NAVIGATING COMPLEXITIES OF THE DOCTRINE OF ACCRETION IN THE PACIFIC ISLANDS: *ONGOSIA V TONGIA*

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ABSTRACT

This case note analyses the operation of foreshore law in Tonga through the lens of the Land Court's decision in *Ongosia v Tongia.* The case note commences with a brief description of the case, outlining the relevant facts and reasoning of the Court, before turning to discussion of two of the main issues: the doctrine of accretion in contemporary law and the intersection between common law and customary law principles. The case note argues that the doctrine of accretion is inadequate in the modern context given the intensifying threat of climate change and development of modern technology. The case note then discusses the role of customary law in Tonga by applying a comparative analysis between Tonga and other nations including the Solomon Islands, Vanuatu and New Zealand. The case note concludes by offering potential solutions for addressing foreshore ownership in Tonga.

INTRODUCTION

In 2006, the Land Court of Tonga ruled in *Ongosia v Tongia*[1] that if part of an owner's land is taken from him by erosion, the landowner is treated as losing part of their land. Given the system of land tenure in Tonga, this has serious ramifications for displacement and land security. This case note examines the Court's decision by discussing two key issues. Firstly, it considers the adequacy of the doctrine of accretion in contemporary law in the context of climate change and rising sea levels. The second section of the case note looks at the intersection between common law and customary law in relation to ownership of the foreshore and seabed. Finally, the case note briefly outlines some possible considerations for adapting to a modern, climate-changed world.

DETAILS OF CASE

The plaintiff was the registered holder of a tax allotment at Hinakauea Beach, Pangaimotu, Vava'u. In Tonga, land ownership is limited to a life interest in a portion of land which is subject to strict laws of inheritance.[2] One of the types of life interest is a tax allotment.

In 1994, the Governor of Vava'u granted a permit to the defendants to 'care for and manage' Hinakauea Beach and foreshore.[3] The relevant part of the foreshore was a strip of grass approximately 20 to 30m wide, adjacent to the beach. The defendants had built several *fales*

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[1] *Ongosia v Tongia* [2006] TLR 197.

[2] *Royal Land Commission* (Final Report, March 2012); *Land Act 2016* (Tonga) ss 4 and 5.

[3] *Ongosia v Tongia*, above n 1, 200.

on the strip. The defendants also had a current licence from the Tourism Council to operate Tongan feasts along the strip covered by the permit. The defendants continued to use the land with a valid permit and had occupied the foreshore for more than 10 years without issue.

The foreshore is defined as being 15.24 metres above the high-water mark.[4] This dispute arose because the sea had eroded the beach and soil in the area. This meant that the 20-30m strip of foreshore now overlapped with the plaintiff's allotment. Consequently, many of the defendant's buildings, which had been built within the parameters of the foreshore at the time, also occupied the plaintiff's grounds as marked by the tax allotment. The plaintiff sought to evict the defendants from the part of the foreshore that overlapped due to erosion of the beach.

Webster CJ dismissed the plaintiff's claim for eviction. In doing so, Webster CJ held that when land is conveyed, it is conveyed subject to and with the benefit of such changes as may take place over the years.[5] He determined that the location of the foreshore may vary from time to time if gradual changes occur to the shore line. Thus, as the high and low water marks shift, so does the boundary of the land. It was held that cl 109 of the Tongan Constitution, which defines the foreshore, must be interpreted flexibly as applying to the foreshore as it currently is and not applied to the foreshore at the time the Constitution was written.[6]

Counsel for the plaintiff, Mr Vaipulu, also argued that if the land did revert to the Crown, the plaintiff was entitled to compensation for loss of land. Webster CJ rejected this on various grounds. Under Tongan law, compensation is payable where land is resumed by the Crown.[7] In Webster CJ's view, as the land had merely disappeared and resulted in a reassessment of the foreshore, this did not constitute a resumption of land by the Crown. Webster CJ also referred to precedents for the principle that compensation is not payable where the foreshore has shifted due to erosion.[8] Nonetheless, Webster CJ's decision was not determinative, as the Crown would have had to be formally joined or the matter pursued as a separate action for the Court to appropriately deal with it.[9]

Counsel for the defendants, Mr Taufaeteau, submitted two counterarguments. Firstly, he argued that the plaintiff was prevented from bringing an action by s 170 of the *Land Act*.[10] Section 170 provides that a person cannot bring an action 10 years after the time at which the claim arose.[11] The Court held that this limitation must be strictly applied. Even if the defendants' occupation of the land was unlawful, the limitation would apply, provided occupation of the land was adverse for longer than the defined period, being 10 years.[12]

The defendants also argued that the plaintiff's tax allotment exceeded the statutory size for tax allotments.[13] As Webster CJ had already rejected the plaintiff's claim on several grounds, his Honour did not make a determination regarding the excess size of the allotment. Nonetheless,

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[4] *Ongosia v Tongia*, above n 1, 198. See also *Constitution of Tonga 1875* s 109. See also *Land Act 1927* s 2.
[5] *Ongosia v Tongia*, above n 1, 207.
[6] *Ongosia v Tongia*, above n 1, 210.
[7] *Land Act 2016* (Tonga) s 143.
[8] *Ongosia v Tongia*, above n 1, 210. See also *Attorney-General v Chambers* [1843-60] All ER Rep 559; *Attorney-General of Southern Nigeria v John Holt and Co (Liverpool) Ltd* [1915] AC 599; *Southern Theosophy v South Australia* [1982] 1 All ER 283.
[9] *Ongosia v Tongia*, above n 8.
[10] *Ongosia v Tongia*, above n 8.
[11] *Land Act 2016* (Tonga) s 170.
[12] Above n 1, 210.
[13] *Ongosia v Tongia*, above n 1,211.

his Honour made various comments about the importance of interpreting statutes in a way that avoids manifest injustice or unreasonableness, so long as the statute is interpreted in a way that is consistent with its purpose.[14] Section 49 of the *Land Act* should be interpreted as rendering void only the area of a grant which exceeds the area permitted by the *Land Act* and not the entire grant of land. Regardless, the defendants had not identified any specific area of excess. As the plaintiff's tax allotment was to be re-surveyed anyway due to the movement of the foreshore, this argument had no relevance.
While counsel for the defendants made submissions in relation to equity, Webster CJ did not consider these points.[15]

COMMENTARY

Doctrine of accretion

This case primarily involved the application of the doctrine of accretion to determine the rightful owner of the land as a result of changing sea levels.

History of law

The doctrine of accretion is an important concept in foreshore legal principles.[16] Relying on Halsbury's Laws, Webster CJ succinctly stated the law as being that, as the water boundaries shift, the boundaries of the land shift accordingly.[17] The doctrine generally applies to all lands bounded by water with a particular relevance to ocean coasts, rivers, and lakes.[18]
Citing *Attorney-General v Chambers*, Webster CJ noted that the doctrine of accretion provides that any new land gained due to accretion belongs to the adjoining landowner.[19] Importantly, however, this relationship is reciprocal. The owner of land does not derive the benefit alone and thus any land lost due to erosion is treated as a loss of property by the landowner.[20] Webster CJ went on to describe how this loss of land is silently transferred to the correct proprietor of the foreshore and seabed, which in this case is the Crown.[21]
The doctrine of accretion is a common law doctrine that developed as a response to the transitory nature of natural boundaries.[22] Given the challenges faced by the interaction between strict property boundaries and the dynamic nature of water movement, this doctrine is founded on a need for security and discretion.[23] Citing *Re Hull and Selby Rail Co,* Webster CJ

[14] *Ongosia v Tongia*, above n 1, 209.
[15] *Ongosia v Tongia*, above n 1, 211.
[16] John Corkill, *Principles and Problems of Shoreline Law* (ACCARNSI Discussion Paper, December 2012) 1.
[17] *Ongosia v Tongia*, above n 1, 202.
[18]John Corkill, above n 16, 16.
[19] *Ongosia v Tongia*, above n 1, 202, citing *Attorney-General v Chambers* [1843-60] All ER Rep 559.
[20] *Ongosia v Tongia*, above n 1, 203.
[21] *Ongosia v Tongia*, above n 1, 203.
[22] Mick Strack, ''They'll be Drownded in the Tide': Reconsidering Coastal Boundaries in the Face of Sea-level Rise' (2014) 34 *Geography Research Forum* 23, 26.
[23] Sam Glasscock III., 'Effects of Accretion and Erosion on Coastal Property in the United States' (1993) 8(1) *International Journal of Marine and Coastal Law* 135, 137.

emphasised the need for a rule of law which allows for the protection and adjustment of property.[24] He also highlighted the general convenience which lies at the core of the doctrine.[25] There is no doubt that shifting water boundaries provide a challenge to legal principles.[26] Constantly changing water levels produce a relentless and perpetually fluctuating manner of gains and losses that never reach any static state, which makes it difficult to apply strict rules.[27] However, the law as it stands recognises a level of mutuality. That is, the doctrine of accretion implies some expectation of a large-scale natural balance between what is lost and what is gained. Sir Robert Megarry V-C described the doctrine as a 'form of rough justice'.[28] He argued that a land owner 'should not complain of losing land since he would have gained land if instead the sea had retreated'.[29]

However, the conditions resulting from climate change, particularly rising sea levels and cumulative storm events, suggest that in fact most future change will result in a loss of land by erosion.[30] Consequently, this implied mutuality between loss and gain will become more and more unbalanced. Over the past few decades, two-thirds of the world's coastlines have continuously retreated.[31] This means that the law of accretion is becoming inadequate as a contemporary legal principle. Further, such a common law principle is inappropriate in a legal system like Tonga where the land laws are so distinctive. Given that land ownership is absolute and cannot be sold or changed, the accretion doctrine in the context of climate change disproportionately affects the people of Tonga.

Adequacy in modern setting

Rising sea levels are indisputable.[32] As a result, climate change and rising sea levels provide a distinct challenge to this entrenched principle of law. The issue is that very little scholarly discourse is available regarding the elements of foreshore law and its application in the context of rising sea levels and coastal erosion.[33] Additionally, many of these aspects of the doctrine of accretion have not been discussed or decided in case law. For example, there is little precedent on how fast or sudden coastal erosion must occur for the doctrine to apply, nor is there much discussion of what constitutes 'natural' change.[34] Another question is whether rising sea levels are gradual or imperceptible given modern technologies that are capable of

[24] *Ongosia v Tongia,* above n 1, 203, citing *Re Hull and Selby Rail Co* (1839) 5 M & W 327.
[25] *Ongosia v Tongia*, above n 1, 204, citing *Attorney-General of Southern Nigeria v John Holt and Co (Liverpool) Ltd* [1915] AC 599.
[26] Sam Glasscock III, above n 23, 136.
[27] Mick Strack, above n 22, 27.
[28] *Ongosia v Tongia*, above n 1, 206, quoting *Baxendale v Instow Parish Council* [1981] 2 All ER 620.
[29] *Ongosia v Tongia,* above n 28.
[30] Zada Lipman and Robert Stokes, 'Shifting Sands: The Implications of Climate Change and a Changing Coastline for Private Interests and Ppublic Authorities in Relation to Waterfront Land' (2003) 20 *Environmental and Planning Law Journal* 406, 407.
[31] Werner Hennecke, Catharina Greve, Peter Cowell and Bruce Thom, 'GIS-Based Coastal Behavior Modeling and Simulation of Potential Land and Property Loss: Implications of Sea-Level Rise at Collaroy/Narrabeen Beach, Sydney (Australia)' (2004) 32(4) *Coastal Management* 449, 450.
[32] IPCC, 'Climate Change 2023: Synthesis Report' (Working Paper, Intergovernmental Panel on Climate Change, 2023) 46.
[33] John Corkill, above n 16, 57.
[34] John Corkill, above n 16, 58.

indicating the precise rate of sea level rise.[35] This section of the case note seeks to explore the implications of these issues in the modern setting.

'Gradual/imperceptible'

The first element of the doctrine of accretion is that the change must be gradual. Case law gives some indication as to what constitutes gradual change. As stated by Webster CJ, the nature of the change must be so gradual as to be imperceptible in its progress.[36] This means change that is not clearly visible to the naked eye or occurring on a day-to-day basis. Citing *Humphrey v Burrell,* the concept of imperceptibility is described as progress which cannot be observed 'from moment to moment or from hour to hour'.[37] However, Glesson J acknowledges that after 'a certain period' the change may be noticeable.[38] There is no case law which covers the meaning of 'a certain period', particularly in the context of rising sea levels and coastal erosion. In Tonga, increasing global temperatures has been a key driver of rising sea levels.[39] In fact, these levels are continually increasing with intensifying speed due to strong winds and destructive waves in storm and cyclonic events. These natural disasters, which occur at a more frequent rate due to climate change, will continue to contribute to faster erosion of the coastline.[40] Lifuka Island in Ha'apai experienced an earthquake in 2006 and suffered 23cm of subsidence (downward shift of the land). As a result, coastal erosion was exacerbated and resulted in an immediate sea level rise overnight. [41] Even without these standalone events, Lifuka Island experiences severe coastal erosion, with a 0.7 metre shoreline recession every year. In fact, some localised parts of the island experience a rate as high as 1.4m/year.[42] Yet it is unclear at what point this rate would be considered so fast as to fall outside of the doctrine of accretion and the definition of 'gradual'.

Development of modern technology also raises a distinct question regarding what is considered gradual or imperceptible. There are various data modelling technologies that allow for tracking rising sea levels, which were not available 20 years ago.[43] Historically, sea level observations relied on tide gauge measurements. However, the emergence of precise satellite altimetry has significantly progressed knowledge of sea level changes and land loss.[44] Additionally, technology like high precision gravity measurements and Argo profiling floats have allowed for constant and accurate monitoring of changes.[45] For example, the IPCC Synthesis Report is able to identify that sea levels have increased by approximately 3.7mm per year since 2006.[46]

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[35] John Corkill, above n 16, 34.
[36] *Ongosia v Tongia,* above n 1, 204, citing *R v Lord Yarborough (1824) 3 B & C 91.*
[37] *Ongosia v Tongia*, above n 1, 205, quoting *Humphrey v Burrell* [1951] NZLR 262 ('*Humphrey v Burrell*').
[38] *Ongosia v Tongia*, above n 37.
[39] Government of the Kingdom of Tonga, 'Coastal Resilience Project – Tonga Technical Feasibility Assessment' (Green Climate Fund Funding Proposal, March 2017) 11.
[40] Worley Parsons, 'Coastal Rehabilitation Lifuka Island, Tonga' (Engineering Options Report, Secretariat of the Pacific Community, April 2013) 5.
[41] Worley Parsons, above n 40.
[42] Worley Parsons, above n 40, 21.
[43] Michael Oppenheimer and Bruce C. Glavovic, 'Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities' (Special Report, Intergovernmental Panel on Climate Change, 2019) 334.
[44] Michael Oppenheimer and Bruce C. Glavovic, above n 43.
[45] Michael Oppenheimer and Bruce C. Glavovic, above n 43.
[46] IPCC, above n 32, 46.

Additionally, predictive modelling can demonstrate that sea levels will rise by approximately 0.84m by 2100.[47] With rapid advancement of technology in this field, it is arguable that the element of gradual is outdated. It can no longer be said that rising sea levels are not observable on a day-to-day basis.

'Natural'

The second element of the doctrine of accretion is that the change must be natural. Webster CJ refers to *Humphrey v Burrell,* stating that the accretion or erosion must occur in the 'ordinary course of the operation of nature'.[48] Case law provides that natural erosion or changes to water levels include natural processes such as the gradual build-up of soil and sediment or gradual retreat of a body of water. Other phenomena like wind are also recognised as natural occurrences.[49]

This means that where the accretion or erosion is unnatural or artificial, the doctrine does not apply. For example, deliberate and unnatural acts which cause sudden accretion or erosion would prevent the doctrine from applying. In *Humphrey v Burrell,* Glesson J refers to an example of the removal of a considerable quantity of soil from the land.[50] This raises an interesting question regarding how much, and at what frequency, sand removal would need to take place to cross-over into the 'unnatural' territory. In *Ongosia v Tongia,* Webster CJ determined that the removal of sand did not cause any immediate or sudden change and thus did not impact the application of the doctrine. In dismissing the plaintiff's argument, Webster CJ relied on the land surveyor's evidence that the erosion of the beach had been slow.[51] There was no evidence that a *considerable* quantity of sand was taken suddenly from the beach. Additionally, Webster CJ referred to *Brighton & Hove General Gas v Hove Bungalows,* in which Romer J held that the doctrine applied to gradual change even though it was unintentionally assisted by, or would not have taken place without, human interference by the erection of groynes.[52] This implies that some level of human intervention is permissible, provided it does not cause sudden, substantial change.

However, what is deemed 'considerable' should be viewed in the relevant context. For example, Tongan land tenure does not allow the selling or purchasing of land. Thus, if 'natural' change is occurring over time, landowners are condemned to lose part of their land every year. As land is passed down generationally, the population will increase while the available area will decrease. This raises potential issues of overcrowding and displacement.

Tonga is also more heavily impacted by rising sea levels. Satellite data indicates sea levels near Tonga have risen by appropriately 6mm per year since 1993.[53] Additionally, the average height above sea level in Tonga is two to five metres.[54] In the capital of Nuku'alofa, the average

[47] Michael Oppenheimer and Bruce C. Glavovic, above n 43, 324.
[48] *Ongosia v Tongia*, above n 1, 205, citing *Humphrey v Burrell* [1951] NZLR 262.
[49] *Southern Theosophy v South Australia* [1982] 1 All ER 283.
[50] *Ongosia v Tongia,* above n 1, 205, quoting *Humphrey v Burrell* [1951] NZLR 262.
[51] *Ongosia v Tongia,* above n 1, 210.
[52] *Ongosia v Tongia,* above n 1, 205, citing *Brighton & Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch 372.
[53] Government of the Kingdom of Tonga, above n 39, 12.
[54] Government of the Kingdom of Tonga, above n 39, 7.

elevation is only between 0.5 and 1.5 meters.[55] This means that even small quantities of sand or soil being removed from the area can have a disproportionately severe impact on the erosion of the foreshore. These issues demonstrate the inadequacy of this test in the context of Pacific Island nations.

An alternative argument is that, as a human-made occurrence, climate change could provide the basis for a challenge to the rule of accretion regarding this element. While general fluctuating sea levels are normal, the rapid rate of increase is undeniably the result of human emissions.[56] On this basis, it seems plausible to argue that the doctrine should not apply given the anthropogenic nature of rising sea levels and consequential coastal erosion.

The common law of accretion is no longer satisfactory in the modern context. Additionally, given the unique nature of land ownership in Tonga, it is necessary that laws adapt to deal with issues that are peculiar to the region. Thus, it is vital that the application of this doctrine be reconsidered in the context of the South Pacific and rising sea levels to ensure fairness and security of land.

Foreshore Ownership

Another important aspect of this case was its reaffirmation of the common law principle, enshrined in the Tongan Constitution, that the rightful owner of the foreshore is the Crown. However, this does not align with many other jurisdictions in the Pacific Islands. In recent years, legal developments in other jurisdictions have suggested that the foreshore, and in some cases the seabed, belongs to the customary owners of the land. The continuation of this common law principle in Tonga clearly demonstrates the role of Western influence and its impact on land tenure in the region. Even beyond common law principles relating to foreshore ownership, there is a clear distinction between countries like Tonga, where the land belongs to the Crown, and other Pacific Island countries where land belongs to the people. This further exemplifies the enduring influence of foreign custom and legal principles on Tonga's land system.

Unlike many countries in the South Pacific, Tonga's Constitution does not make any reference to customary law as playing a role in their legal system. Rather, in theory, Tongan law is a mixture of English common law and Tongan statute. Nonetheless, the system of land tenure in Tonga is indicative of a close relationship between social and cultural organisation and land rights.[57] Therefore, it is clear that customary law still plays an important role in the Tongan legal system. This demonstrates how legal pluralism plays a role in Tonga, both within and outside the formal system.

Generally, legal pluralism can be defined as two or more legal systems that co-exist within the same social field.[58] It is well recognised that legal pluralism can often lead to conflicts with a country's legal system. This is often due to differences in the styles of law or norms that are

[55] Nobuo Mimura and Netatua Pelesikoti, 'Vulnerability of Tonga to Future Sea-Leve Rise' (1997) 24 *Journal of Coastal Research* 117, 118.
[56] IPCC, above n 32, 46.
[57] Sue Farran, 'Environmental Law in the Context of Legal Pluralism' in Margaretha Wewerinke-Singh and Evan Hamman (eds), *Environmental Law and Governance in the Pacific* (Routledge, 2020) 10, 17.
[58] Jennifer Corrin, 'Exploring the Deep: Looking for Deep Legal Pluralism in the South Pacific' (2017) 48(2) *Victoria University of Wellington Law Review* 305, 305.

applied.[59] In Tonga, this is particularly visible in the land tenure system which contains both traditional concepts of land ownership and legislation based on Western models.

History of land tenure

Land ownership in Tonga has a long and complex history. In Tonga, as in most other Pacific Island cultures, there is a deep emotional attachment to the land. Land tenure has social, economic, and political importance to the people of Tonga.[60]

Historically, the land was seen as belonging to Tu'i Tonga, the sacred sovereign of divine origin who represented Tonga society collectively.[61] In practice, land was controlled by various chiefs, or *'eiki,* and it was their duty and their right to distribute this land among their people. An important distinction from today is that traditionally, land rights passed from groups of adult males in one generation to the following generation.[62] Now, land rights are inherited on a strictly individual basis.

Another important distinction between Tonga and other Pacific Island nations is that it was never colonised.[63] Instead, it became a Protected State within the British Commonwealth under the Treaty of Friendship.[64] This nonetheless meant that Tonga experienced the influences of colonialism and capitalism. Additionally, aside from being a British Protected State, the most influential visitors to Tonga were the missionaries.[65] Subsequently, Tongan society adapted to the influences and interactions of the new values, institutions and ideologies introduced by the West. The influence of the West has been pervasive and continual, which is evident in the development of the Tongan land tenure. The missionaries not only influenced traditional religious beliefs, but they also changed the political and legal system by aiding the development of three law codes in 1839, 1850, and 1862.[66] These three codes eventually culminated in the Tongan Constitution.

The introduction of the Tongan Constitution by Tupou I completely altered the land system of Tonga that had existed for centuries prior. Tupou I removed the power of the chiefs and instead gave certain chiefs an aristocratic title, *nõpele*.[67] A *nõpele* was given an area of land, *tofi'a.* Other land domains were granted to the royal family and the Government, while all territory and land which was not suitable for cultivation, such as beaches, also passed into the hands of the Government.[68] The result of western influence in Tonga is a hybrid of traditional land customs with Western legal concepts.

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[59] Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(3) *Sydney Law Review* 375, 375.

[60] Sione Halatuituia, 'Tonga's Contemporary Land Tenure System: Reality and Rhetoric' (Research Paper, Faculty of Science, University of Sydney, July 2002) 5.

[61] Paul van der Grijp, 'After the Vanilla Harvest: Stains in the Tongan Land Tenure System' (1993) 102(3) *The Journal of the Polynesian Society* 233, 234.

[62]Mirja Trilsch, 'Protectorates and Protected States' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, at February 2011), 4.

[63] Spike Boydell, 'South Pacific Land: An Alternative Perspective on Tenure Traditions, Business, and Conflict' (2010) 11(1) *Georgetown Journal of International Affairs* 17, 19.

[64] Paul van der Grijp, above n 61, 233.

[65] Charles F. Urbanowicz, 'Motives and Methods: Missionaries in Tonga in the Early 19th Century' (1977) 86(2) *The Journal of the Polynesian Society* 245, 246.

[66] Charles F. Urbanowicz, above n 65, 257.

[67] P. Done, 'Land and the Law in the Kingdom of Tonga' (1998) 34(268) *Survey Review* 389, 392.

[68] P. Done, above n 67, 394.

Many other Pacific Island nations have faced similar issues in relation to these conflicting systems. Yet recently other countries have seen a change to the way land ownership is understood, particularly in relation to the foreshore and seabed. Notably, Tonga is unique in that all land belongs to the Crown.[69] This creates distinctive challenges to land reform in Tonga. Nonetheless, it is important to consider the progress in other jurisdictions relating to customary land ownership.

Comparison to Solomon Islands

In 2009, the Solomon Islands Law Reform Commission reviewed the legal position regarding ownership of the foreshore.[70] In Solomon Islands, the foreshore, beaches, and land between the high and low water marks was governed by customary law before the establishment of the British Protectorate.[71] In 1959, the Land and Title Ordinance was introduced and declared that the land was public land.[72] However, this declaration could not affect any customary land claims.

This resulted in conflicting decisions in the High Court and confusion over the true owner of the relevant areas. Two critical cases discussed the legal position of ownership of the foreshore prior to the Commission's report.

Allardyce[73]

This case was brought in 1990 in relation to Lofung in the Solomon Islands. The plaintiff operated a logging business on a parcel of land. The defendant was a representative of two families who claimed customary ownership of the land adjacent, which now overlapped due to erosion. The plaintiff brought legal proceedings seeking declarations that they were entitled to use the land without interference. The defendants brought a counterclaim, arguing that the land, including the Lofung reefs, was customary land. The plaintiff contended that ownership of the foreshore and the seabed vested in the State.[74]

Like other Pacific Islands, custom had to be proved by bringing evidence before the court. Thus, to prove his case, the defendant had to prove the existence of customary law in relation to the areas in question, as well as proof of his rights to ownership under that customary law.[75] The defendant gave evidence in which he claimed customary ownership of the foreshore and the seabed. He asserted his right on three bases; a decision of the Famoa Chiefly Council regarding ownership of the Lofung Reef, his descent from the original grantors, and the fishing rights over the area which, in custom, belonged to the families he represented.[76]

Ward CJ interpreted the definition of 'land covered by water' as not including the seabed. Thus, he determined that areas permanently and naturally covered by the sea were not and could not

[69] *Constitution of Tonga 1875* s 104.
[70] Solomon Islands Law Reform Commission, *The Land Below High Water and Low Water Mark* (Consultation Paper, October 2009).
[71] Solomon Islands Law Reform Commission, *Review of the Law That Applies to Land Below High Water Mark and Low Water Mark* (Report, October 2012) 13.
[72] Solomon Islands Law Reform Commission, above n 71, 14. See also *Land and Titles Ordinance 1959* s 47.
[73] *Allardyce Lumber Company Ltd v Laore* [1990] SILR 174 ('*Allardyce*').
[74] *Allardyce,* above n 73, [1]-[13].
[75] *Allardyce,* above n 73, [14].
[76] *Allardyce,* above n 73, [16].

be customary land.[77] The defendant nonetheless tried to rely on the chiefs' decision as proof of his customary ownership of the reefs. The defendant argued that the chiefs' decision has the status of a court ruling under the *Local Courts (Amendment) Act 1985*. However, to achieve that status, Ward CJ held that the procedure set out in the legislation had to be followed. Here, there was no evidence that the procedure had been followed.[78] Ward CJ was not satisfied that a local court or the chiefs had the power to determine ownership of the reefs. As a result, the decision of the chiefs was deemed of no assistance to the defendant's case.[79]

Additionally, the only evidence called by the defendant regarding historical use of the reef was that his family had in the past fished in this area. No other evidence was led. Thus, Ward CJ was not satisfied that the defendant had established the existence of any customary right to the sea in the Lofung area.[80] This demonstrates a conflict between Western legal concepts and traditional law. The idea that customary law cannot be proved by evidence of longstanding practices appears to be contrary to traditional notions of justice.

Combined Fera Group v Attorney-General[81]

In *Combined Fera Group,* a Solomon Islands court again considered whether the seabed and foreshore could be subject to customary ownership. In complete contrast to the court's reasoning and conclusions in *Allardyce,* which were drawn from common law principles, it was determined that the seabed could form part of customary land.[82] It was noted in *Combined Fera Group* that the express terms of the *Land and Titles Act* provided that land below the low water mark could be registered by the Commissioner of Lands as public land. Therefore, if the seabed and foreshore were capable of being public land, it was logical to assume they could also form part of customary land through a claim of ownership, use or occupation. Thus, the foreshore and seabed were deemed capable of being customary land.[83]

This conflicting case law resulted in referral to the Solomon Islands Law Reform Commission, which recognised that the relevant legislation was unsatisfactory and inadequately dealt with questions of land ownership and boundaries. In their final report released in 2012, the Commission made twelve recommendations for reform.[84] One of its recommendations was that legislation should designate land below the high and low water mark as tribal land.[85] Another recommendation was the change of term from 'customary land' to 'tribal land', including recognition that tribal land includes land covered by sea and water.[86] The Commission stated that these changes would reflect the customs and values of Solomon Islands.[87] This is also

[77] *Allardyce,* above n 73, [35].
[78] *Allardyce,* above n 73, [30].
[79] *Allardyce,* above n 73, [37].
[80] *Allardyce,* above n 73, [38].
[81] *Combined Fera Group v Attorney-General* (High Court of Solomon Islands, Palmer, J, 19 November 1997) ('*Combined Fera Group*'), available via www.paclii.vu at [1997] SBHC 55.
[82] *Combined Fera Group,* above n 81, [33].
[83] *Combined Fera Group,* above n 81.
[84] Solomon Islands Law Reform Commission, above n 70.
[85] Solomon Islands Law Reform Commission, above n 70, 17.
[86] Solomon Islands Law Reform Commission, above n 70, 18.
[87] Solomon Islands Law Reform Commission, above n 70, 18.

reflected in the Preamble to the *Constitution of Solomon Islands*, which gives power to the people and vests all natural resources in the people and government.[88]

Despite these recommendations, no further action has been taken. While there is clear recognition that reform is needed, it presents complex challenges that are difficult to overcome. For example, striking the right balance between customary ownership and permitting land use which promotes economic prosperity for the country is a multifaceted issue that the Government and traditional leaders of Solomon Islands must address.[89]

Vanuatu

The law regarding ownership of the foreshore and seabed has also been a contentious topic in Vanuatu. In *Terra Holdings v Sope,*[90] Mr Sope brought the proceedings on behalf of his family and six other custom landowner families of Kawenu and adjoining lands. The issue related to a grant which allowed Terra Holdings to carry out a development along the beach, including reclaiming the seabed and excavating a channel in Kawenu Cove. Mr Sope claimed that the grant was unlawful as the custom owners had not been consulted and did not consent to the development.[91]

Pursuant to the Vanuatu Constitution, all land belongs to the indigenous custom owners and their descendants.[92] Relying on precedents, the Court accepted that customary ownership included the foreshore and seabed.[93] The Court recognised that where foreshore development is approved on public land, or where custom owners consent to the development, the development would not raise constitutional issues. However, as the custom owners had not been consulted, nor had they consented, the Court upheld the lower court's decision to impose an injunction preventing the applicants from any development. Thus, recognition of customary ownership of the foreshore and seabed was upheld.[94]

New Zealand

Like many other Pacific Island nations, New Zealand has extensive interaction between customary law and common law.[95] European colonisation did not understand the rules of Māori land tenure. While Māori possession of dry land was recognised, any possession of water and sea was dismissed as incompatible with English property law.[96] The Crown assumed that those areas automatically vested in the Crown.[97]

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[88] *Constitution of Solomon Islands 1978.*
[89] Jennifer Corrin and Graham Baines, 'Land Tenure in Solomon Islands: Past, Present and Future' (2020) 27 *Canterbury Law Review* 57, 76.
[90] *Terra Holdings Ltd v Sope* (Vanuatu Court of Appeal, Lunabek, CJ, Robertson, von Doussa, Saksak, Fatiaki, Speak JJA, 19 July 2012) ('*Terra Holdings*'), available via www.paclii.vu at [2012] VUCA 16..
[91] *Terra Holdings*, above n 90, [5]-[8].
[92] *Constitution of the Republic of Vanuatu 1980* art 73.
[93] *Terra Holdings*, above n 90, [12].
[94] *Terra Holdings*, above n 90, [63].
[95] Mick Strack, above n 22, 23.
[96] Mick Strack, above n 22, 24.
[97] Mick Strack, above n 22, 24.

This assumption formed the basis for the controversial decision in *Attorney-General v Ngati Apa.*[98] In *Ngati Apa,* eight northern South Island *iwi* (tribes) applied for orders declaring the foreshore and seabed of the Marlborough Sounds Māori customary land. Elias CJ accepted that while there is a presumption that the seabed and foreshore belong to the Crown at common law, Māori custom and usage displaces any common law presumption unless such land interests have been lawfully extinguished.[99] Therefore, the court determined that the seabed and foreshore could be subject to customary ownership.[100]

The New Zealand government's hasty reaction was to pass the *Foreshore and Seabed Act 2004,* which prevented further claims to customary title of the foreshore.[101] This sparked further debate and eventually resulted in the *Marine and Coastal Area (Takutai Moana) Act* in 2011 which replaced the *Foreshore and Seabed Act.* This new law established a 'no ownership' regime.[102] The Act recognised that Māori may have customary interests in the foreshore and seabed, but that those interests cannot prevent public use and access of those areas.

The legal developments in these jurisdictions place more weight on customary values of land ownership. This starkly contrasts with Webster CJ's heavy reliance on common law legal concepts and precedents. Like other Pacific Island nations and New Zealand, land plays an important role in Tongan society and culture. Ongoing tensions between Western legal concepts and the increasing demands of a changing Pacific must be addressed.

GOING FORWARD

It is evident that the current law in Tonga is inadequate and that vast changes must be made. The final section of this case note briefly considers some alternative solutions for addressing foreshore ownership and land erosion in Tonga.

Public interest

Webster CJ stressed the importance of Crown ownership of the foreshore to ensure that the public have free and easy access to those areas. This interest was a crucial reason for deciding that the Crown was the rightful owner of the strip of land, despite any extenuating factors or the impact it would have on the plaintiff.[103] In fact, almost no consideration was given to the possible ramifications on the plaintiff's enjoyment of his land.

Contrastingly, in *Terra Holdings,* extensive consideration was given to whether the public interests of free access and use outweigh customary interests in land. This was due to the operation of Article 5 and 73 of the Constitution, which protects the people of Vanuatu from unjust deprivation of property.[104] Due to the Constitution, the Court was required to consider the impact of the development on the landowners' rights and enjoyment of the land and whether the development would materially affect those rights to the extent that it can be said to amount

[98] *Attorney-General v Ngati Apa* [2003] 3 NZLR 634 ('*Ngati Apa*').
[99] *Attorney-General v Ngati Apa.* above n 98, [16].
[100] *Attorney-General v Ngati Apa.* above n 98, [52].
[101] Mick Strack, above n 22, 25.
[102] Mick Strack, above n 22, 25.
[103] *Ongosia v Tongia,* above n 1, 202.
[104] *Constitution of Vanuatu 1980* art 5(1)(j), art 73.

to an unjust deprivation of property.[105] In relation to whether it was a deprivation of property, the proposed development extended over a substantial area of custom land below the low water mark. The development would change the physical characteristics of the land, the marine biodiversity and fisheries resources would be destroyed, and the owners' customary practices over the seabed would be permanently extinguished. Thus, it constituted a deprivation of property.[106]

The second consideration was whether the deprivation would be 'unjust'. Terra Holdings argued that the deprivation was lawful as it served a public interest of tourism. However, the Court held that this claim lacked substance. Any benefit was dwarfed by the extent and magnitude of the deprivation of property. Here, there was no urgent need of safety, protection, or defence. Thus, a public interest argument could not be justified without the Government first obtaining title through the relevant legal processes.[107] As the Government did not take the necessary steps of compulsory acquisition and compensation, the approval was deemed invalid as an unjust deprivation of property.[108]

Similar reform to protect unjust deprivation of property in Tonga may provide relief for the expected continual loss of land at the hands of rising sea levels. However, this presents unique challenges as land in Tonga belongs to the Crown.[109] In this context, questions arise as to whether the Crown, the owner of the allotment, or both are being deprived of property.

Duty of care

Another consideration is whether the Tongan government should be subject to a duty of care to protect the land from rising sea levels. In *Falkner v Gisborne City Council*,[110] the Court held that there was a duty on the Crown to protect land from erosion. However, the Court clarified that this duty is for the protection and safety of the public and not for the benefit of private landowners.[111] Nonetheless, if the Crown is the rightful owner of the foreshore in Tonga, it may be necessary to impose a duty on it to prevent future erosion for the benefit of the public. This might, in turn, protect lessees and allottees in Tonga.

CONCLUSION

The application of the common law of accretion, while perhaps providing acceptable solutions in the past, is manifestly inappropriate as a resolution mechanism for property boundaries in a climate change future. It is imperative that consideration of local land tenure systems and modern climate circumstances be taken into account in the development of land law in Tonga going forward.

[105] *Terra Holdings*, above n 86, [50].
[106] *Terra Holdings*, above n 86, [52].
[107] *Terra Holdings*, above n 90, [61].
[108] *Terra Holdings*, above n 90, [63].
[109] *Constitution of Tonga 1875* s 104.
[110] *Falkner v Gisborne District Council* [1995] 3 NZLR 622.
[111] *Falkner v Gisborne District Council*, above n 110, [34].