IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 445

(BARRY M. BOWEN **CLAIMANT**
(
(AND
(
(THE ATTORNEY GENERAL OF BELIZE **DEFENDANT**

CLAIM NO. 506

(BELIZE LAND OWNERS ASSOCIATION LTD **CLAIMANTS**
(IVAN ROBERTS
(PEARL TRAPP
(HECTOR MONTERO
(JOVITA MIRANDA
(
(AND
(
(THE ATTORNEY GENERAL **DEFENDANT**

Mr. Eamon Courtenay, S.C. along with Mrs. Magali Marin-Young for the claimant in Claim 445.
Mr. Richard "Dickie" Bradley along with Mr. Anthony Sylvestre for the Claimants in Claim 506
Mrs. Lois Young-Barrow, S.C. along with Mr. Philip Palacio for the Defendants in both claims.

RULING

1. I have listened with great care and attention to the arguments and submissions in support of the instant application by the defendant, the Attorney General, to have Claims No. 445 and 506 of 2008 which seek to

impugn Clause 2 of the Belize Constitutional (Sixth Amendment), 2008 to the Belize Constitution.

2. Ms. Lois Young, SC for the applicant/defendant, Attorney General, has moved this application to dismiss the claims principally on three grounds, namely;

(1) The claimants seek to challenge a Bill and seek to obtain an Order of this court which would thereby constitute a fetter on the legislature's powers.

(2) The Claims disclose no exceptional circumstances warranting "the intervention of Court before the Bill becomes an Act," by which I take to mean this court should not entertain these claims.

(3) The Claimants in any event do not have the necessary locus or standing to prosecute this claim.

3. Having heard Mr. Eamon Courtenay, SC for the Claimant in Claim No. 445 and Mr. Anthony Sylvestre for the Claimant in Claim No. 506, who essentially adopted the arguments and submissions of Mr. Courtenay, I have come to the conclusion that I must refuse this application, and I do so for

the following reasons:

4. I am unpersuaded that for this court to entertain and embark on an examination of the Claimants' case would in any way constitute a fetter on the legislature as I understand that term. The knob of the Claimants' case of which I take a preliminary view only at this point in my ruling on the application, is that the Bill if enacted would become a part of the Constitution and it significantly derogates from the fundamental rights provisions of the Constitution. I must confess that the application to strike out the claims puts the court in some quandary but it is the duty and this has been widely recognized almost from time immemorial that the last bastian between the citizen and the Executive including the Legislature is the courts. If the court fails to hear a citizen who claims that his fundamental rights are in jeopardy, the court would be failing in its constitutional duty, in my view. The claim may or may not be made out but I am of the considered view that a Claimant in the face of such a challenge must have his day in court and therefore the exercise of jurisdiction by the court to hear such a claim cannot in any way be considered or viewed as a fetter on the Legislature or anyone for that matter. It is simply the court exercising its

constitutional responsibilities and duty. I am fortified in this conclusion by the consideration that the Claimants in both instances are not seeking any injunctive relief against either the Legislature or anyone else for that matter, including the Executive. The principal relief they ask is that in the light of the Constitution and its provisions guaranteeing human rights, in particular, Sections 1, 3, 9, 17 and 20, this court cannot but hear them out to see if their claim is made.

5. Additionally, this is not a challenge or prospective challenge to an ordinary Bill or Legislation. What is sought to be queried is a constitutional amendment which, particularly in its Clause 2, trenches fundamentally on rights guaranteed by Part II of the Belize Constitution, in this instance, the right to protection from deprivation of property, the right to approach the court for a determination of compensation if there is effected a deprivation. All these are weighty considerations that in my view would make me hesitate seriously to want to strike out the Claimants' case. This is not ordinarily a case that you could say would be remedied if the proposed Bill were enacted by a post-enactment litigation. The Bill trenches, in my estimation, on certain values, freedoms and rights provided for in the

Constitution. In the circumstances, I don't think it would be reasonable to say that the Claimants should wait until post enactment. I am mindful of the admonition adumbrated by Lord Nicholls of Birkenhead in ***Privy Council Appeal No. 70 of 1998 The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon J. Symonette M.P. Speaker of the House of Assembly and 7 Others*** and I pay due regard to the diffidence which must attend any court interfering in the legislative process. But as Lord Nicholls of Birkenhead in that case recognized, there may be exceptional circumstances which may warrant intervention by the court and in my view hearing this case is not intervention in the legislative process. It is only exercising a jurisdiction as was recognized by their Lordships in the ***Bahamas Methodist Church*** case that properly belongs to the court.

6. In so far as exceptional circumstances are concerned, I am of the view that these are present in the Claimants' case to warrant this court to exercise its jurisdiction to hear their claims. Whether the claims would be borne out or not is another matter but at this stage I don't think it is right or reasonable to, as it were, keep them away from the seat of judgment which is their

constitutional due. An exceptional circumstance in this case is that the amendment sought is not the enactment of any ordinary piece of legislation. It is legislation, albeit, amending the Constitution and the fundamentals, the vitals, if you will, of the Constitution, and the Claimants' claim that this is being done in a derogatory fashion. It is not an ameliorative amendment that the Belize Constitutional (Sixth Amendment) Bill seeks to effect. Of course if enacted this would necessarily present an inherent tension within the Constitution itself, an antinomy, if you will, between one section and another. It is an invidious task no doubt the court will have to perform to resolve that. I say no more on that, but I am satisfied that exceptional circumstances exist in this case that if the court did not hear the Claimants this may very well work immediate and irreversible prejudice to the Claimants, in particular as concerns the rights they seek to agitate and advance before this court relating to property rights and the right to sue in court to protect or prosecute the protection or compensation for their property.

7. Thirdly, in so far as the standing of the claimants is concerned, I have no doubt said enough to indicate that I am convinced beyond peradventure that

the Claimants have the necessary standing to urge on this court their claims. Both the Claimant in 445, Barry M. Bowen, and the Claimant in 506, Belize Landowners Association Ltd. and others, have from their accompanying affidavits put *prima facie* evidence before this court that they have sufficient proprietary interests that the protection afforded by section 17 of the Constitution is meant to secure and protect.

8. Additionally also, in so far as standing is concerned, I am satisfied that the claims raise fundamental public law issues that should not be inhibited or thwarted by technical considerations of standing and interest. The claims trench on the Constitution of Belize in particular, its Part II concerning fundamental rights and freedoms. In short, I conceive of the claim as one of public interest litigation and I therefore would be loathe to deny the Claimants standing to argue their case.

9. For all these reasons, I am unable to accede to the application to dismiss the Claimants' case.

10. The question of costs will be reserved to the conclusion of the case when the case itself is heard.

DATED this 24th day of September, 2008.

A.O. Conteh
Chief Justice

IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 445 OF 2008

BETWEEN	(BARRY M. BOWEN	Claimants
	(AND	
	(THE ATTORNEY GENERAL OF BELIZE	Defendant

CLAIM NO. 506 OF 2008

IN THE MATTER of an application under section 20 of the Belize Constitution

AND

IN THE MATTER of sections 1, 3, 6, 17 and 68 of the Belize Constitution

AND

IN THE MATTER of clause 2 of the Belize Constitution (Sixth Amendment) Bill, 2008

BETWEEN

BELIZE LAND OWNERS ASSOCIATION LIMITED
IVAN ROBERTS
PEARL TRAPP
HECTOR MONTERO
JOVITA MIRANDA — Claimants

AND

ATTORNEY GENERAL OF BELIZE — Defendant

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Eamon Courtenay SC, with Mrs. Magali Marin Young for the claimant in Claim No. 445.
Mr. Richard Bradley, with Mr. Anthony Sylvestre and Mr. Arthur Saldivar for the claimants in Claim No. 506.
Ms. Lois Young SC, with Mr. Philip Palacio, Crown Counsel, for the defendant in both claims.

—

JUDGMENT

Introduction

This judgment is in respect of two cases that were, by the agreement of the parties and for convenience, heard together. The cases raised the same issues, and for convenience the singular, "the case", is used in this judgment to refer to them.

2. The principal issue in this case is whether clause 2 of the Belize Constitution (Sixth Amendment) Bill, 2008, is compatible with the Belize Constitution. Again, for the sake of convenience, I shall refer to this in this judgment as "Clause 2 of the Sixth Constitutional Amendment", or simply as "clause 2". Originally, clause 2 was clause 3 in the Sixth Constitutional Amendment Bill when the claimants commenced this action. The original clause 2 related to amendments to section 5 of the Belize Constitution relating to personal liberty by introducing preventive detention. But this was subsequently dropped and clause 2 in issue in this case was upgraded from its original position as clause 3 to its present position as clause 2. It is thus the object of challenge by all the claimants in this case.

3. The claimants' claim, in essence, is that clause 2 is **ultra vires** the Belize Constitution and would therefore constitute an impermissible amendment if allowed to stand.

4. In consequence, all the claimants have, pursuant to Part 56.7 of the Supreme Court (Civil Procedure) Rules 2005, sought the following relief pursuant to section 20 of the Belize Constitution from this court.

In the case of the claimant in Claim No. 445 of 2008, he seeks the following:

1. *A Declaration that clause 2 of a Bill for an Act intituled BELIZE CONSTITUTION (SIXTH AMENDMENT) ACT, 2008 which seeks to amend section 17 of the Belize Constitution to provide that:*

   "(3) Subsection (1) of this section [17] does not apply to petroleum, minerals and accompanying substances, in whatever physical state, located on or under the territory of Belize (whether under public, private or community ownership) or the exclusive economic zone of Belize, the entire property in and control over which are exclusively vested, and shall be deemed always to have been so vested, in the Government of Belize:

   (4) For the purpose of subsection (3) above, the terms "petroleum" and "minerals" shall have the meanings as are or may be ascribed to them by any law."

   is an unconstitutional attempt to amend the Belize Constitution and is likely to contravene the constitutional rights of the Applicant generally and including those enshrined in sections 1, 3, 6, 17, 20 and 95 of the Belize Constitution

2. *An Order striking down clause 2 of a Bill for an Act intituled BELIZE CONSTITUTION (SIXTH AMENDMENT) ACT, 2008 currently before the House of Representatives; and*

3. *Such other declarations and orders and such directions as this Honourable Court may consider appropriate for the purposes of enforcing the enforcement of the aforementioned Declaration and Order;*

4. *Further or other relief.*

In the case of the claimants in Claim No. 506 of 2008 they seek the following:

(1) *An order of Declaration that Clause 2 of the Belize Constitution (Sixth Amendment) Bill 2008 is in violation of, repugnant to, ultra vires of and inconsistent with section 1 of the Belize Constitution which provides that Belize SHALL be a democratic state.*

(2) *An order of Declaration that Clause 2 of the Belize Constitution (Sixth Amendment) Bill 2008 which effect is to preclude the Claimants from applying to the Supreme Court for redress in respect of the likely contravention of their right under section 17 of the Belize Constitution is in violation of, repugnant to, ultra vires of and inconsistent with the rule of law, viz. due process of law.*

(3) *An order of Declaration that Clause 2 of the Belize Constitution (Sixth Amendment) Bill 2008 is in violation of, repugnant to, ultra vires of and inconsistent with section 3(d) of the Belize Constitution which enshrines the fundamental right of protection from arbitrary deprivation of property.*

(4) *An order of Declaration that Clause 2 of the Belize Constitution (Sixth Amendment) Bill 2008 which effect is to preclude the Claimants from applying to the Supreme Court for redress in respect of the likely contravention of their right under section 17 of the Belize Constitution, is in violation of, repugnant to, ultra vires of and inconsistent with section 20 of the Belize Constitution which enables any person who alleges that any of his rights contained in Part II of the Constitution is likely to be infringed to apply to the Supreme Court for redress.*

(5) *An order of Declaration that Clause 2 of the Belize Constitution (Sixth Amendment) Bill 2008 which effect is to preclude the Claimants from applying to the Supreme Court for redress in respect of the likely contravention of their right under section 17 of the Belize Constitution is in violation of the principle of separation of powers, and therefore repugnant*

to, ultra vires of, and inconsistent with the Belize Constitution and is therefore unlawful and void.

(6) *An order of Declaration that Clause 2 of the Belize Constitution (Sixth Amendment) Bill 2008 is in violation of, repugnant to, ultra vires of and inconsistent with section 6 of the Belize Constitution which provides that every citizen is entitled to equal protection before the law.*

(7) *An order of Declaration that Clause 2 of the Belize Constitution (Sixth Amendment) Bill 2008 is in violation of, repugnant to, ultra vires of and inconsistent with section 68 of the Belize Constitution as being inimical to peace, order and good government of Belize.*

(8) *An Order that the Court doth strike down Clause 2 of the Belize Constitution (Sixth Amendment) Bill 2008.*

(9) *Such further or other orders or reliefs as may be just.*

<u>*Clause 2 of the Sixth Constitutional Amendment Bill 2008*</u>

5. Clause 2 itself seeks to effect certain amendments to the extant section 17 of the Belize Constitution by adding new subsections (3) and (4) in the following terms. I have as well included sub clause (3) which is integral to clause 2 that is sought to be impugned.

"(2) *Subsection (1) of this section does not apply to petroleum, minerals and accompanying substances, in whatever physical state, located on or under the territory of Belize (whether under public, private or community ownership) or the exclusive economic zone of Belize, the entire property in and control over*

which are exclusively vested, and shall be deemed always to have been so vested, in the Government of Belize

(3) For the purpose of subsection (2) above, the terms "petroleum" and "minerals" shall have the meanings as are or may be ascribed to them by any law."

6. The extant section 17 of the Constitution of Belize, it is manifest, is intended to provide protection against the deprivation of **any** and all property save as provided in subsection (2). The section in terms provides as follows:

17.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that -

(a) prescribes the principles on which and the manner in which reasonable compensation therefore is to be determined and given within a reasonable time; and

(b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of –

(i) establishing his interest or right (if any);

(ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;

(iii) determining the amount of the compensation to which he may be entitled; and

(iv) enforcing his right to any such compensation.

(2) Nothing in this section shall invalidate any law by reason only that it provides for the taking possession of any property or the acquisition of any interest in or right over property -

(a) in satisfaction of any tax, rate or due;

(b) by way of penalty for breach of the law or forfeiture in consequence of a breach of the law;

(c) by way of taking a sample for the purposes of any law;

(d) as an incident of any deposit required to be made with the Government of a reasonable number of copies of every book, magazine, newspaper or other printed work published in Belize;

(e) where the property consists of an animal, upon its being found trespassing or straying;

(f) as an incident of a lease, tenancy, mortgage, charge, bill of sale or any other right or obligation arising under a contract;

(g) by way of requiring persons carrying on business in Belize to deposit money with the Government or an agency of the Government for the purpose of controlling credit or investment in Belize;

(h) by way of vesting and administration of trust property, enemy property the property of deceased persons, persons of unsound mind or persons adjudged or otherwise declared bankrupt or the property of companies or other societies (whether incorporated or not) in the course of being wound up;

(i) in the execution of judgments or orders of courts;

(j) in consequence of any law with respect to the limitation of actions;

(k) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants;

(l) for the purpose of marketing property of that description in the common interests of the various persons otherwise entitled to dispose of that property; or

(m) for so long only as may be necessary for the purpose of an examination, investigation, trial or enquiry or, in the case of land, the carrying out on the land –

(i) of work of soil conservation or the conservation of other natural resources; or

(ii) of agricultural development or improvement which the owner or occupier of the land has been required and has without reasonable and lawful excuse refused or failed to carry out.

7. It is to the present section 17 that it is proposed to add the new subsections (3) and (4) which are the object of the challenges in these proceedings.

<u>*The Evidence and the standing of the claimants*</u>

8. The parties filed affidavits with exhibits in support of their respective positions.

9. It is fair to say that the recent discovery of oil in the country, particularly in the Toledo and Cayo Districts, has animated both sides in these proceedings. From the evidence I am satisfied that all the claimants are landowners. In the case of the claimant in Claim No. 445, the holding is

considerable and for the individual claimants in Claim No. 506, the holding is appreciable. The prospect that these holdings may contain petroleum, no doubt, is an added spur to all the claimants: see in particular paras. 16, 17, 18, 19, 20, 24 and 25 of Sir Barry Bowen's first affidavit, as well as paras. 2, 13, 14, 16, 20, 21, 22, 23 and 24 of the first affidavit of Mr. Ivan Roberts.

10. At the first hearing of this case, Ms. Lois Young SC, the learned lead attorney for the defendant, the Attorney General, launched an unsuccessful bid to torpedo the claimants' case on the principal ground that they lacked the necessary standing to prosecute this case: see the Ruling of the Court dated 25th September 2008. Undaunted, she raised the issue of the claimants' standing again at the subsequent substantive hearing. This resulted in her cross-examination of Mr. Roberts. This only confirmed Mr. Roberts' averments in his affidavit that there are petroleum deposits under his 25 acres holding in the Cayo District.

11. From the evidence, I am satisfied that all the claimants have, in virtue of their ownership of and interests in land, the requisite standing to advance their claims in this case. In the case of the first claimant in claim No. 506, **The Belize Land Owners Association Ltd. (BLAL)**, I am also satisfied that this incorporated entity has the necessary interest to pursue this claim. It is a newly incorporated Not-For-Profit company with a membership of some 200 persons, all landowners. The objects for which it was incorporated are stated to include:

> *(i) The protection and advancing the property rights of all land owners in Belize;*
>
> *(ii) The protection and advancing the mineral and petroleum rights of all landowners within Belize;*

(iii) To educate and inform the public about private property rights issues;

(iv) To represent collectively all landowners members in negotiations with governmental agencies and commercial interests.

12. I am not therefore convinced, in the light of the issues in this case, that I should deny standing to BLAL or indeed, **a fortiori** to any of the other claimants.

13. I am inclined to the view that the requirements as to standing in litigation generally is to weed out the meddlesome busybody with really no stake in the outcome of the particular proceedings. The law therefore discourages one litigant from presenting and arguing another person's claim. In public law cases, the tendency is for courts to take a more liberal view of the requirements as to standing so long as a claimant can show some interest. In a constitutional claim such as the instant case, I think the guiding, almost determinative principle, is to be found in section 20(1) of the Belize Constitution in claims for breaches of any of its fundamental rights provisions which provides in terms, so far as material for this purpose as follows:

"(20)(1) If any person alleges that any of the provisions of section 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him ... then without prejudice to any other action with respect to the same which is lawfully available, that

person ... may apply to the Supreme Court for redress."

This conclusion, I am satisfied, does not contradict the position advanced by Ms. Young SC that there is no representative action in a constitutional claim, a position expressly admitted by section 20(1) in the case of a detained person in Belize, but I think this section is expansive enough to ground standing in the claimants in the light of the issues agitated in this case.

See generally on standing in constitutional claims, the judgment of this court in Claim No. 338 of 2005, **Jeffrey Prosser et al v The Attorney General et al** of 19th September 2005 at paras. 11 – 21.

14. Ms. Daphne McFadzean also made an affidavit in this case on behalf of Sir Barry Bowen. By this affidavit, several historical documents relating to the genesis and adoption of the Belize Constitution were put in evidence.

15. The Attorney General is the defendant in this case. He is the principal legal adviser to the Government of Belize, and the Minister responsible for the administration of legal affairs in Belize, as well as the representative of the State in civil proceedings (section 42 of the Constitution). He filed an affidavit to which was attached several exhibits. In his affidavit, the Attorney General averred that clause 2 of the Bill does not take away any rights or interests in petroleum or minerals which landowners had before the Bill; he therefore stated that clause 2 confirms by way of the Constitution, the Government of Belize's ownership of petroleum and minerals in Belize as prescribed by existing law. He referred to the Petroleum Act – Chapter 225 of the Laws of Belize, in particular to section 3. He also referred to section 2 (although he said "section 3") of the Mines and Minerals Act – Chapter 226 of the Laws of Belize which is to the same

effect in respect of minerals. The Attorney General in his affidavit at paras. 13 – 18 offered what could be described as the rationale or **raison d'etre** of clause 2 of the Bill and I reproduce these paragraphs here:

The Public Interest served by Clause 2 of the Bill

13. *The Government has already given out licences to prospect for petroleum over the entire area of Belize. These licences are in the form of Production Sharing Agreements and to date the Government has entered into 19 Production Sharing Agreements.*

14. *Each of the said agreements was entered into on the basis that the Government of Belize owns the petroleum that may be located in the sub-soil. This presumption is based on the Petroleum Act.*

15. *A reversal of this statutory position would cause upheaval in the petroleum industry in Belize. It would also be a huge deterrent to investment in Belize because investors invest based on the existing law.*

16. *It is in the public interest that the Government should control petroleum as it is a source of wealth naturally created in Belize. The Government uses revenues generated through the Production Sharing Agreements and taxation, for the good of all the people of Belize.*

17. *There is also a practical consideration captured by section 3 of the Petroleum Act and recognized by the Constitutional Amendment. It is that because petroleum is liquid, although brought to the surface on one landowner's parcel of land, it may well actually originate on some other than owner's parcel of land. Anything other that (sic) ownership remaining as vested in the Government may therefore lead to chaos.*

18. In the premises it is the Respondent's position that the Bill does not deprive the Claimants of property or in any way seek to abrogate their fundamental rights.

16. It is common ground between all the parties that the Constitutional Sixth Amendment Bill 2008, has gone through all the requisite legislative stages but it has not been presented to the Governor General for his assent as required by section 81 of the Constitution because of legal challenges such as the instant case and in another claim now before the Court of Appeal in which the claimants contend for a referendum as the bill purports to derogate from fundamental rights guaranteed in Part II of the Constitution pursuant to section 2(2)(a) of the extant Referendum Act at the time of their claim.

Issues in the case

17. This case is without doubt of great constitutional moment. It marks the first time when an amendment to the Constitution itself is being challenged as **ultra vires** the Constitution and impermissible. For the sake of clarity it must be said that the claimants have not in these proceedings, launched a wholesale attack on the Belize Constitution (Sixth Amendment) Bill, 2008 itself. It is only its clause 2 they challenge. They have not, in these proceedings, found fault with any of the other provisions of the Bill.

18. It must also be stated that in these proceedings the claimants do not question the power of the Legislature to vest petroleum and minerals in the Government of Belize or the State. Indeed, in argument, Mr. Eamon Courtenay SC candidly conceded this and his client Sir Barry Bowen stated as much in para. 27 of his first affidavit; as did Mr. Ivan Roberts in paras. 10, 11, 12 and 23 of his first affidavit.

19. The claimants' quarrel with clause 2 as it stands is that they contend that it offends the Constitution as it bars them from accessing the courts to test the consequences of the vesting as presently guaranteed in section 17 (1) of the Constitution. In other words, they contend that by clause 2 purporting to disapply sub-section (1) of section 17 it goes far too far. In the words of Mr. Richard Bradley, the learned attorney for the claimants in Claim No. 506, this was a forbidden exercise of the Legislature's powers. The claimants therefore contend that the effect of clause 2 is to bring into operation compulsory acquisition of property (Petroleum and Minerals), especially their interests associated therewith as landowners, without the benefit of the protection guaranteed in section 17(1) of the Constitution.

20. From the submissions, both written and oral, and the claims, at the heart of this case, in my view, is the interplay between the Preamble of the Constitution, the Fundamental Rights and Freedoms provided in Chapter II and the Legislative competence of the Legislature as provided for in sections 68 and 69, in particular, as regard those rights and freedoms.

21. It is the contention of the claimants that in seeking to exclude access to the courts as guaranteed in section 17(1) of the Constitution for the purposes stated therein in case of deprivation of property, clause 2 is contrary to the Preamble of the Constitution in which is set out the ideals, beliefs, needs and principles of the people of Belize which permeate the Constitution by which they, in exercise of their constituent power, have set up Belize as a democracy.

22. It is further contended for the claimants that clause 2 in seeking to disapply section 17(1) of the Constitution in relation to petroleum and minerals, is negating the separation of powers.

23. It is also contended for the claimants that the Legislature's powers to make laws are not unlimited and that in addition to the limitation in section

68, which confines the law-making-power to conformity with the Constitution, the Legislature cannot legitimately make laws that are contrary to the **basic structure** of the Constitution itself; and that clause 2 is one such law that would be contrary to the basic structure of the Constitution.

24. An allied contention for the claimants in this regard is that section 69 of the Constitution on its alteration, is not a grant of legislative power but rather only a manner and form provision for altering the Constitution; and that it is only a **procedural provision** for alteration of the Constitution, and it cannot and does not empower the Legislature to ignore the limitations in the Constitution, including implied limitations flowing from its structure.

25. On the other hand, however, the principal contention urged on the defendant's behalf is that so long as the provisions of section 69 of the Constitution are satisfied, and in particular sub-section (3), (5) and (5A), the Legislature has full powers to alter, change, amend and even abrogate any of the provisions of the Constitution, including any or all of its provisions on fundamental rights and freedoms in its Chapter II. This, it was submitted, had been done with the Sixth Constitutional Amendment Bill 2008 with its clause that is sought to be impugned in these proceedings.

26. It is further contended on the defendant's behalf that clause 2 does not offend the Constitution as it does not effect a compulsory acquisition of petroleum or minerals because all it does is to declare these vested in the Government of Belize as was already the case under the Petroleum Act – Chapter 225 of the Laws of Belize, Revised Edition, 2000 and The Mines and Minerals Act – Chapter 226 of the Laws of Belize, Revised Edition, 2000. Therefore, it was urged on the defendant's behalf, all clause 2 seeks to do is to raise to a constitutional level the vesting in the

Government of Belize of these resources that had been done by earlier legislation.

27. Directly flowing from this is the further contention for the defendant that regard must be had to the substance of clause 2 and not its form a **la Hinds (Moses Hinds and others v The Queen (1977) A.C. 195**, where Lord Diplock stated among other things: *"It is the substance of the law that must be regarded not the form."* Therefore, it is contended for the defendant the substance of clause 2 does not effect any compulsory acquisition of any property belonging to the claimants, consequently they cannot legitimately complain against the clause.

Determination

28. In my view, central to a determination of the issues in this case, would be an analysis of clause 2 itself. I have set out its provisions in para. 5 of this judgment. First, it is unarguable that clause 2 seeks to disapply sub-section (1) of section 17 of the Constitution from petroleum, minerals and accompanying substances in whatever physical state located in Belize whether under public, private or **community ownership** or the EEZ of Belize: it states so expressly.

In the second place, clause 2 seeks to declare that these resources, that is, petroleum, minerals and accompanying substances, are exclusively vested and shall be deemed **always** to have been so vested in the Government of Belize.

29. It is therefore not difficult in my view to conclude that this latter aspect of clause 2 is to effect a constitutional compulsory acquisition or expropriation of petroleum, minerals and accompanying substances and vests these in the Government of Belize.

30. There may or may not be anything wrong with such a stance and it is certainly not the province of this Court to pass on the wisdom or otherwise of such a policy. But this policy or position is already extant in existing legislation, namely, section 3 of the Petroleum Act and section 2 of the Mines and Minerals Act. These two sections declare that the entire property in and control over all petroleum and minerals are vested exclusively in the Government of Belize or Belize respectively. But it is of some significance that these two legislation on petroleum and minerals recognize and affirm the rights and interests of land owners beneath whose land petroleum reservoir is located, to a share of the royalty in the case of petroleum – section 31(4); and in the case of minerals, the written consent of the owner/lawful occupier of the land is required for a holder to exercise any of his rights in relation to the land under the Act – section 102(1)(b) of Chapter 226. There is however the provision that the Minister responsible for mines, after hearing the parties, that is, the landowner and the holder, to direct the land owner/occupier to allow the holder to carry on such works on the land on such terms and conditions and within such period as may be specified in the Order: section 102(1)(b) of Chapter 226. Importantly, under section 111 also, there is power granted to the Minister to compulsorily acquire any land that is required to secure the development or utilization of the mineral resources of Belize: he may direct that this be done under the Land Acquisition (Public Purposes) Act – Chapter 184 of the Laws of Belize. There is a similar provision in the case of private land under which there is petroleum: section 27(2) of the Petroleum Act.

31. But more fundamentally under the Land Acquisition (Public Purposes) Act the principles and provisions of section 17(1) are, of course, applicable – see **San Jose Farmers' Cooperative Society Ltd v Attorney General BLR 1**; **Erland Blomquist v Attorney General of Dominica (1987) A.C. 489, (1987) 2 WLR 1185.**

32. An uneasy feature I find in clause 2, in terms of ownership of land under which petroleum or minerals may be located, is its explicit reference to **community ownership** in addition to private or public ownership. The last two classes of land ownership are statutorily recognized and provided for. But clause 2 marks the first time when there is a reference in an instrument of **community ownership** of land. The Supreme Court had however in Claims Nos. 171 and 172 of 2007 in **Cal et al v The Attorney General and Another** and **Coy et al v Attorney General and Another**, found that the claimants in those cases had community title to land in accordance with Maya customary land tenure. One of the effects of clause 2 evidently by its reference to "community ownership" is to negate any rights such holders may have in petroleum and minerals that may be found beneath their land.

33. A further disturbing feature I find in clause 2 is that it purports to re-vest petroleum and minerals in the Government of Belize retroactively, seemingly from time immemorial. It says these resources *"shall be deemed always to have been so vested in the Government of Belize"*. This would have the effect in the case of petroleum, to override the rights of private landowners to royalty from the Government of Belize assured by section 31(4) of the Petroleum Act, who would otherwise have the benefit of petroleum rights in respect of their lands but for the passing of the Petroleum (Production) Act 1937 and the Petroleum Act itself: section 31(4) of the latter.

34. Therefore, in my view, it is the disapplication of section 17(1) of the Constitution in respect of petroleum and minerals that is at the heart of the claimants' case, hence the challenge to clause 2 in these proceedings.

35. An analysis of section 17(1) of the Constitution which is sought to be disapplied by clause 2 may help to put the claimants' challenge in perspective.

36. Section 17(1) is closely allied to section 3(d) of the Constitution. Together, they form with other sections, part of the **Protection of Fundamental Rights and Freedoms** stipulated in Part II of the Constitution. In the context of property ownership or holding, section 3(d) assures every person in Belize, subject to respect for the rights and freedoms of others and for the public interest, **"protection from arbitrary deprivation of property."** Although "arbitrary deprivation of property" is not defined and it must be a matter of appreciation in each case, it is unarguable that deprivation of property may be arbitrary if it is done without a law authorizing it and with no access to a process to determine a person's interest in the property in question and to determine the quantum of compensation payable for the deprivation suffered and the right to enforce that compensation. In short, notwithstanding the terse words of section 3(d), there will be arbitrary deprivation of property where due process is denied or unavailable.

37. Section 17(1) of the Constitution therefore, in my view, fleshes out the laconic rendition of the constitutional protection afforded to property in section 3(d). I have set out the provisions of section 17 earlier at para. 6 of this judgment.

38. It is to be noted that in terms of subject-matter, the protection afforded by section 17 is exceptionally wide: it extends to **"property of any description** and it includes **"interest in or right over property of any description."** It would therefore readily comprehend "petroleum and minerals" and rights or interests associated therewith for landowners which are the objects of clause 2.

39. Arguably perhaps, because of the possible effect of sections 3 and 2 respectively of the Petroleum Act and the Mines and Minerals Act, the claimants may not have ownership rights or title to petroleum or minerals

themselves that may be found on their land. But they do have **some or other interests** in these resources to the extent they might exist on their lands. And these rights and interests are statutorily recognized by these two Acts. (More on this later).

40. An analysis of section 17(1) discloses that it is not in and of itself, a constitutional bar to compulsory acquisition, expropriation or nationalization of any property. And experience shows that in the life of a nation such action, though drastic, may sometimes be necessary. But however necessary such action may be, in order to pass constitutional muster and be legitimate, it must be done under a law that:

i) *prescribes the principles on which and the manner in which reasonable compensation for the compulsory acquisition* **(a term I find that can in context be interchangeable with nationalization or expropriation)** *is to be determined and given within a reasonable time, and*

ii) *secures to any person claiming an interest in or right over the property* ***a right of access to the courts*** *for the purpose of:*

a) *establishing his interest or right (if any)*

b) *determining whether the taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorizing the taking of possession or acquisition*

c) *determining the amount of the compensation to which the person whose property is taken may be entitled; and*

d) *enforcing that person's right to any such compensation.*

41. It could therefore readily be seen that section 17(1) is not only the protective guarantee of the ordinary Belizean's right to his private property, but also a charter for domestic and foreign private investment. It ensures that if there must be a compulsory acquisition of property or interest, it must be according to a law that meets the several criteria listed in it.

42. A criterion listed in section 17(1) is that the taking of the property in question must be for a **public purpose**. A purpose of clause 2 as stated in the Long Title, is among other things, *"to provide for the vesting of all property rights in petroleum and minerals in the Government of Belize."* This, no doubt, may be for a public purpose as indeed the Attorney General deposed in para. 16 of his affidavit:

> *"It is in the public interest that the Government should control petroleum as it is a source of wealth naturally created in Belize. The Government uses revenues generated through the Petroleum Sharing Agreements and taxation for the good of all the people of Belize."*

43. I find this averment wholly laudable and it would readily meet the public interest criterion of section 17(1). But on the whole, clause 2 as it stands, signally fails, I find, to meet any of the **other** criteria stipulated in section 17(1).

44. In fact, it expressly seeks to disapply section 17(1) itself. Can it, in conformity with the Constitution, do this, even in the form of a constitutional amendment?

45. I now turn to an examination of the several arguments that the learned attorneys advanced against and in support of clause 2.

A. Is the Preamble of the Constitution a Part of it?

46. It was vigorously contended for the claimants that the Preamble of the Constitution **is** a part of it and that it should play a central and important role as a touchstone in its interpretation. It was equally vigorously contended for the defendant that the Preamble is not a part of the Constitution and that it can only be used as an aid to interpret such sections of the Constitution as may be ambiguous.

47. Mr. Eamon Courtenay SC for Sir Barry Bowen, took the Court through an interesting journey of the evolution of the Constitution of Belize, culminating in the country's attainment of independence on 21 September 1981. Ms. McFadzean put in evidence some of the historical documents and debates attendant on independence and the adoption of the Belize Constitution. One signal fact stands out in all of these processes and it is that Belize's Constitution is autochthonous and was not handed down like in some Caribbean and other Commonwealth countries, as an annex to an Order-in-Council from Her Majesty granting independence and a constitution to the country. The Constitution is the embodiment and immanation of **the people of Belize as a whole**: it is **their** constitution.

48. Having listened carefully to both Mr. Courtenay SC and Ms. Young SC, I am inclined to the view that the Preamble is a part and parcel of the Constitution. It is, I find, not just a **mere** preamble, but rather integral to the Constitution itself. And it was, as Mr. Courtenay SC correctly

submitted, enacted as a **part** of the Belize Constitution Act in 1981. Today, it is as a part of the Constitution of Belize, which forms Chapter 4 of the Laws of Belize, Revised Edition, 2000 – 2003.

49. To my mind, the issue was put beyond doubt when, since 1981, the Preamble itself has been amended twice by legislation in the form of constitutional amendments, namely, Acts Nos. 2 and 39 of 2001.

50. In the Preamble of the Constitution certain principles, needs and beliefs are affirmed and stated by "the people of Belize." Among these, they *"**recognize** that men* (no doubt, women to be politically correct) *and institutions remain free only when freedom is founded upon respect for moral and spiritual values and **upon the rule of law**"* para. (d).

51. And in the context of this case it is stated in para. (e) of the Preamble that *"the people of Belize **require** policies of State ... which preserve the right of the individual to the ownership of private property and the right to operate private business ...".*

52. In paragraph (f) of the Preamble, it is expressly stated that *"the people of Belize ... **desire that their society shall reflect and enjoy the above mentioned principles, beliefs and needs and that their Constitution should therefore enshrine and make provisions for ensuring the achievement of the same in Belize.**"* (Emphasis added)

53. In sections 3(d) and 17, there are dispositive provisions expressly articulating and guaranteeing the desire of the people of Belize as regards private property as adumbrated in the Preamble of the Constitution. I

have tried to make an analysis of the provisions at paras. 35 - 42 of this judgment.

54. I find therefore that there is an indissoluble link, an umbilical cord, if you will, between the Preamble of the Constitutions and its dispositive provisions, especially in the context of these proceedings concerning the constitutional protection of property. Accordingly, I accept the submission on behalf of the claimants that the Preamble has a critical and important role to play in both the provisions of the Constitution itself and in the very scheme of it. It is not just merely an aid to interpretation, this it most certainly can be. But beyond this, the Preamble animates and breathes life into the very structure of the Constitution itself.

55. In this connection, I adopt with respect the dictum of Wit J. of the Caribbean Court of Justice in the case of **Attorney General and Others v Joseph and Boyce (2006) 69 WIR 204**, where, apropos the Preamble of the Constitution of Barbados, which in several respects is similar to that of Belize, the learned Justice stated at paras. 18 and 19 of his judgment:

> *[18] I now turn to the Barbados Constitution. This founding document clearly embodies and constitutes a constitutional democracy. Although this Constitution is largely concerned with seemingly formal and institutional issues, it is undoubtedly a qualitative and normative document. This is not only clear from the content of Chapter II on the protection of fundamental rights and freedoms of the individual, but also from the preamble in which the people of Barbados, amongst other things, proudly –*
>
> > *'proclaim that they are a sovereign nation founded upon principles that acknowledge the supremacy of God, the dignity of the human person, their unshakeable faith in fundamental human rights and freedoms'*

and 'affirm their belief that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law'. It is in this light that the Barbados Constitution as a whole has to be understood and interpreted as these words fill the Constitution with meaning reflecting the very essence, values and logic of constitutional democracies in general and that of Barbados in particular.

[19] These normative parts of the Constitution breathe, as it were, life into the clay of the more formal provisions in that document. Thus, the fact that the three branches of Government are formally dealt with in separate chapters and the fact that the chapter on the judiciary contains strong procedural safeguards against undue influence from the political branches, all taken together with the supremacy clause in s 1, establish in the light of the solemn affirmation of the rule of law the substantive concept of the separation of powers, which is considered to be the backbone of any constitutional democracy. Some aspects of this principle as a Caribbean constitutional principle had already been acknowledged in 1977 by Lord Diplock in the well-known case, Hinds v R, although that result was reached through his 'somewhat conservative approach' of assuming that the principle was a feature of the original Westminster constitution and that the Constitution at hand was basically modelled after that original.

56. See as well the cases from other parts of Commonwealth Africa attesting to the importance of the Preamble of a Constitution in the interpretation and application of the provisions of the Constitution: **Paul K Semogerere v The Attorney General** - Constitutional Appeal No. 1 of 2002 from Uganda, in particular the judgment of Judge Kanyeihamba and the case of **Njoya et al v The Attorney General et al (2004) LLR 1** from Kenya.

57. I am fortified in my conclusion that the Preamble of the Belize Constitution is a part of the constitution's text and architecture and in its interpretation and application, it fills the text with meaning, and gives the Constitution itself a shape and form reflecting the very essence, values and logic of the Belizean people as a whole. In this regard I am guided by Lord Wilberforce's sage and abiding charge that the task of interpreting a

constitution's provisions dealing with fundamental rights is one that calls *"for a generous interpretation, avoiding what has been called the 'austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."* **Minister of Home Affairs and Another v Fisher and Another (1980) A.C. 319.**

58. From my analysis of clause 2 itself and section 17(1) it seeks to disapply, in relation to petroleum and minerals, in paras. 28, 29, 31 and 35 to 42 of this judgment, I can only conclude that its enactment would seriously impair, distort and negate the Preamble of the Constitution concerning private property in addition to setting at naught the constitutional protection against arbitrary deprivation of property expressly provided for in section 3(d) and 17(1) of the Constitution. I find the arguments and submission on behalf of the defendant regarding the limited role of the Preamble as a mere guide in case of ambiguity to be unavailing. I am therefore of the considered view that ownership and interests in property are regarded in Belize, by the stipulations of the Constitution as a fundamental right derogable only, like other fundamental rights, in the circumstances prescribed. In the case of property or interests in it, the circumstances and conditions permitting derogation are in my view, clearly stated in subsection (1) of section 17 of the Constitution flowing from its Preamble.

59. Clause 2 states no condition, it bluntly seeks to disapply section 17(1) in relation to petroleum and minerals.

B. Does clause 2 in disapplying section 17(1) of the Constitution offend the Separation of Powers?

60. It is argued for the claimants that clause 2 in seeking to disapply section 17(1) of the Constitution to petroleum and minerals is, in effect, a

legislative judgment and therefore offends the principle of separation of powers.

61. The Constitution of Belize, arranging as it does, the several provisions dealing with **The Executive** (in Part V), **The Legislature** (in Part VI) and **the Judiciary** (in Part VII) clearly intends these institutions of State to be separate. This arrangement underscores a balanced distribution or **separation of the powers** of the State among these institutions: The Executive is responsible for the administration of the country; the remit of the Legislature is, subject to the Constitution, to make laws for Belize; and the Judiciary is charged with interpreting and applying the laws of the country and given by section 20 of the Constitution the specific responsibility of enforcing the protective provisions of its Fundamental Human Rights provisions. In this regard, the Courts have come to exercise judicial review, in the broader sense of the expression, over the actions of the Executive and Legislature to ensure compliance and conformity with the Constitution to maintain its supremacy. In this, the judiciary has an exclusive preserve. This is a marked feature of Belizean democracy and constitutionalism.

62. This separation of powers between the judiciary and the other two branches has over the years become so established that any action, whether by legislation or executive decision, that is perceived to be an infringement on the judicial preserve is not looked upon with favour by the Courts and would often be struck down.

63. Thus, legislation which purported to take the discretion in sentencing away from the Courts was struck down in **Liyanage v The Queen (1967) A.C. 259**, where, in the Privy Council, Lord Pearce gave the rationale for the invalidity of the legislation at pp. 291 – 292 as follows:

> *'If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges.*

It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid."

64. The law reports are replete with cases in which the Court have affirmed and upheld the separation of powers principle and disallowed legislation or actions they perceived as trenching on the judicial power. Thus, in **Ahnee v Director of Public Prosecutions (1999) A.C. 294**, Lord Steyn, speaking for the Board in the Privy Council on the reach of the contempt powers of the Supreme Court of Mauritius (which was an issue in the case), stated, after outlining the relevant provisions of the Constitution of Mauritius:

"14. From these provisions the following propositions can be deduced. First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary. Fourthly, in order to enable the judiciary to discharge its primary duty

to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it."

65. Indeed, the separation of powers principle is unarguably today generally taken for granted, especially in national constitutions such as Belize's that are patterned after the Westminster model. At the heart of this principle is, as Mr. Courtenay SC correctly, in my view, submitted and concurred in by Mr. Bradley, the imperviousness of the dividing wall between the Judiciary on the one hand, and the Executive and the Legislature on the other. This point was recently reiterated by the Privy Council in the case of the **Director of Public Prosecutions v Mollinson (2003) 2 A.C. 411**, when Lord Bingham of Cornhill, speaking for the Board after approving the decision of the Privy Council in **Hinds v The Queen (1977) A.C. 195** on the separation of powers issue, said at para. 13 of the judgment:

"Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": R (Anderson) v Secretary of State for the Home Department [2002] 3 WLR 1800, at 1821-1822, paragraph 50. In the opinion of the Board, Mr. Fitzgerald has made good his challenge to section 29 based on its incompatibility with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive."

See as well **Semogerere supra** where the Supreme Court of Uganda held an amendment to that country's Constitution as unconstitutional.

66. In my view, the separation of powers principle should, in Westminster-type Constitutions, like in Belize, be rigid and impermeable, especially when it is realized that in practice, it is often the Executive that drives legislation. Therefore to weaken the separating wall between the two as regards the Judiciary is but a short step to Executive/Legislative judgment

67. On the basis of this principle, this Court had the unappetizing task to strike down legislation, both principal and subordinate, that had purported to give a Minister of government (therefore a member of the Executive and the Legislature) the authority to declare a particular species of property (in that case the Special Share in a private company) invalid and of no effect. The Court stated that in the circumstances of that case the legislation in question was a clear and egregious case of the conflation of the executive, legislative and judicial powers in the Minister and that this was a transgression of the principle of separation of powers and an impermissible legislative transfer of judicial power to a member of the executive and was therefore not in consonance with the Constitution: **Jeffrey Prosser et al v The Attorney General et al, Civil Claim No. 338 of 2005.**

68. In the instant case, it is clear from an analysis of section 17(1) that there is, in the case of any taking, deprivation or compulsory acquisition of property, ultimate recourse to **a judicial process** for the determination of the propriety of that action and the consequences, such as a determination of the interest, if any, of the person affected and the determination of compensation and the enforcement of its payment.

69. But clause 2 seeks to exclude this judicial process provided for in section 17(1) in relation to petroleum and minerals. This smacks of a legislative

judgment, in my view, by which the Legislature is trying to exercise a judicial power contrary to the separation of power principle.

70. Ms. Young SC for the defendant urged and invited the Court to have regard only to the substance of clause 2 and not its form. It is certainly not an unattractive invitation coming as it does with the high authority of Lord Diplock's statement in **Hinds supra** that: *"It is the substance of the law that must be regarded and not the form."*

Therefore, she argued that the substance of clause 2 is really only to seek to vest petroleum and minerals in the Government of Belize, and that these resources were already by legislation vested in the government. She consequently submitted that the clause does not effect any taking of property which the claimants could legitimately complain about.

71. I must confess to some difficulties with this line of reasoning or argument. The first is, it does not state the **full substance** of clause 2 expressed in its very opening phrase *"Subsection (1) of this section* (that is section 17 on protection of property from deprivation) *does not apply to petroleum, minerals etc ...".* This is simply to disapply the Constitution's protection for the species of property it purports to vest in the Government of Belize. Surely this cannot by any consideration be regarded as an insubstantial matter or merely of form.

Moreover, if these resources were already vested in the Government of Belize by legislation why now seek to re-vest them, this time round, by way of a constitutional amendment that clearly seeks to disapply existing constitutional protection of **any** property.

Surely, this is not far removed, if at all, from a legislative judgment vesting these resources in the Government of Belize and purporting to exclude any judicial process whatsoever regarding them or interests associated with them. The Legislature can, of course, by Constitutional provision or

ordinary legislation, vest any property, including petroleum and minerals, in the Government of Belize. But to preclude any judicial review of such action, would, in my view, be a plain legislative judgment, especially when the effect is to negate other interests that are associated with these resources when they are found on private lands.

72. I find much weight in the claimants' argument that, if enacted, clause 2 would deny them access to the Courts for a judicial determination of any interest they might have by the presence of these resources on their lands. This, I find, would offend the separation of power principle and be contrary to section 6 of the Constitution which guarantees the equal protection of the law to everyone, which includes access to the Courts.

73. Moreover, I find something surreal in this line of argument for the defendant. Petroleum and minerals by definition ordinarily exist on or under land or sea-bed including the Exclusive Economic Zone (EEZ) and the continental shelf off a country's coast. The latter three locales belong to government. But land under which petroleum or minerals may exist is often in the ownership of some kind, either public or private, including community ownership. This fact is reflected in clause 2 itself in its reference to the location of the resources in question. This fact is also recognized in the existing legislation concerning ownership of the property in these resources: see in particular sections 3 and 2 respectively of the Petroleum Act and the Mines and Minerals Act. But in their respective sections 31(4), 27(7) and 102 (1)(b) and 111 of these Acts, there is a clear recognition of the rights of the owner/lawful occupiers of land on which petroleum or minerals may be located. (See paras. 30 - 32 of this judgment). Petroleum and minerals hardly ever exist in **terra nullius** or no man's land. In the case of petroleum, the landowner has a right to receive royalty from the Government of Belize. In the case of minerals, the written consent of the landowner is necessary for a permit holder to exercise any rights relating to minerals granted under the Act Therefore to

enact clause 2 would be effecting a legislative judgment on any possible challenges to vindicate these rights of landowners recognized by existing legislation. This would have a chilling effect on these rights without the benefit of any judicial process.

74. This I find would seriously undermine the separation of powers that is undoubtedly a part and parcel of the Constitution and an indispensable requirement for the rule of law.

Property in petroleum and minerals and the rights and interests of landowners

75. Ms. Young SC for the defendant also argued that the claimants have no case against clause 2 because it does not take away any petroleum or minerals belonging to them, nor for that matter, does it take any land away from them. Therefore, she submitted, all that clause 2 seeks to do is to vest in the Government of Belize, albeit, in a constitutional amendment, petroleum and minerals already vested by ordinary legislation in the Government of Belize.

76. I would be prepared to agree with Ms. Young SC if this were all clause 2 seeks to achieve.

77. But this line of argument, with respect, fails to answer the gravamen of the claimants' case, which simply put is, they claim that clause 2 as it stands, will deny them access to the courts to determine any interests they might have that are associated with the presence of petroleum and or minerals on their land. I had already mentioned that all the claimants do not question the Government of Belize's right to have petroleum and minerals vested in it by the Legislature (see paras. 18 and 19 of this judgment). What they question is the purported exclusion of section 17(1) of the Constitution in the circumstances.

78. An analysis of the present legislation on the ownership and control of petroleum and the provisions of the legislation on the rights and interests of landowners on which these resources may be found would, I think, help to put the claimants' arguments in perspective.

79. Undoubtedly, clause 2 does not purport to take away the claimants' land or anyone else's for that matter. But what it seeks to do, in addition to re-vesting petroleum and minerals in the Government of Belize, is to disapply section 17(1) of the Constitution in the process to these resources. This is the point of departure between clause 2 and the current legislation vesting these resources in the Government of Belize.

80. Section 3 of the Petroleum Act – Chapter 225, provides as follows:

> *"3(1) The entire property in and control over all petroleum and accompanying substances, in whatever physical state located on or under the territory of Belize or in areas of the Continental Shelf in which rights of exploration and exploitation are exercisable by Belize are hereby vested exclusively in the Government of Belize.*
>
> *(2) Notwithstanding the provisions of subsection (1), a contract may provide for a contractor to acquire property in, title to, or control over any petroleum within Belize.*
>
> *(3)* ***Subject to section 31****, the provisions of subsections (1) and (2) shall have effect notwithstanding any rights which any person may possess in or over the soil on or under which petroleum is discovered."* (Emphasis added).

In vesting minerals in the state (for present purposes coterminous with the Government of Belize). Section 2(1) of the Mines and Minerals Act – Chapter 226, is to the same effect and it provides in terms as follows:

> *"2(1) Notwithstanding anything in any other Act or any grant of, or title to, land conferring rights to minerals, the entire property in and control of all minerals -*
>
> *(a) in any land in Belize;*
>
> *(b) under territorial sea as determined by the maritime legislation in force;*
>
> *(c) on or under the sea bed beyond the territorial sea to a point where the sea is two hundred metres in depth and beyond to such depths of the superjacent waters as admit of exploitation of minerals;*
>
> *(d) in suspension or in solution in any spring, stream, river, lake, lagoon or in the sea,*
>
> *shall be deemed to be and always to have been vested in Belize."*

81. It is therefore manifest that even without clause 2, petroleum and mineral were already declared by legislation to be vested in the Government of Belize.

82. But the material difference with clause 2 is that the existing legislation does not displace or disapply any fundamental rights of the landowners under whose soil petroleum and minerals may be found. On the contrary, the two legislation on these resources recognize in their provisions the rights and interests of the landowners. In the case of petroleum the vesting of property in and control over it, in the Government of Belize and the fact that a contractor may by contract (doubtless with the Government of Belize), acquire property in, title to or control over any petroleum, are expressly subject to the right to royalty in the Government of Belize which in turn shall pay five percent of such royalty to the owner of any private land beneath which the petroleum is won: section 31(4) of the Petroleum Act. This is a clear recognition that private landowners from whose land petroleum is won are entitled to a given percentage as royalty from the Government of Belize. This is, unarguably, a right to property within the contemplation of the Constitution.

83. But if clause 2 were enacted as a subsection of section 17 and there is a dispute between a landowner and the Government of Belize over the payment of royalty, either through reduction in the statutory percentage or withholding the royalty, any avenue for judicial redress would be a mere chimera: clause 2 would effectively disapply any remedy in relation to petroleum.

84. More ominously, if there was a compulsory acquisition of a landowner's land with petroleum and or minerals as the law allows, for the purposes of securing the development and utilization of these resources (see sections 27(7) of the Petroleum Act and 111 of the Mines and Minerals Act) disapplying subsection 17(1) of the Constitution in relation to these resources would negative any effective recourse or remedy for any hapless landowner in such circumstances.

85. I therefore find clause 2 as it stands, purporting to disapply section 17(1)'s protection of the Constitution from petroleum and minerals, would be a legislative judgment that is decidedly at odds with the separation of powers. Its enactment as a part of the Constitution would, in effect, mean that the Constitution's protection of property would not avail in the case of petroleum and minerals.

This, I find, would have far-reaching effect not only for persons having petroleum and minerals on their lands and therefore entitled to rights and interests flowing from that fact, but also as well, for contractors under the Petroleum Act and permit holders under the Mines and Minerals Act. Any rights or interests they may have would stand bereft of any constitutional protection. This is so, because, if enacted, clause 2 would preclude any protection and as a part of the Constitution, it would have the vigour and force nay, supremacy section 2 of the Constitution imparts to the Constitution and its provisions.

86. Finally on this point, it is to be observed that in none of the thirteen fold exceptions to the protection of property stated in subsection (2) of section 17 (paras. (a) – (m)), is there an express exclusion of the right of access to the courts. Subsection (2) only saves (or does not invalidate) any law that provides for the taking of possession of any property or the acquisition of any interest in or right over property in the thirteen circumstances stated. Any of these instances must be referable to a law that would provide for the taking of possession of the property in question. This, in my view, is in consonance with due process, affirming that the Constitution's protection of property can only be lawfully set aside in the context of due process.

87. This is in stark contrast to clause 2. I find its severity unmitigated: it puts a blanket over the vesting of petroleum and minerals in the Government of

Belize, and blots out any access to the courts by disapplying section 17(1)'s protection from such vesting and any consequences that could flow therefrom. This, I find, would not be supportive of or resonate with the rule of law. In this, in my view, if enacted as it stands, clause 2 would seriously undermine the principle of the separation of powers so indelibly etched on the constitutional underpinning of Belize. It would, in effect, stand as a judicial determination by the Legislature of any consequences of vesting petroleum and minerals in the Government of Belize. From a plain reading of clause 2 as it stands, a material substance of it, apart from its vesting aspect, is in my view, to preclude **in limine** any judicial review or adjudication of claims to rights and interests, if any, that any claimant might have, including those statutorily recognized by the Petroleum Act and the Mines and Minerals Act, as already discussed. But also, it would exclude an examination and determination of any compulsory acquisition of lands that contain petroleum and or minerals.

C. *The power of the Legislature to alter the Constitution and the Basic Structure of the Belize Constitution in relation to Clause 2*

88. These are two separate considerations that bear on the determination of the issues in this case. But because of their interrelationship and for convenience, I have decided to treat them together.

89. The central plank in the platform on which the defence is mounted in this case is that because of the provisions of sections 68 and 69 of the Constitution, the Legislature has the power and authority to alter the Constitution, in particular, in this case, by the enactment of clause 2 as it stands, as a valid alteration or amendment of section 17 as contained in clause 2. It is therefore submitted for the defendant that the words of sections 68 and 69 are clear and unambiguous and that there is no

implied restrictions on the power of the Legislature to alter the Belize Constitution: any and all restrictions are stated in the Constitution itself.

90. Section 68 of the Constitution grants the Legislature the power to make laws for Belize. It provides in terms as follows:

> *"68. **Subject to the provisions of this Constitution**, the National Assembly may make laws for the peace, order and good governance of Belize."* (Emphasis added)

91. It is manifest, therefore, I think, that the grant of law-making power to the Legislature is not **carte blanche** or unlimited: the power is subject to the provisions of the Constitution. It is, therefore, the case that this law-making power is always subject to a continuing audit to ensure conformity in its exercise with the Constitution. This audit, I think, extends to all and every legislative action in the form of a law. Each must conform with the Constitution or be void to the extent of any inconsistency in it. This is a stipulation in section 2 of the Constitution itself which is declared to be the supreme law of Belize.

92. Section 69 of the Constitution provides for its alteration and it states as follows:

> *"69(1) The National Assembly may alter any of the provisions of this Constitution in the manner specified in the following provisions of this section.*
>
> *(2) Until after the first general election held after Independence Day a Bill to alter any of the provisions of this Constitution shall not be regarded as being*

passed by the National Assembly unless on its final reading in each House the Bill is supported by the unanimous vote of all members of that House.

(3) *A Bill to alter this section, Schedule 2 to this Constitution or any of the provisions of this Constitution specified in that Schedule shall not be regarded as being passed by the House of Representatives unless on its final reading in the House the Bill is supported by the votes of not less than there-quarters of all the members of the House.*

(4) *A Bill to alter any of the provisions of this Constitution other than those referred to in subsection (3) of this section shall not be regarded as being passed by the House of Representatives unless on its final reading in the House the Bill is supported by the votes of not less than two-thirds of all the members of the House.*

(5) *A Bill to alter any of the provisions of this Constitution referred to in subsection (3) of this section shall not be submitted to the Governor-General for his assent unless there has been an interval of not less than ninety days between the introduction of the Bill in the House of Representatives and the beginning of the*

proceedings in the House on the second reading of the Bill.

(5A) *A Bill to alter any provisions of Part II of this Constitution shall not be regarded as being passed by the National Assembly unless it is supported by a simple majority of the Senate.*

(6)(a) *A Bill to alter any of the provisions of this Constitution shall not be submitted to the Governor-General for assent unless it is accompanied by a certificate of the Speaker signed by him that the provisions of subsection (2), (3) or (4) of this section, as the case may be, have been complied with.*

(b) *The certificate of the Speaker under this subsection shall be conclusive that the provisions of subsection (2), (3) or (4) of this section, as the case may be, have been complied with and shall not be enquired into by any court of law.*

(c) *In this subsection, references to the Speaker shall, if the person holding the office of Speaker is for any reason unable to perform the functions of his office and no other person is performing them, include references to the Deputy Speaker.*

(7) *In this section and Schedule 2 to this Constitution, references to any of the provisions of this Constitution include references to any law that alters that provision.*

(8) *In this section, references to altering this Constitution or any provision thereof include references -*

(a) *to revoking it, with or without re-enactment thereof or the making of different provision in lieu thereof;*

(b) *to modifying it, whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise; and*

(c) *to suspending its operation for any period or terminating any such suspension".*

93. The principal argument and submission on behalf of the defendant are that all or any limitations on the Legislature's power to make laws, including amending the Constitution, are to be found in section 69. That is, so long as the provisions of this section are observed, any provision of the Constitution can be amended. Ms. Young SC in this regard was emphatic in her submissions that so long as the provisions of section 69 are met, in particular, subsections (3), (5) and (5A), then clause 2 would be a valid alteration of section 17 of the Constitution by its insertion immediately after the extant section 17; and that this would be an "alteration" within the contemplation and meaning of subsection (8) of section 69 on the alteration of the Constitution. Clause 2, she therefore

submitted, is within the competence of the Legislature in terms of altering or amending the Constitution. She put much store in this connection on Lord Diplock's statement in **Hinds supra** at page 215:

> *"One final general observation: Where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the Constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specifies majorities, which is generally all that is required, though exceptionally as respects some provisions the alternative may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for "entrenchment" is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws."*

94. Ms. Young SC also prayed in aid the decision of the Singapore High Court in **Teo Soh Lung v The Minister of Home Affairs and Others (1990) LRC (Const.), 400.**

95. For the claimants on the other hand, it was with equal vigour submitted that section 69 of the Constitution is only a **procedural** provision and not a grant of law-making power to the Legislature. It is, both Mr. Courtenay SC and Mr. Bradley for the claimants submitted, only a **manner and form provision**, as to how the Constitution can be altered, and that law-making power to effect this is contained in section 68. Section 68, they argued, speaks to the law-making competence of the Legislature. This competence, they submitted, is not unlimited but as the section itself states, it is *"subject to the provisions of the Constitution..."*

96. Therefore, it was submitted for the claimants that in addition to conformity with the provisions of the Constitution (as stipulated in its section 68), the Legislature cannot legitimately make laws that would alter the **basic structure** of the Constitution. They submitted that clause 2 as it presently stands, purporting to disapply section 17(1) of the Constitution, would be an alteration that would be outwith the basic structure of the Constitution and is therefore impermissible.

97. I have anxiously considered the rival contentions on behalf of the parties on this aspect of this case. I am particularly conscious and mindful of the separation of powers principle which I have discussed at some length in this judgment. I therefore do not wish this Court to trespass on the legislative preserve of the Legislature. But the very provisions of the Constitution themselves impel this Court to embark upon a careful examination of this aspect of this case. Section 1 of the Constitution stipulates, as far as is material for this examination that:

> *"1(1) Belize shall be a sovereign democratic State of Central America in the Caribbean region."*

And section 2 of the Constitution states:

> *"2. This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."*

98. These two sections form Part I of the Constitution of Belize.

99. In my estimation, these sections together form the mete by which any exercise of the public power in Belize, be it Judicial, Executive or Legislative, must be measured.

100. Law-making is, of course, the preserve of the legislature; but it is to the judiciary that the responsibility falls to determine any challenge to that law, be it ordinary legislation or a proposed constitutional amendment. It is this responsibility that solely concerns this Court in this case and nothing else.

101. I am convinced that section 69 of the Constitution speaks to the **manner and form** requirements for the alteration of any of its provisions: subsection (1) expressly so states. I am therefore of the considered view that subsections (3), (5) and (5A) of section 69 address the **manner and methodology** by which an alteration of Part II (on the protection of fundamental rights and freedoms) and the other provisions specified in its Schedule 2 may be adopted in a Bill. But the enabling constitutional provision to make that Bill a law is contained in the section 68. There is, as well, in this regard, section 81 of the Constitution on the mode of exercising legislative powers.

102. **Section 81** provides for the way the legislative power can be exercised, namely, through Bills passed by the Senate and House of Representatives (except for money bill which can only be passed by the House of

Representatives alone). And to be law the Bills must be assented to by the Governor General.

103. The Governor General may assent or withhold his assent to any Bill: section 81(2). On the Governor General's assent the Bill becomes law and the Governor General shall cause the law to be published in the **Gazette** as law – (3) of section 81.

104. No law made by the National Assembly shall come into operation until it has been assented to by the Governor General; although the National Assembly may postpone the coming into effect of any law and may make laws with retrospective effect – **subsection (4) of section 81**.

105. Therefore, subsection (4) imparts a normative limitation on the power of the National Assembly to make laws, including amendments to the Constitution. Such amendments invariably are set in **Bills** which must receive the Governor General's assent to become laws by way of constitutional amendments. This additionally reinforce the position that section 69 address only the **manner and form** for the alteration of the Constitution.

106. Of course, every and any alteration of the Constitution must perforce take the form of a Bill in order to become a law. And **section 68** the enabling provision for the National Assembly to make laws for Belize subjects this power to the provisions of the Constitution.

107. Therefore, in my view, any proposed amendment of the Constitution being an exercise of making laws for Belize must meet the imperatives of section 68. That is to say, it must be compliant with the provisions of the Constitution. Additionally, such an amendment to be operational as law

must be in a Bill passed by the National Assembly **and** assented to by the Governor General.

108. There is nowhere in the Constitution any provision to obviate the necessary assent of the Governor General to Bills to become law. I find no overriding mechanism if he fails to give his assent. There is nothing in section 34 of the Constitution on the exercise by the Governor General of his functions that states he must assent to Bills, rather it is expressly provided in section 81(2) that he assents or without his assent.

109. Therefore, the contention on behalf of the defendant that so long as **sections 69(3), (5) and (5A)** are satisfied, the National Assembly can alter any provision of Part II of the Constitution, including derogation from fundamental rights, does not give the full picture. To be a valid amendment, it must be complaint with the Constitution's provisions by not transgressing or disapplying any of the fundamental rights guaranteed in Part II. Therefore to the extent that clause 2 seeks to disapply the protective provisions on petroleum and minerals, to that extent it is at odds with the Constitution.

110. It is common ground between the parties that the provisions on the manner and form for altering, by in this case, amending section 17 of the Constitution by the addition of clause 2, had been complied with. It is of course the proposal in clause 2 to disapply subsection (1) of section 17 that is the bone of contention between the parties. The claimants do not challenge the Parliamentary process for the adoption of clause 2. Their challenge is directed to that part of clause 2 that seeks to disapply section 17(1) in relation to petroleum and minerals. The gravamen of their challenge on this score is that it is against the basic structure of the Belize Constitution.

111. I am however satisfied that section 69 of the Constitution contains only provisions for the alteration of the Constitution. It is a part of the **alteration** process, but it grants no legislative imprimatur to the process. This imprimatur or competence to make an alteration into law is, in my view, contained in sections 68 and 81 of the Constitution.

112. In so far as Lord Diplock's statement in **Hinds supra,** relied upon by Ms. Young SC, I must say with the greatest respect, I find it of only limited assistance in this case. His Lordship was not addressing the issue of an **amendment to the Jamaican Constitution** that sought to derogate from a fundamental right. It was the compatibility with the Constitution of an ordinary legislation, setting up the so-called 'Gun Courts' in that country that was in issue in that case. In the instant case before me is the vexed and troubling issue of a proposed **constitutional amendment** that expressly seeks to disapply a protected constitutional right. Moreover, His Lordship's statement was, as he himself said, a "general observation". I would therefore not put the weight sought to be placed upon it by Ms. Young SC as authority for the proposition that even fundamental rights are derogable so long as the procedural provisions for altering the Constitution are observed. With respect, I prefer to take Lord Diplock's statement in this context as no more than an **obiter dictum**, without a precedential quality.

113. I am persuaded however, that in the jurisprudence of the Privy Council, the Board has had occasion to acknowledge the basic structure of a country's Constitution in determining challenges to amendments to its Constitution that were impugned for infringing fundamental rights guaranteed in the Constitution: **Ahnee v Director of Public Prosecutions supra** and **The State v Abdool Rachid Khoyraty**, judgment of the Board delivered on 22nd March 2006. In both of these cases the Board embarked upon an analysis of the **structure** of the

Constitution to determine that the constitutional amendments were unsustainable. In **Ahnee** supra, the Board expressly stated: *"The **structure** of the Constitution of Mauritius 1968 **is important**"* (Emphasis added). In **Khoyraty** supra, Lord Steyn who gave the lead judgment of the Board, first embarked on an analysis of the structure of the Constitution of Mauritius before concluding that the constitutional amendment which sought to restrict bail was impermissible, albeit more for the reason that the entrenched provision to change section 1 of the Constitution declaring Mauritius a democratic state was not followed.

114. Ms. Young SC further relied on **Teo Soh Lung supra**, for the proposition that so long as the requirements of section 69 of the Constitution relating to the alteration of any of the provisions of its Part II are satisfied, then any resulting alteration is constitutionally valid, there being no other limitation on the altering or amending powers of the Legislature other than those expressly stated. There are, she submitted, no **implied** limitations on the Legislature's power in this regard. In this, I must say, she is in the good company of Chua J. of the Singapore High Court. The learned judge in that case refused to follow the precedent-setting decision of the Supreme Court of India in the case of **His Holiness Kesavananda Bharati Sripadogalvaru v State of Karela (1973) 4 SCC 225 AIR (1973) SC 1461** (The Kesavenanda case). This case was decided by a majority of a thirteen-man bench of the Indian Supreme Court on 24 April 1973 and has given birth to the **Kesavananda Doctrine**. The learned judge's decision was based on his view that **Kesavananda** was not applicable to the Singaporian Constitution. I can only say that a close reading of **Teo Soh Lung** will disclose that indeed the provisions of the Constitution of Singapore relating to its amendment in its Article 5 are markedly different from the provisions of the Constitution of Belize relating to law-making and alteration of the latter. In Belize, the law-making power of the Legislature is subject to the provision of the Constitution and section 69 provides only

a procedural handbook as to how to alter the Constitution, which must be complied with to effect a valid alteration. But this is not all there is to altering the provisions of Part II of the Constitution.

115. On reflection, and given the issues under consideration here, in particular, whether the Legislature can override, short-cut or derogate from any and all fundamental rights provided in Part II of the Constitution, I am unable to share the company of Chua J. as enunciated in **Teo Soh Lung** having regard to the basic structure or feature of the Constitution of Belize.

116. The essence of the basic structure doctrine is that an amendment of a constitution can be made validly but its effect should not be destructive of the basic structure of the Constitution itself. As Khanna J. who broke the tie in **Kesavananda** stated:

> *"The power of amendment ... does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features."* (Emphasis added)

117. The basic structure doctrine was recently re-affirmed and clearly enunciated in the **I R Coelho v State of Tamil Nadu (2007) 2 SCC1** by the Indian Supreme Court when it stated at para. 140 of its judgment:

> *"The doctrine of basic structure as a principle had now become an axiom. It is premised on the basis that invasion of certain freedoms*

needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered with in cases relating to terrorism, it does not follow that the same test can be applied to all the offences. The point to be noted is that the application of a standard is an important exercise required to be undertaken by the Court in applying the basic structure doctrine and that has to be done by the Courts and not by prescribed authority under Article 368. The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basis structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles thereunder."

118. I am very mindful of the fact that each country's Constitution may be unique to it given its historical, social, cultural and political development. But it cannot be denied today that most written Constitutions have certain features and provisions that can properly be regarded as their basic structure. My task in these proceedings therefore, is to test and ascertain whether clause 2 is compatible with the basic structure of the Constitution of Belize.

119. In my view, the basic structure doctrine is at bottom the affirmation of the supremacy of the Constitution in the context of fundamental rights. I venture, from an analysis of the provisions of the Constitution of Belize and its scheme, to posit the following as its basic structure:

1. It proclaims and establishes Belize as a sovereign democratic State in Central America in the Caribbean region.

2. It proclaims the Constitution as the supreme law.

These two provisions together form Part I of the Constitution.

3. In its Part II extensive provisions are made for the protection of fundamental rights and freedoms. And a feature of Part II which is a part of the Constitution's basic structure is section 20 giving original jurisdiction to the Supreme Court to secure the enforcement of fundamental rights and freedoms.

4. The separation of powers recognized in Parts V, VI and VII establishing respectively, the Executive, the Legislature and the Judiciary.

5. The Power of the Legislature is not unlimited: sections 68 and 69. These two provisions stipulate both normative and procedural limitations on the Legislature. Thus all laws are subject to the Constitution and the procedure stated in section 69 must be adhered to effect any alteration of the Constitution.

6. The Rule of law stated in the Preamble is infused throughout the Constitution in tandem with an independent judiciary.

120. I therefore find the defendant's position unsustainable, as it would, in my view, run afoul of the basic structure of the Constitution to the extent it posits that any and all alterations of the Constitution is valid so long as the provisions of section 69 are satisfied. The defendant's position I fear, will thereby enthrone "Parliamentary Supremacy" in place of the Constitutional Supremacy declared in section 2 of the Constitution.

121. I am persuaded that the enactment into law of clause 2 with its disapplication of the protection of section 17(1) to property, will breach the imperative injunction against arbitrary deprivation of property stipulated in section 3(d) of the Constitution and elaborated in section 17(1) itself. These sections, as I have found, contain principles, ideals, beliefs and desires that the people of Belize want enshrined in their Constitution as they are adumbrated in the Preamble of the Constitution of Belize. The disapplication of the protection of property outside of the provisions of subsection (2) of section 17, will be a legislative determination which is impermissible and contrary to the basic structure of Belize's Constitution in so far as the separation of powers and the rule of law are concerned. In my view, the issue whether any property does or does not benefit from constitutional protection against arbitrary deprivation is one that is intrinsically within the domain of the judiciary. To the extent that the purported wholesale disapplication of section 17(1) in relation to petroleum and minerals is contained in clause 2, to that extent I find, it is contrary to the basic structure of the Constitution. In particular, I find it will render access to the Courts, implicit in section 6 of the Constitution, unavailing; it will negate the rule of law, impinge on the separation of powers by infringing on the province of the judiciary and will set at naught the constitutive democratic foundation of Belize as declared in section 1 of the Constitution.

122. In this regard I find the statement of Chief Justice Sabharwal of India in **Coelho supra** instructive:

> *"103. The history of the emergence of modern democracy has also been the history of securing basic rights for the people of other nations also. In the United States the Constitution was finally ratified only upon an understanding that a Bill of Rights would be immediately added guaranteeing certain basic freedoms to its citizens. At about the same time when the Bill of Rights was being ratified in America, the French Revolution declared the Rights of Man to Europe. When the death of colonialism and the end of World War II birthed new nations across the globe, these states embraced rights as foundations to their new constitutions. Similarly, the rapid increase in the creation of constitutions that coincided with the end of the Cold War has planted rights at the base of these documents.*
>
> *104. Even countries that have long respected and upheld rights, but whose governance traditions did not include their constitutional affirmation have recently felt they could no longer leave their deep commitment to rights, left unstated. In 1998, the United Kingdom adopted the Human Rights Act which gave explicit effect to the European Convention on Human Rights. In Canada, the "Constitution Act of 1982" enshrined certain basic rights into their system of governance. Certain fundamental rights, and the principles that underlie them, are foundational not only to the Indian democracy, but*

democracies around the world. Throughout the world nations have declared that certain provisions or principles in their Constitutions are inviolable.

105. Our Constitution will almost certainly continue to be amended as India grows and changes. However, a democratic India will not grow out of the need for protecting the principles behind our fundamental rights.

106. Other countries having controlled constitution, like Germany, have embraced the idea that there is a basic structure to their Constitutions and in doing so have entrenched various rights as core constitutional commitments. India's constitutional history has led us to include the essence of each of our fundamental rights in the basic structure of our Constitution.

107. The result of the aforesaid discussion is that since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the fundamental rights or any other aspect of basic structure then it will be struck down. The extent of abrogations and limit of abridgment shall have to be examined in each case."

123. I therefore, find myself unable to accede to the defendant's arguments and submissions that clause 2 would be a valid exercise of the power to alter the Constitution as granted to the Legislature so long as the provisions of

section 69 of the Constitution are satisfied. I find this position to be contrary to the basic structure of the Constitution. The hallmark of this position is that in the face of the requisite majority in the Legislature (three-quarters of its membership in the case of the fundamental rights provisions in Part II), **no** provision is beyond alteration or even revocation. In my view, on this hypothesis, the guarantee of fundamental rights and freedoms assured in Part II, would only be a paper guarantee; and that any of those rights and freedoms may, in the hands of the requisite majority in the Legislature, likely disappear by the process of alteration. I find that it is no answer to say that this is unlikely. This case itself disproves that facile answer.

124. In my view, fundamental rights and freedoms, if they are to mean anything, are too fundamental to be left to the vagaries of a General Election whose outcome may determine the arithmetical computation of the majority specified in section 69(3) (three-quarters of all the members of the House) for so fundamental a measure as the alteration, by derogation, of any of the fundamental rights stipulated in Part II of the Constitution. Surely such an arrangement puts in the hands of the three-quarter majority in the House at any time, an all too powerful mechanism that has the undoubted potential to enable that majority to alter, abolish or change in a derogating manner, any and all of the fundamental rights provisions of the Constitution, tempered only by the 90-day interval between the introduction of such a bill and its second reading. And this can be done not even so much as by the leave and consent of the people of Belize for whose benefit and protection the fundamental rights provisions of the Constitution are meant to serve. In my view also, there must be something inviolable about fundamental right. Where they need to be circumscribed in the public interest and the rights of others, the several provisions of the Constitution do so provide. This is what makes these rights and freedoms **fundamental**. And Part II of the Constitution is

headed, in my view, not for nothing **"Protection of Fundamental Rights and Freedoms."**

125. I therefore think that on the hypothesis of the defendant, no fundamental right is protected or safe, in the face of section 69(3). I find this argument unavailing and contrary to the basic structure of the Constitution of Belize. Therefore, I think, to propose an alteration of the Constitution that does **not enhance** a fundamental right contained in its Part II but rather seeks to derogate from it, as clearly clause 2 as it stands does, is to undercut the basic structure of the Constitution. It is far too late in the day to argue that the protection of fundamental rights and freedoms stipulated in Part II of the Constitution is not a distinct and clear feature of the Constitution. Indeed, it forms a pillar of the essential and basic structure of the Constitution as a whole.

126. The claimants have argued and, in my view, with some cogency, that to disapply the fundamental right against arbitrary deprivation of property contained in the Constitution and indeed, any of its fundamental rights guaranteed in it, the people of Belize should have a say either through a referendum or a General Election in which such a change is put to them for their views in exercise of their constituent power by which they had set up both the State of Belize and its Constitution. It is difficult to dissent from such a view. Indeed, in paras. 36 and 37 of the first affidavit of Sir Barry Bowen, the statement is made that in the campaign and manifesto of the political party that now enjoys the three-quarter majority in the House, there was no mention of the changes now contained in clause 2.

127. In terms of the entrenchment of the fundamental rights provisions in section 69 on the alteration, these provisions discloses to my mind a rather lax situation: a three-quarter majority in favour in the House and the 90-day waiting period is all that is required. But in 1998 a referendum on

a derogating amendment was introduced by section 2(2)(a) of the old Referendum Act. Further, by Act No. 39 of 2001 a simple majority vote in the Senate was added as a requirement to alter any provisions of the Constitution on fundamental rights. This became section 69 (5A) of the Constitution.

128. However, a part of the package of proposed legislation introduced soon after the General Election on 7th February 2008, included the abolition of the requirement for a referendum on any derogating amendment to any of the fundamental rights provisions in Part II of the Constitution. There was animated litigation on this, the outcome of an appeal to the Court of Appeal is awaited.

129. But within the proposals in the Sixth Constitutional Amendment Bill 2008, there is tucked away in clause 11 a provision to delete section 69 (5A) of the Constitution thereby dispensing with any contribution or say from the Senate on any amendment to the fundamental rights provisions of the Constitution.

130. These, of course, are matters of policy which is not the province of the Courts. But I cannot help noticing that instead of entrenching or deeply en trenching fundamental rights in Belize such as through a referendum as in other countries in the region, there is a perceptible move to weaken or water-down any protection against derogating alteration of these rights.

131. This reinforces, in my view, the need to articulate and apply the basic structure of the Constitution which, I believe, will temper any urge to alter, in a derogating manner, the fundamental rights provisions. The basic structure doctrine or principle is, as I have said, at bottom, about the supremacy of the Constitution in contradistinction to the transient and formulaic majority in section 69(3) of the Constitution which is simply

genuflection to "Parliamentary supremacy", an out-moded concept in a country with a written Constitution.

The basic structure is the foundation of the supremacy of the Constitution, without which, for example, the unprotected section 2 proclaiming the supremacy of the Constitution itself will not be beyond the reach of alteration or revocation, as it stands as a solitary sentinel without **any** protection against alteration or even revocation as provided for in section 69 of the Constitution. There is no garland of protection around section 2 or even section 1 for that matter. These two sections, in my view, provide the very foundation of the basic structure of the Constitution of Belize.

132. In establishing the basic structure of the Constitution of Belize, regard must, I think, be properly had to the constitution as a whole and the way a particular issue is treated within it. In this connection, I respectfully adopt the statement by the U.S. Supreme Court in **Smith Dakota v South Carolina 192 US 268 (1940)**:

> *"It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument."*

133. I am settled in my view that the great purpose of para. (e) of the Preamble, sections 3(d) and 17(1) of the Constitution is to afford to property a measure of protection that clause 2 would blightly throw overboard by seeking to disapply section 17(1) itself in relation to petroleum and minerals. In this regard, if enacted, it would be at cross-purposes with the Constitution's solicitude for and protection of property so clearly

adumbrated in its Preamble and provided for in its specific provisions in sections 3(d) and 17(1).

In short, it would be more than a wedge to undermine the basic structure of the Constitution.

Conclusion

134. I cannot conclude this judgment without acknowledging the assistance I received from all the learned attorneys in this case, in particular for the wealth of materials they put at my disposal and the skilful and able manner in which they pressed their respective client's case.

I have therefore been able to arrive at the ineluctable conclusion in the light of the issues so ably argued that I must perforce follow the clear and unambiguous command of the Constitution in its section 2:

> *"This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution, that other law shall to the extent of the inconsistency be void."*

However, as I stated in para. 16 of this judgment, it is common ground between all the parties that the Sixth Constitutional Amendment Bill, 2008, including its clause 2, which is sought to be impugned in these proceedings, has gone through all the legislative processes and phases required by the Constitution. But it has not yet been presented to the Governor General for his assent and for him to cause it to be published in the **Gazette** as law. It is only when this is done will it become law. The Governor General may, of course, withhold his consent s section 81(2) perfectly entitles him. Therefore the Sixth Constitutional Amendment Bill,

2008, is exactly that, a bill, which is not yet law and has not yet amended the Constitution.

I do not, therefore, think the claimants can properly move this Court to grant them the coercive relief they seek to have me strike down clause 2.

But, however, in the light of my several findings and conclusions regarding clause 2 in seeking to disapply section 17(1), they are undoubtedly entitled to some declaratory relief.

In the circumstances therefore, I find and **declare** that the enactment of clause 2 as it stands, particularly its purported disapplication of section 17(1) of the Constitution to petroleum and minerals, would not be in consonance with the Constitution. In particular, I **declare** that it would offend those parts of the Preamble of the Constitution regarding the ownership of private property; section 3(d) of the Constitution enjoining arbitrary deprivation of private property; section 6(1) of the Constitution guaranteeing equal protection of the law, implicit in which is unimpeded access to the Courts; and section 17 (1) itself which though not prohibiting the policy of clause 2 vesting petroleum and minerals in the Government of Belize, does afford access to the Courts to test the validity of that vesting and to determine the interests, if any, of the claimants and to have compensation ordered and the enforcement of that compensation.

I **declare** as well that the enactment of clause 2 with its purported exclusion of section 17(1) rights will offend and upset the basis structure of the Constitution of Belize regarding the principle of the separation of powers and its undoubted concomitant, the rule of law and the protection of fundamental rights especially those relating to the ownership and protection of property from arbitrary deprivation.

Finally, in the course of the hearing of this case, I explored with the attorneys for the parties, the use of the blue pencil to excise the offending parts of clause 2, but they all demurred. In retrospect, I think it was just as well: clause 2 is only a bill and not an enacted legislation in which case there would have been no utility for the blue pencil exercise. But the declarations I have made regarding that part of clause 2 purporting to disapply section 17(1) of the Constitution should suffice.

It is not the business of the Courts to write amendments to bills, however well-intentioned the offer to do so!

I will now hear counsel on costs, which in view of my conclusions, I award to the claimants.

Costs to claimants fit for two attorneys per claimant, to be agreed or taxed.

A. O. CONTEH
Chief Justice

DATED: 13th February, 2009.