor's admission to the bar was handled in the usual course, and not under any special waiver.

3. *Appointment of a Morolel*

Senator Olikong suggests to us that he will be in full compliance with the judgment in this case if he appoints a "morolel"³ to serve in his House of Traditional Leaders seat. However, issues concerning compliance with a declaratory judgment are initially a matter for the trial court. We express no opinion as to whether this proposal would comply with the Trial Division's decision.

CONCLUSION

In sum, we agree with the Trial Division's holding that the Appellants all hold public positions incompatible with Article IX, section 10 of the Palau Constitution. We deny Appellants' request that we overturn the decision in *Kotaro*, and reaffirm that the challenges to the constitutionality of the Special Prosecutor's Act currently ripe for review do not violate the principle of separation of powers. We express no opinion as to the constitutionality of those provisions that are not ripe for determination on these facts, and also decline to express a view on Senator Olikong's suggested method of complying with the lower court's judgment.

² "Rule 3 of the Palau Rules of Admission for Attorneys shall be modified so that he may practice law in Palau as a Special prosecutor for 5 years without taking the Palau bar examination."

³ Senator Olikong defines a "morolel" as one who is appointed by another person to sit as a substitute during that person's absence or incapacity.

APPENDIX A

REPUBLIC OF PALAU

v.

**SEIT ANDRES, ANTONIO BELLS, LUCIUS MALSOL,
SANTOS OLIKONG, ALAN SEID, and ELIA TULOP**

Civil Action No. 99-137

Supreme Court, Trial Division
Republic of Palau

Issued: April 6, 2000

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice.

1253 In this action, the Office of the Special Prosecutor (the “Special Prosecutor”) contends that the defendants, all of whom are members of the Olbiil Era Kelulau (“OEK”), are violating the Palau Constitution by also holding positions in state government. This Court concludes that the Special Prosecutor is correct.

PROCEDURAL BACKGROUND

The Special Prosecutor filed this case on May 3, 1999, bringing a single cause of action against defendants Andres, Bells, Malsol, Olikong, Seid and Tulop.⁴ The Special Prosecutor alleged that “each of the above named Defendants is presently a member of the OEK and holds other public office or public employment in violation of Article IX, § 10 of the Constitution of the Republic of Palau.” In their answers, the defendants, except defendant Seid, admitted that they were member of a state legislature in addition to holding a position in the OEK. Defendant Seid acknowledged that he was a member of the Board of Directors of the Koror State Public Lands Authority (“KSPLA”). The Special Prosecutor responded to the defendants’ answer by filing a motion for summary judgment. The defendants countered with briefs in opposition to that motion. In addition, defendants Seid and Olikong filed motions asking the Court to dismiss the complaint, and defendants Seid and Tulop filed motions for summary judgment. The motions have now been fully briefed and the parties have had an opportunity to present oral argument. Because the motions all address the same underlying issue, they will be treated together in this single opinion.

⁴ The Special Prosecutor brought suit against Isidoro Rudimch as well. Because Mr. Rudimch later passed away, he is no longer part of this case.

DISCUSSION

A. Palau Constitution

Article IX, § 10 of the Palau Constitution provides that “a member may not hold any other public office or public employment while a member of the OEK.” The defendants, who are all members of the OEK, are also members of either a state legislature or a state public lands authority. Thus, the Special Prosecutor contends, the defendants are clearly in violation of Art. IX, § 10. The defendants argue, however, that the matter is not so simple. They note that they hold their positions in state government as a result of their traditional titles and maintain that the Special Prosecutor’s position ignores another provision of the Palau Constitution, Art. V, § 1.⁵ That section provides: “The government shall take no action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with this Constitution, nor shall it prevent a traditional leader from being recognized, honored, or given formal or functional roles at any level of government.” According to the defendants, the Special Prosecutor is interfering with their roles as traditional leaders and is seeking to prevent them from being given a “role at any level of government.” Although this is the heart of their position, the defendants raise several secondary arguments.

B. The Defendant’s Secondary Arguments

Defendant Seid contends that the Court must dismiss this case because the act creating the Office of the Special Prosecutor is unconstitutional. Although defendant Seid **1254** presents his argument at considerable length and with considerable vigor, the issue has already been resolved. In *Kotaro v. Republic of Palau*, 7 ROP Intrm. 57 (1998), the Appellate Division held that 2 PNC §§ 501, *et seq.*, the act creating the Office of the Special Prosecutor, was constitutional. The trial division is bound by this decision. If defendant Seid believes *Kotaro* was decided improperly, he must address that argument to the Appellate Division.

Defendant Seid also contends that his seat on the KSPLA Board of Directors is not a position of public office or public employment. Such an argument confines the “public” realm far too narrowly. The KSPLA’s entire purpose is to promote the public interest in land use issues concerning Koror. Even though Seid has refused to accept his compensation as a Board member, the very fact that the state would pay him for his work shows that a seat on the KSPLA Board of Directors is public. Defendant Seid cites several early twentieth century cases to suggest that his position is not public. *See South Carolina v. United States*, 199 U.S. 437 (1905); *Bineiwski v. City of New York*, 44 N.Y.S.2d 543 (1943); *In re Board of Rapid Transit R. Comm’rs of City of New York*, 90 N.E. 456 (N.Y. 1909); *Boston Molasses Co. v. Commonwealth*, 79 N.E. 827 (Mass. 1907). These cases do not persuade this Court that the KSPLA should be considered a private entity.

Some of the defendants also maintain that the Palau Supreme Court has no authority to resolve this matter because the Constitution provides that the OEK is the sole judge of the

⁵ Defendant Seid does not join in this argument because, unlike the other defendants, he does not hold his position in state government as a function of any traditional title.

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“election and qualifications of its members.” *See* ROP Const. art. IX, § 10. According to the defendants, by entertaining this lawsuit, this Court is infringing on the OEK’s authority and thereby disrupting the carefully structured balance of powers established by the constitutional framers.

The defendants’ argument overlooks ample precedent providing that this Court is the final arbiter of constitutional dispute and has the power to “say what the law is.” *See Becheserrak v. Koror State*, 3 ROP Intrm. 53, 55 (1991). The Palau Supreme Court is the ultimate interpreter of the Constitution and has the duty to decide disputes involving another branch of government. *See Remeliik v. Senate*, 1 ROP Intrm. 1, 4 (1981). Moreover, this Court’s resolution of this case does not affect the OEK’s authority to be the sole judge of the elections and qualifications of its members. This Court must decide whether members of the OEK are violating the Constitution by holding of the public office or public employment. To reach this decision, it is unnecessary to evaluate the defendants’ qualifications as OEK members.

C. The Defendants’ Primary Argument

What is not an issue? Although defendants claim that the Government is interfering with the roles of the traditional leaders by filing this lawsuit, the Court believes the real issue is the meaning of the words “public office or public employment.” The Government is asking this Court to say what these words mean in Article IX, section 10 of the Constitution.

The defendants’ primary argument is that traditional leaders are not “public” officials and therefore that the positions they hold in state government as a function of their traditional titles are not “public” positions either. Although the defendants may be correct that traditional leaders are not public officials when fulfilling their traditional leadership roles, the situation is far different when those same individuals are acting as members of a state legislature. Membership in a state legislature is a public office and a position of public employment. State legislators act for the public benefit in **1255** undertaking legislative business. In determining whether membership in the state legislature is a public position, it does not matter that a legislator holds his position solely because his state constitution guarantees certain title holders a seat in the state legislature. An individual need not be elected in order to hold public office or public employment.

This conclusion does not diminish the role carefully preserved for traditional leaders by the constitutional framers. There is no doubt that the framers sought to preserve the function of traditional leaders in Palauan society. That is the entire purpose behind Art. V, § 1 of the Constitution. Indeed, traditional leaders continue to play an important role in Palauan society through the Council of Chiefs. *See* ROP Const. art. VIII, § 6. But the constitutional framers also understood the potential dangers of double office holding, and included Art. IX, § 10 to avoid these dangers.

At the time of the Constitutional Convention, the predecessor bodies to the state legislatures, the Municipal Councils, were already in place. Certain individuals served on the Municipal Councils as a function of their traditional titles. The councils were organized to

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promote the public interest. *See e.g.*, Melekeok, Ngeremlengui and Ngiwal identical ordinance 4-59, Art. I. section 2 (“The function of the Council shall be to enact necessary ordinance and otherwise prescribe regulations to promote the health, peace, morals, education and order of the people”); Koror Municipal Ordinance 6-59, Article I, section 2 (“The functions of the Council shall be to make and pass ordinance . . . for the welfare and good government of the inhabitants of the municipality. Such functions shall include but not limited to the following matters; . . . 2. public Health 3. The use of public land 4. The maintenance of peace, order and public safety . . . 7. Fishing and fishing rights; 8 Education.”). Members of these councils were considered to be public officeholders. *See Silmai v. Magistrate of Ngardmau Municipality* , 1 ROP Intrm. 47, 51 (Tr. Div. 1982). Knowing that traditional title holders were already serving on these public bodies, if the constitutional framers had wanted to allow traditional title holders to be able to serve in both the OEK and the state legislatures, they would have made a specific exception to Art. 9, § 10. But the framers made no such exception.

Accordingly, the Court finds that defendants Andres, Bells, Malsol, Olikong, Seid and Tulop are in violation of Art. IX, § 10 of the Palau Constitution because they are members of the OEK and hold other public office or public employment. The Special Prosecutor’s motion for summary judgment is granted and all other pending motions are denied.