

## Editorial

### South Pacific Islands' Jurisprudence on Climate, Environment, Natural Resources and Land Tenure

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This Special Issue presents case studies of court decisions from common law jurisdictions in selected South Pacific Island Countries (PICs) and Papua New Guinea. The cases highlight topical issues involving climate, environmental, land, resource, and human rights law, as well as the law's role in protecting the environment and human wellbeing. The decisions also demonstrate how common law courts in these jurisdictions are developing a unique jurisprudence by drawing on local customs, interpreting national constitutions, and adjusting the common law to local circumstances.<sup>1</sup> As discussed further below, the selection of seven case notes is drawn from studies completed by students who participated in The University of Sydney Law School's 2023 Climate and Environmental in the Pacific unit, which was delivered in partnership with the University of South Pacific School of Social Sciences and Law.

South Pacific Island countries are highly heterogeneous, as is Papua New Guinea. In Melanesia, hundreds of languages are spoken. Culture and biodiversity are intricately connected throughout the South Pacific, and social and economic livelihoods are often derived from nature.<sup>2</sup> South Pacific peoples have lived sustainably on their lands for hundreds, and sometimes thousands of years.<sup>3</sup> Communities are at the heart of environmental law, where customary tenure has served people's basic needs for generations.<sup>4</sup> Customary land tenure is the predominant form of tenure in the South Pacific region, and accounts for 80 to 98 per cent of the total land area in most PICs.<sup>5</sup> These tenure systems allow customary groups to manage their land in accordance with their own decision-making processes, based on social and spiritual beliefs.<sup>6</sup>

This way of life is now increasingly under threat from accelerating climate change. Most PICs are small, low-lying, geographically isolated, and surrounded by vast oceans.<sup>7</sup> Rising sea levels pose a great threat to low-lying islands like Tuvalu and Solomon Islands, which could become completely inundated over time, destroying agriculture and habitable lands.<sup>8</sup> Loss of habitable

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<sup>1</sup> Jennifer Corrin, 'Legal Scholarship and Pacific Islands' Jurisprudence' (2021) 26 *Comparative Law Journal of the Pacific* 139.

<sup>2</sup> Steven R. Fischer, *A History of the Pacific Islands* (Bloomsbury Publishing, 2013); Kamanamaikalani Beamer and Peter Morrison Vitousek, *Islands and Cultures: How Pacific Islands Provide Paths Toward Sustainability* (Yale University Press, 2022).

<sup>3</sup> Maria-Goreti Muavesi and Patricia Parkinson, Advancing environmental law in the Pacific: Towards 2030 and Beyond: Highlights of the Inaugural IUCN Oceania Environmental Law Conference 2021 (Oceania Environmental Law Congress, 2022), 20.

<sup>4</sup> Commonwealth of Australia, *Making Land Work: Reconciling customary land and development in the Pacific* (2008), ix.

<sup>5</sup> Above, n 4; Don Paterson, 'Some thoughts about Customary Land' (2001) 5 *Journal of South Pacific Law*.

<sup>6</sup> Above, n 4.

<sup>7</sup> Savin, Chand et al, 'Climate Processes and Drivers in the Pacific and Global Warming: a review for informing Pacific planning agencies' (2023) 5(2) *Climatic Change* 176.

<sup>8</sup> World Meteorological Organization, *State of the Climate in the South-West Pacific 2022* (August 2023), 2, 12; Reuters, 'Pacific island sea levels rising faster than global average, WMO says' (Webpage, 19 August 2023), <<https://www.reuters.com/business/environment/pacific-sea-levels-rising-faster-than-global-average-wmo-says/>>

land will impact both the populations living within that territory and broader notions of statehood under international law.<sup>9</sup> Other climate change impacts include ocean acidification, warming of the ocean's surface, destruction of coral reefs, and shifting locations of marine species.<sup>10</sup> Freshwater supplies on some islands are contaminated by saltwater, making agriculture unworkable.<sup>11</sup>

South Pacific Island countries are also highly vulnerable to natural disasters, such as tropical cyclones, storm surges, heavy rainfall, flooding, droughts, high winds, and large waves.<sup>12</sup> Many islands are 'continually in a response and recovery mode.'<sup>13</sup> In March 2023, for example, Vanuatu faced two category four cyclones within 72 hours. Vanuatu Climate Change Minister, Ralph Regenvanu, observes that '[w]e are rapidly heading towards a world that will not be very safe and liveable for our children. And that's something I think most of us have accepted already: can we make it a bit less unsafe, or a bit more liveable?'<sup>14</sup>

This Editorial was written during the 28th Conference of the Parties to the UN Framework Convention on Climate Change (COP28), where Pacific leaders are advocating for the survival of Pacific communities on the frontline of climate change. Meeting temperature targets of the Paris Agreement is critical for protecting Pacific lives, livelihoods and cultures, as PICs may be irreversibly affected by global warming above 1.5°C.<sup>15</sup> Greenhouse gas emissions, however, continue to rise. In its 2022 Emissions Gap Report, the UN Environment Programme assessed the world as currently on track for a 2.8 degrees Celsius increase in global temperatures by the end of the century.<sup>16</sup>

In response to years of campaigning by Pacific island nations and members of AOSIS, COP28 has approved the creation of a new Loss and Damage Fund, which will support: 'the development of national response plans; addressing insufficient climate information and data, and promoting equitable, safe and dignified human mobility in the form of displacement, relocation, and migration, in cases of temporary and permanent loss and damage'.<sup>17</sup> However, more substantial funding is required to address loss and damage, mitigate and adapt to climate change and transition to renewable energy. South Pacific Islanders are also turning to international legal avenues, seeking clarification on states' obligations under international law,

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[island-sea-levels-rising-faster-than-global-average-wmo-says-2023-08-18/#:~:text=That%20means%20low%2Dlying%20territory,to%20move%20to%20higher%20elevations>.](#)

<sup>9</sup> Melissa Stewart, 'Cascading Consequences of Sinking States' (2023) 59 *Stanford Journal of International Law* 131.

<sup>10</sup> Vicky Lam et al, 'Climate Change, Tropical Fisheries and Prospects for Sustainable Development' (2020) 9(1) *Nature Reviews Earth & Environment* 440.

<sup>11</sup> J.S. Hauger, 'Climate change challenges to security in the Pacific Islands Region and opportunities for cooperation to manage the threat', in R. Azizian and C. Cramer (eds), *Regionalism, Security & Cooperation in Oceania* (2015, Asia Pacific Center for Security Studies); SPREP, PACC Experiences: Building resilient freshwater systems (2014).

<sup>12</sup> Chand, above n 7; Commonwealth Scientific and Industrial Research Organisation, Australian Bureau of Meteorology and Secretariat of the Pacific Regional Environment Programme, 'Climate in the Pacific: A regional summary of new science and management tools' (2015).

<sup>13</sup> Laura Chung, 'Heading towards a very unsafe world': Vanuatu's climate change minister fights to end fossil fuel projects' *Sydney Morning Herald* (Webpage, 30 November 2023), quoting Vanuatu Climate Change Minister Ralph Regenvanu.

<sup>14</sup> Chung, above n 13.

<sup>15</sup> Ove Hoegh-Guldberg et al, (2018). Impacts of 1.5 C global warming on natural and human systems. *Global warming of 1.5° C*, 234-5.

<sup>16</sup> United Nations Environment Programme (2022). *Emissions Gap Report 2022: The Closing Window — Climate crisis calls for rapid transformation of societies*. Nairobi. <https://www.unep.org/emissions-gap-report-2022>.

<sup>17</sup> UNFCCC, COP, 'Operationalization of the new funding arrangements, including the fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4' (29 November 2023).

including through the International Tribunal for the Law of the Sea and the International Court of Justice.<sup>18</sup>

The case notes demonstrate collectively how PICs are at the forefront of the global climate crisis affecting their oceans, biodiversity and livelihoods. They also show how climate change is not just about physical damage, but also the ‘social and cultural impacts on island communities’.<sup>19</sup> Additionally, PICs face challenges in the effective implementation and enforcement of law, and new pressures, such as climate change and a growing mining sector, are putting customary systems of land tenure to the test.<sup>20</sup> At the same time, the case notes demonstrate the value of synergies between customary and formal legal and governance systems for achieving just and environmentally sustainable outcomes.

### **Aims of the course**

In the Climate and Environmental Law in the Pacific unit, undergraduate students addressed climate, environment, natural resources, land, and human rights law issues at the international, regional, and local levels and were introduced to customary law in the South Pacific. The course was taught over two weeks at the University of the South Pacific’s Emalus campus in Port Vila, Vanuatu, as an advanced offshore elective for final and penultimate year law students.

Through collaboration with the University of the South Pacific, students had the opportunity to apply their legal knowledge in a global context and develop cultural competence, teamwork, communication, problem-solving skills, and cross-cultural understanding through experiential learning activities. The unit's specific learning outcomes included advanced understanding of legal systems, climate, and environmental law in the region, critical evaluation of climate and environmental law issues, analysis of legal dilemmas, and development of advanced legal arguments.

Students developed local knowledge by engaging with government, judicial, NGO, community-based organisations and staff and students at the university. They also had the opportunity to integrate academic study with field-based socio-cultural learning around Port Vila and the island of Efate. As part of the program, classes were interspersed with cultural activities such as visits to Wan Smolbag Theatre, a grassroots NGO that brings local environmental issues to life through performance, and the Vanuatu Cultural Centre, as well as visits to culturally significant sites, including the UNESCO-listed gravesite of Chief Roy Mata. As a result, students gained a better understanding of how both natural and cultural heritage are inextricably linked, as well as how international and domestic laws can be applied to protect cultural heritage and natural environments alike. Other topics covered in the field included customary law, land and resources, and climate adaptation. The students observed the effects

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<sup>18</sup> Request for an Advisory Opinion, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS, 12 December 2022; *Request for an Advisory Opinion of the International Court of Justice on Obligations of States in Respect of Climate Change* (GA A/RES/77/276, 4 April 2023).

<sup>19</sup> RMI Climate Envoy Kathy Jetñil-Kijiner, quoted in Nic Maclellan, ‘Pacific Fights for Climate Finance at COP28’ *Islands Business* (11 December 2023).

<sup>20</sup> Commonwealth of Australia, above n 4.

of climate change on the island of Efate as well as how community-based adaptations were being made.

### **Aims of the case note exercise**

The assessment regime of the course focussed on a case note exercise, which incorporated a case note outline, a case note presentation, and an extended case note. Students were required to select a decision from a common law court in Cook Islands, Fiji, Kiribati, Nauru, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu or Vanuatu, which involved issues of environmental law, climate change, and/or human rights in the Pacific. As a first step, the students submitted a summary of the case chosen, and this was followed by a class presentation in which the students presented the facts, issues and outcome of the case that they had chosen to write about for their major assignment. As a final step, each student was required to submit an extended case note based on independent research, building on their outline and in-class presentation. In the commentary section of the case note students were required to demonstrate critical engagement with the course topics by discussing some of the issues focussed on in this course.

### **Key themes across the case notes**

The case notes selected for this issue were presented and critically evaluated throughout the course. They consider a multitude of issues, including constitutional human rights claims related to climate change,<sup>21</sup> fulfilling constitutional mandates to develop administrative law suited to the national context in the context of customary land law,<sup>22</sup> and tensions between combatting climate change and underlying land tenure issues.<sup>23</sup> Specific attention is also given to the role of the doctrine of accretion in light of climate change and rising sea levels,<sup>24</sup> the long-term security of custom as binding domestic law and the position of the Judicial Committee of the Privy Council,<sup>25</sup> the existence of novel duties of care underpinned by a constitutional human right to environment,<sup>26</sup> and the benefits of the *suo moto* jurisdiction in PNG.<sup>27</sup>

**Alana Barbaro** examines *Morua v China Harbour Engineering Co (PNG) Ltd (Morua)*,<sup>28</sup> the first case in Papua New Guinea's to consider the impact of climate change on human rights (in this case the right to life and the right to a healthy environment) and to confirm the potential availability of constitutional claims for those affected. Barbaro outlines the various ways in which the court wove together the longstanding judicial emphasis on access to justice with the

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<sup>21</sup> National Court of Justice, Papua New Guinea, Kandakasi DCJ, 7 February 2020, available at [www.paclii.org](http://www.paclii.org) at [2020] PGNC 16 ('*Morua*').

<sup>22</sup> *Esso P'nyang Limited v Bernard* (Supreme Court, Papua New Guinea, Logan, Toliken & Higgins JJ, 8 September 2017) ('*Esso v Bernard*'), available via [www.paclii.org](http://www.paclii.org) at [2017] PGSC 62.

<sup>23</sup> *Kula Oil Palm Ltd v Tieba* (National Court, Papua New Guinea, Kandakasi DCJ, 16 August 2021) available via [www.paclii.org](http://www.paclii.org) at [2021] PGNC 611 ('*Kula Oil v Tieba*').

<sup>24</sup> *Ongosia v Tongia* [2006] TLR 197.

<sup>25</sup> *Framhein v Attorney-General of the Cook Islands* [2022] UKPC 4

<sup>26</sup> *Fiji Fish Marketing Group Ltd v Pacific Cement Ltd* ('*Fiji Fish*') (High Court, Fiji, Amaratunga, 18 April 2023), available via [www.paclii.org](http://www.paclii.org) at [2023] FJHC 223.

<sup>27</sup> *Re Enforcement of Basic Rights Under the Constitution, Section 57* (National Court of Papua New Guinea, Cannings J, 19 February 2020) ('*Re Fish Ban*').

<sup>28</sup> National Court of Justice, Papua New Guinea, Kandakasi DCJ, 7 February 2020, available at [www.paclii.org](http://www.paclii.org) at [2020] PGNC 16 ('*Morua*').

new possibility of constitutional human rights claims related to climate change. She also illustrates how the case demonstrates a willingness by the courts to adapt a range of procedural requirements, using human rights protection as a justification. These include the plaintiffs' standing, the Court's *suo moto* action (in which the Court is empowered to act on its 'own initiative' to commence or intervene in proceedings), the refusal to allow default judgments or summary dismissals, and the new recognition of the link between human rights and climate and environmental stability. Placing these developments in an international context, Barbaro examines how they may benefit future litigation in PNG to prevent or compensate for the harm caused by climate change.

*Esso P'nyang Limited v Bernard*<sup>29</sup> involved a claim by customary landowners concerning the development of the P'nyang gas fields in the Western Province of Papua New Guinea. **Sophia Bleakley** takes critical stock of the Supreme Court's interpretation of the *Oil and Gas Act 1993* (Papua New Guinea) and the *National Court Rules 1983* (Papua New Guinea), as well as the Court's approach to questions of standing in administrative law. She questions whether the Supreme Court's constitutional mandate to develop an administrative law suited to Papua New Guinea's unique context was met. Her critique is particularly important in the broader context of burgeoning extractive industries across the Pacific, and the challenges that Pacific Islanders face in having their land recognised and protected from development and project impacts. Bleakley argues that the court's approach fails to respect the deep significance of customary land tenure for the legal system, economic development, and sustainability of the environment of Papua New Guinea.

*Kula Oil Palm Ltd v Tieba*<sup>30</sup> is one of a few Papua New Guinean court cases that specifically concerns environmental protection and climate change. It sets an important precedent regarding the proactive role judiciaries should take to limit environmental degradation in light of climate change. It also raises questions about how courts reconcile local customary laws with the State legal system in a legally pluralistic, post-colonial country, particularly in light of climate change and economic development. **Emily Dong** addresses these issues in her case note, arguing that, in focussing on climate mitigation, the judgment does not critically consider the possibility of underlying tenure issues within the ecological buffer zones of the plaintiff company's palm plantation. She analyses *Kula Oil Palm Ltd v Tieba* against the backdrop of land tenure and illegitimate land grabs across Papua New Guinea using State Leases, a mechanism designed to establish links between customary and State laws.

In analysing *Ongosia v Tongia*,<sup>31</sup> **Alexandra Gerrard** focusses on the doctrine of accretion in contemporary law in light of climate change and rising sea levels in the South Pacific. The Land Court of Tonga held that if part of a landowner's land is lost to erosion and encroached upon by water, the landowner ceases to own that part of the land. With a focus on two key issues, Gerrard examines the implications of the case for displacement and land security in Tonga. Gerrard first examines the adequacy of the doctrine of accretion in contemporary law

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<sup>29</sup> *Esso P'nyang Limited v Bernard* (Supreme Court, Papua New Guinea, Logan, Toliken & Higgins JJ, 8 September 2017) ('*Esso v Bernard*'), available via [www.paclii.org](http://www.paclii.org) at [2017] PGSC 62.

<sup>30</sup> *Kula Oil Palm Ltd v Tieba* (National Court, Papua New Guinea, Kandakasi DCJ, 16 August 2021) available via [www.paclii.org](http://www.paclii.org) at [2021] PGNC 611 ('*Kula Oil v Tieba*').

<sup>31</sup> *Ongosia v Tongia* [2006] TLR 197.

in light of climate change and sea level rise. She then examines the intersection of common law and customary law in relation to foreshore and seabed ownership, comparing Tonga with other nations, including Solomon Islands, Vanuatu and New Zealand. Given accelerating climate change and modern technology, Gerrard argues that the accretion doctrine is not fit for the purpose of determining property boundaries, and offers some preliminary solutions for addressing the ownership of foreshore in Tonga in the light of climate change.

*Framhein v Attorney-General of the Cook Islands*<sup>32</sup> concerned the legality of government expansion of purse seine fisheries within the Cook Islands' exclusive economic zone. **Jarrah Lindhout** examines a key issue heard by the Judicial Committee of the Privy Council on appeal, namely whether the government's failure to consult with the local Aronga Mana breached custom. Lindhout describes how, despite overturning the findings of the lower courts and finding the appellant had proved a consultative duty in custom, the appeal was dismissed. Lindhout examines art 66(3) of the Cook Islands' Constitution, under which custom forms part of the binding domestic law of the Cook Islands, but points out that the subclause does not apply 'in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision or of any enactment'. In this case, custom was held to be inconsistent with the government's authority and functions under the *Marine Resources Act 2005*, and consequently the government was held not to be in breach of custom. Lindhout explores the Committee's decision as both a 'forwards and backwards' step for the position of custom in Cook Islands law. While the decision adopts a pragmatic approach to proving custom, Lindhout contends that it adopts a narrow, rule-based approach to customary duties, contrary to judicial dicta, legislative intent, and logic. Lindhout applies a post-colonial lens to *Framhein* to raise broader questions about the long-term security of custom as binding domestic law and the enduring colonial legacy in the Pacific in the form of the Judicial Committee of the Privy Council as part of the Cook Islands court hierarchy, i.e.

**Sean O'Beirne** examines the circumstances of a final injunction to prevent the pollution caused by the transport of an environmentally hazardous industrial material across Suva Harbour in *Fiji Fish Marketing Group Ltd v Pacific Cement Ltd* ('Fiji Fish').<sup>33</sup> He points out that this case, handed down by Amaratunga J in 2023 in the Fiji High Court, is significant in many ways, including in presenting one of the first applications of the right to environment enshrined in the current Constitution of the Republic of Fiji, which only entered into force in 2013.<sup>34</sup> While this strand of constitutional jurisprudence is still in its infancy, O'Beirne discusses the various reasons why Amaratunga J's judgment provides a strong precedent for practical applications of this constitutional right. The case also provides significant guidance on when and how a common law duty of care is imposed on polluters when regulatory protections under pollution legislation have not been enforced. O'Beirne demonstrates that the synergistic pluralism of constitutional, international, and common law sources employed in *Fiji Fish* provide future plaintiffs with a strong precedent for a novel duty of care in environmental cases, despite the erosion of Fijian customary law status.

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<sup>32</sup> [2022] UKPC 4.

<sup>33</sup> High Court, Fiji, Amaratunga, 18 April 2023, available via [www.paclii.org](http://www.paclii.org) at [2023] FJHC 223.

<sup>34</sup> *Constitution of the Republic of Fiji 2013*, s 162(2).

In *Re Enforcement of Basic Rights Under the Constitution, Section 57*,<sup>35</sup> a case decided by Cannings J in the National Court of Papua New Guinea ('PNG'), it was held that under the Constitution, National and Supreme Court judges have the authority to bring proceedings on their own initiative to enforce and protect human rights. As part of her analysis of this judgment, **Caroline Xu** considers whether the case is consistent with other decisions on s 57 *suo moto* jurisdiction, and whether it reflects current law. She argues for the expansion of the s 57 jurisdiction in light of the spirit of PNG's Constitution, as well as the potential for this power to benefit PNG's human rights landscape. In addition, Xu discusses judicial activism and whether concerns regarding allocation of political decisions to judges, and the possibility of improper exercise of the section 57 power, can be adequately addressed.

While the seven case notes cannot possibly represent the spectrum and variety of climate, environment and resources issues in PICs, we hope that the excellent analysis in these studies will encourage ongoing dialogue, research, and collaboration between law students and scholars in Australia and PICs. Advancing climate, environment, resources and land laws, and developing a unique Pacific jurisprudence, is an increasingly urgent and vital part of addressing, adapting to and mitigating the impacts of climate change.

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<sup>35</sup> *Re Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea, Section 57* (National Court of Papua New Guinea, Cannings J, 19 February 2020) (*'Re Fish Ban'*).