# Prefatory Report: Rules Implementing the Separation of the Justices

## Introduction

The Palau Constitution took effect on January 1, 1981. As originally enacted, Article X, Section 2, of the Constitution provided:

> The Supreme Court is a Court of Record consisting of an appellate division and a trial division. The Supreme Court shall be composed of a Chief Justice and not less than three (3) nor more than six (6) Associate Justices, all of whom shall be members of both divisions. All appeals shall be heard by at least three justices. Matters before the trial division may be heard by one justice. No justice may hear or decide an appeal of a matter heard by him in the trial division.

Section 2 provided the basic structure for the Supreme Court of the Republic. This structure mirrored certain common features of constitutional courts in other countries. For example, the division of trial and appellate functions is a common feature of constitutional courts. As another example, a basic tenet of constitutional judiciaries is that appeals are not decided by the same justice who heard the trial in that matter.

However, the structure provided by Section 2 differed from the structure commonly used in the constitutional courts of other countries in certain respects. Most notably, all of the justices of the Supreme Court were full members of both the trial and appellate divisions.

It is not particularly unusual in the courts of other countries for justices or judges to sometimes serve on both trial-level and appellate-level courts. For example, in the United States, federal trial court judges can be designated to sit on panels to hear matters in the federal appellate courts. But those designated sittings generally account for only a limited portion of a given judge's work; a judge will primarily serve at either the trial or appellate level.

In this regard, the structure provided by Section 2 was unusual. The justices of our Supreme Court regularly served in both the trial and appellate divisions. Such dual service was a practical consequence of the size of the Supreme Court. Section 2 provided that the Supreme Court would have at most seven justices (a Chief Justice and six Associate Justices); it could have as few as four justices. In cases in which one or more justices were recused due to conflicts of interest, the pool of available justices might be even smaller.

The Constitution requires at least four different justices be available in order to fully adjudicate disputes before the Supreme Court: one justice to hear the trial in the dispute and three different justices to hear any appeal. Given the limited number of justices, it was unavoidable that justices would frequently need to serve in the trial division in one case and in the appellate division in the next case.

The original structure provided by Section 2 works. The prohibition on a justice hearing both the trial and appeal of the same dispute ensured that parties can appeal trial decisions to a disinterested appellate panel. But the original structure practically required that all the justices regularly served in both the trial and appellate divisions.

## The Second Constitutional Convention

Delegates to the Second Constitutional Convention considered a number of proposed amendments related to the judiciary. *See, e.g.*, Second Palau Constitutional Convention, Convention Journal at 1166-1170 (May 23, 2005); 1244-55 (June 10, 2005). The records of the convention indicate that the delegates were concerned with minimizing the rotation of justices between the trial and appellate divisions. *See, e.g., id*. at 569-578 (July 6, 2005). The records also indicate that the delegates were concerned with the financial cost of establishing wholly-separate trial and appellate courts. *See, e.g., id.* The delegates ultimately proposed a constitutional amendment representing a compromise between competing concerns. *See, e.g., id.* at 1042-43 (July 14, 2005).

The proposal was ultimately adopted on November 19, 2008, as the Fourteenth Amendment to the Constitution. The Fourteenth Amendment amends Section 2 of Article X to read as follows:

> The Supreme Court is a Court of Record consisting of an appellate division and a trial division. The Supreme Court shall be composed of a Chief Justice and not less than three (3) Associate Justices all of whom shall be members of both divisions, provided, however when the Olbiil Era Kelulau appropriates funds for additional justices to serve on the appellate division, the Chief Justice shall implement the separation of the Justices of the appellate division and provide rules and regulations therefore. All appeals shall be heard by at least three justices. Matters before the trial division may be heard by one justice. No justice may hear or decide an appeal of a matter heard by him in the trial division.

The amended Section 2 shares much of the same language as the original. Section 2 still provides for a Supreme Court consisting of an appellate division and a trial division; it still provides that the Supreme Court shall have a minimum

of four justices (a Chief Justice and three Associate Justices); it still provides that appeals shall be heard by at least three justices; and it still prohibits a justice from deciding an appeal of a matter that the justice heard in the trial division.

The amended Section 2 departs from the original in two important respects. First, the original Section 2 limited the number of Associate Justices to six; the amended Section 2 no longer includes a limit on the number of Associate Justices who may be appointed to serve on the Supreme Court. Second, the original Section 2 provided that all justices would be members of both the appellate and trial divisions of the Supreme Court. The amended Section 2 still provides the default that all justices "shall be members of both divisions." However, the amended Section 2 also includes a contingent provision: "when the Olbiil Era Kelulau appropriates funds for additional justices to serve on the appellate division, the Chief Justice shall implement the separation of the Justices of the appellate division and provide rules and regulations therefore." This provision envisions a contingency in which all the justices will no longer be regular members of both the trial and appellate divisions.

## Separation of the Justices of the Appellate Division

From November 2008—when Section 2 was amended by adoption of the Fourteenth Amendment—until February 2016, the Supreme Court operated under the amended Section 2 in much the same way as it operated under the original Section 2. In February 2016, the President signed into law Public Law No. 9-55. Through that law, the OEK appropriated funds "for the purpose of implementing the separation of personnel within the trial and appellate divisions by hiring new personnel for both divisions of the Palau Supreme Court." RPPL 9-55, § 5 (February 5, 2016). This funding triggered the Chief Justice's duty under the amended Section 2 to "implement the separation of the Justices of the appellate division and provide rules and regulations therefore." The newly-funded "additional justices to serve on the appellate division" were sworn in to office by the President on October 28, 2016.

Section 2 reflects a clear intent to have separate justices of the appellate division. Section 2 further requires that appeals be heard by at least three Justices. Thus the Chief Justice and the two "additional justices" funded to serve on the appellate division constitute a constitutionally-acceptable three-justice appellate division.

The amended Section 2 does not foreclose assigning more than three justices to the appellate division and does not explicitly prohibit non-assigned justices from serving in the appellate division in certain circumstances. Indeed, categorically prohibiting any other justices from serving in the appellate division is untenable in practice. The Constitution requires appeals be heard by at least three justices. If,

for example, any one of the three justices of the appellate division is unable to hear an appeal due to a conflict of interest, there is no way for the Supreme Court to hear an appeal unless there is a mechanism by which another justice can serve in the appellate division. The language of Section 2 reflects this reality. Section 2 prohibits justices from hearing appeals of matters "heard by him in the trial division." This language allows for a justice who regularly hears matters in the trial division to hear an appeal as long as that justice did not hear the appealed matter in the trial division. This language would be superfluous if all justices were prohibited from ever hearing both trial and appellate matters.

Section 2 likewise does not explicitly define the number of justices to serve in the trial division. Section 2 provides that matters before the trial division may be heard by a single justice. Constitutionally, therefore, there is no need for more than a single justice to serve in the trial division; but a single-justice trial division is wholly unworkable in practice. Generally speaking there are more trials than appeals and trials are often very time-consuming. Further, a given justice may be unable to hear a trial due to a conflict of interest. If there were no additional justices serving in the trial division and no mechanism by which another justice could serve in the trial division, there would be no way for the Supreme Court to hear a trial.

These various practical considerations inform the interpretation of the Chief Justice's duty to "implement the separation of the Justices of the appellate division." The implementation is still guided, however, by the clear intent of the delegates drafting the Fourteenth Amendment to separate the justices so that they primarily serve in only one of the appellate or trial divisions. The rules implementing the separation should reflect that intent.

As a final consideration, the Fourteenth Amendment altered the language of Section 2, but did not amend the language of the other Sections of Article X. Section 12 still provides that the Chief Justice shall be the administrative head of the unified judicial system and that the Chief Justice may assign judges from one court for temporary service in another court. Historically, pursuant to this provision the Chief Justice has overseen the distribution of cases within both the trial and appellate divisions, assigning justices to hear specific cases in the trial division and assigning panels of justices to hear specific cases in the appellate division.

Continuing this practice creates considerable tension with the intent of the Fourteenth Amendment's changes to Section 2. Having a justice serving in the appellate division, while directing the work of the trial division, significantly undermines the intent to separate the justices between the divisions. The Fourteenth Amendment was adopted in part out of a concern that individual

justices were regularly serving in both divisions; having a justice play a regular and significant role in both divisions undermines the amendment.

Formally, the trial and appellate divisions remain part of a single court: the Supreme Court. Practically, the effect of the OEK's funding of additional appellate justices is to allow the trial and appellate divisions to administer themselves as mostly independent entities. Each of these entities necessarily needs to have a way to administer itself; for example, some mechanism must exist to determine which justice will hear a matter when it is initially filed in the trial division. Every court needs some internal authority to make this sort of determination, even when those determinations are simple. Many such determinations are in fact far from simple and involve subtle and complex considerations.

Reflecting this inherent necessity, every judicial function ever created in the Republic has assigned an individual within that judicial function to oversee these determinations. The National Court has a designated presiding judge. *See* Const., Art. X, § 4; 4 PNC § 202. The Court of Common Pleas has a designated senior judge. *See* 4 PNC § 203. The Land Court has a designated senior judge. *See* 4 PNC § 203. During the historical period in which the justices regularly served in both the trial and appellate divisions of the Supreme Court, the Chief Justice was the presiding or senior justice for both divisions. With the justices to be separated between the trial and appellate divisions, it is most consistent with the language, structure, and history of our Constitution and laws to have a justice serving in the trial division preside over the trial division.

# Rules Implementing the Separation of the Justices

The following rules are provided to "implement the separation of the Justices of the appellate division." Const., Art. X, § 2, as amended.

## I. Authority

These rules are promulgated pursuant to Article X, Section 2, of the Constitution (as amended by the Fourteenth Amendment to the Constitution).

## II. Designation of Justices

The Chief Justice and the two Associate Justices sworn into office by the President on October 28, 2016, are assigned to serve as the Justices of the Appellate Division. All other current Associate Justices are assigned to serve as the Justices of the Trial Division. Future Associate Justices sworn into office shall serve in the division of the Supreme Court indicated in that justice's official appointment. If an Associate Justice is appointed without an indication of the division in which they are to serve, that justice shall serve as a Justice of the Trial Division.

## III. Duties of the Justices of the Appellate Division

In addition to duties assigned to all Associate Justices of the Supreme Court by the Constitution, the Justices of the Appellate Division shall hear and decide all matters related to filings in the Appellate Division.

## IV. Duties of the Justices of the Trial Division

In addition to duties assigned to all Associate Justices of the Supreme Court by the Constitution, the Justices of the Trial Division shall hear and decide all matters related to filings in the Trial Division. The Chief Justice shall assign a Justice of the Trial Division to preside in the Trial Division. This presiding justice shall be responsible for case assignment among the Justices of the Trial Division, monitoring case management, and responding to public and governmental inquiries regarding the work of the Trial Division. The assigned presiding justice shall be entitled to any additional compensation provided by law. If the assigned presiding justice is unable to perform these duties, that justice shall designate another Justice of the Trial Division to preside in the Trial Division on a temporary basis. If the assigned presiding justice leaves the Supreme Court or is otherwise permanently unable to fulfill these duties, the Chief Justice shall assign another Justice of the Trial Division to preside.

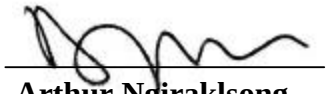
## V. Appellate Panels

The Chief Justice shall assign at least three Justices of the Appellate Division to a panel to hear each appeal. If, through vacancy, disability, recusal, or other good cause, three Justices of the Appellate Division are not available to hear a particular appeal, the Chief Justice shall designate a sufficient number of Justices of the Trial Division, Judges of the Court of Common Pleas, or Judges of the Land Court to serve in the Appellate Division and supplement the panel for that particular appeal.

## VI. Effective Date

These rules are effective immediately. Notwithstanding any provision of these rules, appeals for which a panel has already been assigned by the Chief Justice may be heard by that panel.

These rules are hereby promulgated this 5th day of January, 2017.



**Arthur Ngiraklsong**
**Chief Justice**