REDEFINING LANDSCAPES: ADMINISTRATIVE LAW AND CUSTOMARY LAND OWNERSHIP IN *ESSO P'NYANG LIMITED V BERNARD*

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ABSTRACT

This case note analyses the decision of the Supreme Court of Papua New Guinea in *Esso P'nyang Limited v Bernard*. After considering the procedural history and outcomes at first instance and on appeal, the case note contends that the decision failed to uphold the legal interests of the customary landowner claimants. The case note critiques the Supreme Court's approach to construing provisions under the *Oil and Gas Act 1993* (Papua New Guinea) and the *National Court Rules 1983* (Papua New Guinea), and to questions of standing in administrative law. It is argued that the outcome in *Esso P'nyang Limited v Bernard* failed to achieve the Supreme Court's constitutional mandate to develop an administrative law suited to the unique context of Papua New Guinea. This approach failed to respect the deep significance of customary land ownership to Papua New Guinea's legal system, economic development, and environmental sustainability.

INTRODUCTION

Recent proceedings between a petroleum developer and customary landowners in Papua New Guinea reveal the tensions underlying the country's administrative law. Customary land ownership accounts for over 97% of Papua New Guinea's land mass.[1] Autonomous customary law gives rise to constitutionally recognised deep legal pluralism.[2] Consequently, administrative law, particularly as it concerns customary owners, plays a key role in balancing the country's economic development against the preservation of its traditional social structures and natural resources.

In *Esso P'nyang Limited v Bernard*[3] ('*Esso v Bernard*'), the Supreme Court of Papua New Guinea responded to a claim by customary landowners in respect of the development of the P'nyang gas fields in the Western Province of Papua New Guinea. Mr Bernard commenced representative proceedings on behalf of the Wokflyak clan of Kayangabip Village, seeking declarations and injunctions to restrain the development of the P'nyang gas fields. Mr Bernard argued that the developer, Esso P'nyang Limited ('Esso'), and various government officials

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[1] Charles Yala, 'Rethinking Customary Land Tenure Issues in Papua New Guinea' (2006) 21(1) *Pacific Economic Bulletin* 129, 129. https://openresearch-repository.anu.edu.au/bitstream/1885/157848/1/211_rethinking.pdf (Accessed 10 August 2023).

[2] *Constitution of the Independent State of Papua New Guinea* s 18, sch 2.3 ('*Constitution*').

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

had failed to comply with the statutory procedures governing petroleum development in the *Oil and Gas Act 1993* (Papua New Guinea) ('*Oil and Gas Act*').[4]

The Supreme Court's decision to dismiss Mr Bernard's claim on procedural grounds is an unsatisfactory legal and practical outcome. First, a mischaracterisation of Mr Bernard's claim led the Supreme Court to incorrectly apply various provisions of Papua New Guinea's written law. Second, the Supreme Court's approach to questions of standing overlooked the depth of customary land ownership in Papua New Guinea and failed the Court's constitutional mandate to develop a uniquely Papua New Guinean administrative law.

CASE OUTLINE

Facts

The Wokflyak clan of Kayangabip Village was among the customary owners of the P'nyang area of the Western Province of Papua New Guinea. Esso held a petroleum retention licence for gas fields in the area with terms governed by s 42 of the *Oil and Gas Act*. In 2015, Esso applied to convert its petroleum retention licence into a petroleum development licence in accordance with s 53(2) of the *Oil and Gas Act*. While the petroleum retention licence recognised Esso's exclusive title to the gas at the P'nyang site, a petroleum development licence would permit Esso to begin extracting this gas and, eventually, convey this gas to its existing infrastructure in the Southern Highlands of Papua New Guinea.[5]

Throughout the licence conversion process, Esso and certain government officials were required to comply with procedures in the *Oil and Gas Act*. This included a requirement under s 47(5) for Esso to identify the customary landowners of the P'nyang site by carrying out social mapping and landowner identification studies.[6] Following these studies, the government officials were obliged by s 48(1) to convene a development forum with the customary landowners.[7] The relevant provisions in ss 47 and 48 are extracted below:

> **47. SOCIAL MAPPING AND LANDOWNER IDENTIFICATION STUDIES.**
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> …
>
> (5) If a licensee or a person makes an application for a petroleum development licence under Section 53, the licensee shall submit with that application a full-scale social mapping study and landowner identification study of customary land owners in –
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> (a) the licence area of that petroleum development licence; and …
>
> (d) other areas which would be affected by the petroleum project if developed. …
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> **48. DEVELOPMENT FORUM.**
>
> (1) Subject to Section 169(8), prior to the first grant of a licence or licences in respect of a petroleum project, the Minister shall convene a development forum at a place close to the

[4] *Oil and Gas Act 1993* (Papua New Guinea) ss 47, 48 ('*Oil and Gas Act*').
[5] *Oil and Gas Act*, above n 4, s 59.
[6] *Oil and Gas Act*, above n 4, s 47(5).
[7] *Oil and Gas Act*, above n 4, s 48(1).

proposed licence area to provide ease of access, being a meeting to which are invited persons who, in the view of the Minister, will be affected by that petroleum project, including –

(a) the applicant or intending applicant for the licence or licences; and

(b) the project area landowners determined under Section 169(2) or their duly appointed or elected representatives; and …[8] (footnotes omitted)

On 29 October 2015, the Minister for the Department of Petroleum and Energy ('DPE') ('Minister for DPE') issued a declaration pursuant to s 169(2) of the *Oil and Gas Act* identifying the customary landowners of the P'nyang site which were entitled to compensation in respect of the development. This included the Wokflyak clan. The relevant extracts of s 169 appear below:

169. IDENTIFICATION OF LANDOWNER BENEFICIARIES.

…

(2) Prior to convening or during a development forum under Section 48, the Minister shall determine, by instrument–

(a) the persons (other than affected Local-level Governments or affected Provincial Governments) who shall receive the benefits granted by Sections 167 and 168; and

(b) the incorporated land groups or, if permitted in accordance with Section 176(3)(f), any other persons or entities who shall represent and receive the benefit on behalf of the grantees of the benefit. …

(10) A ministerial determination made pursuant to the section shall not be reviewable before any court unless an application for review is made within 28 days of the Ministerial determination.[9]

In November 2015, Mr Bernard, a customary owner of the P'nyang site, commenced proceedings in his own capacity and on behalf of the Wokflyak clan of Kayangabip Village, against:

- the Honourable Nixon Duban, MP, Minister for DPE;
- Mr Rendle Rimua, Secretary for DPE;
- the Chairman (Mr Rendle Rimua) of the Petroleum Advisory Board; and
- the Independent State of Papua New Guinea (collectively, 'the government defendants').

Mr Jackson Kolo appeared for Mr Bernard and the government defendants were represented by the Solicitor General, Ms Faith Barton. Mr Bernard claimed that the social mapping and landowner identification studies at the P'nyang site did not comply with s 47 of the *Oil and Gas Act*. Representatives of the government defendants purported to carry out some social mapping and landowner identification studies at the P'nyang site, and their studies identified Mr Bernard and the Wokflyak clan as customary owners of the P'nyang site. However, Mr Bernard argued that in carrying out these studies, the representatives of the government defendants:

[8] *Oil and Gas Act*, above n 4, ss 47, 48.
[9] *Oil and Gas Act*, above n 4, s 169.

- spent minimal time at each location they visited;
- did not visit all relevant locations, and relied on third-party reports of the customary landowners present at locations which they did not visit; and
- failed to verify the information finalised in the studies with the relevant customary leaders or district and provincial council wards.[10]

Mr Bernard sought:

- interim and permanent injunctions restraining the government defendants from holding a development forum and thus from proceeding to develop the P'nyang site; and
- various declarations concerning the validity of the social mapping and landowner identification studies.

The National Court of Papua New Guinea granted the interim injunction sought by Mr Bernard ex parte and joined Esso as a party likely to be affected by the injunction. Esso was represented by Mr Ian Molloy & Mr Allan Mana. Two judgments have been issued in the proceedings, each concerning whether the interim injunction should remain in place: *Bernard v Duban*[11] ('first instance decision'), and *Esso v Bernard*[12] ('appeal decision').

First instance decision

Issues

Justice Kandakasi presided over an interim hearing in the National Court to determine whether the interim injunction should remain on foot to restrain the government defendants from convening a development forum and consequently from continuing to develop the P'nyang gas site. This required his Honour to consider, firstly, whether there was an arguable case that Esso had not met the requirements for social mapping and landowner studies at s 47 of the *Oil and Gas Act* and secondly, whether the interests of justice favoured the continuation of the interim injunction, having regard to locus standi, irreparable damage, balance of convenience, and an undertaking as to damages.[13]

Outcome at first instance

Justice Kandakasi found in favour of Mr Bernard and held that the interim injunction should remain on foot until the final resolution of the issues in the proceedings.[14] In accordance with s 18 of the *Constitution*, his Honour referred certain constitutional questions which arose in the hearing to the Supreme Court for determination.[15]

Justice Kandakasi reached this decision based on *ratio* concerning the operation of the *Oil and Gas Act*. His Honour held that the requirements for social mapping and landowner identification studies at s 47 are express preconditions to the grant of petroleum prospecting,

[10] *Bernard v Duban* (National Court, Papua New Guinea, Kandakasi J, 27 May 2016), available via ww.paclii.org at [2016] PGNC 121, [13] http://www.paclii.org/ ('*Bernard v Duban*').
[11] *Bernard v Duban*, above n 10.
[12] *Esso v Bernard*, above n 3.
[13] *Bernard v Duban*, above n 10, [3].
[14] *Bernard v Duban*, above n 10, [118].
[15] *Bernard v Duban*, above n 10, [37].

retention, and development licences.[16] The identification of customary owners for the purposes of s 47 must be governed by custom.[17] Social mapping studies must be undertaken by persons with the necessary training, skills, knowledge, and expertise to conduct such studies within Papua New Guinea.[18] The studies must yield a complete list of the persons with customary ownership, rights, or interests in the relevant land, and also note the nature of any disputes between those persons.[19]

Justice Kandakasi held that the remaining requirements for the grant of an interim injunction were satisfied. In relation to locus standi, his Honour held that only persons who have an interest in the subject matter of a complaint have standing.[20] In relation to irreparable damage, Kandakasi J held traditional owners would suffer permanent upset and damage as a result of a petroleum development licence granted without proper mitigating measures, including harm to their way of life, environment, culture, and tradition.[21] For developers, the potential damage caused by the grant of an injunction is limited to loss of income which can easily be recovered through commercialisation of other resources, tax offsets, and similar measures.[22] In relation to an undertaking as to damages, Kandakasi J held that there is no such requirement in Papua New Guinea's law because most of the country's citizens are impecunious; importing this requirement would act as barrier to those citizens enforcing their legal rights in court.[23]

Further remarks by the National Court

Kandakasi J made further remarks in *obiter dicta* concerning the obligation for petroleum developers to comply with Papua New Guinea's Constitution, particularly the individual rights it protects[24] and the Fourth National Goal.[25] The Fourth National Goal requires that the country's natural resources and environment be conserved and used for the collective benefit of all its citizens. Although non-justiciable, the Fourth National Goal is an important principle which guides 'government, policy and all other decision makers, including the Courts'.[26] Further, his Honour noted that petroleum development carries the potential to undermine the right to life enshrined at s 35 of the Constitution, by disturbing all aspects of customary landowners' natural environment, from air quality to traditional social and leadership structures.[27]

[16] *Bernard v Duban*, above n 10, [73].
[17] *Bernard v Duban*, above n 10, [49].
[18] *Bernard v Duban*, above n 10, [73].
[19] *Bernard v Duban*, above n 10, [77].
[20] *Bernard v Duban*, above n 10, [98].
[21] *Bernard v Duban*, above n 10, [105]–[106]; Chris McGrath, 'Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in Papua New Guinea against Australia's Largest Climate Polluter' (2020) 37 *Environmental and Planning Law Journal* 42, 54–55 http://envlaw.com.au/wp-content/uploads/mcgrath_2020.pdf (Accessed 26 July 2023).
[22] *Bernard v Duban*, above n 10, [107].
[23] *Bernard v Duban*, above n 10, [115].
[24] *Constitution*, above n 2, ss 44, 45, 48, 49, 51, 53.
[25] *Constitution*, above n 2, preamble para 4.
[26] *Bernard v Duban*, above n 10, [23].
[27] *Bernard v Duban*, above n 10, [105].

Appeal decision

Issues

Esso appealed the decision by Kandakasi J to extend the interim injunction. The appeal required the Supreme Court to consider whether there was a serious question to be tried in the proceedings, and whether the balance of convenience and interests of justice favoured the continuation of the interim injunction. In determining whether there was a serious question to be tried, the Supreme Court considered whether Mr Bernard ought to have commenced the proceedings by a judicial review application, and whether the customary landowners had standing to bring a judicial review application. In response to an argument raised by Mr Bernard, the Supreme Court also considered Esso's competence to bring the appeal.

Disposition of the appeal

In a joint judgment, Logan, Toliken and Higgins JJ allowed Esso's appeal and dissolved the interim injunction. This permitted Esso and the government defendants to continue developing the P'nyang gas fields. Their Honours reached this decision on the basis that there was no serious question to be tried in the proceedings.[28]

Justices Logan, Toliken and Higgins held that where the substance of a proceeding alleges jurisdictional error by a public official and seeks remedies in the nature of mandamus, prohibition, certiorari or quo warranto, it will usually be an abuse of process to bring that proceeding other than by way of judicial review.[29] Further, s 169(10) of the *Oil and Gas Act* requires that challenges to ministerial declarations made under s 169(2) must be heard by way of judicial review, not merits review.[30] Their Honours held that if customary landowners are entitled to receive compensation for the development of their land,[31] and there is no evidence of special harm, they will not have standing to seek judicial review of decisions concerning the development because they are not persons aggrieved by those decisions.[32]

The Supreme Court also held that Esso was competent to bring the appeal.[33] Although the default position is that a party must seek leave to appeal, an appeal against an order continuing an interim injunction falls within the exception to this rule at s 14(3)(b)(ii) of the *Supreme Court Act 1975* (Papua New Guinea) given that it is substantially the same as an appeal against an order 'granting … an injunction'.[34] Further, a party is competent to bring an appeal where at least one ground of its appeal falls within the jurisdiction of the Supreme Court.[35]

[28] *Esso v Bernard*, above n 3, [22].
[29] *Esso v Bernard*, above n 3, [15].
[30] *Esso v Bernard*, above n 3, [15].
[31] *Oil and Gas Act*, above n 4, ss 167, 168.
[32] *Esso v Bernard*, above n 3, [16].
[33] *Esso v Bernard*, above n 3, [8].
[34] *Esso v Bernard*, above n 3, [6].
[35] *Esso v Bernard*, above n 3, [7].

Further remarks by the Supreme Court

Given that the Court reached its decision on the basis that there was no serious question to be tried, it was not required to consider the balance of convenience test. Nevertheless, Logan, Toliken and Higgins JJ made further comments in *obiter dicta* concerning this test. Their Honours remarked that where customary landowners stand to receive compensation in relation to a development project,[36] and where there is no evidence of special harm, their receipt of compensation means that the balance of convenience test will never weigh in their favour, because damages will always be adequate. As a result, the customary landowners will never have an interest justifying the grant of an interim injunction.

COMMENTARY

There are various difficulties with the Supreme Court's decision to allow Esso's appeal and dismiss Mr Bernard's claim on procedural grounds. First, the Supreme Court should not have concluded that it was an abuse of process for Mr Bernard to commence his claim other than by way of judicial review proceedings; this outcome was reached through a mischaracterisation of Mr Bernard's claim. Second, the Supreme Court's conclusion that Mr Bernard would not have standing for the purpose of judicial review proceedings misconstrues the nature of customary land ownership and runs contrary to the role of administrative law in Papua New Guinea.

An abuse of process for Mr Bernard to commence his claim other than by way of judicial review?

Mischaracterisation of Mr Bernard's claim

The Supreme Court reached its conclusion that Mr Bernard's claim was an abuse of process by interpreting the claim as a challenge to the Minister's declaration under s 169 of the *Oil and Gas Act*, and thus, in substance, a judicial review proceeding. This is a subtle mischaracterisation of Mr Bernard's claim which led to an unjust dismissal of the proceedings. The Supreme Court characterised Mr Bernard's claim as 'in substance, seeking to quash the Minister's determination [under s 169(2)] and to prohibit him from holding the development forum or converting or issuing any licence.'[37] Conversely, Kandakasi J in the first instance decision described Mr Bernard's claim as an application for an interim injunction to restrain the government defendants from convening a development forum (and thus developing the Pn'yang site), on the basis that Esso failed to carry out sufficient social mapping and landowner identification studies.[38] This is a claim for an interim injunction to restrain the process at s 48(1) of the *Oil and Gas Act*, based on contraventions of s 47. The Supreme Court adopted a similar description to Kandakasi J when recounting the declarations sought by Mr Bernard.[39] Logan, Toliken and Higgins JJ further noted that Mr Bernard 'sought, apart from permanent

[36] *Oil and Gas Act*, above n 4, ss 167, 168.
[37] *Esso v Bernard*, above n 3, [15].
[38] *Oil and Gas Act*, above n 4, s 47.
[39] *Esso v Bernard*, above n 3, [13].

injunctive relief of the kind granted on an interlocutory basis, a number of declarations.'[40] These declarations concerned only the validity of the social mapping and landowner identification studies, not the subsequent Ministerial declaration under s 169(2).

Contrary to the characterisation reached by the Supreme Court, Mr Bernard's claim focused only on the requirement for Esso to complete social mapping and landowner identification studies under s 47(5) of the *Oil and Gas Act*. Mr Bernard sought only injunctions and declarations in respect of these studies; he made no claim for additional relief in the nature of mandamus, prohibition, certiorari, or quo warranto.

Supreme Court's erroneous application of order 16 r 1 of the National Court Rules

The Supreme Court's mischaracterisation of Mr Bernard's claim led it to incorrectly apply ord 16 r 1 of the *National Court Rules 1983* (Papua New Guinea) ('*National Court Rules*') and s 169(10) of the *Oil and Gas Act*. This resulted in the Supreme Court's dismissal of Mr Bernard's claim. Justices Logan, Toliken and Higgins concluded that ord 16 r 1 required Mr Bernard to commence his proceedings by a judicial review application. The text of ord 16 r 1 provides as follows:

> **11. Cases appropriate for application for judicial review.**
>
> …
>
> (1) An application for an order in the nature of mandamus, prohibition, certiorari or quo warranto **shall** be made by way of an application for judicial review in accordance with this Order.
>
> (2) An application for a declaration or an injunction **may** be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to
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> (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari; and
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> (b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and
>
> (c) all the circumstances of the case,
>
> it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.[41] (emphasis added).

Their Honours applied r 1(1), which strictly requires that applications falling within that sub-rule 'shall' be made by way of judicial review application. Conversely, r 1(2) is drafted more broadly; applications falling within that sub-rule 'may' be brought by way of judicial review. In other words, applications for mandamus, prohibition, certiorari, or quo warranto must always be made by way of judicial review application, but there is greater flexibility for applications for declarations or injunctions. Applications for declarations or injunctions may (but not must) be pursued through a judicial review application.

The above analysis demonstrates that Mr Bernard sought only declarations and injunctions, and no relief in the nature of mandamus, prohibition, certiorari, or quo warranto. Therefore, it

[40] *Esso v Bernard*, above n 3, [13].

[41] *National Court Rules 1983* (Papua New Guinea) ord 16 r 1 ('*National Court Rules*').

seems clear that Mr Bernard's claim falls within r 1(2), not r 1(1) as applied by the Supreme Court. Pursuant to r 1(2), there was no binding obligation for Mr Bernard to commence the proceedings by way of judicial review application. On this analysis, it is difficult to accept the Supreme Court's conclusion that it was an abuse of process for Mr Bernard to commence the proceedings other than by way of judicial review.

Further, even if (contrary to this analysis) Mr Bernard's claim did fall with ord 16 r 1(1), the Supreme Court was not bound to strictly apply that provision. Pursuant to ord 7 of the *National Court Rules*, the Supreme Court retains discretion to dispense with the requirements under ord 16 r 1.[42] A flexible approach to these procedural rules would have achieved a more just result, particularly for plaintiffs that are not acquainted with complex court procedures, [43] such as Mr Bernard and the Wokflyak clan. Justice Kandakasi endorsed this flexible approach to the application of procedural rules, noting that 'the Courts should be slow to driving a plaintiff out from having his day in Court except only in the clearest of cases, for instance where there is no disclosure of a cause of action known to law'.[44] It was undoubtedly open to the Supreme Court to adopt a flexible approach when applying the procedural *National Court Rules*. The Court should not have applied ord 16 r 1(1) of the *National Court Rules* to dismiss Mr Bernard's claim as this approach misapplied the text of r 1(1) and deprived Mr Bernard of the opportunity to have his claim heard in Court.

Supreme Court's erroneous application of s 169(10) of the Oil and Gas Act

The other basis for the Supreme Court's conclusion that Mr Bernard's claim was an abuse of process was s 169(10) of the *Oil and Gas Act*, which provides that applications to review Ministerial declarations made under s 169(2) must be brought within 28 days of the declaration.[45] The Supreme Court held that Mr Bernard's claim contravened s 169(10) because, although made within 28 days, it was not brought as a judicial review application. Subsequent case law has affirmed that s 169(10) requires a judicial review application, as opposed to a merits review application.[46] However, when Mr Bernard's claim is properly understood, s 169(10) does not apply at all because Mr Bernard was not seeking to challenge the Ministerial declaration made under s 169(2).

As discussed, Mr Bernard's claim challenged only the social mapping and landowner identification studies carried out by Esso (pursuant to s 47(5) of the *Oil and Gas Act*), not the declaration of affected landowner beneficiaries by the Minister (pursuant to s 169(2)). This characterisation is intuitively preferable because Mr Bernard and the Wokflyak clan were identified by the Ministerial declaration as landowner beneficiaries in respect of the P'nyang gas site; it would have been incongruous for the owners to have challenged this finding. Section 169(10) is expressly limited to reviews of the Ministerial declaration issued under s 169(2), not

[42] *National Court Rules*, above n 41, ord 7.
[43] Morry Bailes, 'Foreign Activity in the South Pacific and its Implications for the Rule of Law' (31st LAWASIA Conference, Cambodia, 3 November 2018).
[44] *Bernard v Duban*, above n 10, [98].
[45] *Oil and Gas Act*, above n 4, s 169(10).
[46] *Pelego v Pok* [2021] PGNC 50 http://www.paclii.org/.

reviews of the requirements of ss 47 and 48 of the *Oil and Gas Act*. As a result, the Supreme Court ought not to have applied s 169(10) to Mr Bernard's claim.

Given that neither s 169(10) of the *Oil and Gas Act* nor ord 16 r 1(1) of the *National Court Rules* properly applied to Mr Bernard's claim, there was no requirement for Mr Bernard to commence proceedings by a judicial review application. Neglecting to do so was not an abuse of process.

Standing of customary landowners under Papua New Guinea's administrative law

The *Constitution* requires that administrative law reflect the nation's unique social context. The Supreme Court held that that the Wokflyak clan's entitlement to compensation denied the group standing for the purpose of administrative law. In doing so, the Court failed to appreciate the significance of customary law ownership to members of society in Papua New Guinea and accordingly fell short of its constitutional mandate.

Constitutional basis for administrative law in Papua New Guinea

The *Constitution* requires that administrative law derive from and reflect the unique context of deep legal pluralism in Papua New Guinea. The Supreme and National Courts' inherent power of judicial review is enshrined by ss 155(3) and (4) of the Constitution. These subsections provide as follows:

> **155. The National Judicial System.**
>
> …
>
> (3) The National Court—
>
> (a) has an inherent power to review any exercise of judicial authority; and
>
> (b) has such other jurisdiction and powers as are conferred on it by this Constitution or any law,
>
> except where—
>
> (c) jurisdiction is conferred upon the Supreme Court to the exclusion of the National Court; or
>
> (d) the Supreme Court assumes jurisdiction under Subsection (4); or the power of review is removed or restricted by a Constitutional Law or an Act of the Parliament.
>
> (4) Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case. [47]

The exercise of the Courts' inherent power of judicial review in ss 155(3) and (4) is conditioned by ss 59 and 60 of the Constitution, which require that administrative law be specifically defined to suit and reflect the context of Papua New Guinea. Further, s 59 explicitly defines principles of natural justice by reference to the underlying law of Papua New Guinea. Sections 59 and 60 of the Constitution provide as follows:

[47] *Constitution*, above n 2, s 155.

59. Principles of natural justice.

(1) Subject to this Constitution and to any statute, the principles of natural justice are the rules of the underlying law known by that name developed for control of judicial and administrative proceedings.

(2) The minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly.

60. Development of principles.

In the development of the rules of the underlying law in accordance with Schedule 2 (adoption, etc., of certain laws) particular attention shall be given to the development of a system of principles of natural justice and of administrative law specifically designed for Papua New Guinea, taking special account of the National Goals and Directive Principles and of the Basic Social Obligations, and also of typically Papua New Guinean procedures and forms of organization.[48]

The 'rules of the underlying law' referenced in s 59 are embodied in the *Underlying Law Act 2000* (Papua New Guinea) ('*Underlying Law Act*'). The *Underlying Law Act* acknowledges deep legal pluralism as the result of a colonial superimposition of English law onto Papua New Guinea's existing customary law.[49] The explicit references in the *Underlying Law Act* to the distinct sources of law in Papua New Guinea—written law, underlying law, customary law, and common law—recognise the unique source of authority for each.[50] Section 6 of the *Underlying Law Act* requires that customary law be applied in priority to common law and dictates that the common law will only apply in circumstances where there are no applicable alternate sources of law.[51]

The combined effect of ss 59 and 60 of the Constitution and s 6 of the *Underlying Law Act* is that Papua New Guinea's administrative law is informed by rules of customary law.[52] Given the hierarchy espoused by s 6 of the *Underlying Law Act*, common law administrative principles should be of last resort to the National and Supreme Courts. This stands in contrast to the common law tradition of administrative law in England.[53] This constitutional imperative that administrative law reflect the unique context of Papua New Guinea ought to have been of paramount concern to the Supreme Court in *Esso P'nyang Limited v Bernard*.

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[48] *Constitution*, above n 2, ss 59, 60.

[49] Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 381–386 https://www.austlii.edu.au/au/journals/SydLRev/2008/20.pdf (Accessed 14 August 2023); J Rivers and HA Amankwah, 'Sovereignty and Legal Pluralism in Developing Nations: a New Appraisal of the Papua New Guinea Case' (2003) 10 *James Cook University Law Review* 85 http://www5.austlii.edu.au/au/journals/JCULawRw/2003/5.html (Accessed 10 August 2023).

[50] Law Reform Commission of Papua New Guinea, *Declaration and Development of the Underlying Law* (Working Paper 4, September 1976), 9.

[51] *Underlying Law Act 2000* (Papua New Guinea) s 6; *Sukuramu v New Britain Palm Oil Ltd* [2007] PGNC 21 http://www.paclii.org/, [89]–[90].

[52] Jennifer Corrin, 'Administrative Law and Customary Law in Papua New Guinea' (2018) 18(2) *Oxford University Commonwealth Law Journal* 123, 126 https://www.tandfonline.com/doi/full/10.1080/14729342.2018.1537994 (Accessed 10 August 2023); Bruce Ottley, 'Reconciling Modernity and Tradition: PNG's Underlying Law Act' (2002) 80 *Australian Law Reform Commission Reform Journal* 22, 22 http://www6.austlii.edu.au/cgi-bin/viewdoc/au/journals/ALRCRefJl/2002/5.html (Accessed 10 August 2023).

[53] Justice Kiefel, 'Prerogative Writs and Modern Judicial Review – Constancy and Change' (Sir Buri Kidu Lecture, University of Papua New Guinea, Port Moresby, 17 May 2023).

Supreme Court's failure to reflect unique Papua New Guinea administrative law context

The Supreme Court's decision that Mr Bernard and the Wokflyak clan did not have standing to bring judicial review proceedings failed to achieve the constitutional mandate for Papua New Guinea's administrative law. The Supreme Court reached this decision on the basis that the members of the Wokflyak clan were 'identified landowner beneficiaries' in respect of the P'nyang site, meaning they were entitled to receive royalty benefits under s 168 of the *Oil and Gas Act*. According to the Supreme Court, the customary landowners' entitlement to compensation and the absence of any special harm meant that they were not persons aggrieved by application of the *Oil and Gas Act*, such that they did not have standing to commence judicial reviewing proceedings in respect of the P'nyang development.[54]

The approach adopted by the Supreme Court suggested the only interest giving an applicant standing in administrative law to be a financial interest. The Supreme Court failed to appreciate the importance of customary land ownership to Papua New Guinea's law and society.[55] At first instance, Kandakasi J explained the potential for the P'nyang gas development to '[upset] and [damage] for good the traditional landowners' way of life, environment, culture and tradition and matters of traditional value and importance to them'.[56] His Honour highlighted the immense impacts of gas developments on customary owners. These included the potential for introduced cash to disturb 'traditional social structure and leadership' [57] and for 'dust produced by moving heavy and light vehicles … [to] contaminate the quality of air for the people from one of pristine and natural to contaminated dusty air'.[58] The Supreme Court's conclusion that the Wokflyak clan did not have standing, despite the immense and life-altering interruptions facing the group, overlooked the significance of their customary law rights. As a result, the Supreme Court's approach to the question of standing fell short of the constitutional mandate for Papua New Guinea's administrative law enshrined by ss 59 and 60.

CONCLUSION

The Supreme Court's conclusion that Mr Bernard's claim was an abuse of process is not supported by the text or spirit of the legislative provisions the Court applied. The Court mischaracterised Mr Bernard's claim as involving a challenge to the Ministerial declaration under s 169(2) of the *Oil and Gas Act*, rather than to Esso's social mapping and landowner identification studies under s 47. This led the Court to incorrectly apply ord 16 r 1(1) of the *National Court Rules* and s 169(10) of the *Oil and Gas Act*. Further, the Supreme Court's approach to the standing of the Wokflyak clan failed to achieve the constitutional directive to develop an administrative law suited to the unique context of Papua New Guinea. The Court's approach is inconsistent with the significance of customary land ownership to Papua New Guinea's legal system, economic development, and environmental sustainability.

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[54] *Esso v Bernard*, above n 3, [23].
[55] Jennifer Corrin, 'Exploring the Deep: Looking for Deep Legal Pluralism in the South Pacific' 47(2) *Victoria University of Wellington Law Review* 305, 310–311 https://ojs.victoria.ac.nz/vuwlr/article/view/4738 (Accessed 14 August 2023).
[56] *Bernard v Duban*, above n 10, [105].
[57] *Bernard v Duban*, above n 10, [105].
[58] *Bernard v Duban*, above n 10, [105].