FACING THE FUTURE:[1] *MORUA V CHINA HARBOUR ENGINEERING CO (PNG) LTD*, ACCESS TO JUSTICE, AND THE EMERGING ROLE OF HUMAN RIGHTS IN CLIMATE LITIGATION

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ABSTRACT

Papua New Guinea's Constitution, and the underlying law authorised by it, was created with the intention of shaping a legal system that responds to the unique needs of the independent nation. As part of this process, and particularly in cases involving human rights breaches, Courts have prioritised access to justice, impacting how courts address issues of standing, the availability of *suo moto* action, summary dismissal, and default judgment. *Morua v China Harbour Engineering Co (PNG) Ltd* provides a recent example of this, and also marks the first time Papua New Guinea's judiciary addressed the impact of climate change upon human rights and indicated the availability of constitutional human rights claims for those affected. This case note explores how the approach taken in *Morua* was influenced by a longstanding judicial emphasis on access to justice and the implications of the newly-recognised possibility of constitutional claims for climate change–related harms. It will tie these aspects of the case to a desire to shape Papua New Guinea's laws to best respond to prominent issues affecting the country, draw links to similar developments in overseas jurisdictions, and explore some unique features of potential climate litigation in PNG.

INTRODUCTION

In January 2015, China Harbour Engineering Co (PNG) Ltd ('CHECL') was contracted by the government of Papua New Guinea ('PNG') to reconstruct a bridge in PNG's Central Province. Families living on a nearby parcel of land alleged that CHECL, while carrying out the work, caused significant environmental damage through releasing pollutants and waste. In *Morua v China Harbour Engineering Co (PNG) Ltd*[2] *('Morua'),* Deputy Chief Justice Kandakasi heard competing motions to dismiss the resulting proceedings or enter default judgment. His Honour refused all motions and attached additional defendants in the proceedings due to breaches of human rights having potentially occurred in the process of the reconstruction. Deputy Chief Justice Kandakasi's judgment provides opportunity to consider two aspects of Papua New Guinea's laws: first, the direction in which they have developed to meet the needs of its citizenry, and secondly, where they may extend to in future as contemporary challenges arise.

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[1] Papua New Guinea Constitutional Planning Committee, *Papua New Guinea Constitutional Planning Committee Report* (Report, 1974) Chapter 2, [1]-[2].

[2] (National Court of Justice, Papua New Guinea, Kandakasi DCJ, 7 February 2020), available at www.paclii.org at [2020] PGNC 16 ('*Morua*').

After a brief summary of relevant aspects of the case, this note will explore these two issues. First, it will demonstrate how longstanding values and precedent relating to access to justice, especially in cases involving human rights breaches, informed the procedural determinations on standing, the availability of *suo moto* action, and the suitability of default judgment and summary dismissal. When discussing standing, attention will be drawn to two key aspects of Kandakasi DCJ's reasoning: the underlying law and potential impacts on the plaintiffs' fundamental rights. The nature and availability of *suo moto* action – in which the Court is empowered to act on its 'own initiative' to commence or intervene in proceedings – will be considered through comparison to other jurisdictions which allow *suo moto* actions. This examination will highlight common views across these jurisdictions and demonstrate that acting *suo moto,* like relaxing standing, has long been seen as a mechanism for responding to perceived 'injustice' caused by procedural inflexibility in cases involving fundamental rights. Lastly on this point, the common rationale for refusing summary dismissal and default judgment will be identified.

The note will then highlight new legal advances made in this case, particularly surrounding the enforcement of human rights in the context of a changing climate. Deputy Chief Justice Kandakasi considered two rights in particular: the right to life, as provided for in Papua New Guinea's Constitution, and the right to a healthy environment, the existence of which in Papua New Guinea was seriously contemplated, but not explicitly confirmed. *Morua* was the first judgment in PNG to identify that climate change will impact these rights and to confirm the potential availability of constitutional claims for those affected. These developments will be placed in an international context and potential future implications for PNG will be discussed.

CASE SUMMARY

The plaintiffs, represented by F. Unage, lived on land near the Laloki Bridge in the Central Province of PNG.[3] The lead plaintiff's family owned the polluted land and all other plaintiffs had been invited to live on the land.[4] The defendants (CHECL), represented by H. Monei, were contracted by PNG's Government to reconstruct the bridge in January 2015.[5] The plaintiffs claimed CHECL's work caused air, water and noise pollution which caused substantial environmental damage and affected the topsoil of their land.[6] This impacted the lands' viability for farming, and consequently the plaintiffs' livelihoods.[7] CHECL also allegedly entered the plaintiffs' land without prior consent and failed to rectify the damage despite the plaintiffs' complaints.[8]

The plaintiffs brought these issues to the attention of government authorities, including the Conservation Environment Protection Authority (CEPA).[9] Relevantly, they asked CEPA whether CHECL had applied for and received relevant permits under PNG's *Environment Act,*

[3] *Morua,* above n 2, [4].
[4] *Morua,* above n 2, [12].
[5] *Morua,* above n 2, [4].
[6] *Morua,* above n 2, [5].
[7] *Morua,* above n 2, [5].
[8] *Morua,* above n 2, [5], [7].
[9] *Morua,* above n 2, [5].

and for advice regarding CHECL's responsibility to rectify the damage.[10] CEPA confirmed that CHECL did not apply for or have relevant permits. Subsequently, the parties, the CEPA and a private environmental impact assessor company met to discuss potential avenues for resolution of the dispute. After a clean-up by CHECL was deemed unviable due to CHECL not having a license for clean-up work, the plaintiffs filed proceedings.[11]

The plaintiffs sought damages for environmental damage, trespass, and possible conversion; the present decision addressed two motions made relating to those initial claims.[12] CHECL applied for dismissal of the proceedings for lack of standing and failure to disclose a reasonable cause of action.[13] The plaintiffs applied for default judgment against CHECL after it failed to file and serve a defence before the required deadline.[14] Deputy Chief Justice Kandakasi, in the National Court of PNG, addressed the three applications as separate issues and dismissed all three, with all associated costs ordered against CHECL.[15] The plaintiffs were granted leave to 'file and serve an amended writ and statement of claim which observes the rules of proper pleading with particulars.'[16] Additionally, the Court, using *suo moto* powers available to it under s 57(1) of PNG's *Constitution* and Order 5, Rule 8(1) of the *National Court Rules,* joined the below five government bodies and representatives who may have failed to ensure CHECL did not harm the environment or rights of nearby persons as defendants to the proceedings and ordered them to report on their compliance with the *Environment Act* and other relevant national and international laws:

1. the Managing Director of CEPA and Director of Environment;
2. the Environment Protection Authority;
3. the Secretary for the Department of Environment and Conservation;
4. the Minister for Environment and Conservation; and
5. the Independent State of PNG.[17]

PRIORITISING ACCESS TO JUSTICE

Locus standi

Kandakasi DCJ's judgment in relation to *locus standi* identifies three factors which indicated the plaintiffs' standing: their direct interests in the affected land, the underlying law on standing, and the rules of standing which apply when fundamental rights are invoked.[18] The latter two of these points will be considered further.

[10] *Morua,* above n 2, [5].
[11] *Morua,* above n 2, [6]-[7].
[12] *Morua,* above n 2, [5].
[13] *Morua,* above n 2, [8].
[14] *Morua,* above n 2; *National Court Rules 1983* (Papua New Guinea) order 9 r 25.
[15] *Morua*, above n 2, [69].
[16] *Morua,* above n 2.
[17] *Morua,* above n 2.
[18] *Morua,* above n 2, [14]-[25], [48].

Locus standi in the underlying law

PNG's Constitution imposes a duty on courts and legal professionals to develop an 'underlying law' from a combination of custom and common law.[19] PNG's *Underlying Law Act 2000,* building on these constitutional requirements, formulates a mechanism for developing the underlying law and dictates that courts should refer to this underlying law before customary and common law.[20] This framework seeks to elevate indigenous custom in PNG and minimise circumstances in which customary law operates separately from and unrecognised by the 'formal' legal system, thereby creating a legal system which incorporates and addresses the nations' pluralist context.[21]

PNG's rules relating to standing, first developed in *Re Petition of Michael Thomas Somare* ('*Somare*'), now form part of PNG's underlying law.[22] Under these rules, a plaintiff with a 'sufficient interest' in a matter will have standing in relation to that matter. Such an interest will be demonstrated by a plaintiff whose personal interests or rights are affected by the matter, a citizen with 'a genuine concern for the subject matter' or a holder of public office whose functions relate to the matter.[23] Further, the Supreme Court has indicated that if 'allegations of illegality are sufficiently grave and the evidence of an arguable case sufficiently cogent… even a citizen with no other interests than to see the law upheld may have sufficient interest to bring the case.'[24]

This position, which is broader than the approach to standing that developed under Anglocentric common law, in which a person must 'show a personal interest or stake' in the issue, is said to have developed with reference to the 'underlying principles' of PNG's constitutional democracy.[25] These principles include natural justice, the rule of law, the notion of power belonging to the people, and that all persons have a right to come to Court for resolution of issues.[26] The underlying law on standing is also said to reflect PNG's particular context, in which there may be 'few individuals' directly affected by actions 'who have the resources to be able to come to the higher courts' for relief.[27] Though the law developed first in relation to *locus standi* under s 18(1) of PNG's Constitution, it has since been accepted to apply wherever 'a person wishes to challenge the constitutionality of the actions of other bodies.'[28]

In *Morua*, Kandakasi DCJ emphasised the reasoning which has led courts to determine that, to allow expedient access to justice, standing 'must be open and liberal.'[29] An understanding that

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[19] *Constitution of the Independent State of Papua New Guinea* (1975) schs 2.3-2.4 ('*Constitution*').
[20] *Underlying Law Act 2000* (Papua New Guinea) s 7.
[21] Jennifer C. Corrin, 'Getting Down to Business: Developing the Underlying Law in Papua New Guinea' (2015) 46(2) *Journal of Legal Pluralism and Unofficial Law* 155, 158.
[22] *Re Petition of Michael Thomas Somare* [1981] PNGLR 265.
[23] *Re Petition of Michael Thomas Somare,* above n 22; *Namah v Pato* (Supreme Court of Justice, Papua New Guinea, Salika DCJ, Sakora, Kandakasi, Cannings and Poole JJ, 29 January 2014,), available via www.paclii.org at [2014] PGSC 1, [24] ('*Namah'*).
[24] *Mondiai v Wawoi Guavi Timber Co. Ltd* (Supreme Court of Justice, Papua New Guinea, Kapi CJ, Davani and Lay JJ, 17 October 2007), available via www.paclii.org at [2007] PGSC 6, [79] ('*Mondiai'*).
[25] *Namah,* above n 23, [30].
[26] *Namah,* above n 23, [30]-[39]; *Constitution,* above n 19, s 59.
[27] *Morua,* above n 2, [19]; *Mondiai,* above n 24, [79].
[28] *Namah,* above n 23, [25].
[29] *Namah,* above n 23, [30].

the underlying law, as developed in and since *Somare*, will not allow procedural barriers and resource deficiencies to undermine the ability for unlawful conduct to be brought before the courts also appeared to provide a basis for Kandakasi DCJ's understanding of *locus standi* where fundamental rights are invoked.

Locus standi and fundamental rights

Kandakasi DCJ noted that the plaintiffs were 'effectively claiming their right to life and healthy environment [had] been breached' by CHECL.[30] His Honour stated that the right to life provided by PNG's Constitution protects more than a mere 'animal existence' and could therefore also protect the right to live in 'a safe and clean environment.'[31] Consequently, activity causing environmental damage or contributing to climate change may breach the right to life.[32] In light of this conclusion, some clarification of *locus standi* in cases where an actual or potential breach of fundamental rights is at issue was provided.

Section 57 of PNG's Constitution relevantly provides that a protected right or freedom is enforceable in the National Court on application by 'any person' who has an interest in its protection and enforcement.[33] This can include any person with an 'interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law.'[34] Relief may also be granted where a 'reasonable probability of infringement' exists.[35] PNG's Constitutional Planning Committee ('CPC') stated that the purpose of section 57 was to ensure the ability to 'complain of a breach of a human right and have that complaint judicially decided without undue difficulty,' such that human rights issues are not 'stifled' by arduous procedure.[36] This has previously supported the conclusion that 'a person who claims that his right is infringed… has an interest in its protection and enforcement'.[37]

Although Kandakasi DCJ's finding that environmental damage may breach the plaintiffs' right to life should be sufficient to demonstrate their standing by reference to s 57(1) and this existing precedent, his Honour considered the words of the CPC and those in s 57(1) further. He reasoned that they demonstrate a desire to enable flexible, 'prompt intervention and judicial determination in respect of any actual, imminent, likely or reasonable probability of a breach of any person's human rights,' so as to minimise or 'avoid' harm without 'undue difficulty.'[38] He noted that strict standing requirements may pose a challenge to enforcement of human rights, and consequently undermine this desire. Therefore, in cases of this category, an 'interest' is construed so broadly that effectively 'any person concerned' with their own or

[30] *Morua,* above n 2, [49].
[31] *Morua,* above n 2, [49], citing *Munn v State of Illinois,* 94 US 113 (1876)*, Sunil Batra v Delhi Administration* AIR 1978 SC 1675, *Maneka Gandhi v Union of India* AIR 1978 SC 597.
[32] *Morua,* above n 2, [49].
[33] *Constitution,* above n 19, s 57(1).
[34] *Constitution,* above n 19, s 57(2)(c).
[35] *Constitution,* above n 19, s 57(5).
[36] Papua New Guinea Constitutional Planning Committee, *Papua New Guinea Constitutional Planning Committee Report 1974* (1974) Chapter 5, part 1, 18 [116], cited in *Morua,* above n 2, [22].
[37] *SC No 1 of 1977; Re Rights of Person Arrested or Detained* [1977] PNGLR 362, 366-368 (Frost CJ), cited in *Morua,* above n 2, [23].
[38] *Morua,* above n 2, [24], citing *Papua New Guinea Constitutional Planning Committee Report 1974* (Report, 1974) Chapter 5, part 1, 18 [116].

others' rights will have standing to seek protection or enforcement of a constitutional right or freedom.[39]

Kandakasi DCJ's discussion reflects an ongoing adherence to access to justice in PNG, which can be seen also in the prioritisation of the rules of law and natural justice in the Constitution, the CPC, and the underlying law. The position espoused in *Morua* may support more widespread access to Courts in cases invoking fundamental rights. Additionally, recognition that recourse to Courts is available prospectively – that is, where there is 'likely or reasonably probable breach' – may allow improved outcomes compared to those human rights jurisdictions which only operate retrospectively and can therefore only address misconduct after it has occurred.[40]

Suo moto actions

While determining the plaintiffs' *locus standi*, Kandakasi DCJ reiterated the Court's ability to act *suo moto* in those same circumstances which he considered gave rise to near-open standing.[41] His Honour noted the particular wording of section 57(1), relevantly that:

> A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court… either on its own initiative or on application…[42] (emphasis added).

It was concluded that this wording authorises the National Court to, on its own initiative, take action to enforce constitutional rights and freedoms or act on its own initiative in existing proceedings of that kind.[43] Relevant to his Honours' conclusion was the purpose of s 57(1), as elaborated on by the CPC – that the Constitution was framed with the intention of minimising or preventing harm caused by breaches of those rights protected by it.[44] Courts must be empowered to respond to actual or potential breaches without being required to await an application to achieve this as quickly and with as little difficulty as possible. Numerous cases demonstrating the 'well established' nature of this *suo moto* jurisdiction were referred to.[45]

Notably, Kandakasi DCJ's position was previously rejected by the Supreme Court in *Independent State of Papua New Guinea v Transferees*.[46] Kandakasi DCJ declined to follow the Supreme Court on this issue for five main reasons: 1) he felt that the decision failed to interpret the word 'initiative' in the Constitution as it is commonly understood in other contexts, such as s 28(1) of the *Supreme Court Act*; 2) it was a view expressed in obiter and was therefore not binding; 3) it did not reflect those purposes or objects of the Constitution previously highlighted; 4) it did not 'give any consideration' to prior precedent; and 5) the power to act *suo moto* is a well-understood judicial concept that is not unique to PNG and exists

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[39] *Morua,* above n 2, [56].
[40] Elena Cima, 'The right to a healthy environment: Reconceptualizing human rights in the face of climate change' (2022) 31(1) *Review of European, Comparative & International Environmental Law* 38.
[41] *Morua,* above n 2, [25].
[42] *Constitution,* above n 19, s 51(1).
[43] *Morua,* above n 2, [25]-[46].
[44] Papua New Guinea Constitutional Planning Committee, *Papua New Guinea Constitutional Planning Committee Report 1974* (1974) Chapter 5, part 1, 18 [116], cited in *Morua,* above n 2, [22].
[45] *Morua,* above n 2, [26]-[34]
[46] (Supreme Court of Justice, Papua New Guinea, Sakora, Gavara-Nanu and Ipang JJ, 5 August 2015) available via www.paclii.org at [2015] PGSC 45.

in other jurisdictions such as Pakistan and India.[47] Deputy Chief Justice Kandakasi's rejection of the conclusion in *The State v Transferees*[48] was followed approvingly by Cannings J shortly after *Morua* was decided.[49] The issue does not yet seem to have been reconsidered by the Supreme Court; therefore, it is somewhat unsettled whether the position described by Kandakasi DCJ remains good law.

The nature of suo moto actions

Deputy Chief Justice Kandakasi noted the behaviour of courts acting *suo moto:*

> They have stepped out of the normal or traditional adversarial role to more inquisitorial roles… This has seen to an elimination and liberation from the different layers in the normal handling of court files and cases… [which cause] so many inordinate and lengthy delays without getting to a final outcome… They have all aspired to correct injustices without being constraint (sic) by forms and formalities. These kinds of interventions have been very public with much public endorsement.[50]

As his Honour noted, the power to act *suo moto* is not unique to PNG's Courts. It is useful, therefore, to comment on these observations with reference to those other jurisdictions identified by Kandakasi DCJ in which courts act *suo moto,* namely Pakistan and India.[51] The inquisitorial role that the court 'steps into' when acting *suo moto* has been observed by academics in these other jurisdictions. Khan, for instance, highlights that in Pakistan, the court effectively 'becomes a party to the matter at hand' and can compel bodies to present evidence or 'specify the lines of inquiry and the nature of evidence.'[52]

In Pakistan, the abandonment of the adversarial model in *suo moto* actions has been thought to be motivated by a view that it is at times unsuitable for Pakistan's postcolonial context, for instance in cases where there are many undetermined litigants, or affected parties without resources to commence litigation.[53] This view often considers the adversarial model, as well as associated common law procedural requirements such as standing, to be ill-fitting colonial legacies. In some more spirited writing by former Chief Justices, these procedures have been described as 'Anglo-Saxon outgrowth[s],' and an 'inherited evil'.[54] These comments reflect the push towards 'informalisation and indigenisation of judicial proceedings', which is present in some judicial activism – sometimes referred to as 'judicial populism' – in both Pakistan and

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[47] *Morua,* above n 2, [36]-[46].
[48] *Independent State of Papua New Guinea v Transferees* (Supreme Court, Papua New Guinea, Sakora J, Gavara-Nanu & Ipang JJ, 5 August 2015), available via www.paclii.org at [2015] PGSC 45.
[49] *In re Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea, Section 57* (National Court of Justice, Papua New Guinea, Cannings J, 19 February 2020), available via www.paclii.org at [2020] PGNC 45.
[50] *Morua,* above n 2, [47].
[51] Justine Bell James and Briana Collins, 'Queensland's Human Rights Act: A New Frontier for Australian Climate Change Litigation?' (2020) 43(1) *University of New South Wales Law Journal* 3, 33.
[52] Muhammad Mustafa Khan, 'Forty-Eight Years of Supreme Court's Original Jurisdiction: Issues Remain' (2021) 12 *Pakistan Law Review* 1, 18.
[53] *Benazir Bhutto v President of Pakistan* PLD 1988 SC 388; Justice Ajmal Mian, 'Hardships to Litigants and Miscarriage of Justice caused by Delay in Courts' (1991) *PLD 1991 Journal* 103, cited in Rafay Alam, 'Public Interest Litigation and the Role of the Judiciary', *Academia* (Article) <https://www.academia.edu/18138693/Public_Interest_Litigation_and_the_Role_of_Judiciary>.
[54] *Benazir Bhutto v President of Pakistan,* above n 53, 488 (Haleem CJ); Justice Ajmal Mian, above n 53, 104, cited in Rafay Alam, above n 53.

India.[55] Deputy Chief Justice Kandakasi's comments, noting the *suo moto* power as allowing 'liberation from' procedural requirements, could be considered to echo some of these sentiments surrounding the unsuitability of adversarial procedure in certain circumstances, as well as a desire to, at least in some contexts, alter and informalise legal procedure to better address contemporary needs.

Deputy Chief Justice Kandakasi's observation that such actions aspire to 'correct injustices' without being constrained by form could be considered to reflect a prioritisation of access to justice over procedural regularity in cases involving human rights abuses. This was also evident in his Honour's comments regarding standing and can be considered consistent with *suo moto* actions in other jurisdictions. In Pakistan, for instance, the ability for courts to act *suo moto* developed following relaxation of *locus standi* requirements in cases involving matters of public importance and enforcement of fundamental rights.[56] Though Pakistan's judicial development of the ability to act *suo moto* is distinct from PNG's constitutional framework, the jurisprudence on this issue reflects a view similar to Kandakasi DCJ's on the importance of access to justice in cases involving breaches of fundamental rights.[57] Pakistan's modern position on *locus standi* in these same cases is also rather similar to the 'open standing' described by Kandakasi DCJ in *Morua*.[58] These similarities indicate that relaxation of procedural requirements, whether by a Court acting *suo moto* or relating to *locus standi*, is seen in both jurisdictions as a necessary action where fundamental rights are at risk.

As Kandakasi DCJ suggests, this view is often justified by reference to the urgency and relative importance of enforcing constitutionally protected rights – or of 'correcting injustices.'[59] In a *suo moto* action concerning the right to life under Article 9 of Pakistan's Constitution, for example, the Supreme Court went so far as to consider that Pakistan's Constitution and Objectives Resolution suggest that 'all technical difficulties' relating to bringing a case would be removed when the matter concerns a fundamental right.[60] Likewise, in India, the ability to act *suo moto* has been traced to the Supreme Court, in the aftermath of the 1975-1977 Emergency, eschewing 'common law procedural requirements such as standing, allowing activists or other members of the public to raise constitutional claims on behalf of those deprived of fundamental rights.'[61] It has been considered an 'offshoot' of public interest litigation ('PIL'), in which the Court relaxes rules of procedure, and bears many of the hallmarks associated with the judicial activism that created PIL.[62]

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[55] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, 2nd ed, 2016), cited in Marc Galanter and Vasujith Ram, '*Suo Motu* Intervention and the Indian Judiciary' in Gerald N. Rosenberg, Sudhir Krishnaswamy and Shishir Bail (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (Cambridge University Press, 1st ed, 2019) 92.

[56] Aman Ullah, 'Public Interest Litigation: A Constitutional Regime to Access to Justice in Pakistan' (2018) 19(2) *Pakistan Vision* 1.

[57] Muhammad Mustafa Khan, above n 52; Aman Ullah, above n 56.

[58] Aman Ullah, above n 56; *The Human Rights Case (Environmental Pollution in Balochistan)* PLD 1994 SC 102; *Benazir Bhutto v President of Pakistan* PLD 1988 SC 388, 491.

[59] Aman Ullah, above n 56.

[60] Aman Ullah, above n 56, 10, citing *The Human Rights Case (Environmental Pollution in Balochistan)* PLD 1994 SC 102.

[61] Marc Galanter and Vasujith Ram, above n 55, 98.

[62] Marc Galanter and Vasujith Ram, above n 55, 99.

These commonalities reveal the interconnectedness between justification for relaxed standing and acting *suo moto* in cases involving violations of human rights. Both actions are grounded in a prioritisation of access to justice and a view of common law procedures being unsuitable in particular contexts. The contexts in which *suo moto* actions arise, their inquisitorial character, and the 'liberation' they allow from established procedures could, perhaps, be characterised as a judicial response to desires to indigenise and de-formalise the law.

Khan takes perhaps a more cynical view of *suo moto* powers, arguing that, as 'legal systems are primarily creatures of habit,' switching 'to relatively unlearnt techniques' increases 'potential for errors borne out of inconsistency.'[63] He argues that inconsistent use of *suo moto* powers may 'convey a perception of partiality,' to the detriment of a 'public perception of fairness,' the rule of law, and equality of treatment.[64] Others suggest *suo moto* powers may politicise the judiciary by allowing it to become involved in issues of public importance unprompted.[65] In the Indian context, Galanter and Ram argue that *suo moto* actions reflect public interest litigation 'gradually becoming top-down in nature'.[66]

These criticisms do not demonstrate, however, that acting *suo moto* is inherently flawed. Indeed, as Khan notes, very few or no 'pure adversarial or inquisitorial systems exist presently… judicial systems are mostly hybrid encompassing traits of both systems, which are applied according to the needs of the case.'[67] The *suo moto* action in *Morua* and others in PNG, Pakistan, and India may be understood simply as a more efficient way to address the need to enforce fundamental rights, which must be prioritised by virtue of their constitutional basis. While there may be scope for misuse of such powers, Kandakasi DCJ's utilisation and reasoning in this case, as his Honour himself notes, reflects longstanding understandings of *suo moto* actions in PNG.

Default judgments and summary dismissals

When addressing whether the plaintiffs had failed to disclose a reasonable cause of action, Kandakasi DCJ emphasised that the Constitution and underlying laws of PNG stipulate that a party has a right to be heard which cannot be denied summarily.[68] Additionally, the National Court Rules provide a mechanism for requesting further particulars where pleadings are unclear.[69] Referring to his prior judgment in *Kerry Lerro v Philip Stagg,* his Honour repeated that summary dismissal should only be allowed where issues in pleadings 'cannot be cured' by such a request.[70]

The plaintiffs' pleadings evidently alleged trespass, possible conversion, and environmental damage; however, they were unclear and lacked particulars.[71] His Honour noted similarities

[63] Muhammad Mustafa Khan, above n 52, 9.
[64] Muhammad Mustafa Khan, above n 52, 10.
[65] Christophe Jaffrelot, *Pakistan at the Crossroads: Domestic Dynamics and External Pressures* (Columbia University Press, 1st ed, 2016).
[66] Marc Galanter and Vasujith Ram, above n 55, 102.
[67] Muhammad Mustafa Khan, above n 52, 9.
[68] *Morua,* above n 2, [60].
[69] *Morua,* above n 2, [61]; *National Court Rules 1983* (Papua New Guinea) order 8 rr 36, 50-51.
[70] *Morua,* above n 2, [61], citing *Kerry Lerro v Philip Stagg* (National Court of Justice, Papua New Guinea, Kandakasi J, 20 April 2006), available via www.paclii.org at [2006] PGNC 2, [14].
[71] Morua, above n 2, [59].

between this case and *Philip Takori v Simon Yagari* in that CHECL had 'failed to note and appreciate the "distinction between a total failure to disclose a cause of action and a failure to plead with sufficient particulars and the different consequences"'.[72] Deputy Chief Justice Kandakasi emphasised the inappropriateness of CHECL's motion, given the significance of the right to be heard, the unused mechanisms available for requesting amended pleadings, and precedent demonstrating it was unlikely to succeed.[73]

The same right to be heard likely underpinned Kandakasi DCJ's reasoning in relation to the issue of whether default judgment should be entered against CHECL. Although this was not explicit in this present judgment, this rationale has been plainly stated in other cases.[74] When refusing an application to appeal a denial to enter default judgment, for instance, the Supreme Court has previously stated that default judgment effectively asks the Court 'to shut a defendant out' from their day in Court 'before final judgment and allow[s] a plaintiff to succeed without any proper hearing'.[75] This, says the Court, 'runs contrary to the well accepted principle that the Courts must always seek to dispense justice on the substantive merits of the case and allow each party to have their day in Court.'[76] Therefore, failure to comply with procedural requirements 'will give way to the right of a party to be heard,' particularly where such failure can be explained and rectified.[77] The prior observation on the plaintiffs' pleadings likely informed a view that the National Court Rules should 'give way' to ensure a hearing could occur following formulation of pleadings that could form a 'proper foundation' for a judgment.[78]

Overall, Kandakasi DCJ's assessments of standing, *suo moto* actions, default judgment, and summary dismissal are underpinned by a consistent view that access to remedies through the courts will not be lightly denied. On these issues, *Morua* represents a continuation of relatively long-held views that exist in the identified case precedent, and which can be compared to jurisprudence in other comparable jurisdictions.

THE RIGHT TO LIFE, THE RIGHT TO A HEALTHY ENVIRONMENT, AND CLIMATE CHANGE

Morua marks the first recognition by PNG's judiciary of the potential impact of climate change on the right to life and is one of few to consider the intersection of environmental harm and the right to life. Deputy Chief Justice Kandakasi also considered that recent developments in international jurisprudence and overseas jurisdictions may have created a separate right to a healthy environment.[79] Deputy Chief Justice Kandakasi's discussion of the right to life in this context places the case among a relatively small but growing cohort of cases internationally,

[72] *Morua*, above n 2, [64], citing *Philip Takori v Simon Yagari* (Supreme Court of Justice, Papua New Guinea, Kirriwom, Gavara, Nanu and Kandakasi JJ, 28 February 2007), available via www.paclii.org at [2007] PGSC 48, [32].
[73] *Morua*, above n 2, [66].
[74] *Morua*, above n 2, [68]; *National Court Rules 1983* (Papua New Guinea) order 9 r 25.
[75] *Bluewater International Ltd v Mumu* (Supreme Court of Justice, Papua New Guinea, Kandakasi DCJ, Pitpit and Dingake JJ, 1 May 2019), available via www.paclii.org at [2019] PGSC 41, [12].
[76] *Bluewater International Ltd v Mumu,* above n 75; *Philip Takori v Simon Yagari,* above n 72.
[77] *Bluewater International Ltd v Mumu,* above n 75, [13].
[78] *Bluewater International Ltd v Mumu,* above n 75, [13]; *Morua,* above n 2, [68].
[79] *Morua,* above n 2, [50]-[52].

which demonstrate a broader 'rights turn' in climate and environmental litigation.[80] Other examples of climate litigation which discuss or invoke the right to life can be found in, inter alia, Germany, the United States, Colombia, the European Court of Human Rights, and Australia.[81]

The recognition of the link between human rights and climate change is not necessarily a recent development – the United Nations ('UN') Human Rights Council acknowledged its existence in 2008 and 2009.[82] Nor is recognition of the potential for climate change and environmental damage to impact the right to life specifically. In *Teitiota v New Zealand,* the UN Human Rights Committee accepted that climate change and sea level rise created a risk of breach of the right to life under Article 6 of the International Covenant on Civil and Political Rights.[83] The minority in *Billy and Ors v Australia* believed similarly in relation to the impacts of Australia's failure to mitigate climate change on Torres Strait Islanders.[84]

The right to a healthy environment, on the other hand, is considered a more contemporary development, despite its origins in the 1972 *Stockholm Declaration.*[85] Since the judgment in *Morua*, the UN General Assembly, following a recommendation by a Special Rapporteur of the UN Human Rights Council, has declared the existence of a right to a clean, healthy and sustainable environment.[86] Though there is still no international binding right to a healthy environment, it is increasingly litigated, with one global database indicating 33 cases outside of the United States currently invoke this right.[87] Further, gradual recognition of the right 'seems to have contributed to the success of human rights based climate cases.'[88]

Cases which recognise both rights have been observed most 'in jurisdictions which have a rich history of judicial activism and strong constitutions.'[89] In *Ashgar Leghari v Federation of*

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[80] Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37.

[81] Bundesverfassungsgericht, 1 BvR 2656/18, 24 March 2021; *Juliana v United States,* 947 F 3d 1159 (9th Cir, 2020); *Held et al v State of Montana et al* (D Mont, CDV-2020-307, 14 August 2023); *Demanda Generaciones Futuras v Minambiente* (Supreme Court of Justice of Colombia, Magistrate Luis Armando Tolosa Villabona, 5 April 2018); *Budayeva and Others v Russia* (European Court of Human Rights, First Section, Application Nos 59609/17, 74677/17 and 76379/17, 29 September 2008); *Waratah Coal Pty Ltd v Youth Verdict Ltd & Or*s (No 6) [2022] QLC 21.

[82] Human Rights Council*, Report of the Human Rights Council,* UN Doc A/63/53 (28 March 2008); Human Rights Council*, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights,* UN Doc A/HRC/10/61 (15 January 2009).

[83] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016,* 127th sess, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) *('Teitiota v New Zealand').*

[84] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019,* 135th sess, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) ('*Billy and Ors v Australia*').

[85] United Nations Conference on the Human Environment in Stockholm, *Report of the United Nations Conference on the Human Environment*, UN Doc A/Conf.48/14/Rev.1 (1973) ch I ('*Stockholm Declaration*').

[86] John H. Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 73rd sess, UN Doc A/73/188 (19 July 2018); United Nations General Assembly, *The human right to a clean, healthy and sustainable environment,* 76th sess, UN Doc A/76/L.75 (26 July 2022).

[87] Sabin Centre for Climate Change Law, 'Global Climate Change Litigation', *Climate Case Chart* (Database, 2023) <https://climatecasechart.com/non-us-climate-change-litigation/>.

[88] Pau de Vilchez and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Game Changer?' (2021) 32, *Yearbook of International Environmental Law* 3, 17.

[89] Justine Bell James and Briana Collins, 'Queensland's Human Rights Act: A New Frontier for Australian Climate Change Litigation?' (2020) 43(1) *University of New South Wales Law Journal* 3, 33.

Pakistan, etc, the Lahore High Court accepted that Pakistan's failure to meet climate adaptation targets breached the fundamental rights of citizens, including the right to life, which they reasoned included a right to a healthy environment.[90] In *Re Court on its Own Motion v State of Himachal Pradesh and Others,* India's National Green Tribunal, acting *suo moto*, found that Indian citizens have a right to a healthy environment that derives from constitutional requirements to protect the environment and protections of the right to life.[91] Both of these judgments bear evident similarities to *Morua* and indicate how constitutional protections of the environment and the right to life may give rise to a separate right to a healthy environment, as contemplated by Kandakasi DCJ. The recent declaration by the UN General Assembly may also be influential in forthcoming litigation in PNG and elsewhere.

Urgenda Foundation v The Kingdom of Netherlands, though also cited in *Morua,* can be distinguished from the prior-discussed cases. The Hague District Court did not find a human rights violation had occurred, but instead 'used rights,' including, inter alia, the right to life under Article 2 of the European Convention of Human Rights, 'as an interpretative tool in analysing the question of whether the Dutch government had breached its duty of care' to Urgenda and others.[92] Although not entirely comparable to *Morua,* it is nonetheless considered a preeminent example of the 'rights turn' in climate litigation and was likely cited for this reason.[93]

Enforcement of fundamental rights against private parties

The judgment indicates that CHECL may be responsible alongside the named government bodies for breaching the right to life. While many cases globally have implications for corporations,[94] fewer suggest corporations are directly responsible for human rights breaches.[95] The issue is, however, arising increasingly, partly due to growing concern surrounding corporations' human rights responsibilities.[96]

The decision in *Morua* results from the allowance in PNG's Constitution for 'horizontal' enforcement of constitutional rights between private actors.[97] Similar provisions can be found, for instance, in Tuvalu's Constitution.[98] In contrast, other states such as the Fiji Islands bind

[90] Lahore High Court, Shah J, 4 April 2015 [8].
[91] National Green Tribunal, Kumar, Nambiar JJ, A.R. Yousuf, Birkram Singh Sajwan, 9 May 2016.
[92] *Urgenda Foundation v The State of the Netherlands* (The Hague District Court, H.F.M Hofhuis, J.W. Bockwinkel and I. Brand, 27 June 2015), upheld in *State of the Netherlands v Urgenda Foundation* (Supreme Court of the Netherlands, Vice President Streefkerk, Snijders, Polak, Tanja-van den Broek and Wattendorff JJ, 20 December 2019); Jacqueline Peel and Hari M. Osofsky, above n 80, 38.
[93] Jacqueline Peel and Hari M. Osofsky, above n 80.
[94] See, for example, *Waratah Coal Pty Ltd v Youth Verdict Ltd & Or*s, above n 81.
[95] For example, *Milieudefensie et al v Royal Dutch Shell Plc* (The Hague District Court, L. Alwin, I.A.M. Kroft and M.L. Harmsen, 26 May 2021); in a nonjudicial context, see: Commission on Human Rights of the Philippines, 'National Inquiry on Climate Change Report', *Commission on Human Rights* (Report, December 2022) <https://chr.gov.ph/wp-content/uploads/2022/12/CHRP_National-Inquiry-on-Climate-Change-Report.pdf>.
[96] Geetanjali Ganguly and Joana Setzer, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies* 841; Stuart Casey-Maslen and Christof Heyns, *The Right to Life under International Law: An Interpretative Manual* (2021, 1st ed, Cambridge University Press).
[97] *Constitution*, above n 19, s 34; Jennifer C. Corrin, 'From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific' (2009) 58(1) *The International and Comparative Law Quarterly* 31.
[98] *The Constitution of Tuvalu* (2008) s 12(1)(a).

only government actors, while others such as Solomon Islands are somewhat silent on the issue.[99] There is some debate surrounding the suitability of horizontally enforceable rights, particularly when relatively newly-recognised rights may conflict with longstanding customs, as has been noted to occur in many postcolonial, legally pluralistic jurisdictions.[100] One view maintains that enforcement should only be against states and public authorities, as human rights developed and can therefore most suitably apply in this context.[101] As has been suggested elsewhere, however, such an argument may have 'little force in Pacific Island countries,' or indeed many postcolonial nations, as this development is not necessarily an aspect of that nations' historical context, and traditional leaders may wield 'as much or more power' than state authorities.[102]

There are, of course, regularly-voiced concerns that horizontal enforcement of rights may affect customary practices if fundamental rights are invoked in customary contexts.[103] However, as is evident in this case, significant disparities may exist between private groups on either end of disputes, and it is an unfortunate reality that these disparities are often far starker and more readily exploited in Global South nations with colonial pasts such as PNG.[104] Multinational corporations, for instance, could 'not be restrained from breaches of human rights under a vertical approach.'[105] *Morua* provides a pertinent example of the potential need for constitutional protection from such exploitation, and the consequence of having human rights protections that may be enforced against private parties.

Environmental rights in PNG: looking ahead

Morua reveals two potentialities for PNG: first, that a right to a healthy environment exists, and second, that constitutional rights may be invoked in climate and environment-related claims. Some further points on these possibilities, and their implications, can be made.

Environmental protections are relatively robust in PNG, particularly compared to nearby Pacific Island nations it is often associated with.[106] This is likely at least in part due to a constitutional obligation to safeguard the environment in the interests of present and future generations.[107] This obligation is reflected in PNG's Environment Act.[108] The constitutional basis for environmental protection may bolster claims that rights relating to the environment exist in the country, though there has not yet been further judicial discussion on this point.

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[99] *Constitution of the Republic of Fiji* (2013) s 6(1); Jennifer C. Corrin, above n 97.
[100] Jennifer C. Corrin, above n 97; Melissa Demian, 'On the Repugnance of Customary Law' (2014) 56(2) *Comparative Studies in Society and History* 508.
[101] Jennifer C. Corrin, above n 97.
[102] Jennifer C. Corrin, above n 97, 56.
[103] Jennifer C. Corrin, above n 97, 56.
[104] Jennifer C. Corrin, above n 97, 56.
[105] Jennifer C. Corrin, above n 97, 60.
[106] Margaretha Wewerinke-Singh et al, 'Human rights and the environment in Pacific Island states,' in Margaretha Wewerinke-Singh and Evan Hamman (eds), *Environmental Law and Governance in the Pacific* (2020, 1st ed, Routledge) 237.
[107] *Constitution*, above n 19, national directive 4, 5.
[108] *Environment Act 2000* (Papua New Guinea) pts 4(a), (c), 18(b).

Generally, however, there has been a noted increase in judicial activism in land and environment cases in PNG.[109] Further, fundamental rights provided in the Constitution tend to be interpreted broadly and liberally, in part due to a requirement to give paramount consideration to the dispensation of justice.[110] As Kandakasi DCJ noted, human rights provisions may apply pre-emptively to address potential breaches of human rights. This is not the case for many human rights jurisdictions, as mentioned prior, and may be especially advantageous for claims made while climate impacts are still projections of future harm.[111] These circumstances may form a strong foundation for further development of environment-related rights and successful rights-based environmental and climate litigation in PNG.

One well-established limitation for human rights claims in PNG is that a party seeking to enforce human rights must first exhaust other available remedies, so that the courts do not usurp other authorities or legal regimes.[112] However, where there are no existing proceedings arising out of the same background, and no known alternative method for proceedings, s 57(1) may be invoked immediately by a party or the court acting *suo moto* to enforce fundamental rights.[113] It is certainly conceivable that, in the context of climate change and associated widescale environmental and social harm, this may occur in future. In fact, the potential for *Morua* to pave the way for further rights-based claims in cases of climate impacts or environmental damage has already been noted by the Supreme Court:

> …it should not come as a surprise if the rise in sea levels and displacement of local inhabitants of islands and low-lying coastal villages in Papua New Guinea may attract litigation for breach of human rights and enforcement under Section 57 of the Constitution. The Court adverted to this class of cases in *Morua v. China Harbour Engineering Company (PNG) Ltd.*[114]

Kandakasi DCJ's rulings on standing, the availability of *suo moto* action, and default judgment were each informed by prior case law in which the judiciary shaped the law to meet the perceived needs of the nation. Perhaps, then, these foreshadowed developments suggest a newly developing way in which PNG's courts may respond to another, emerging need: to address harms caused by climate change.

CONCLUSION

Morua displays several varied impacts of the tradition of human rights protection in PNG, from willingness to alter procedural requirements to a newfound recognition of the link between human rights and climatic and environmental stability. This note has demonstrated the interconnected justifications in *Morua* for the plaintiffs' standing, the Court's *suo moto* action, and the refusal to allow default judgment or summary dismissal. It has linked these

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[109] *Commander of Beon Correctional Institution v Mal* (Supreme Court of Justice, Papua New Guinea, Kandakasi DCJ, Makail and Anis JJ, 6 January 2022), available via www.paclii.org at [2022] PGSC 1.
[110] *Commander of Beon Correctional Institution v Mal,* above n 109; *Constitution*, above n 19, s 158.
[111] *Morua*, above n 2,[24]-[25], [56]; Elena Cima, 'The right to a healthy environment: Reconceptualizing human rights in the face of climate change' (2022) 31(1) *Review of European, Comparative & International Environmental Law* 38.
[112] Jennifer C. Corrin, above n 97; *Independent State of Papua New Guinea v Siune* (Supreme Court of Justice, Papua New Guinea, Kandakasi DCJ, Thompson and Berrigan JJ, 4 February 2021), available via www.paclii.org at [2021] PGSC 5.
[113] *Independent State of Papua New Guinea v Siune,* above n 112; *Re Miriam Willingal* [1997] PNGLR 119.
[114] *Commander of Beon Correctional Institution v Mal,* above n 109.

justifications to well-established principles in PNG and international jurisprudence. It has also highlighted the new developments by Kandakasi DCJ in the context of climate, environment, and human rights, placed these in international context, and suggested some ways in which they may prove advantageous for further litigation which seeks to prevent or compensate for climate change-related harm in PNG. The judgment in *Morua,* thus, reflects both the direction in which the law in PNG has developed under its Constitution, and how it may continue to do so in order to meet newly emerging challenges.

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When a country achieves Self-Government and Independence, its Constitution tends to be concerned largely with the tensions that exist at that time. While it is important that these tensions … be taken care of, partly through constitutional provisions if necessary, pre-occupation with this problem can have one unfortunate consequence. It is that the Constitution does not face up to the problems of the future, and this tends to defeat the great opportunities presented by Self Government and Independence… If the Constitution is to be truly the fundamental charter of our society and the basis of legitimate authority, it should be an instrument which helps to achieve these goals and not one which obstructs. Our Constitution should look towards the future and act as an accelerator in the process of development, not as a brake.[115]

[115] Papua New Guinea Constitutional Planning Committee, *Papua New Guinea Constitutional Planning Committee Report* (1974) Chapter 2, [1]-[2].