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UNIQUE AND COMPLEX ISSUES OF PALAUAN LAW: CUSTOM & JURISDICTION

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ABSTRACT

This Article discusses the significant legal challenges Palau has faced in two critical areas: customary law and subject matter jurisdiction. The Palauan Constitution uniquely establishes traditional law as equally authoritative to statutes, leading the Supreme Court to struggle with how to identify and apply these fluid traditions. This complexity is intensified by a shifting jurisdictional standard that has swung from a “very liberal” approach to a restrictive “injury-in-fact” requirement and recently back to a nearly unlimited standard. This current era of expansive jurisdiction has forced the Court into the role of a frequent arbiter of internal clan disputes, particularly through declaratory judgments. Consequently, Palau stands at a crossroads, needing to determine whether to maintain this high level of judicial intervention or return to a more restrained approach.

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INTRODUCTION²

Like the other former Trust Territories,³ Palau emerged from U.S. trusteeship with a form of government modeled after that of the United States, but with its own alterations to reflect the culture and desires of the Palauan people. Unlike the Federated States of Micronesia,⁴ Palau elected to closely follow U.S. precedent and restatements when deciding novel issues of law.⁵ While Palau chose to break from U.S. precedent at times, making a multitude of modifications⁶ that adapted the U.S. system to a design Palau's constitutional framers thought better fit the needs of their new nation, the Palauan Supreme Court has fluctuated

2. For additional discussion on Palau's history through a legal lens, see Ketib Oldiais, Comment, Anderson-Burdick, *Democracy, and Tradition in the Republic of Palau*, 2021 Wis. L. REV. 1581 (2021) (discussing the framework of traditional Palauan law and the Court's struggle with the balance of power between traditional and elected leaders); Antonio L. Cortés, *Land in Trust: The Invasion of Palau's Land-Tenure Customs by American Law*, 14 ASIAN-PACIFIC L. & POL'Y J. 167 (2013) (explaining the history of land tenure institutions in Palau over the course of successive foreign administrations); Kevin Bennardo, *The Rights and Liberties of the Palau Constitution*, 12 ASIAN-PACIFIC L. & POL'Y J. 1 (2011) (thoroughly analyzing the Constitution of Palau and the first sixteen years of case law interpreting it).

3. The former Trust Territories of the Pacific Islands include Palau, the Federated States of Micronesia (FSM), Republic of the Marshall Islands (RMI), and Commonwealth of the Northern Mariana Islands (CNMI). Excluding FSM, which consists of four former Trust Districts, each nation was its own district, managed by the United States as Trustee from 1947 until independence or—in the case of CNMI—joining the United States. *Trust Territory of the Pacific Islands*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Trust-Territory-of-the-Pacific-Islands> (last visited July 12, 2024).

4. For a more in-depth discussion on how FSM's legal system departed from the U.S. model and its approach to the use of U.S. law for precedent, see Edward C. King, *Custom and Constitutionalism in the Federated States of Micronesia*, 3 ASIAN-PACIFIC L. & POL'Y J. 249 (2002).

5. 1 PNC § 303 ("The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law . . . or local customary law . . . , and except as otherwise provided in section 305 of this chapter . . ."). Of note, however, this does not apply to constitutional matters, where the Court "can and should" look to U.S. decisions but is not necessarily required to do so. *Adachi v. Republic of Palau*, 18 ROP 183, 184 n.1 (Tr. Div. 2011).

6. One major difference is the lack of a constitutional right to bear arms—which would be blasphemous to many Americans. Other differences, such as banning the storage of nuclear, biological, or chemical weapons or waste in Palau, might seem unusual but are, in fact, rooted in the region's history. ROP CONST. art. II, § 3; *id.* art. XIII, § 6. At the time of the drafting of Palau's Constitution and, in many ways, to this day, RMI suffered from significant radioactive contamination from the testing of nuclear weapons, which caused cancer and other medical conditions among its people and made several atolls uninhabitable. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-24-104082, NUCLEAR WASTE: CHANGING CONDITIONS MAY AFFECT FUTURE MANAGEMENT OF CONTAMINATION DEPOSITED ABROAD DURING U.S. COLD WAR ACTIVITIES (2024), <https://www.gao.gov/products/gao-24-104082>. Against this backdrop, including a provision in the Constitution banning such dangerous materials drew a clear line in the sand to ensure a similar situation would never occur in Palau.

as to how closely it follows U.S. common law.⁷ This general reliance on U.S. law created a system where court decisions in Palau are more predictable, making matters easier for practitioners to argue due to the extensive U.S. precedent that exists for the myriad issues that have not otherwise previously arisen in Palau.

However, where Palau elected to break from U.S. precedent, the Court was left to chart its own path. Two of the most substantial topics in this regard are subject matter jurisdiction and the Court's involvement in issues of customary law. These topics, each complex on their own, are further complicated by their overlap, and the Court has struggled with establishing clear rules for either matter. This has resulted in the Court's stance on each of these issues changing over time and, on occasion, the Court's rulings being applied inconsistently. This Article will focus on jurisdiction and customary law in Palau: how they interact with each other, their changes over time as the Court has tried to reflect the founders' conscious choice to modify the jurisdictional rules and preserve the role of Palauan tradition and culture, and potential pathways the Court can take moving forward when addressing these topics.

DEFINING AND PROTECTING CUSTOM IN PALAUAN LAW

Customs are an integral part of Palauan culture and have been passed down through countless generations; however, they are fluid and continue to develop and change over time. When Palau became an independent nation, determining how to incorporate customs into its legal structure was a point of contention.⁸ Throughout the region, every country, including the U.S. territories of Guam and CNMI, takes a different approach to how custom is incorporated into its laws and society.⁹

7. For example, in *Yano v. Kadoi*, 3 ROP Intrm. 174, 189 (1992), the Court stated, "[t]his Court is free to interpret the law as it sees fit in light of Palauan law and custom, but has as a practical matter often relied on the 'well-developed' body of United States case law." However, in *Ngersikesol Lineage v. Ngiwal State Legislature*, 5 ROP Intrm. 284, 287 (Tr. Div. 1994), it is noted that "[t]his court is obliged by the requirements of 1 PNC § 303 to follow '[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States . . .'" Also of note, Justice Bennardo in his concurrence in *Techeboet Lineage v. Baules*, 2019 Palau 21 ¶¶ 13, 16, questioned "the propriety of 1 PNC § 303" as it "violates the separation of powers by impermissibly raiding the Palauan judiciary of one of its core functions: to form the common law of Palau."

8. Oldiais, *supra* note 1, at 1588–98.

9. See generally *id.* (providing additional context on the integration of custom into Palauan law). Robert J. Torres, Jr., *Jon'd at the Hip: Custom and Tradition in Island Decision Making*, 35 UNIV. HAW. L. REV. 921 (2013) (discussing the role of custom throughout Micronesia).

The founders of Palau elected to incorporate custom into its Constitution at Article V, Section 2, which states, “[s]tatutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law.”¹⁰ Through this section, Palau’s founders ensured that custom would retain its place as a source of law within the nation, allowing the country to follow its own path and develop over time. The founders also wanted Palau’s traditional leaders to retain their significance and power as shown through Section 1 of Article V. Section 1 prevents the government from taking an “action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with th[e] Constitution, nor shall it prevent a traditional leader from being recognized, honored, or given formal or functional roles at any level of government.”¹¹ Additionally, Article VIII, Section 6 establishes a Council of Chiefs who “advise[s] the President on matters concerning traditional laws, customs[,] and their relationship to the Constitution and the laws of Palau.”¹² Further, Article IX, Section 1 requires the states to follow the “traditions of Palau;”¹³ Article XIII, Section 1 enshrines “Palauan traditional languages” as the national languages;¹⁴ and Article I, Section 2 prevents the impairment of “traditional fishing rights and practices.”¹⁵ The preservation of the role of custom, traditional practices, and customary leaders throughout Palau’s Constitution emphasizes the founders’ dedication to Palau’s traditional way of life and its continuation into the future.

However, these sections’ interpretations have been heavily debated since Palau’s first days of independence.¹⁶ In the Palauan Supreme Court’s first case on the matter, *Udui v. Dirrecheteet*, the Court determined that custom was, in fact, common throughout modern society, comparing it to business customs within U.S. common law.¹⁷ As such, based on U.S. precedent, the Court determined that matters of custom are conclusions of law that must be proven by clear and convincing evidence.¹⁸ Over a decade later, the Court pivoted in *Remoket v.*

10. ROP CONST. art. V, § 2.

11. ROP CONST. art. V, § 1.

12. ROP CONST. art. VIII, § 6.

13. ROP CONST. art. IX, § 1.

14. ROP CONST. art. XIII, § 1.

15. ROP CONST. art. I, § 2.

16. *See, e.g.,* Beouch v. Sasao, 20 ROP 41, 45–47 (2013).

17. *Udui v. Dirrecheteet*, 1 ROP Intrm. 114, 116 (1984).

18. *Id.* at 117.

Omrekongel Clan, stating that “[t]he existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence at the trial court level” and determining that “the trial court’s findings regarding the terms and existence of customary law and the existence of the facts to which the customary law is applied are subject to the clearly erroneous standard of review.”¹⁹ In doing so, the Court confusingly cited *Udui* as supporting a different holding than the clear and convincing evidence standard it seemed to establish,²⁰ and it did not provide any further explanation as to why this new standard applied.

One other decision that would prove impactful came almost two decades later in *Beouch v. Sasao*, in which the Court found that it could take judicial notice of customs, though only in situations where it did not contradict the record.²¹ The *Beouch* Court held that the standards for when and how customs would be recognized “st[ood] on shifting and uncertain grounds” and required clarification.²² The Court explained that, while customary law can be complex, there is no legal doctrine that justifies the higher standard of review that *Udui* applied solely because of its complexity.²³ Additionally, the Court rejected the *Udui* Court’s analogy to custom in business practices, as it reasoned that business custom is a narrow tool to “aid in interpreting an ambiguous contractual term,” whereas custom in Palau is a source of law that is as authoritative as statutes.²⁴

After effectively overruling *Udui*, the Court looked back to the days when Palau was still a Trust Territory for guidance.²⁵ Before independence, the Trust Territory viewed questions of custom as “mixed question[s] of law and fact.”²⁶ The *Beouch* Court determined that, because language on custom from the Palau Constitutional Convention mirrored that of the Trust Territory, the founders intended to use the same requirements to recognize a custom as traditional law.²⁷ The Court laid out a four-part test, requiring that “(1) the custom is engaged voluntarily; (2) the custom is practiced uniformly; (3) the custom is followed

19. *Remoket v. Omrekongel Clan*, 5 ROP Intrm, 225, 227, 234 (1996).

20. *Id.* at 227.

21. *Beouch*, 20 ROP at 47.

22. *Id.* (providing examples of when the Court did so).

23. *Id.*

24. *Id.*

25. *Id.* at 45.

26. *Lajutok v. Kabua*, 3 TTR 630, 634 (1968).

27. *Beouch*, 20 ROP at 48.

as law; and (4) the custom has been practiced for a sufficient period of time to be deemed binding.”²⁸

The Court outlined an additional test to aid in determining when the more complex four-part test must be applied by the trial court: If the custom is “firmly established and widely known[,]” the trial court can take judicial notice of a custom, and the *Beouch* analysis does not need to be applied.²⁹ The *Beouch* Court left the door open as to what the exact parameters are for determining if a custom is “firmly established and widely known” but noted that “past judicial recognition of a traditional law as binding will be controlling as a matter of law, absent evidence that the custom has changed.”³⁰ If a custom is not “firmly established and widely known,” the trial court must then conduct the four-part test to determine if a custom qualifies as a traditional law under Article V, Section 2 of the Constitution.³¹

While *Beouch* took great strides towards creating a uniform system of recognizing customs and evaluating whether a custom falls under Article V, Section 2, there are a few unanswered issues and potentially unintended consequences of the *Beouch* decision. One consequence is that the Court has become an arbiter for deciding what is and is not custom. Under the four-part *Beouch* test, a custom must be “practiced uniformly.”³² However, the Court did not clarify how uniformly a custom must be practiced for it to qualify as a traditional law. Logically, each clan should be able to determine their own customs, and the Court has hinted at the need to consider differences in custom at the clan and lineage level.³³ But, under *Beouch*, the door is left open for the Court to swing in either direction, potentially determining that there is only one national standard for custom or that every clan or lineage can decide their own customs if they are practiced uniformly.

In making its decisions, the Court relies upon the testimony of experts,³⁴ but what if traditional leaders decide that a custom needs

28. *Id.*

29. *Id.* at 48 (internal quotations omitted).

30. *Id.*

31. *See id.* at 48–49.

32. *Id.* at 48.

33. There is precedent recognizing the common custom of a chief title being appointed by the lineage or clan and accepted by the Council of Chiefs. *See, e.g., id.* at 54; Ngardmau Trad. Chiefs v. Ngardmau State Gov’t, 6 ROP Intrm. 192, 193, n.5 (1997). The specific details, however, differ between clans and lineages, so the parties should address these details on remand. *See Beouch*, 20 ROP at 53–54 (noting one such difference: the requirement in Ngatpang that a *blengur* must be held before a chief title is conferred). *Rengiil v. Ongos*, 22 ROP 48, 54 n.7 (2015).

34. *See, e.g., Beouch*, 20 ROP at 52.

to change or a new custom must be created? A newly created custom would likely fail to meet the standard established by the fourth part of the *Beouch* test, as it would not be practiced for a “sufficient period of time to be deemed binding.”³⁵ Determining what satisfies this fourth part will require additional input from the Supreme Court. While the aforementioned “newly created custom” example would be the most questionable, the fact that customs have continued for countless generations raises a further question of how long a custom must be practiced to be deemed binding, as a custom that has been engaged in for decades—even two or three generations—may still be considered a young custom in relation to the lengthy history of Palauan culture.

Although the Court notes that customs can change over time, *Beouch*’s recognition of judicial notice of prior decisions may chill any such changes, posing another potential issue.³⁶ For example, a recognized traditional law is that the *ourrot*³⁷ must be consulted before clan land can be alienated.³⁸ It is possible that over the course of a few years—or even decades depending on the strictness with which the Court interprets the “sufficient time” requirement of *Beouch*—a hypothetical clan could stop fully adhering to that custom and consult only some of the *ourrot*. If a lease is then challenged in court for failing to consult the *ourrot*, the court would either take judicial notice that the *ourrot* must be consulted and consequently declare the lease to be invalid, or apply the *Beouch* test and find that, potentially, the custom has not been followed for long enough to be binding. Then, the hypothetical clan would have to resume consulting all of the *ourrot*, thereby restoring the custom from which the clan had started to drift away. While the example of notifying the *ourrot* prior to alienating land is a custom that would likely be challenged immediately if not adhered to, there are many customs that may only surface and be challenged sporadically. Still, if those customs were ever challenged, the Court would likely be bound to reinstate them in their original form.

While Palau’s founders went through great lengths to enshrine Palauan customs by placing protections for multiple aspects of Palauan customary law into the Constitution, precisely defining custom has proven to be a more difficult task. While the *Beouch* Court eventually settled on a clearer standard for deciding what constitutes customary

35. *Id.* at 48.

36. *Id.* at 49.

37. The *ourrot* are the senior female members, generally within the maternal lines, of a clan. *Ngirmang v. Filibert*, 9 ROP 226, 229 (Tr. Div. 1998).

38. *Etpison v. Obichang*, 2020 Palau 8 ¶ 31.

law, the current system is not without its flaws, all of which will have to be addressed over time.

THE SWINGING PENDULUM OF JURISDICTION IN PALAU

In the United States, federal jurisdiction is established under Article III, Section 2 of the Constitution. Clause 1 of Article III, Section 2 states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.³⁹

Based on this provision, the U.S. Constitution requires that a plaintiff have standing to bring a suit, limits the federal judiciary from hearing cases that are unripe or moot, and prohibits the issuance of advisory opinions.⁴⁰ In Palau, however, the founders decided to take a slightly different approach. Article X, Section 5 of the Palau Constitution states:

The judicial power shall extend to all matters in law and equity. The trial division of the Supreme Court shall have original and exclusive jurisdiction over all matters affecting Ambassadors, other Public Ministers and Consuls, admiralty and maritime cases, and those matters in which the national government or a state government is a party. In all other cases, the National Court shall have original and concurrent jurisdiction with the trial division of the Supreme Court.⁴¹

The key difference in this section of Palau's Constitution, which details the jurisdiction of the Supreme Court of Palau in parallel to Clause 1 of Article III, Section 2 of the United States Constitution, is that the judicial power extends to "all matters in law and equity" as opposed to "all [c]ases." This small change has had an outsized impact on Palau's legal system as the Supreme Court has tried to grapple with the bounds of "all matters in law and equity."

In *Gibbons v. Republic of Palau*, the first case on the matter, the Supreme Court of Palau held that the founders intentionally chose "all

39. U.S. CONST. art. I, § 2, cl. 1.

40. See generally *Muskrat v. United States*, 219 U.S. 346, 356–59 (1911).

41. ROP CONST. art. X, § 5.

matters of law and equity” to extend Palauan courts’ jurisdiction beyond that of the “case[s] or controvers[ies]” standard of the United States.⁴² In recognition of that broad language, the Court construed Article III, Section 2 as a grant of jurisdiction over “any and all matters which traditionally require judicial resolution,” a construction which “compel[led] [the Court] to adopt a very liberal approach in determining whether a plaintiff has standing.”⁴³

The broad interpretation of the Court’s jurisdiction in *Gibbons* led to a consequential difference in standing doctrine between Palau and the United States, as *Gibbons* allowed a taxpayer to sue the national government without a particularized injury.⁴⁴ The Court found that “a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public’s generally, if he can show that he has suffered or will suffer some injury in fact from the contested action.”⁴⁵ In making its decision, the Court weighed policy concerns, noting that “[t]he issue of standing is determined by the courts as a matter of policy” and so “[c]onsequently, the individual must be able to take the initiative through taxpayer’s suits to keep the government accountable.”⁴⁶ Further, Palau could take a different approach from the United States because the “federal requirement of particularized injury for plaintiffs to maintain taxpayer actions is based, in large part, on the substantial population of the United States” and, with Palau’s population “of approximately 15,000 people, the distinction between the Palauan taxpayer and one in the United States, though one of degree, is obvious.”⁴⁷ While the *Gibbons* Court considered policy and practicality, it ultimately noted that “[t]he extremely

42. *Gibbons v. Republic of Palau*, 1 ROP Intrm. 634, 637 (1989) (internal quotation marks omitted). An interesting counterpoint by Justice Gregory Dolin is that the *Gibbons* Court’s interpretation “is not necessarily ‘obvious[]’ that the term ‘matters’ is broader than ‘cases or controversies.’” *Ngiraterang v. Ngarchelong State Assembly*, 2021 Palau 18 ¶ 44 n.9 (Dolin, J., dissenting). Justice Dolin explains that Article X, Section 5 of the Palau Constitution—“all matters affecting Ambassadors, other Public Ministers and Consuls”—mirrors the U.S. Constitution’s Article III, Section 2, which uses the language “all Cases affecting Ambassadors, other public Ministers and Consuls.” *Id.* (citing ROP Const. art. X, § 5 and U.S. Const. art. III, § 2). He notes that “it is hard to imagine” that a matter involving an ambassador would not be a “case” and, as such, the words “matter” and “case” are used interchangeably, leading to doubts as to the *Gibbons* Court’s interpretation. *Id.*

43. *Gibbons*, 1 ROP Intrm. at 637.

44. *Contrast id.* (where the Palauan Supreme Court granted a taxpayer’s standing with no particularized injury), *with* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (where a taxpayer’s disapproval of how taxpayer funds were being used was not particularized nor concrete enough to support Article III standing).

45. *Gibbons*, 1 ROP Intrm. at 640.

46. *Id.* at 639.

47. *Id.* at 638–39.

broad language of the Palau Constitution thus compels us to adopt a very liberal approach . . . [and, f]or this reason alone, we must hold that plaintiffs possess standing in this case.”⁴⁸

With time, however, the Court began to rely on U.S. precedent and, as a result, its jurisdictional standard began to change. This significantly decreased the breadth of the Court’s jurisdiction, dwindling the divide between “all matters in law and equity” and “cases or controversies.” The first case to restrict the Court’s jurisdiction from “all matters in law and equity” to something more akin to the U.S. standard was *Becheserrak v. Republic of Palau*.⁴⁹ Here, the Court cited *Gibbons*: “[t]he key to standing is an actual or threatened injury.”⁵⁰ In 2017, the Court noted that “[i]n hindsight, the *Becheserrak* Court misread *Gibbons v. ROP*, merging the ‘very liberal approach’ compelled by our Constitution with the ‘actual injury’ requirement drawn from U.S. cases.”⁵¹ Whether accidental or not, this was the beginning of a new standard that would redefine Palau’s jurisdictional requirements for decades to come.

The Court continued to follow this new and more stringent version of Palau’s jurisdictional requirement without further reasoning. In *Senate v. Nakamura* (*Nakamura 1998*), the Court, again citing to *Gibbons*, claimed that Article X, Section 5 “limited [its] jurisdiction to ‘matters which traditionally require judicial resolution’ . . . [and,] at a minimum, the allegations of the complaint must show that the defendant has caused the plaintiff to suffer an injury in fact and that the injury was to a legally protected right.”⁵² This also misstates the holding of *Gibbons*, but the Court did not explain why it now viewed *Gibbons* in this alternate light.

Though the Court continued to recognize that the standing requirement in Palau was looser than that of the United States and continued to cite to *Gibbons* in support of its new jurisdictional requirements,⁵³ the exact parameters of Palau’s jurisdiction became significantly different from the original *Gibbons* standard. In *Republic of Palau v. Koshiba*,

48. *Id.* at 637.

49. *Becheserrak v. Republic of Palau*, 5 ROP Intrm. 63 (1995).

50. *Id.* at 67 (citing *Gibbons*, 1 ROP Intrm. at 637–38).

51. *Koror State Legislature v. Koror State Pub. Lands Auth.*, 2017 Palau 28 ¶ 12.

52. *See The Senate v. Nakamura*, 7 ROP Intrm. 8, 9 (1998) [hereinafter *Nakamura 1998*].

53. *See Republic of Palau v. Koshiba*, 8 ROP Intrm. 243, 244 (2000) (“Our Constitution’s grant of judicial power over ‘all matters in law and equity’ is broader than the U.S. Constitution’s grant of judicial power over ‘cases’ and ‘controversies.’ *See Gibbons v. ROP*, 1 ROP Intrm. 634, 640 (1989): The ‘extremely broad language of the Palau Constitution . . . compels us to adopt a very liberal approach in determining whether a plaintiff has standing.’ *Id.* at 637; *accord Becheserrak v. ROP*, 5 ROP Intrm. 63, 66 (1995).”).

the Court relied on *Becheserrak* and explained that the requirement for the Court's jurisdiction was "'an actual or threatened injury,' . . . [in which] '[o]nly slight injury' is required, and 'an identifiable trifle is enough for standing to fight out a question of principle.'" ⁵⁴ By the time of *Gibbons v. Seventh Koror State Legislature*, the Court had honed in on its responsibility "to verify that a party has suffered an injury that the court is capable of redressing before allowing the party to proceed with a lawsuit." ⁵⁵ While the Court still referenced *Gibbons*, it had now clearly deviated from its original meaning of giving the Court jurisdiction over all matters that "traditionally require judicial resolution" and now required a clear injury that is redressable by the Court. ⁵⁶

Indications that change was coming to how the Court applied the "all matters of law and equity" jurisdictional standard began with Chief Justice Arthur Ngiraklsong's concurrence in *Nakamura v. Sablan* (*Nakamura 2005*). ⁵⁷ In his concurrence, Chief Justice Ngiraklsong reiterated that Palau's "all matters of law and equity" was broader than the United States' "cases or controversies" requirement. ⁵⁸ He then identified that in *Nakamura 1998*, the Court had misinterpreted *Gibbons* and had accidentally narrowed the Court's jurisdiction to being "limited to those 'matters which traditionally require judicial resolution.'" ⁵⁹

Without explicitly stating so, Chief Justice Ngiraklsong's focus on the fact that the Court must have jurisdiction over "matters which traditionally require judicial resolution" and that their jurisdiction is not necessarily "limited" to those matters indicated that he believed the Court's jurisdiction *could* extend beyond Palau's broad "all matters of law and equity" standard. ⁶⁰ However, he did not elaborate on this notion, concluding his concurrence by stating that the exact jurisdiction of the Court was "yet to be fully defined" and that it would be determined "on a case-by-case basis as we develop our jurisprudence consistent with our Constitution." ⁶¹ He then reiterated that the injury requirement had improperly been included in the Court's assessment of jurisdiction and "[the Court] should not adopt case law based on

54. *Id.*

55. *Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 106 (2004) (citing *Nakamura 1998*, *supra* note 51, at 9).

56. *Id.* at 105.

57. *Nakamura v. Sablan*, 12 ROP 81, 85 (2005) [hereinafter *Nakamura 2005*].

58. *Id.* at 85–86.

59. *Id.* at 85 n.1 (quoting *Nakamura 1998*, *supra* note 51, at 9).

60. *Id.* at 85–86.

61. *Id.* at 86.

a foreign constitution when its language is dissimilar to [Palau's] [C] onstitution.”⁶²

Not long after, the Court's standard changed again when *Becheserrak* was dramatically reversed by the *Koror State Public Lands Authority (KSPLA) Court*,⁶³ resulting in much ensuing debate and confusion. The Court noted that the prior reliance on U.S. precedent had “effectively narrowed the scope of [its] subject matter jurisdiction to that prescribed by the U.S. Constitution” and that the Court has a “responsibility” to exercise its jurisdiction.⁶⁴ (This phrase particularly would have a large impact, most notably with respect to declaratory judgments, which will be discussed in depth below.) Then, the Court, without any ambiguity, stated that it “hereby overrule[s] any portion of [its] prior cases that holds that [its] constitutional subject matter jurisdiction is limited to cases in which a plaintiff demonstrates injury, causality, and redressability.”⁶⁵

With decades of precedent overruled, the Court reestablished the original *Gibbons* jurisdictional standard encompassing “any and all matters which traditionally require judicial resolution.”⁶⁶ The Court proceeded to provide some examples of what would qualify as a “traditional judicial task” that requires resolution, such as statutory construction, fact-finding, the application of the law to facts, and remedial analysis.⁶⁷ The Court did not create a bright line rule to determine whether it has jurisdiction, however. Noting only that a court may have jurisdiction over a matter if it “[o]n its face . . . presents an archetypal legal dispute,” the Court left the determination of the exact parameters to future courts.⁶⁸ Thus, what was an already confusing requirement, with nearly no recent precedent after decades of past cases had strayed from the *Gibbons* standard, was to be subject to continual reevaluation. Essentially, the Court instructed lower courts to let their intuition guide them.

Justice Dolin, in his concurrence *dubitante* in *Demei v. Sugiyama* and his dissent in *Ngiraterang v. Ngarchelong State Assembly*, raised issue with the *KSPLA Court*'s decision.⁶⁹ One of his main arguments

62. *Id.*

63. *Koror State Legislature v. Koror State Pub. Lands Auth.*, 2017 Palau 28 ¶ 19.

64. *Id.* ¶ 16.

65. *Id.* ¶ 19.

66. *Gibbons v. Republic of Palau*, 1 ROP Intrm. 634, 637 (1989).

67. *Koror State Legislature*, 2017 Palau 28 ¶ 33.

68. *See id.*

69. *See Demei v. Sugiyama*, 2021 Palau 2; *Ngiraterang v. Ngarchelong State Assembly*, 2021 Palau 18.

was that *stare decisis* should have applied, noting that “[t]he law of standing as set forth in the *Becheserrak*, *Nakamura*, *Koror State*, and *Ichikawa* line of cases continued unchallenged for the next decade until 2017. It was not until then that the Court did a *volte face*, adopted Chief Justice Ngiraklsong’s views as expressed in his concurring opinion in *Sablan* [*Nakamura 2005*] and in one fell swoop abrogated nearly three decades worth of an uninterrupted precedent.”⁷⁰

Turning his critique to the opinion itself, Justice Dolin noted that *KSPLA* was internally inconsistent and “a recipe for judicial chaos.”⁷¹ He also explained that *KSPLA* lacked thorough reasoning, failed to address concerns of separation of powers, and did not explain why *Becheserrak* and its progeny were so flawed as to merit overruling *stare decisis*.⁷² Most tellingly, Justice Dolin clearly stated the issue that the Court continues to grapple with:

On the one hand, the opinion not only held that our jurisdiction is broader than heretofore thought, but also that the exercise of that jurisdiction whenever we are seized of it, is essentially mandatory. But on the other hand, the Court proceeded to spend seven paragraphs over four pages suggesting that we are free to decline to adjudicate cases for “prudential” reasons even in situations where jurisdiction exists Even more problematic, the Court, though it spent some time discussing the theory of prudential standing, failed to give any definitive guidance to the public and the lower courts in how to determine which cases do and which do not call for abstention. The Court candidly acknowledged that it has not even “attempted to announce a comprehensive bright-line test for standing.” Instead, the Court promised that [] “[its] jurisdiction and justiciability doctrines will be refined slowly on a case-by-case basis over time.”⁷³

While Justice Dolin argued vehemently in defense of *stare decisis*, his proposed solution to his issues with *KSPLA* was that the Court “should recede from [its] decision in *KSPLA*.”⁷⁴ He explained it was not simply because he would have decided the case differently but because of its lack of guidance and inconsistent application of *KSPLA*,⁷⁵ which will be further discussed below. Nonetheless, he argued for the reversal of *KSPLA* despite the opinion only having been drafted four years earlier.⁷⁶ Not addressed in Justice Dolin’s dissent and concurrence is the *KSPLA*

70. *Ngiraterang*, 2021 Palau 18 ¶ 55 (Dolin, J., dissenting).

71. *Id.* ¶ 71.

72. *Id.* ¶ 63, 64, 67–70.

73. *Id.* ¶ 71 (internal citations omitted).

74. *Id.* ¶ 73.

75. *Id.*

76. *Id.* ¶ 55.

Court's interpretation of *Gibbons*. While Justice Dolin argued that, for the sake of stare decisis, the *Becheserrak* standard should be maintained even if it was based on an incorrect interpretation of *Gibbons*, an alternative argument could be made that the *Becheserrak* standard is simply a clarification of the holding in *Gibbons*. After all, *Gibbons* simply stated that Article III, Section 2 of the Constitution shows "the intent of the Framers that this Court exercise jurisdiction over any and all matters which traditionally require judicial resolution" and this "compels us to adopt a very liberal approach in determining whether a plaintiff has standing to bring a particular action."⁷⁷ This standard under *Gibbons* was very vague and, with no other case law to turn to, it left room for a significant amount of interpretation for later courts to define the parameters of Palau's jurisdiction. Thus, rather than viewing *Becheserrak* as misinterpreting *Gibbons*, one could also view it as a clarification. The standard under *Becheserrak*, while not as broad as what would be expressed in *KSPLA*, remained broader than that of the United States. As the Court noted, it allowed a citizen to sue the national government even though such a case could not be brought in the United States.⁷⁸ A looser interpretation of the injury requirement for standing would still provide "a very liberal approach in determining whether a plaintiff has standing to bring a particular action" without stretching the bounds of jurisdiction as far as the Court did in *KSPLA*.⁷⁹ While the *Becheserrak* Court may have misstated the holding of *Gibbons*, the standard it applied was still within the overarching guidance stated in the opinion.

While the Court has found advisory opinions to be outside of its jurisdiction and requires adversity between the parties, it has given more leeway on other matters. For example, in *Republic of Palau v. Koshiba*, the Court noted that "injury may be minor rather than severe, and may be threatened or potential rather than immediate."⁸⁰ In sum, while the *KSPLA* Court was not wrong that the boundaries of its jurisdictional requirement had been restricted over time, the requirements were still more liberal than that of the United States and well within the bounds of what was originally laid out in *Gibbons* and Article III, Section 2. As Chief Justice Ngiraklsong himself noted in his concurrence in *Nakamura 2005*, the Court needed to, "on a case-by-case

77. *Gibbons v. Republic of Palau*, 1 ROP Intrm. 634, 637 (1989).

78. *Contrast id.* (where the Palauan Supreme Court granted a taxpayer's standing with no particularized injury), *with* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (where a taxpayer's disapproval of how taxpayer funds were being used was not particularized nor concrete enough to support Article III standing).

79. *Gibbons*, 1 ROP Intrm. at 637.

80. *Republic of Palau v. Koshiba*, 8 ROP Intrm. 243, 244 (2000).

basis[,] . . . develop [its] jurisprudence consistent with [Palau's] Constitution,"⁸¹ which is what the Court did with *Becheserrak* and the cases that followed from it. Yet, the Court found it necessary to do a hard reset in *KSPLA*, as it felt that it had drifted into a realm too similar to that of the United States.

Since *KSPLA*, the Court has entered its most complex stage of applying its jurisdiction based on the new precedent and the cases that have followed. While the Court has returned to the *Gibbons* standard, it is vague, and the Court again struggles with clarifying the meaning of *Gibbons* in relation to *KSPLA*.⁸² Generally, the courts avoid unnecessary decisions where the parties lack a legally cognizable interest in the outcome.⁸³ As a result, possessing judicial restraint while allowing cases that are moot but capable of repetition to be brought can be a difficult task. The Palauan Supreme Court has previously held that when an issue is likely to recur, it is ongoing and appropriate for judicial determination.⁸⁴ Of particular interest are cases in which a power struggle between the parties "creates a climate for an ongoing issue" that may "spur up" again.⁸⁵

As the pendulum of Palau's jurisdictional limits has swung back and forth over the country's relatively brief history, it has gone from a very liberal to a stricter but still arguably lenient standard based on *Becheserrak* to the now exceptionally liberal standard based on *KSPLA*. As further discussed below, the *KSPLA* standard has left a significant amount of upheaval and confusion in its wake, particularly in the realm of declaratory judgments where custom and jurisdiction most significantly collide, and it appears the jurisdictional pendulum may now be swinging back in the opposite direction.

THE UNCERTAIN FUTURE OF DECLARATORY RELIEF IN PALAU

One of the most difficult questions caused by the uncertainty surrounding the breadth of the Court's jurisdiction is what the Trial Division should do regarding declaratory judgments, particularly those relating to custom. As noted earlier, Palau has incorporated significant portions of the U.S. legal system, including the ability to provide

81. *Nakamura 2005*, *supra* note 56, at 86.

82. *See, e.g.*, *Demei v. Sugiyama*, 2021 Palau 2.

83. *E.g.*, *Ngirameketii v. Ngirarsaol*, 2021 Palau 1 ¶ 3.

84. *Ngiraterang v. 19th Ngarchelong State Assembly*, 2021 Palau 18 ¶ 12.

85. *Id.* (referring specifically to power struggles between the branches of government but parallels can be drawn to power struggles among clan members which also create climates for repetitious disputes).

declaratory judgments. Declaratory judgments are governed by 14 PNC § 1001 and Rule 57 of the Republic of Palau Rules of Civil Procedure. Rule 57 states:

In a case of actual controversy within its jurisdiction, the court, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration has the force and effect of a final judgment or decree and is to be reviewable as such. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of a declaratory-judgment action.⁸⁶

While seemingly granting the same rights as Rule 57 of the U.S. Federal Rules of Civil Procedure, the extent to which the Court could provide declaratory judgments was a matter of significant uncertainty due to the jurisdictional modifications in Palau's legal system. Both Rule 57 and 14 PNC § 1001 state "actual controversy" as the standard for when the Court could provide declaratory relief, but the Court was uncertain if the drafters intended to use the same jurisdictional standard as that of the United States or the broader Palauan jurisdictional standard. This is evident in *Senate v. Nakamura* (*Nakamura 2000*), in which the Court questioned the standard applying to declaratory judgments and noted that "[i]t is unclear whether [S]ection 1001 incorporates the 'case and controversy' jurisdictional requirement of [A]rticle III of the U.S. Constitution or the jurisdictional grant of [A]rticle X of the Palau Constitution."⁸⁷ Ultimately, the Court concluded that "[it] need not decide that issue . . . because in [its] view the case meets the potentially more restrictive 'case and controversy' standard."⁸⁸ However, the Court could not avoid this problem for long.

Two years later, in *Matlab v. Melimarang*, the Court reiterated that discretion is needed when deciding if a declaratory judgment should be made and provided additional guidance as to when a request for declaratory judgment should be denied.⁸⁹ The Court recognized that, in certain cases, wading into an internal clan issue could cause more harm than good as "court involvement prolongs the dispute by permitting

86. ROP R. CIV. P. 57. 14 PNC § 1001 also applies, and, in effect, has the same requirements: "In a case of actual controversy within its jurisdiction, any appropriate court of the Republic, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

87. *Senate v. Nakamura*, 8 ROP Intrm. 190, 194 n.3 (2000) [hereinafter *Nakamura 2000*].

88. *Id.*

89. *Matlab v. Melimarang*, 9 ROP 93 (2002) (overruled by *Kiuluul v. Elilai Clan*, 2017 Palau 14, on other grounds).

dissatisfied persons to seek review of a traditional council decision concerning membership.”⁹⁰ The Court clarified that “[it did] not mean to suggest that the Court can always avoid issues concerning traditional titles,” but “when parties seek a declaratory judgment that asks the Court only to review a decision of a traditional council to seat a person, th[e] Court should decline when the resulting judgment does not clarify the issues or terminate the controversy.”⁹¹ A few years later in *Ngarmesikd Council of Chiefs v. Rechucher*, the Court added that declaratory judgments on custom should be “appropriately narrow,” reaching only the conclusions “necessary to settle the controversy between the parties.”⁹² The Court reiterated that while it has the authority to resolve disputes, it “opts for the exercise of the least supervision necessary.”⁹³

Perhaps in a sign of what was to come in *KSPLA*, the Court, in *Kiuluul v. Elilai Clan*, began to move in the opposite direction.⁹⁴ After finding “that neither side had proved—or even meaningfully pursued—its claims for damages” and that the claims “lack[ed] of evidence,” the Trial Division dismissed the parties’ remaining request for declaratory relief as they “failed to ‘present a justiciable controversy that is ripe for adjudication.’”⁹⁵ On appeal, the *Kiuluul* Court reversed and remanded on the basis that the Trial Division had jurisdiction over the request for declaratory relief.⁹⁶ The Court explained that “the trial court may have been led astray by statements from prior appellate decisions suggesting that courts should only intervene in customary disputes when it is necessary to quiet controversy, bring peace, and settle differences.”⁹⁷ Further, the *Kiuluul* Court clarified that there are no “additional barriers to seeking declaratory judgments grounded in customary law, above and beyond the usual requirements for seeking a declaratory judgment under Rule 57.”⁹⁸ In a clear sign of what was to come, the Court extolled that “declaratory judgment actions may be ideal for resolving customary title disputes, since they allow the court to focus solely on the nuances of customary law without the distraction of collateral issues such as land ownership or damages.”⁹⁹

90. *Id.* at 98.

91. *Id.* at 98–99.

92. *Ngarmesikd Council of Chiefs v. Rechucher*, 15 ROP 46, 50 (2008).

93. *Id.* (internal quotations omitted).

94. *Kiuluul v. Elilai Clan*, 2017 Palau 14.

95. *Id.* ¶ 3 (internal quotations omitted).

96. *Id.* ¶ 16.

97. *Id.* ¶ 11 (internal quotations omitted).

98. *Id.* ¶ 13.

99. *Id.*

By redefining the Court's jurisdiction, *KSPLA* significantly changed the Court's stance on declaratory judgments and, in doing so, engendered a near complete reversal of the Court's prior view of its role in resolving customary issues. As Justice Dolin noted in his dissent in *Ngiraterang*, "one area where *KSPLA* has wreaked much havoc is the Court's involvement in adjudicating clan title controversies that are unconnected to disputes over land or other legal rights."¹⁰⁰ By encouraging—if not outright requiring—the Trial Division to hear matters of custom raised in declaratory judgments, the Court waded further into becoming the arbiter of all customary issues.

The fallout from *KSPLA* in regard to declaratory judgments began with *Ngarbechesis Klobak v. Ueki (Ueki)*.¹⁰¹ In *Ueki*, the Court discussed a previously unanswered question regarding declaratory judgments: does the U.S. "cases and controversies" standard apply to declaratory judgments under Rule 57, or do the Palauan jurisdictional requirements apply?¹⁰² Since *KSPLA* made it clear that U.S. precedent does not apply when determining jurisdictional requirements, the *Ueki* Court similarly held that Rule 57, despite including "actual controversy" in the rule, is free of the "actual controversy" requirement.¹⁰³ *Ueki* thus further expanded the already broad jurisdiction established by *KSPLA*, in effect requiring declaratory judgments whenever one was requested. In doing so, the Court essentially ruled that because the phrase "actual controversy" would conflict with the prior liberal interpretation of its jurisdictional requirement, the use of "actual controversy" was an oversight and would not be followed.

Only a few years after *Ueki*, the Court began to indicate that it had gone too far in its guidance on declaratory judgments. In footnote three of *Lakobong v. Blesam*, the Court noted that "the time may be ripe . . . to reassert, as a prudential matter, its ability to decline to determine those internal clan title disputes that are not connected to specific disputes over land or an exercise of legal authority, and which cannot be satisfactorily resolved through litigation."¹⁰⁴ The Court, citing *Matlab* as an example, returned to its long-held stance that "the issuance of declaratory relief concerning the seating of a title holder is at odds with th[e]

100. *Ngiraterang v. Ngarchelong State Assembly*, 2021 Palau 18 (Dolin, J., dissenting).

101. *Ngarbechesis Klobak v. Ueki*, 2018 Palau 17.

102. *Id.* ¶¶ 20–21. Previously, the Court touched on the subject in *Nakamura (2000)* but found that the issue at hand met the more restrictive U.S. standard, so the Court did not need to reach a conclusion on what standard applied.

103. *Id.* ¶ 22.

104. *Lakobong v. Blesam*, 2020 Palau 28 ¶ 7 n.3.

Court's repeated insistence that the selection of a title bearer is not the courts' responsibility."¹⁰⁵

The following year, in *Demei v. Sugiyama*, the Court reiterated the unnecessary involvement in clan issues caused by *Ueki*.¹⁰⁶ The Court noted that because "neither Demei nor Sugiyama had the authority to execute the leases on the land, the title disputes became untethered from any discrete, real-world dispute."¹⁰⁷ The Court also stated that "[f]urthermore, according to the parties at oral argument, the resolution of the title disputes by the trial court or [appellate c]ourt will do little to quell the internecine conflicts that are roiling the Clan and its surrounding community."¹⁰⁸ The Court then cited to *Lakobong* and provided the same statement that "the time may be ripe for [it] to reassert, as a prudential matter, its ability to decline to determine those internal clan title disputes that are not connected to specific disputes over land or an exercise of legal authority, and which cannot be satisfactorily resolved through litigation."¹⁰⁹ In his concurrence, Justice Dolin went a step further, stating that he was "increasingly skeptical of the wisdom of this Court adjudicating intra-clan title disputes that are untethered to any dispute over land or other legal right."¹¹⁰

Justice Dolin argued that *KSPLA* and the Court's long-standing precedent of not involving itself in selecting title bearers are not at odds.¹¹¹ He explained that *KSPLA* "endorsed the notion that, as a *prudential* matter, cases over which this Court has jurisdiction may nevertheless be non-justiciable."¹¹² In doing so, he placed the blame for the unnecessary decisions on clan titles at the feet of the Trial Division.¹¹³ However, Justice Dolin reached a logical conclusion that the Appellate Division "should take the earliest possible opportunity to authoritatively set forth the factors that would militate for or against the exercise of jurisdiction in such disputes."¹¹⁴ Yet, he did not provide an outline as to what such a system would look like beyond stating that declaratory

105. *Id.* (quoting *Matlab v. Melimarang*, 9 ROP 93, 97 (2002)).

106. *Demei v. Sugiyama*, 2021 Palau 2.

107. *Id.* ¶ 12 n.6.

108. *Id.*

109. *Id.* (internal quotations omitted).

110. *Id.* ¶ 13

111. *Id.* ¶ 14.

112. *Id.*

113. "[O]ur courts have adjudicated intra-clan disputes without sufficiently considering whether, as a prudential matter, these contests may be inappropriate for consideration for other than constitutional reasons." *Id.* (internal quotations and modifications omitted).

114. *Id.* ¶ 15.

judgments to resolve intra-clan disputes “should be exercised rarely and gingerly.”¹¹⁵

While it was certainly valid to push for the Appellate Division to reset the standard for addressing untethered declaratory judgments on customary, Justice Dolin’s concurrence skipped over two issues. First, there was a clear conflict with *KSPLA*, as he had previously noted in his dissent in *Ngiraterang*.¹¹⁶ The conflict was only further exacerbated by the ruling in *Ueki*, which clarified there was not only a failure to consider prudential matters at the Trial Division but now a requirement for the Court to respond to untethered declaratory judgment requests.¹¹⁷ The Appellate Division’s intent to push the Court towards an increased involvement in customary decisions was already evident in *Kiuluul* when the Court stated that “declaratory judgment actions may be ideal for resolving customary title disputes, since they allow the court to focus solely on the nuances of customary law without the distraction of collateral issues such as land ownership or damages.”¹¹⁸ Second, “[c]ourts of Palau are not permitted to give second-class status to customary law, and declaratory relief should become no less available to a litigant simply because resolving his dispute requires an adjudication under customary law.”¹¹⁹ This conflicts with Justice Dolin’s guidance that the Court should “authoritatively set forth the factors that would militate for or against the exercise of jurisdiction in such disputes,” unless such standards were to apply to all declaratory judgments.¹²⁰

Like its stances on its involvement in customary issues and its overall approach to jurisdiction within Palau, the Court has taken a more hands-on approach to matters requiring declaratory judgments. While it appears that the Court may have reached a high-water mark in its level of required involvement in declaratory judgments, it remains unclear whether the Court will provide greater flexibility to the Trial Division on declaratory matters and, if it does, to what extent the Court will refrain from declarations and if any special provisions will be granted for matters of custom. This leaves Palau at a crossroads as it must balance the liberal jurisdictional standard laid out in the Constitution with the reality of limited judicial resources and the constitutional goal of limiting the court’s involvement in areas of custom.

115. *Id.* ¶ 16.

116. *Ngiraterang v. Ngarchelong State Assembly*, 2021 Palau 18 (Dolin, J., dissenting).

117. *Ngarbechesis Klobak v. Ueki*, 2018 Palau 17 ¶ 23.

118. *Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 13.

119. *Id.* ¶ 15.

120. *Demei*, 2021 Palau 2 ¶ 15.

PALAU AT A CROSSROADS

Across the Court's jurisdictional and customary rulings, there is a clear trend of increased involvement in ruling on customary issues. In *Beouch*, the Court applied a uniform standard for determining custom.¹²¹ In doing so, it solidified that the Court is the final arbiter of what customary law is and that a court's decision on such a matter creates binding precedent absent evidence of customary change. As noted, allowing judicial notice of prior decisions on custom in effect freezes the role and form of custom at the time of the Court's decision.¹²² Also, as seen through *KSPLA* and subsequently *Ueki*, the Court's insistence on maximizing its jurisdiction in declaratory judgments has created another avenue where the Court plays an increased role in clan matters.¹²³ However, the Court has also historically tried to minimize its role in determining customary disputes.

Thus, Palau is at a crossroads as it is faced with deciding whether it will maintain its commitment to maximizing its jurisdictional obligations based on *KSPLA*'s interpretation of the Palauan Constitution or if it will focus on its historical deference to customary leaders. In either case, a clear ruling on the matter would assist in ending this long running conflict. As the Court continues to clarify the boundaries of its jurisdiction and decide how to address the complex and sensitive issues of custom, there are a few approaches the Court could consider to create a clearer and more consistent process.

One solution that could provide a well-defined rule is if the Court found titles to be intangible property and as such, rather than an issue for declaratory judgment, a title dispute would be a live dispute over property. Such an approach would be grounded in U.S. precedent, "[i]ntangible property is property that lacks a physical existence. Unlike tangible property, intangible property cannot be perceived by the senses Intangible personal property includes mere rights of action and things that have no 'intrinsic' value, such as contracts, deeds, and mortgages."¹²⁴ In effect, a clan chiefly title would be a right granted by the clan to an individual. So long as the individual meets the requirements of the clan, they receive certain benefits, entitlements, and rights to property. Upon their death, the right is terminated and all benefits conferred to the individual return to the clan. This approach would, for

121. *Beouch v. Sasao*, 20 ROP 41, 48 (2013).

122. *See infra* pp. 7–8.

123. *See infra* pp. 22–24.

124. RESTATEMENT (FOURTH) OF PROPERTY § 1.2 cmt. b, (Vol. 4) (Tentative Draft No. 3, 2022).

better or worse, remove discretion from the Trial Division when deciding on possession of chiefly titles.

However, this solution does contain two potential drawbacks. The first is that title issues arise frequently and are factually and legally complex. Because of this, they require expert witnesses on customary law and multiple exhibits and witnesses to confirm blood relations and acts within the clan. If the Court were required to hear all chiefly title disputes, judicial resources would be significantly drained. Second, this path would ignore the fact that the Court previously made a clear effort to take a hands-off approach to dealing with customary issues.

Deferral to custom and customary leaders is a precedent that can be traced back to before Palau's independence.¹²⁵ During the Trust Territory period, it was established that "under Palau custom[,] the management and distribution of assets within a clan is primarily a private matter . . . so long as it acts fairly with a proper regard for the interests of all its members and in accordance with law, including particularly accepted customary law."¹²⁶ In the beginning, the Court held that a balance must be "maintained between the Court's exercise of authority and the size of the space within which customary player[s]/litigants are accorded to play their customary roles."¹²⁷ Accordingly, "[w]herever it is possible [the Court] adhere[s] to a course of judicial restraint in these matters and opt[s] for the exercise of the least supervision necessary and provision for the greatest freedom of customary action as may be accorded."¹²⁸ This provided a clearly established and consistently applied rule that the Court can intervene if a clan cannot decide an internal dispute, although it should do so with restraint.¹²⁹

Another, and, perhaps, less drastic solution, would be for the Court to decide on Rule 57 and its recent precedent and guidance given in *KSPLA*. Does the Court have discretion in matters requesting declaratory judgment, or is it required to adhere to its "unflagging obligation" to exercise its authority and hear all matters, including issues solely seeking declaratory judgments?¹³⁰ The Court has tipped its hand in *Lakobong* and *Demei*, indicating that it is aware that *KSPLA* might have gone too far with the suggestion that the Court must nearly always

125. See *Beouch*, 20 ROP at 45–47.

126. *Lalou v. Aliang*, 1 T.T.R. 290, 293 (Tr. Div. 1955).

127. *Blesam v. Tamakong*, 1 ROP Intrm. 578, 582 (1989).

128. *Id.*

129. See, e.g., *id.*; *Sengebau v. Balang*, 1 ROP Intrm. 695, 699 (1989); *Espangel v. Diaz*, 3 ROP Intrm. 240, 245 (1992); *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225 (1996).

130. See *Koror State Legislature v. Koror State Pub. Lands Auth.*, 2017 Palau 28 ¶ 16 (quoting *Reyes Mata v. Lynch*, 576 U.S. 143, 144 (2015)).

exercise its authority and a return to something more similar to *Matlab* would be the easiest solution. This would provide the Court with greater discretion; however, additional guidance should be provided to create consistency. The standard that declaratory judgments must be tied to a discrete dispute would be a clear and reasonable guideline, and it appears to have some support within the Court already.¹³¹ In doing so, the Court could maintain its liberal jurisdiction that extends beyond that of the United States while still following its precedent of decreasing its role in customary conflicts when possible without removing itself from the matter entirely.

While the jurisdictional pendulum has started to swing back towards deference to the Trial Division and decreasing involvement in customary issues, the Court has not officially adopted this stance and remains highly involved in customary issues. Although the Court has recently expressed an interest in curbing its influence, or at least the requirement that it gets involved in clan issues, the Court could elect to continue to play an increased role in customary matters and even expand its role through reinterpreting clan titles as intangible property in order to provide a clear standard for when to the Court should involve itself in customary matters. In either case, directly addressing this conflict between jurisdiction and custom would be a significant step towards solving the conflict between them and stopping the swinging pendulum of jurisdiction.

CONCLUSION

Palau has used the U.S. legal system as a baseline for its own government; however, its decision to make modifications to the U.S system so that its government better reflects and serves the needs of its people has not been without difficulties. The Palauan Supreme Court has had to chart its own path in certain areas of law, particularly jurisdiction and custom. These two areas have proven to be the two most complex and difficult areas for the Court to adjudicate, and that difficulty has been compounded by their considerable overlap. The turbulent case law in these fields highlights the Court's struggle. The Court has made dramatic changes in Palau's relatively short history, and the significant jurisdictional change in *KSPLA* has consequentially impacted how the Court addresses matters of custom. As the pendulum has swung towards a nearly unlimited jurisdiction, resulting in increased judicial involvement in customary issues, the Court is now at a crossroads. While the

131. See *Lakobong v. Blesam*, 2020 Palau 28; *Demei v. Sugiyama*, 2021 Palau 2.

Court has acknowledged that it has perhaps gone too far, there has not been another significant revision to officially reduce the Court's involvement in customary issues. This Article has proposed a few paths that the Court could take to clarify its role in interpreting custom and to draw a jurisdictional boundary. These options involve either the solidification of its current system, which allows extensive Court involvement in all legal matters and, as such, enables an increased role in determining custom, or a reversion towards a less hands-on approach. While there is no perfect solution, this Article has presented pathways that can help clear the current legal confusion, depending on the course the Court wishes to take.