# Sir Buri Kidu Lecture, 17 May 2023 at the University of Papua New Guinea, Port Moresby

## *"Prerogative writs and modern judicial review – constancy and change"*

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It is an honour to give this annual lecture, named for the first Papua New Guinean to serve as Chief Justice of the Supreme Court. Australians no doubt feel Sir Buri Kidu has a special connection to our country, given that he attended school and studied for his degree in law in Queensland. And of course it was as a student in Brisbane that he met his future wife, herself a Queenslander, who became Dame Carol Kidu. But the education which he had and the public service he gave, which extended over most of his adult life, was for his country.

As Chief Justice, Sir Buri Kidu was well known for his views about the importance of the independence of the judiciary. He understood that public perception of the courts as independent from external pressure is critical to the courts' effectiveness in society. Nowhere is the perception of independence more important than in the exercise by the courts of their power of review of governmental decision-making.

Judicial review of government decision-making has its source in the common law of England. The original remedies given by the courts with respect to unauthorised governmental action were the prerogative writs of the King's Bench. The supervisory powers associated with the writs inhered in our courts with the reception in our countries of the common law. The *Constitution of the Independent State of Papua New Guinea* expressly acknowledges this. The *Commonwealth Constitution of Australia* provides for the grant of certain of the prerogative writs and other remedies as part of the original jurisdiction of the High Court of Australia. Constitutional recognition serves to protect the supervisory role of the courts and points to this aspect of the common law as a *constant* for both our legal systems.

This does not mean that the supervisory power of our courts to review government action is immune from *change*. The *Commonwealth Constitution of Australia* was framed upon an expectation that the courts would continue to develop the common law to meet changing conceptions of justice and the needs of our society. The principles stated in the Preamble of the *Constitution of the Independent State of Papua New Guinea* exhort the judiciary to 'encourage and promote Papua New Guinea ways in defining and shaping [its] national sovereignty'.[1]

Since Federation in Australia in 1901 there have been developments in the common law relating to judicial review. For a time, it seemed that the complex procedures associated with the prerogative writs would stifle the development of the common law. Ironically it was a statute which provided for a simplified process of review and resulted in many cases coming before the courts which led to the High Court seeking an organising principle. That principle would confirm and protect the role of the courts in determining the limits of governmental power and align the common law with the *Constitution*.

**The history and purpose of judicial review**

As mentioned at the outset, the law of judicial review in Australia and in Papua New Guinea has its roots in the jurisdiction and practices of the original King's court or *Curia Regis* in England. Generally speaking, in Australia the view is taken that the common law was 'received'. Other former colonies may regard it as having been imposed. But history teaches that it has not been uncommon for new laws or legal processes to have an external source rather than resulting from internal development. We tend to overlook that the prerogative writs had their origin in the courts of William the Conqueror and were themselves a result of invasion and settlement.[2]

By the end of the 13th century the *Curia Regis* had been divided into two: the 'Common Bench' or 'Court of Common Pleas', and the 'King's Bench'.[3] The jurisdiction of the King's Bench developed so that it came to correct and supervise the decisions of all other courts and judges.[4]

Writing in 1768, Blackstone described the King's Bench as 'the supreme court of common law in the kingdom'. [5] He said that '[t]he jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority'.[6] The means by which the King's Bench kept other courts within the limits of their jurisdiction and power were the prerogative writs – certiorari, prohibition, mandamus and habeas corpus. Although on occasion they were issued out of the Court of Common Pleas and Chancery, they were pre-eminently issued out of the King's Bench exercising its supervisory jurisdiction.[7]

The supervisory jurisdiction of the King's Bench over other courts came to be extended to the decisions made by administrators. It is said that judicial review in an administrative law sense through the use of the prerogative writs was seen by the early 17th century.[8] They began to be used in connection with administrative agencies such as the Commissioners of Sewers.[9] With the expansion of State functions in post-industrial England and the emergence of many statutory bodies and administrative agencies, the way was open for the expansion of judicial review of government action.

Of course the power exercised was not then called 'judicial review'. Substantive law principles at that time were expressed in terms of procedure and remedies. The courts' power was articulated as being the power to grant the prerogative writs. Importantly, this power was inherent, coming from the common law developed by the courts, not statute.[10] The courts saw their role as enforcing the rule of law. The prerogative writs came to be a key means by which the King's Bench supervised exercises of public power. By means of the prerogative writs administrative decisions could be effectively invalidated and actions upon those decisions prohibited. And in time the colonial courts in Australia came to exercise the power to issue them.

**Judicial review in Australia: the colonial courts**

When the Supreme Courts of the colonies of New South Wales and Van Diemens Land were established in 1823, the judges of those courts were given the jurisdiction and power of the common law courts at Westminster, including the King's Bench.[11] This was a momentous step for the colonies. Prior to this the colonial courts had no power to issue prohibition, certiorari, mandamus or habeas corpus. Now the courts were for the first time in a position to impose legal control on the institutions which exercised power in and over the respective colonies.[12]

The first Chief Justice of New South Wales, Sir Francis Forbes, evidently understood the supervisory jurisdiction to be inherent in the creation of superior courts and to reflect constitutional principles of the common law. He had no difficulty in asserting authority by way of that supervisory jurisdiction over the executive (such as it was at the time).[13] In a notable case some fifteen men had been arrested for cattle stealing and detained for many weeks with little action having been taken to remand them for trial.[14] One of the few trained barristers in the colony of the time successfully applied to a court, over which the Chief Justice presided, by writ of habeas corpus. The court granted an order for the men's discharge.

Judicial supervision of executive action in Australia has long been an important part of the legal and political landscape in Australia. In fact, it preceded control of the executive which would be brought about constitutionally, through the creation of democratically elected legislatures and acceptance of the principle of responsible government. Its importance in colonial times continued as the colonies were federated as States. The common law methods of judicial review developed through the 20th century, but now in a context created by the *Constitution*, although this influence would not be obvious for some time.

**Judicial review and the Constitutions**

In 1972, speaking of the establishment of a Constitutional Planning Committee to undertake the drafting of an independent Constitution for Papua New Guinea the Chief Minister, then Mr Michael Somare, spoke of the idea of a 'home-grown *Constitution*'.[15] By that it was meant that the *Constitution* should not just be adopted from another foreign precedent and should not depend on the transfer of power from the departing colonial authority.[16]

Australia's *Constitution* was also home-grown. It was framed by Australians after many years punctuated by vigorous debate as to how to bring together the colonies into one federated State. The structure and system of governance was crucial to its successful operation as were the institutions it created such as the courts. The *Constitution* separated the branches of government and gave to the federal judicial branch the judicial power of the Commonwealth.

The framers of our *Constitution* accorded a special place to the judiciary. It gave them the power, and the duty, to assess the validity of both legislative and executive acts against relevant constitutional and statutory requirements. The statement made by Chief Justice Marshall in *Marbury v Madison* is often cited in judgments in Australia: '[i]t is emphatically the province and duty of the judicial department to say what the law is'.[17] It follows from that statement that it is the duty of the courts to declare and enforce the law. In doing so they must from time to time determine the limits of the powers of all three branches of government. One of the means by which the courts do so is judicial review and the remedies associated with it. In these respects, our respective constitutions provide similar powers.

The *Commonwealth Constitution* entrenches judicial review by the High Court in the provision is makes in s 75(v) by which the court may make orders of prohibition, mandamus or injunction with respect to the conduct of officers of the Commonwealth. The term 'officers of the Commonwealth' is understood broadly and includes Ministers. Section 75(v) cannot be removed or amended by Parliament. The provision has been described as 'a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them'.[18]

Papua New Guinea's *Constitution* provides the National Court with 'inherent power to review any exercise of judicial authority'.[19] More relevant for present purposes is s 155(4), which provides that both the National Court and the Supreme Court have 'an inherent power to make... orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case'. It has been held that the 'other orders' can include injunctions.[20]

Undeniably the purpose of judicial review is accountability - to subject the executive government to the rule of law. It may be understood as an aspect of the rule of law because it operates to prevent that branch of government from exceeding its powers. The courts of Papua New Guinea and Australia continue the commitment to the rule of law which, it will be recalled, informed the processes of the King's Bench.

**Developments in Australia**

For the first eight decades following Federation, the prerogative writs and the injunctions in s 75(v) of the *Constitution*, together with declaratory relief, were the principal means by which executive decision-making in the Commonwealth could be supervised. As late as 1979 it was said by the High Court that '[t]he use of the word "prohibition" in s 75(v) imports into [the High Court's] jurisdiction the law appertaining to the grant of prohibition by the King's Bench'.[21] Whilst this acknowledged that the common law continued to inform these constitutional remedies, it had for some time been observed that the practices and procedures associated with the common law remedies were 'unwieldy and unnecessary'.[22] Even lawyers could not fully understand their technicalities. It was evident that the prerogative writs procedures could not properly provide for the judicial review of administrative action in modern times.

In 1971, the Commonwealth Administrative Review Committee,[23] recommended that there be a comprehensive system of administrative law, one which is 'essentially Australian and which is specially tailored to meet our own experience, needs and constitutional problems'.[24] The recommendations of the Committee, and its successors,[25] eventually led to the creation of the Commonwealth Ombudsman, the Federal Court and the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'), which commenced operation in 1980. The federal court system in Australia now had a court and tribunal other than the High Court to whom persons could have recourse for judicial review of administrative decisions or actions which adversely affected them. Importantly, the *ADJR Act* provided in a simplified form grounds for review and remedies.

**Common law principle**

The enactment of the *ADJR Act* was significant, not the least because one of its principal purposes was to facilitate access to the courts. But this did not mean that the common law of judicial review had become redundant, even if the courts had been slow to develop and clarify it. With the growth of administrative law cases coming before the courts, the High Court was able to turn its attention to the common law rules upon which the statutory grounds were based, such as the requirements of procedural fairness, rationality and consideration of relevant considerations.

What was missing from both the statute and the common law was a fundamental or organising principle. It is only by reference to such a principle that the courts could more effectively determine the limits of governmental decision-making. The answer for Australian courts was found in the principle of 'jurisdictional error'. Over time the star of jurisdictional error as a basis for judicial review has risen, whilst the significance of the statutory regime has declined.[26] And it would be this principle which would be used to develop a coherent constitutional and common law approach to judicial review and the prerogative writs.

The idea of jurisdictional error is of a decision which is 'made outside jurisdiction' or as 'wanting in authority'.[27] It would later be said by the High Court that a decision that involves jurisdictional error is one that lacks legal foundation and is properly regarded, in law, as no decision at all.[28] The idea of jurisdictional error can be seen in early decisions of the High Court of Australia, although the ubiquity of the contemporary label is more recent. The idea had been conveyed in decisions as early as 1914 by expressions such as 'wrongful assumption of jurisdiction' and 'proceeding without or in excess of jurisdiction',[29] although the early cases did not have the constitutional context which jurisdictional error came to have. The adoption of jurisdictional error as the governing principle for judicial review was a distinctly Australian approach which differed from English law.

In decisions in the 1990s,[30] the concept of jurisdictional error could be seen in the refusal to follow the approach of the English courts,[31] and in the language of jurisdictional error, both implicit and express. In the course of these decisions, which confirmed the centrality of the principle, two key features were identified. First, the principle served to confirm the role of the courts in determining the limits of a decision-maker's powers and, second, the jurisdiction of the court went no further.[32] Both these features are grounded in the notions of the separation of judicial power and the rule of law.

**The constitutional writs**

The conception of the common law supervisory power of judicial review, framed around jurisdictional error, then informed the writs provided for in the *Constitution*. In a case in 2000,[33] it was accepted that the writs would only be applied to cure jurisdiction errors. It was also accepted that a failure to afford procedural fairness constituted such an error. The effect of this and other decisions was that the common law of judicial review and the soon to be called 'constitutional writs' were now more closely aligned. They were founded on the same principles, having the features earlier referred to.

The constitutional writs had the advantage that they were constitutionally entrenched. The High Court's power to provide relief from decisions of officers of the Commonwealth which were tainted by jurisdictional error could not be ousted by legislation. This was made clear when amendments to the *Migration Act* in 2001 included a provision which purported to insulate decisions and put them beyond the reach of the prerogative or constitutional writs.[34] The Court read the provision as applying only to decisions not affected by jurisdictional error.[35]

**Papua New Guinea's *Constitution* and judicial review**

The *Constitution of the Independent State of Papua New Guinea* in its Preamble points the way to the development of a distinctively PNG approach to law and governance. The former Chief Justice, Sir Arnold K Amet, expressed the view that some of the goals expressed in the Preamble 'direct state instrumentalities including the judiciary to encourage and promote Papua New Guinean ways in defining and shaping our national sovereignty'.[36] And he said that, as a body of law, administrative law is intended to ensure 'just and honest government'.[37]

Like Australia, Papua New Guinea inherited the common law. The historical powers to which the common law provided such as judicial review are acknowledged constitutionally to inhere in the courts. It is expected that the courts will develop that body of law consistently with the *Constitution* and in accordance with the demands of the PNG society.

**Conclusion**

In 1993, Sir Buri Kidu remarked on the role the rule of law has had in driving legal thought in the South Pacific.[38] Its continuing importance being 'symbolized by the homegrown constitutions adopted' throughout the region. He continued:

> 'To safeguard the freedoms and rights enshrined in these constitutions, the constitutions have been made the supreme law of the land, and the courts have been empowered to uphold the supremacy of the constitution.'[39]

Each of our countries has the important legacy of the old common law prerogative writs. What remains of them is the essential idea of an independent judiciary which has a duty to declare the law and determine the limits of governmental power. This is a reflection of the rule of law to which our countries strive to be faithful.

The old writs now have a constitutional context so that their fundamental principles are entrenched. As Sir Buri noted, it is for the courts, empowered to uphold the supremacy of their constitution, to develop the processes and remedies by which this jurisdiction can provide the clearest guidance and protection from unauthorised governmental action.

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[1] Sir Arnold K Amet, 'Introduction', in E L Kwa et al (eds), *Development of Administrative Law in Papua New Guinea* (School of Law and Business Studies, University of Papua New Guinea, 2000) 1, 4.

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[2] William Stubbs, *The Constitutional History of England: In Its Origin and Development* (Clarendon Press, 1880) vol 1, 442.

[3] Sir William Holdsworth, *A History of English Law* (Street & Maxwell, 1966) vol 1, 56.

[4] Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England; Concerning The Jurisdiction of Courts* (W Clarke and Sons, 1817) 71-3.

[5] Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1768) bk 3, ch 4, 41.

[6] Ibid 42.

[7] See S A de Smith, 'The Prerogative Writs' (1951) 11(1) *Cambridge Law Journal* 40, 43-4, 49. Though note that there appears to be some controversy as to *when* the shift transpired whereby most prerogative writs were being issued out of the King's Bench: n 28a. See also Edward Jenks, 'The Prerogative Writs in English Law' (1923) 32(6) *The Yale Law Journal* 523.

[8] Edith G Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press, 1963) chs 2 and 3.

[9] *Hetley v Boyer, Mildmay & Ors* (1613/1614) Cro Jac 336; 79 ER 287; and *The King v Smith* (1670) 1 Lev 288; 83 ER 411. See generally, William John Broderip (ed), *The Reading of the Famous and Learned Robert Callis, Esq Upon the Statute of Sewers, 23 Hen VIII c 5 As It Was Delivered By Him At Gray's Inn, in August, 1622* (Joseph Butterworth and Son, 1824) 309, 342-3.

[10] See, eg, *The King v Berkley and Bragge* (1754) 1 Keny 80; 96 ER 923, 931: 'There can be no doubt but the King has a right, an inherent common law right, an antecedent right, to certiorari'.

[11] *New South Wales Act 1823* (UK) (4 Geo IV c 96):

'And be it further enacted that the said courts respectively shall be courts of record and shall have cognizance of all pleas civil criminal or mixed and jurisdiction in all cases whatsoever as fully and amply to all intents and purposes in New South Wales and Van Diemen's Land respectively and all and every the islands and territories which now are or hereafter may be subject to or dependent upon the respective governments thereof as His Majesty's courts of King's bench Common Pleas and Exchequer at Westminster[.]'

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[12] Ian Holloway, 'Sir Francis Forbes and the Earliest Australian Public Law Cases' (2004) 22 *Law and History Review* 209, 216.

[13] Ibid 218-20.

[14] *In re Byrne et al* [1827] NSWSupC 9 (26 February 1827).

[15] Quoted in Anthony J Regan, 'Introduction', in Anthony J Regan, Owen Jessup and Eric L Kwa (eds), *Twenty Years of the Papua New Guinea Constitution* (Lawbook Co., 2001) 1, 4.

[16] Anthony J Regan, 'Introduction', in Anthony J Regan, Owen Jessup and Eric L Kwa (eds), *Twenty Years of the Papua New Guinea Constitution* (Lawbook Co., 2001) 1, 5.

[17] (1803) 5 US 137, 177.

[18] *Plaintiff S157/2000 v Commonwealth* (2003) 211 CLR 476 at 513-4 [104].

[19] *Constitution of the Independent State of Papua New Guinea* s 155(3)(a).

[20] *Powi v Southern Highlands Provincial Government* [2006] PGSC 15, [15]-[17]; *Special Reference Pursuant to Section 19(1) of the Constitution* [2019] PGSC 53, [10].

[21] *R v Judges of the Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 201.

[22] Commonwealth Administrative Review Committee, *Report of the Commonwealth Administrative Review Committee* (1971) 20 [58]. See also, Harry Whitmore, 'Australian Administrative Law – A Study in Inertia' (1963) 36 *Australian Law Journal* 255, 255-6.

[23] Consisting of Sir John Kerr, Sir Anthony Mason, the Hon Robert Ellicott and Professor Harry Whitmore and which became known as the 'Kerr Committee'.

[24] *Report of the Commonwealth Administrative Review Committee* (n 22) 71.

[25] Committee of Review, *Prerogative Writ Procedures* (Parliamentary Paper No 56, 1973).

[26] John Griffiths, 'Judicial Review of Administrative Action in Australia' (2017) 88 *AIAL Forum* 9, 9.

[27] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 133 [24], [26] .

[28] *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-5 [51].

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[29] *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 152 [5], referring to the *Tramways Case [No 1]* (1914) 18 CLR 54, 62, 65, 72.

[30] *Attorney-General (NSW) v Quin (1990)* 170 CLR 1; *Craig v South Australia* (1995) 184 CLR 163; *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620.

[31] See *Craig v South Australia* (1995) 184 CLR 163, 178-9, where Brennan, Deane, Toohey, Gaudron and McHugh JJ discuss the approach in England as set out in *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147.

[32] *A-G (NSW) v Quin* (1991) 170 CLR 1, 35-6.

[33] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

[34] *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), Sch 1.

[35] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 506-7 [76]-[78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[36] Sir Arnold K Amet, 'Introduction', in E L Kwa et al (eds), *Development of Administrative Law in Papua New Guinea* (School of Law and Business Studies, University of Papua New Guinea, 2000) 1, 4.

[37] Sir Arnold K Amet, 'Introduction', in E L Kwa et al (eds), *Development of Administrative Law in Papua New Guinea* (School of Law and Business Studies, University of Papua New Guinea, 2000) 1, 3.

[38] Sir Buri Kidu, 'Foreword' in Michael A Ntumy, *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993).

[39] Ibid.