IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 597 of 2011

THE BRITISH CARIBBEAN BANK LIMITED	**CLAIMANT**
AND	
THE ATTORNEY GENERAL OF BELIZE	**1st DEFENDANT**
AND	
THE MINISTER OF PUBLIC UTILITIES	**2nd DEFENDANT**

CLAIM NO. 646 of 2011

DEAN BOYCE **TRUSTEES OF THE BTL EMPLOYEES TRUST**	**CLAIMANTS**
AND	
THE ATTORNEY GENERAL OF BELIZE **THE MINISTER OF PUBLIC UTILITIES**	**DEFENDANTS**

Hearings
2012
13th March
14th March
11th June

Mr. Eamon Courtenay SC and Mrs. Ashanti Arthurs-Martin for the claimant in Claim 597 of 2011.
Lord Peter Goldsmith QC and Mrs. Magali Marin-Young for the claimants in Claim No. 646 of 2011.
Mr. Denys Barrow SC, Mr. Nigel Hawke and Ms. Illiana Swift for the defendants in both claims.

LEGALL J.

JUDGMENT

Preliminary Facts

1. On 25th August, 2009, the legislature of Belize enacted the Belize Telecommunications (Amendment) Act 2009, No. 9 of 2009, (The 2009 Act) which amended the Belize Telecommunications Act 2002 No. 16 of 2002 (the Principal Act) by adding and inserting new sections 63 to 74 immediately after section 62 of the Principal Act. The new section 63(1) in the Principal Act is as follows:

> "63. (1) Where the licence granted to a public utility provider is revoked by the Public Utilities Commission, or where a licensee ceases operations or loses control of operations, or where the Minister considers that control over telecommunications should be acquired for a public purpose, the Minister may, with the approval of the Minister of Finance, by Order published in the Gazette, acquire for and on behalf of the

> Government, all such property as he may, from time to time, consider necessary to take possession of and to assume control over telecommunications, and every such order shall be prima facie evidence that the property to which it relates is required for a public purpose."

The Minister responsible for telecommunications, acting under the inserted section 63(1) above, issued two statutory instruments, No. 104 of 2009, entitled Belize Telecommunications (Assumption of Control over Belize Telemedia Ltd.) Order 2009, and No. 130 of 2009, which amended No. 104 of 2009, entitled the Belize Telecommunications (Assumption of Control over Belize Telemedia Ltd.) Order 2009 made on 4th December, 2009. Order 104 of 2009 stated, among other things, as follows:

> "AND WHEREAS, after a careful consideration of all the facts and circumstances, I consider that control over telecommunications should be acquired for a public purpose, namely, the stabilization and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious and non-contentious environment; NOW, THEREFORE, in pursuance of the above objectives, it is hereby ordered as follows:
> 1. ….
> 2. The property specified in the Schedule to this Order is hereby acquired for and on behalf of the Government of Belize for the public purpose aforesaid.".

Order 130 of 2009, amended the schedule to order 104 of 2009, and added properties which were also compulsorily acquired.

2. The intention of the legislation above was to compulsorily acquire the properties, rights and interests held by the claimants in both claims (the claimants) in Belize Telemedia Ltd., a major provider of telecommunications services in Belize. There was a challenge to the above legislation by the claimants, in claims No. 874 of 2009 British Caribbean Bank Limited v. Attorney General and Minister of Public Utilities; and No. 1018 of 2009, Dean Boyce v. Attorney General and Minister of Public Utilities, on the grounds that the legislation was contrary to sections 3(d), 6, 16 and 17 of the Constitution; and that the legislation was not made for the stated public purpose; was discriminatory, and was also in breach of the separation of powers doctrine as enshrined in the said Constitution. The claims were heard by Legall J in the Supreme Court, and by a written decision dated 30th July, 2010, the judge dismissed both claims No. 874 and 1018 of 2009, and made orders that the Financial Secretary shall without delay comply with statutory provisions for the payment to the claimants of reasonable compensation within a reasonable time for the properties, rights and interests acquired by the 2009 Act and the above orders. Nearly two years have passed since the date of that judgment and the claimants have not yet received compensation for their properties compulsorily acquired.

3. The claimants in the above claims filed appeals against the said decision of the Supreme Court, to the Court of Appeal, namely Civil Appeals Nos. 30 and 31 of 2010. The Court of Appeal (Morrison JA, Alleyne JA and Carey JA) in a written decision delivered on 24th June, 2011, allowed the appeals and declared that the Acquisition Act and orders were inconsistent with the Constitution and were unlawful, null and void. The Acquisition Act referred to was the 2009 Act, and the orders were orders 104 and 130 of 2009 above. By this declaration, the Court of Appeal held that the acquisition of the properties, rights and interest of the claimants in Claims 874 and 1018 of 2010 was unlawful, null and void. The Court of Appeal did not disturb the conclusion of the trial judge that the claimant Boyce in Claim 1018 of 2009 had not, on the evidence, proved discrimination under section 16(1) of the Constitution, as was alleged by that claimant.

4. The Court of Appeal also held that, on the evidence and for reasons given in the judgment, it did "not think that the compulsory acquisitions were duly carried out for the stated public purpose": see page 89 of the judgment. The Court of Appeal also concluded that the 2009 Act was contrary to section 17(1) of the Constitution because that Act did not prescribe the principles on which reasonable compensation was to be paid within a reasonable time. The court also ruled that the 2009 Act did not secure to a person claiming an interest in the acquired properties, a right of access to the court to establish that interest; and also did not secure to a person who had been awarded compensation, a right of access to the courts to enforce his right to compensation: see page 63 and 64 of the judgment. In

relation to whether the 2009 Act was proportionate or was for an illegitimate purpose, the Court of Appeal concluded that the compulsory acquisitions were not a proportionate response to the requirements of the stated public purpose; and held that, in carrying out the compulsory acquisitions, the government acted for an illegitimate purpose, and thus breached the appellants' constitutional right to protection from arbitrary deprivation of their property.

5. The Court of Appeal also ruled that the appellants were entitled to be heard by the Minister before the Acquisition Orders were issued. In other words, the Minister, before he made the subsidiary legislation – the Orders – to acquire the claimants' properties, had to hear the claimants. The respondents in the appeal did not invoke the jurisdiction of the highest Court of Belize for a ruling on the above findings of the Court of Appeal. The appellants though, appealed the Court of Appeal's decision on the single discrimination point above to the Caribbean Court of Justice (CCJ) which appeal is set to be heard.

6. Rather than invoking the jurisdiction of the CCJ, the respondents rushed with unusual speed to parliament, which passed, in one day, on 4th July, 2011, the Belize Telecommunications (Amendment) Act 2011 (the 2011 Act). The 2011 Act is an "Act to amend the Belize Telecommunication Act No. 16 of 2002": see long title. Section 2 of 2011 Act purports to amend section 63(1) of the Principal Act, which was inserted therein by the 2009 Act. Section 2 of the 2011 Act states:

"Amendment of section 63 (2). Section 63 of the Principal Act is hereby amended as follows:

(a) in subsection (1), by deleting the following words occurring at the end of that section:

"and every such order shall be prima facie evidence that the property to which it relates is required for a private purpose;"

(b) In subsection (2), by substituting the words "As from the date of commencement, for the words "upon publication of the Gazette" occurring at the commencement of the subsection."

7. The legislative draftsperson of the above subsections treated section 63(1) above of the 2009 Act, as inserted in the Principal Act, as if it were still legally there, although the Court of Appeal had previously declared, on 4th June, 2011, that the 2009 Act, in which appeared the said section 63(1), unlawful, null and void. The 2011 Act purported to make other changes to the 2009 Act as inserted in the Principal Act, by repealing and replacing subsection 3 and 4, and inserting new subsections (11) and (12) in the said section 63; and also by amending sections 64 and 67 of the Principal Act by adding new provisions; and by repealing section 71 with a new section 71, and by adding a new section 75 in the Principal Act. The 2011 Act is given as item 1 in the appendix to this judgment.

8. Acting under section 63(1) of the Principal Act, which had been inserted by the unlawful and void 2009 Act, and partially purportedly amended by the 2011 Act, the Minister made on 4th July, 2011 an order, namely the Belize Telecommunications (Assumption of Control over Belize Telemedia) limited order 2011, (the 2011 order). This order was made by the Minister, according to its preamble, "in exercise of the powers conferred upon him by section 63 of the Belize Telecommunications Act No. 16 of 2002 as amended by the Belize Telecommunications (Amendment) Act 2009 No. 9 of 2009 and the Belize Telecommunication (Amendment) Act 2011 (No. 8 of 2011)." The 2011 Order which was also passed with unusual speed on 5th July, 2011, one day after the 2011 Act, purported to compulsorily acquire the same properties that the 2009 Act and Orders had compulsorily acquired, before the Court of Appeal struck them down as being null and void. The 2011 Order states a differently worded public purposes from the 2009 Orders, namely: (a) to restore the control of the telecommunications industry to Belizeans, (b) to provide greater opportunities for investment to socially oriented local institutions and the Belizean society at large and(c) and to advance the process of economic independence of Belize with a view to bringing about social justice and equality for the benefit of all Belizeans." The 2011 Orders are given as item2 in the appendix.

9. By the 2011 Act and 2011 Orders, the National Assembly due to the decision of the Court of Appeal, sought to renationalize the properties of the claimants; and purported to comply, in some respects, with the

Court of Appeal's judgment. In this regard see section 2(a) and (e) of the 2011 Act, and the Court of Appeal's judgment requiring the right to be heard before compulsory acquisition of property. But for the general purposes of allegedly putting the renationalization beyond doubt; and to provide that the government shall, at all times, have majority ownership and control of Belize Telemedia and other public utilities, the National Assembly passed with the required majorities, on 21st October, 2011, the Belize Constitution (Eighth Amendment) Act 2011 (the Eighth Amendment) which amended some provisions of the Constitution. Clause 2 of the Eighth Amendment purports to amend the supreme law clause as contained in section 2 of the Constitution to define "other law," as appears in that section. Section 2 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."

Clause 2 states that: "Section 2 of the Constitution is amended by renumbering that section as subsection (1) and by adding the following as subsection 2. The new subsection 2 states:

> "(2) The words "other law" occurring in subsection (1) above do not include a law to alter any of the provision of this Constitution which is passed by the National Assembly in conformity with section 69 of the Constitution."

The effect of the above provisions would seem to exclude from of the supreme law clause, a law passed in conformity with section 69 of the Constitution, such as the Eighth Amendment, which section provides the required majorities to alter provisions of the Constitution, including fundamental rights. The effect of the section 2 of the Eighth Amendment seems to exclude such other law from the supreme law clause of the Constitution.

10. Section 3 of the Eighth Amendment purports to amend section 69 of the Constitution as follows:

> "3. Section 69 of the Constitution is hereby amended by the addition of the following new subsection after subsection (8):-
>
> "(9) For the removal of doubts, it is hereby declared that the provisions of this section are all-inclusive and exhaustive and there is no other limitation, whether substantive or procedural, on the power of the National Assembly to alter this Constitution."

This section seeks to limit the power of the National Assembly to alter the Constitution, to the provision of section 69. According to the amendment, there is no other limitation in the Constitution other than section 69 on the National Assembly to alter or amend the Constitution. It seems that the intention is to prevent constitutional principles such as the basic structure doctrine of the Constitution, a

doctrine examined below, and section 68 from providing a limit on the power of the National Assembly to alter or amend the Constitution. Section 68 states that subject to the provisions of this Constitution, the National Assembly may make laws for the peace order and good Government of Belize. The provisions of the Constitution include the preamble which is a part of the Constitution.

11. As the appellants were successful in the Court of Appeal, they believed that the orders made by that court entitled them to possession of the properties that were the subject of the void 2009 Act and Orders. That not being accomplished, they applied to the Court of Appeal to intervene and grant consequential relief which would have specifically given them possession of the properties, but the Court of Appeal declined the application. The appellants, who had already filed the claims in this matter, got leave from the Court of Appeal to the Caribbean Court of Justice on the question of whether the Court of Appeal's decision not to grant them consequential relief was correct, and whether the Court of Appeal was wrong on the discrimination ruling above. When that appeal came before the CCJ, the claimants in present claims, wanted to argue before that court, as part of their appeal, the issues raised in these claims – that is to say, the validity of the 2011 Act and Orders and the Eighth Amendment. The CCJ, by majority, (Justice Anderson dissenting) held that since the 2011 Act and Orders and the Eighth Amendment, "could have a devastating impact on the appeals," the CCJ considered "that the better course is indeed to stay the appeals pending the outcome of the challenge in the normal manner to the 2011 Legislation": see ***Dean Boyce v.***

Attorney General and Minister of Public Utilities 2012 CCJ1 AJ (R) at paragraph 11. So the claimants reverted to the Supreme Court with the present claims.

The Present Claims

12. For convenience and for purposes of fully understanding the claims, I have decided to quote each claim as drafted in the filed claim forms. In claim 597 of 2011 the following reliefs are claimed:

> "(a) A Declaration that the Belize Telecommunications (Amendment) Act 2011 (the 2011 Act), is inoperative, void and of no effect in that it purports to amend provisions of the Belize Telecommunications Act (the 2002 Act) purportedly amended by the Belize Telecommunications (Amendment) Act 2009 (the 2009 Act) which said Act was declared unlawful, null and void by the Court of Appeal on the 24th June 2011;
> (b) A Declaration that the 2011 Act is contrary to the Preamble, sections 2, 3(d), 17 and 68 of the Constitution; it violates the Separation of Powers Doctrine and is therefore inconsistent with the Constitution and is unconstitutional, null and void;
> (c) A Declaration that Statutory Instrument No. 70 of 2011 Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2011 (the 2011 Order) is contrary to the Preamble, sections 2, 3(d), 16, 17 and 68 of the Constitution; it violates the Separation of Powers Doctrine and is therefore inconsistent with the Constitution and is unconstitutional and void:
> (d) A Declaration that the compulsory acquisition by the Government pursuant to the 2011 Order of all the rights and interests held by the Claimant under the Mortgage Debenture and Loan Agreements listed in Part II of

Schedule I to the 2011 Order ("the Claimant's Property") is unconstitutional, null and void:

(e) A Declaration that the Claimant is, and has always been the proprietor of the Claimant's property:

(f) Damages for breach of the Claimant's constitutional rights, and an Order for the payment of said damages by a date certain and by a named officer of the Government of Belize;

(g) An Order directing the Registrar of Lands and the Registrar of Companies to take such steps as may be necessary to ensure that their records reflect that the Claimant is the proprietor of the Claimant's property:

(h) An order restraining the Respondents, whether by themselves their servants and/or agents, from taking any steps howsoever that would prevent the Claimant from exercising all rights to which it is entitled under the Mortgage Debenture and Loan Agreements listed in Part II of Schedule I to the 2011 Order:

(i) A Declaration that the Belize Constitution (Eighth Amendment) Act is contrary to the Constitution, and is unlawful, null and void:

(j) An Order that the Claimant shall be at liberty to apply for any further consequential relief as may be necessary to secure the effect of the declarations and orders made herein;

(k) Interest;

(l) Such further and other relief as may be just; and

(m) Costs."

The reliefs claimed in Claim 646 of 2011 are:

(a) A Declaration that the Belize Constitution (Eighth Amendment) Act, 2011 is contrary to Section 2 of the Constitution of Belize, and the principle of constitution supremacy, and is unconstitutional and void;

(b) A Declaration that the Belize Telecommunications (Amendment) Act, 2011 and Statutory Instrument No. 70 of 2011 (Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2011),

and the Belize Constitution (Eighth Amendment) Act, 2011 are contrary to Section 3(a) and Section 6 of the Constitution of Belize and are unconstitutional and void;

(c) A Declaration that the Belize Telecommunications (Amendment) Act, 2011 and Statutory Instrument No. 70 of 2011 (Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2011), and the Belize Constitution (Eighth Amendment) Act, 2011 are contrary to section 3(d) and Section 17 of the Constitution of Belize and are unconstitutional and void;

(d) A Declaration that the Belize Telecommunications (Amendment) Act, 2011 and Statutory Instrument No. 70 of 2011 (Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2011), and the Belize Constitution (Eighth Amendment) Act, 2011 are contrary to Section 16 of the Constitution of Belize and are unconstitutional and void;

(e) A Declaration that the Belize Telecommunications (Amendment) Act, 2011 and Statutory Instrument No. 70 of 2011 (Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2011), and the Belize Constitution (Eighth Amendment) Act, 2011 are contrary to Section 20 of the Constitution of Belize and are unconstitutional and void;

(f) A Declaration that the Belize Telecommunications (Amendment) Act, 2011 and Statutory Instrument No. 70 of 2011 (Belize Telecommunications (Assumption of Control over Belize Telemedia Limited Order 2011), and the Belize Constitutional (Eighth Amendment Act, 2011 are contrary to Section 68 of the Constitution of Belize and are unconstitutional and void;

(g) A Declaration that the Belize Telecommunications (Amendment) Act, 2011 and Statutory Instrument No, 70 of 2011 (Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2011), and the Belize Constitution (Eighth Amendment) Act, 2011 are in breach of the doctrine of the separation of powers, the rule of law, natural justice and protection of fundamental rights enshrined in the Constitution of Belize and are unconstitutional and void;

(h) A Declaration that the Belize Telecommunications (Amendment) Act, 2011 and Statutory Instrument No. 70 of 2011 (Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2011); and the Belize Constitution Eighth Amendment Act, 2011 are unconstitutional and void or the reason that they are ad hominem:

(i) An Order that the First and Second respondent take all necessary steps to effect the reversal of the transfer of the shares that were purportedly acquired pursuant to the Belize Telecommunications (Amendment) Act 2011 and Statutory Instrument No. 70 of 2011 (Belize Telecommunications (Assumption of Control over Belize Telemedia Limited Order 2011);

(j) An Order that the Claimants shall be at liberty to apply for any further consequential relief as may be necessary to secure the effect of the declarations and orders made by this Honourable Court;

(k) Such other declarations and orders and such directions as this Honourbale Court may consider appropriate for the purpose of enforcing or securing the enforcement of the aforementioned Declarations and Orders;

(l) Damages including exemplary damages;

(m) Interest;

(n) Such other reliefs as the Court deems just and equitable; and

(o) Costs."

2011 Act and Orders

(a) amendments to void act?

13. The 2011 Act is challenged on several grounds. The 2011 Act is void, say the claimants, because it purports to amend provisions of the Principal Act which were inserted therein by the 2009 Act which was void ab initio; and therefore was non-existent. In other words, there

was nothing contained in the void provisions of the 2009 Act to amend. We have already shown above that the purported amendments were to section 63(1) and (2) of the Principal Act, as inserted by the 2009 Act. Other such amendments took the form of repeals and replacements of several provisions of the Principal Act as inserted by the 2009 Act, and the addition of new provisions therein, such as subsections (3, (4), (11), (12) of section 63, subsections (3) and (4) of section 64, paragraphs (f) and (g) of section 67, and section 71 and section 75. It is clear that the 2011 Act repealed provisions which in effect recognized the null and void ruling of the Court of Appeal; and put in the Principal Act some new provisions that were not in the 2009 Act. Therefore the ruling by the Court of Appeal in relation to the 2009 Act could not be referring to the new provisions of the 2011 Act, such as subsection (3), (4), (11) and (12) of section 63: subsection (3), (4) of section 64; subparagraphs (f) and (g) of section 67, and sections 71 and 75. These new provisions inserted in the Principal Act are hereinafter after referred to as the New Provisions. It must, however, be noted that subsections 5, 6, 7, 8 and 9 and 10 of section 63, subsections (1), (2) and 3 of section 64, sections 65, 66, 67(1)(a) to (h) and (2), 68, 69, 70, 72, 73 and 74 all of the Principal Act, which were inserted therein by the now void 2009 Act, were not amended or affected by the 2011 Act. These provisions are, in accordance with the Court of Appeal's decision, remain non-existent in the Principal Act – null and void; and there is no express provision in the 2011 Act, or the Eighth Amendment as we shall see below, reenacting and reviving them. These provisions are hereinafter referred to as the Null and Void Provisions.

14. But it also has to be noted that section 2 of the 2011 Act sought to remove words from subsections (1) and (2) of section 63, even though these subsections were declared void by the Court of Appeal and were non-existent or dead at the time. The claimants, to support their contention that provisions in a void Act cannot be amended rely on ***Attorney General of Saint Christopher Nevis and Anguilla v. Yearwood et al Civil Appeal No. 6 of 1977*** and ***Akar v. Attorney General of Sierra Leone 1970 AC 853***. But before examining these authorities, I may mention that I do not think that it could be reasonably argued that provisions in a void Act which were previously inserted in another Act cannot be replaced, in that other Act by new provisions enacted by parliament, as the 2011 Act does in relation to the New Provisions above. I will return to this point below. For now let us examine the above authorities.

15. In ***Yearwood***, the Government of St. Kitts entered into an agreement called the Sugar Industry Rescue Operations Agreement with the St. Kitts Sugar Association Limited for the purpose of rescuing a declining sugar industry by providing that the Association to sell almost all its sugar estate lands in St. Kitts to the government. There were difficulties over a long period of time to come to an agreement as to price, with the parties making offers and counter offers. In the meantime, the government had already introduced a Bill in the legislature for the acquisition of the sugar estate lands and for payment of compensation. The Bill was passed into law and became the Sugar Estates Land Acquisition Act 1975 No. 2 of 1975 on 28th

January, 1975. Subsequently, government officials formally took possession of the lands under the Act. About three days after the Act was passed, the plaintiff issued a writ against the defendants claiming, among other things, that the Act was unconstitutional in that it failed to prescribe proper principles of full compensation for the acquisition of the lands; and that the Act restricted or denied the plaintiff's right of access to the High Court for compensation.

16. About six months after the passing of the Act No. 2 of 1975, on 2nd July 1975, the legislature amended the Act by the Sugar Estates Lands Acquisition (Amendment) Act 1975, No. 8 of 1975. Amending claims and defences were accordingly done to meet the amended Act, before the case came up for trial. The plaintiff claimed that the Act No. 2 of 1975 as amended, was unconstitutional on the above grounds. The judge, at first instance, held that the Act 2 of 1975 as amended was unconstitutional null and void and of no effect. On appeal, several matters had to be decided including the constitutionality of the original Act No. 2 of 1975 and whether the amending Act No. 8 of 1975 was a valid exercise of the power of the legislature. The court held that some provisions of the original Act were unconstitutional as they offended the principles of compensation provided for in the Constitution. On the question whether Act No. 8 of 2005 could properly amend the unconstitutional Act No. 2 of 2005, which the court subsequently found to be void, the Court of appeal held, following the Australian case of ***South Australia v. Commonwealth 1942 65 CLR 873 at page 406*** that: "A pretended law made in excess of power is not and never has been a law at all."

The law is not valid until a court pronounces against it – and thereafter invalid. If it is beyond power it is void ab initio and that unconstitutional statute is dead in the eye of the law." In other words, since the Act 2 of 2005 was unconstitutional, Act 8 of 2005 could not amend it, as it was dead in the eye of the law. In ***Yearwood*** two points must be noted: Firstly, there were only two Acts involved; and secondly, when Act 2 of 2005 was amended, it was not then declared by any court as void. The court subsequently held so.

17. It seems to me that a fine distinguishing feature between ***Yearwood*** and this case before me, is that in ***Yearwood,*** Act 2 of 2005 was not an amending Act, but the Principal Act. In this case before me, the 2009 Act was an amending Act whose provisions were inserted in another Act, the Principal Act, and then there is a third Act, the 2011 Act. So when the 2011 Act, the third Act, was enacted, it sought to amend, not the 2009 Act, but the Principal Act. Therefore when the 2011 Act enacted new replacing provisions in the Principal Act, it was validly there to amend. This would not apply to the purported amendments to subsections (1) and (2) of section 63 by the 2011 Act because these subsections are not replaced, but words therein were purportedly deleted and substituted from the subsections which were not in existence. In my view, the New Provisions which the 2011 Act inserted in the Principal Act – the Belize Telecommunications Act No. 16 of 2002, are still in that Act because no court has declared the New Provisions void. This court is therefore bound to recognize them as being part of the Principal Act. The Principal Act was there for the insertion of the New Provisions. But the New Provisions which are

still in the Principal Act do not make complete sense by themselves, except, of course, the new section 71 and 75, since the Null and Void provisions are not there.

18. The question now is whether the 2011 Act revives the 2009 Act. There is a provision in the 2011 Act which states the Act shall take effect from 25th August 2009, thus giving it retrospective effect. In ***Yearwood***, the court quoting the Indian jurist Basu in his book, Limited Government and Judicial Review states that:

> "An unconstitutional statute cannot be revived by retrospective amendment of that statute. It would follow …. that such unconstitutionality cannot be retrospectively removed by any subsequent amendment of that very statute which was dead ab initio."

The 2011 Act therefore lacked the authority to revive the provisions of the 2009 Act. The provisions of the 2009 Act remain dead. Therefore section 2(a) and (b) of the 2011 Act is meaningless because of the absence of section 63(1). It follows, as night follows day, that the 2011 Order, which was purportedly made under section 63(1) is null and void because there was no statutory authority to make it as we shall further see below. The minister who made the order exceeded his jurisdiction.

19. The other case cited to support the contention that a void Act cannot be amended is ***Akar v. Attorney General of Sierra Leone 1970 AC 853***. In this case the appellant Joseph Akar was born in the former colony or Protectorate of Sierra Leone, to an indigenous Sierra Leone mother and a Lebanese father who had lived in Sierra Leone for fifty-six years, and who was not of "negro African descent." On the 27th April, 1961, Sierra Leone became independent and the appellant became a citizen of Sierra Leone on the basis of section 1(1) of the new independence Constitution which stated that every person having been born in the former colony of Protectorate of Sierra Leone shall become a citizen of Sierra Leone. On 17th March, 1962, section 1(1) above was amended by the House of Representatives by the Constitution (Amendment) No. 2 Act 1962 which inserted in section 1(1) immediately after the words "Every person" the words "of negro African descent," and also defined the words "person of negro African descent" as meaning a person whose father and his father's father are or were negroes of African origin." The amendment had a retrospective effect, as it stated that it was deemed to come into effect on 27th April, 1961 the date of Sierra Leone became independent. As a result of the amendment, the appellant was deprived of his citizenship. The appellant challenged the constitutionality of Act No. 2 of 1962 on the main ground that it was discriminatory on grounds of race and was not reasonably justifiable in a democratic society. The Supreme Court held that it was unconstitutional; but the Court of Appeal reversed that decision. On appeal to the Privy Council, where it was conceded that the use of the word "negro" involved a description by race, the appeal, by majority, was allowed. Lord

Morris of Borth-y-Gest said that their Lordships had no doubt that the Act No. 2 of 1962 was discriminatory because different treatment would be afforded to different people. His Lordship continued: "It seems very doubtful whether it could be said that to impose a disability on the ground that some one's father or paternal grandfather were not "Negroes of African descent" was something which having regard to its "nature was reasonably justifiable in a democratic society": see pages 864 and 865.

20. Since the amendments to section 1 by Act No. 2 of 1962, referred to in the judgment as Act No. 12, were unconstitutional and invalid, it was submitted by the Attorney General that this invalidity was avoided or cured by another Act passed prior to the case reaching the Privy Council, namely the Constitutional (Amendment) No. 3 Act 1962 referred to in the judgment as Act No. 39 of 1962. This amendment referred to subsections (3) and 4 of section 1 which was amended by Act 2 or Act 12 of 1962, which was declared unconstitutional and invalid. His Lordship said that there was therefore nothing for Act 39 of 1962 to amend and continued:

> "In the Constitution unless it had been validly amended there were no such subsections 1. Had the provisions of section 2 of Act No. 12 been valid then there would have been the addition to section 1 of the Constitution of such subsections. Act No. 39 needed as a basis an assumption that Act No. 12 was valid and so was an existing Act. That was an incorrect assumption. Their Lordships are quite unable to accept the contention that Act No. 39 should be regarded as impliedly

> reviving or re-enacting any invalid provisions of Act No. 12. The provisions of section 2 of the Act No. 12 were invalid when the Act was passed and assented to and the provisions must be treated as having been non-existent. There is no provision in Act No. 39 which purports or sets out to give them life. Though Act No. 39 was passed in accordance with the provisions of section 43 it becomes meaningless once the provisions of section 2 of Act No. 12 are ignored, as they must be. The general power of Parliament must include a power to enact that legislation (if valid and validly passed) is to have retrospective effect. An intention so to enact would have to be shown by clear and definite words."

21. In ***Akar*** Act No. 12 was not an existing Act to amend. In this case before me The Principal Act was an existing Act to amend. In addition, in both ***Akar*** and ***Yearwood*** the alterations of the respective provisions related to amendments to specific sections by adding words or subsections to those sections. The effect of the Court of Appeal's decision on the 2009 Act is that the decision deleted the void provisions or sections of the 2009 Act that were inserted in the Principal Act. When that decision was made, it left a gap in the Principal Act, the Belize Telecommunications Act 2002, and what the third Act, the 2011 Act did, was fill the gap with the New Provisions. This is what, in my view, distinguishes this case from ***Yearwood*** and ***Akar***. What the 2011 Act does, except in relation to section 63(1) and (2), is to repeal, which in effect is to delete sections and replace and introduce new subsections and sections, as the New Provisions show. The New Provisions would not be completely understood except

section 71 and 75 because the Null and Void provisions are not there to make the connection and provide cohesion. Therefore objections to the new Provisions except section 71 and 75 cannot be fully analyzed for purposes of submissions made. But in terms of subsections (1) and (2) of section 63 these subsections were not there to delete and substitute words, as sections 2(a)(b) of the 2011 Act purported to do.

22. As I see it, replacing dead sections or subsections of an Act is different from amending parts of a subsection that is already dead. Parliament has the power to enact laws and in exercise of that power it can replace dead or void legislation. The clear intention of parliament was to replace the dead sections with the New Provisions. But in a classic exhibition of inelegant, weak and inexperienced legislative drafting, the draftsperson, by employing words such as "amend" or "amended" rather than simply stating that it was re-enacting new provisions in the Principal Act, should not detract from the clear intention of the legislature which was to re-enact the New Provisions in the Principal Act. These New Provisions are in the Principal Act – the Belize Telecommunications Act 2002 – and recognizing them ought not to be prevented because of a slip or mistake by the legislative draftsperson.

(b) <u>incorporation by reference</u>

23. The defendants submitted that by referring in the new Act – the 2011 Act – to the provisions in the void Act – the 2009 Act, the 2011 Act "gave to the old provisions – (which I think is meant the 2009 Act) the same operation as if they were inserted in the instrument referring to

them." This is what known as incorporation by reference: the incorporation of "earlier statutory provisions by reference rather than setting out similar provision in full": see ***Bennion*** on Statutory Interpretation 5th Edition, at page 758. The submission of the defendants is that the 2011 Act by referring to provisions of the 2009 Act, the 2011 Act, due to the principle of incorporation by reference, re-enacted the provisions of the 2009 Act with modifications such as section 2(a) and (b) of the 2011 Act. The problem with this submission, as the claimants point out, is that there was nothing to incorporate by reference. The provisions of the 2009 Act were not in existence at the time the 2011 Act was passed, as the 2009Act was declared void by the Court of Appeal and non-existent. There was therefore nothing for the 2011 Act to incorporate by reference and the Eighth Amendment did not change this position, as we shall see below.

24. The 2011 Order that acquired the properties of the claimants was made on the foundation of section 63(1) of the Principal Act, inserted by the 2009 Act, which died in the Court of Appeal and which was non-existent at the time the 2011 Order was made. There was therefore no legal basis, no statutory authority that empowered the Minister to make that Order and the Eighth Amendment did not change this position, as we shall see below. Since section 63(1) was not in existence, dead, it would not be necessary to consider the submissions that the acquisition under section 63(1) was arbitrary, disproportionate, not for the stated public purpose and was ad hominen, though the ad hominen point was largely based on what was

said by a person not called as a witness. Similar submissions in regard to the 2011 Order which was purportedly made under the said section 63(1) of the Principal Act would also not be necessary to examine.

Right to be heard

25. The claimants state that the failure of the minister to give them an opportunity to be heard before making the 2011 Order breached their right to be heard. Section 2(e) of the 2011 Act states that it shall not be necessary to give persons whose property is acquired an opportunity to be heard. At the time the Court of Appeal gave its decision, that "in the absence of express contrary statutory provision" justice required a person whose property is about to be acquired should be afforded an opportunity to be heard, section 2(e) of the 2011 Act was not in place. Moreover, I have failed to find in the Court of Appeal's decision that section 17(1) of the Constitution confers a right to be heard before the acquisition is made. What the Court of Appeal said was that generally a "decision maker has a duty to act fairly which in context of the strict provisions of section 17(1) …. must mean that the minister is obliged to give some consideration to the interest of the property owner," before making the acquisition order. It is obvious that the minister could give some consideration to the interest of the property owner by contact with him or without contact with him. So I do not accept that the Court of Appeal ruled that under section 17(1) of the Constitution there is a right to be heard before the making of subsidiary legislation to acquire property. But

the submission that such a property owner has to be heard before passing or making legislation raises questions. Would the National Assembly have to hear a property owner where it intends to pass an Act to compulsorily acquire his property? And what about legislation affecting other fundamental rights, such as the freedom of movement and of assembly? Are the affected members of the public have to be heard before passing such legislation? Public policy would hold against such a hearing, due to the massive task and the inconvenience that a hearing would involve. I think considerations such as the above informed English jurisprudence on the point, resulting in Prof Wade's pronouncement that "there is no right to be heard before making legislation unless it is provided by statute": see Wade, Administrative Law, Eighth Ed p. 544. Apart from section 17(1), the Court of Appeal seems to be of the view that a right to be heard is conferred on the person whose property is intended to be acquired "in the absence of express contrary statutory provision." Section 2(e) of the 2011 Act, it seems to me, is express contrary statutory provision.

The Eighth Amendment

(a) Legislation

26. The question now is whether the Eighth Amendment breathed new life into section 63(1) of the Principal Act thereby causing it to rise, like Lazarus, from the dead – causing it to provide the statutory foundation or basis for the making of the 2011 Order by the Minister. The Eighth Amendment amends sections 2 and 69 of the Constitution and adds a new Part X111 thereto immediately after section 142. We

have already examined above the amendments to sections 2 and 69. Part X111 is important, and for convenience, I give the provision as follows:

> "1. This Act may be cited as the Short title **BELIZE CONSTITUTION (EIGHTH AMENDMENT) Act, 2011** and shall be read and construed as one with the Belize Constitution which, as amended, is hereinafter referred to as the Constitution.
>
> Section 2 of the Constitution is hereby amended by renumbering that section as subsection (1) thereof and by adding the following as subsection 2.
>
> **PART XIII GOVERNMENT CONTROL OVER PUBLIC UTILITIES**
>
> 143. For the purpose of this Part: Interpretation
>
> **"public utilities"** means the provision of electricity services, telecommunication services and water services;
>
> **"public utility provider"** means –
>
> "(a) **Belize Electricity Limited**, a company incorporated under CAP. 250 the Companies Act, or its successors by whatever name called;
>
> (b) **Belize Telemedia Limited**, a

company incorporated under the Companies Act, or its successors by whatever name called; and

(c) **Belize Water Services Limited**, a Company incorporated under the Companies Act, or its successors by Whatever name called;

Cap. 250

"**Government"** means the Government of Belize;

"Government shareholding" shall be deemed to include any shares held by the Social Security Board;

"majority ownership and control" means the holding of not less than fifty one centum (51%) of the issued share capital of a public utility provider together with a majority in the Board of Directors, and the absence of any veto power or other special rights given to a minority shareholder which would inhibit the Government from administering the affairs of the public utility provider freely and without restriction.

144. (1) From the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain at all times majority ownership and control of a public utility provider; and any alienation of the Government shareholding or other rights, whether voluntary or involuntary, which may derogate from Government's majority ownership and control of a public utility provider shall be wholly void and of no effect notwithstanding anything contained

in section 20 or any other provision of this Constitution or any other law or rule of practice:

Provided that in the event the Social Security Board ("the Board") intends to sell the whole or part of its shareholding which would result in the Government shareholding (as defined in section 143) falling below 51% of the issued stock capital of a public utility provider, the Board shall first offer for sale to the Government, and the Government shall purchase from the Board, so much of the shareholding as would be necessary to maintain the Government's ownership and control of a public utility provider; and every such sale to the Government shall be valid and effectual for all purposes.

(2) Any alienation or transfer of the Government shareholding contrary to subsection (1) above shall vest no rights in the transferee or any other person other than the return of the purchase price, if paid.

145. (1) For the removal of doubts, it is hereby declared that the acquisition of Ord certain property by the Government under r the terms of the –

CAP. 221 Act 12/07 Act 4/11 S.I. 67/11

(a) Electricity Act, as amended, and the Electricity (Assumption of Control Over Belize Electricity Limited) Order, 2011 (hereinafter referred to as the "Electricity Acquisition Order"); and

Act 16/02 (b) Belize Telecommunications
29/05
9/09 Act, as amended, and the
8/11 Belize Telecommunications
S.I. 70/11 (Assumption of Control Over Belize Telemedia Limited) Order, 2011, (hereinafter referred to as "the Telemedia Acquisition Order"),

was duly carried out for a public purpose in accordance with the laws authorizing the acquisition of such property.

(2) The property acquired under the terms of the Electricity Acquisition Order and the Telemedia Acquisition Order referred to in subsection (1) above shall be deemed to vest absolutely and continuously in the Government free of all encumbrances with effect from the date of commencement specified in the said Orders.

(3) Nothing in the foregoing provisions of this section shall prejudice the right of any person claiming an interest in or right over the property acquired under the said Acquisition Orders to receive reasonable compensation within a reasonable time in accordance with the law authorizing the acquisition of such property."

(b) <u>The Preamble</u>

27. The claimants in both claims state that the Eighth Amendment is unconstitutional in that it breaches the entrenched rights of the claimants as guaranteed by the Preamble of the Constitution, and sections 3(d) 6 and 17, the doctrine of separation of powers and the basic structure doctrine of the Constitution. The Eighth Amendment also failed, according to the claimants, to comply with manner and form requirements of section 69(5) of the Constitution.

28. The Preamble, say the claimants, lays the foundation that private property has constitutional protection from interference by the State. Therefore, sections 3d and 17 of the Constitution are, according to the claimants, quoting Conteh CJ in ***Barry Bowen v. The Attorney General of Belize Claim No. 445 of 2008***, "disposive provisions expressly articulating and guaranteeing the desire of the people as regards private property as adumbrated in the Preamble of the Constitution." In other words, the separation of powers, the Rule of Law and the above sections of the Constitution emanate from the Preamble which propounds the will of the people of Belize. The Preamble and those provisions constitute the basic structure of the Constitution of Belize and there is, according to the submission, no power of the legislature to alter or amend that basic structure which is according to the claimants, precisely what the Eighth Amendment purports to do. Because the basic structure doctrine was the subject of ardent submissions on the basis of the Preamble, I should quote the Preamble in toto as follows:

> "Whereas the People of Belize:

(a) affirm that the Nation of Belize shall be founded upon principles which acknowledge the supremacy of God, faith in human rights and fundamental freedoms, the position of the family in a society of free men and free institutions, the dignity if the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator;

(b) respect the principles of social justice and therefore believe that the operation of the economic system must result in the material resources of the community being so distributed as to subserve the common good, that there should be adequate means of livelihood for all, that labour should not be exploited or forced by economic necessity to operate in inhumane conditions but that there should be opportunity for advancement on the basis of recognition of merit, ability and integrity, that equal protection should be given to children regardless of their social status, and that a just system should be ensured to provide for education and health on the basis of equality;

(c) believe that the will of the people shall form the basis of government in a democratic society in which the government is freely elected by universal adult suffrage and in which all persons may, to the extent of their capacity, play some part in the institutions of national life and this develop and maintain due respect for lawfully constituted authority;

(d) recognize that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and upon the rule of law;

(e) require policies of state which protect and safeguard the unity, freedom, sovereignty

> and territorial integrity of Belize; which eliminate economic and social privilege and disparity among the citizens of Belize whether by race, colour, creed or sex; which protect the rights of the individual to life, liberty and the pursuit of happiness; which preserve the right of the individual to the ownership of private property and the right to operate private businesses; which prohibit the exploitation of man by man or by the state; which ensure a just system of social security and welfare; which protect the environment; which promote international peace, security and co-operation among nations, the establishment of a just and equitable international law and treaty obligations in the dealings among nations;
>
> (f) 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."

(c) Public Purpose

29. It is urged by the claimants that the doctrine of separation of powers, which spring from the Preamble and is a part of the Constitution, was breached by section 145(1) of the Constitution, inserted by the Eighth Amendment, because, according to the claimants, section 145(1) is a finding or a judgment of the legislature that the acquisition of the claimants' properties was for a public purpose, a matter which, by section 17(1)(b)(ii) is for the courts to determine, not the legislature. Section 17(1) of the Constitution, which was not amended states:

"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 therefor 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 authorizing 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." (emphasis mine)

It is, the claimants say, the function of the court under the above section to determine whether the acquisition of the property was for a public purpose.

30. The defendants are of a different view. The defendants submit that a provision contained within the Constitution, such as section 145(1)

above, "is of the highest normative order so that the validity of such a provision is beyond the power of the courts to question," and therefore the Eighth Amendment, validly passed, became part of the Constitution as the original document and possesses immunity from judicial review by the court. It was further urged by the defendants that the Eighth Amendment sought to bring to an end any challenge to the acquisition of the properties, and the legislation by which the properties were acquired, namely the 2011 Act and Orders. Even if the 2011 Act was void, say the defendants, the Eighth Amendment namely section 145(1)(2) which is an appropriate retrospective amendment to the Constitution, revived the 2011 Act, and therefore brought it in accord with the Constitution and thereby made it valid and therefore made the 2011 order valid. The basic structure doctrine introduced to Belize by ***Bowen***, is, according to the defendants, "thoroughly bad law" as the National Assembly with the required majorities can make any amendment to the Constitution. This is also so, according to the defendants, because by the retrospective Eighth Amendment, the property compulsorily acquired was deemed by the Constitution to vest absolutely and continuously in the government and therefore part of the supreme law, which made the acquisition, to use the words of learned senior counsel, "beyond the possibility of challenge for being in breach of the Constitution." It is for these reasons that the defendants say that the Eighth Amendment to the Constitution brought to an end the possibility of a successful challenge to the acquisition; and therefore the arguments above on public purpose and doctrine of separation of powers have no merit.

(c) Deem to Vest

31. Section 145(2) of the Eighth Amendment states that the property acquired by the 2011 Order shall be deemed to vest absolutely in the government free from all encumbrances. The defendants submitted that section 145(2) of the Eighth Amendment validated the acquisition of the claimants' property by the 2011 Act by deeming to vest the property in Government. "The Legislative device of deeming," say the defendants, "is to make so what otherwise was not so, or to make so what may or may not have been so." The defendants relied on ***Bennion*** above who wrote that "Acts often deem things to be what they are not. Sometimes a big leap in imagination is required …. An enactment may deem something to be the case when it may or may not be the case": see page 949. As it may be recalled, section 145(2) states that the property acquired under the terms of the 2011 Order shall be deemed to vest in the government, but no property was acquired by the 2011 Order, because it was void as shown above and, as we shall see below, the Eighth Amendment did not revive it; and therefore no property to be deemed to vest in the government.

Make Any Amendment?

32. The real issue then is whether section 145 revives the 2011 Order and section 63(1). For this purpose three matters ought to be considered. Firstly, whether the National Assembly of Belize with the required majorities could legally make any amendment to the Constitution it

wants such as the Eighth Amendment, as was submitted; or whether it is limited by the basic structure doctrine and section 68; and secondly, whether the provisions of the Eighth Amendment are expressly given retrospective effect, because if they do and the provisions could be legally made, they would revive section 63(1) of the Principal Act and also make the 2011 Order made pursuant to and under that section lawful: see ***Yearwood*** and ***Akar*** above.

33. The defendants urge that the National Assembly can make any amendment to the Constitution it chooses. It was also urged that the National Assembly can alter any section or provision of the Constitution. In relation to this latter point, there is no dispute by the claimants. They have admitted that the National Assembly can alter or amend any provision or section of the Constitution. But the claimants vehemently insist that the National Assembly cannot make any amendment that it wants, which is different from a power to amend any section or provisions of the Constitution. Parliament, it is submitted, could, for instance, amend sections of the Constitution to replace the Privy Council with the CCJ, but the National Assembly could not make any amendment to, for instance, remove the judiciary or remove the legislature. The defendants have submitted several authorities to show, according to them, that Parliament can make any amendment to the Constitution. An examination of the authorities is needed to determine the merit, if any, of this submission

(a) <u>The authorities</u>

34. In ***Ibralebbe v. The Queen 1964 AC 900***, the defendants rely on a statement made by Viscount Radcliffe in the Privy Council "that the legislative competence of the Parliament of Ceylon includes power at any time, if it thinks right, to modify or terminate the Privy Council appeal from its court and that the decision to end it could be taken by the "sovereign legislative body." It must be noted that the main issue before the Privy Council in ***Ibralebbe*** was whether the right of the Queen or Sovereign to entertain criminal appeals from territories outside of the United Kingdom was a prerogative right, the continuance of which was necessarily inconsistent with the status of Ceylon as an independent political body, as the Chief Justice of Ceylon had decided. The Privy Council was satisfied that the jurisdiction to entertain appeals from Ceylon in criminal matters still existed; and had not been abrogated by Ceylon's attainment of Independence in 1947. Their Lordships' held that the structure of courts for dealing with legal matters, and the system of appeals existing at the date of independence, had not been affected by any of the instruments that conferred the status of independence. But his Lordship proceeded to say that "if it is recognized, as it must be, that the legislative competence of the Parliament of Ceylon includes power at any time, if it thinks right, to modify or terminate the Privy Council appeal from its courts, true independence is not in any way compromised by the continuance of that appeal, unless and until the sovereign legislative body decides to end it." The Privy Council ruled that "if and when a territory having institutional power to do so, as Ceylon has, decides to abrogate the appeal to the Judicial Committee from its local courts what it does is to effect an amendment of its own

judicial structure": see page 922. It is therefore urged by the defendants that ***Ibralebbe*** is authority that Parliament could make any amendment, subject to fulfilling the majorities required by the Constitution, to the Constitution, including the judicial structure. But when the Privy Council spoke of amendment to the judicial structure, I have no doubt that the court had in mind discontinuance of appeals to the Privy Council, rather than an amendment to remove the judiciary or any other basic structure of the Constitution. Moreover, in ***Ibralebbe*** the Privy Council was not asked to make a decision on the basic structure doctrine of the Constitution nor did it consider that doctrine. The court was asked to rule on whether the continuance of criminal appeals to the Privy Council was inconsistent with Ceylon's status as an independent country, and held that it was not.

35. ***Collymore and Abraham v. The Attorney General 1967 12 WIR 5*** is also relied on by the defendants to show that Parliament can make any amendment to the Constitution if Parliament fulfills the majority requirements of the Constitution. But what the court in ***Collymore*** said was that Parliament could alter or amend the Constitution, not that Parliament could make any amendment it wanted. In ***Collymore***, the question for the Privy Council was whether the Industrial Stabilization Act 1965 (Trinidad and Tobago) was ultra vires the Constitution, and the court held that it was not. The court was not asked, and did not make a decision on the basic structure doctrine of the Constitution, but made the point clear that Parliament could alter provisions of the Constitution, but had to observe the requirements of the Constitution, a point not denied by the claimants. The defendants

also rely on ***Hinds v. The Queen 1975 24 WIR 326*** where the Privy Council had to consider the constitutionality of the Jamaica Gun Court Act 1974 which purported to establish a new court called the Gun Court with power to sit in three different divisions – a Resident Magistrate Division, a Full Court Division and a Circuit Division, and which purported to confer on one or other of these divisions, jurisdiction to try certain categories of offenders for criminal offences of every kind. It must be noted that the Gun Court Act itself had not been preceded by legislation passed under the special amending procedures prescribed by section 49 of the Jamaica Constitution to alter provisions of the Constitution, nor did the Gun Court Act itself contain any express amendment of constitutional provisions. The Gun Court Act was an ordinary Act of parliament. It was in that context that Lord Diplock made some observations in the case, some of which were relied on by the defendants as follows:

> "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 of judicial powers, may be altered by those peoples through their elected representatives in the parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration 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. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordship' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision."

36. The claimants do not dispute the authority of the legislature to alter provisions of the Constitution. In ***Hinds*** the Privy Council was not required to decide the validity of any amendments to the Jamaican Constitution or any amendment of fundamental rights contained therein, nor was the court requested to consider the meaning or applicability of the basic structure doctrine in relation to the Constitution of Jamaica. His Lordship, before turning to the express provisions of the Constitution relevant to the appeal, made general observations some of which were the above. Lord Diplock spoke of altering provisions of the Constitution, but did not express any view on the basic structure doctrine nor did he decide that the legislature could make any amendment, including amendments to the basic structure of the Constitution of Jamaica.

37. In ***AG v. McLeod 1984 1 AER 694*** another case relied on by the defendants, the Parliament passed the Constitution of the Republic of Trinidad and Tobago (Amendment) Act 1978, which purported to amend section 49(2) of the Constitution by providing that a member of the House of Representatives was required to vacate his seat if he resigned or was expelled from his political party. As the amendment was passed with less than two thirds majority, the respondent, who was having problems with the leadership of his party, was under a threat of expulsion from the party and having to vacate his seat. He therefore filed a motion seeking a declaration that the amendment was null and void, as it was not passed by a three quarters majority as, according to him, required by the Constitution. The Court of Appeal granted the declaration. On appeal to the Privy Council, it was held that, according to the Constitution, the amendment could be validly made by a simple majority; and therefore the amendment did not infringe the Constitution, and the respondent was not entitled to the declarations sought. Their Lordships pointed out that provisions dealing with qualifications of individuals to be elected to, and to remain members of, the House of Representatives were unentrenched. The defendants rely on the views of Lord Diplock that the Constitution is not immutable and that Parliament may alter any provisions of the Constitution. But once again, as in ***Hinds***, in ***McLeod*** the courts made it clear that Parliament may alter provisions of the Constitution, a point not denied by the claimants. The court did not consider or express any view on the basic structure doctrine of the Constitution, nor did the court rule that Parliament could make any amendment to the Constitution.

38. The defendants also rely on ***Independent Jamaica Council for Human Rights 1998 Limited and others v. Marshall Burnett and another 1005 65 WIR 268*** to support their contention that the National Assembly could make any amendment of the Constitution. In this case, the main issue was whether the procedure of a majority vote in the legislature, in passing legislation to abolish the right of appeal to the Privy Council, and to give that right to the new Caribbean Court of Justice, complied with procedural requirements laid down in the Constitution of Jamaica. The true argument was not whether the Parliament of Jamaica had the power to achieve the object it sought to achieve, but whether the correct procedure of achieving it was followed. The court ruled that the amendments were void because the appropriate procedure for the amendment of entrenched provisions of the Constitution should have been followed, but were not. Once again, the court said that provisions of the Constitution could "be altered only by employing the procedure appropriate for altering such provisions" which is not disputed by the claimants. The point is made again that in this case the court did not express views on the basic structure doctrine of the Constitution nor did it say that the legislature by the appropriate majorities, could make any amendment to the Constitution to remove, for instance any basic structure, such as the judiciary.

39. In ***Taione and Others v. Kingdom of Tonga 2005 4 LRC 661***, the plaintiff challenged certain amendments to the Constitution of Tonga, made by the Constitution of Tonga (Amendment) Act 2003, the

Media Operations Act 2003 and the Newspaper Act 2003. It was alleged that these Acts were inconsistent with the Constitution of Tonga in that they infringed freedom of the press and freedom of speech and void in terms of being contrary to section 82 of the Constitution (the supreme law Clause).

40. Clause 79 of the Constitution of Tonga dealt with procedures for altering the Constitution, but made it clear that such "amendments shall not affect the law of liberty, the succession to the Throne and the titles and hereditary estates of the nobles." Perhaps these are basic structures of the Tonga Constitution that cannot be amended. The Court held that some words of section 7(2) of the Constitution Amendment Act 2003 were contrary and inconsistent with clause 79 of the said Constitution. The Court also held that the Media Operations Act 2003 and the Newspaper Act 2003 were contrary to the Constitution. Webster CJ having examined several authorities, stated, as the defendants submitted, certain principles which he said he drew from the authorities, which included the power of parliament to alter the Constitution in so far as the Constitution itself provides. This is not disputed by the claimants. Webster CJ appreciates that there are limitations on the amending powers of Parliament when he says that "the powers of the Legislature of Tonga are not at large but are circumscribed by the written Constitution of Tonga." These words are wide enough to include, not only written limitations on the legislative powers of Parliament to alter the Constitution, which the learned judge may have had in mind, but they may also include implied limitations on the altering powers of parliament, such as

altering the basic structure doctrine of the Constitution, as authorities such as ***Minerva Mills v. Union of India 1980 3 SCC 625;*** and ***IR Coelho. State of Tamil Nadu 2007 INSC 31***, which we will examine below, have considered and applied. But in ***Taione***, the basic structure doctrine was not considered.

41. To drive home the point that Parliament of Belize can make any amendment to the Constitution, once the required majorities have been complied with, and that that amendment, in this case the Eighth Amendment, cannot be contrary to another provision of the said Constitution, the defendants rely on the case of ***Reference re s 65 of the Constitution 2008 1 LR 508***, a case from the Supreme Court of Appeal of Malawi. In other words, since a section of the Constitution cannot be contrary to another section, the legislature with the required majorities could make any amendment to the Constitution. In ***reference re s 65***, almost all cabinet Ministers of the Government, who had been elected members of one political party – the UDF – became independent; and later joined a new political party, the DPP. The UDF then wrote the Speaker requesting him to declare certain members of Parliament seats vacant due to the crossing of the floor, based on section 65(1) of the Constitution of Malawi. The President of the Republic of Malawi, acting in accordance with section 89(1)(h) of the Constitution, which gave him power to refer disputes of a Constitutional nature to the High Court, issued a fiat requesting the High Court to review section 65(1) on the ground that the section seemed to be inconsistent with other entrenched provisions of the said Constitution, namely sections 32, 33, 35 and 40 and therefore invalid.

It was held, after considering section 9 and 108(2) of the Constitution that "under the Constitutional arrangement a court of law could only invalidate a law or act of government and not a constitutional provision." The court came to its decision based on its interpretation of section 9 of the Malawi Constitution. Section 9 of the Constitution stated:

> "The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all law in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law."

There is no such section in the Belize Constitution. Moreover, the court's interpretation of the sections 9 and 108(2) does not seem to be grounded on any precedent mentioned in the judgment. The court also held the word "law" appearing in the Supreme law clause, and section 108(2) of the Malawi Constitution, which conferred on the court the power of review regarding any law and any decision of the Government, excluded the said Constitution. With respect, it is difficult to agree with this finding, since an Act to amend the Constitution is itself a law passed by the legislature.

42. In Belize the Constitution states that if any other law is inconsistent with the Constitution, that other law shall be void. It would seem to me that when the National Assembly passes an amendment to the existing Constitution, that amendment is a law, which would have its

own provisions and identity previously not contained in the Constitution. Moreover, the cases of ***Yearwood*** and ***Taione*** considered above support the view, with which I am in respectful agreement, that an amendment to the Constitution may be held inconsistent with another provision of the said Constitution.

43. The authorities above, relied on by the defendants to prove that Parliament could make any amendment to the Constitution, are not only different on the facts from the case before me, but also, in my view, do not establish that Parliament could make any amendment to the Constitution such as altering its basic structure, which we will examine below. But it is further urged by the defendants that since the Constitution, in section 69, sets out the procedure for altering any of its provisions, section 69(1) of the Constitution has to be given its clear meaning, that is to say, that the National Assembly may alter any of the provisions of the Constitution, which I think the defendants also mean may make any amendment to the Constitution. Therefore no point would be served, according to learned senior counsel for the defendants "by engaging in any discussion of the basic structure doctrine." The defendants also rely, to support the submission, that Parliament can make any amendment to the Constitution, on section 69(8) of the Constitution which gives a wide definition of altering the Constitution:

> "69(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 operations for any period or terminating any such suspension."

44. The submission therefore is that the National Assembly could make any amendment to the Constitution, including revoking it. Taken literally, section 69(8) would seem to authorize the Government, having the required majorities, in the National Assembly to revoke the Constitution without re-enactment, or to revoke, for instance, provisions of the Constitution that established the legislature, or revoke without re-enactment provisions conferring fundamental rights, or revoke provisions that established the judiciary without re-enactment or revoke provisions in relation to paying reasonable compensation for private property compulsorily acquired. I think there is an implied limitation in the amending or altering power of section 69(8) which prevents the National Assembly from revoking or removing the basic features of the Constitution. The framers or Founding Fathers of the Belize Constitution could not have intended by section 69 to empower the government with the required majorities, in the National Assembly, to make any amendment to the Constitution such as the above that would remove the fundamental pillars of democratic rule and the rule of law, which they have pellucidly expounded in the Preamble; because this would be antithesis to their brave affirmations in the Preamble. In other words, the Founding fathers or framers of the Constitution, if they were asked whether the purposes of section 69 were to authorize the National

Assembly, with the required majorities, to remove, for instance, the judiciary or the legislature or other basic feature, would have, in my view, vociferously exclaimed in the negative; for they could not have intended, having regard to the Preamble, the removal of basic structures of the Constitution by a government with the required majorities to the detriment of the people of Belize.

(b) Basic Structure Doctrine

45. The basic structure doctrine holds that the fundamental principles of the Preamble of the Constitution have to be preserved for all times to come and that they cannot be amended out of existence, though a reasonable abridgment of fundamental rights could be effected for the public safety or public order as fundamental rights provisions of the Constitution of Belize recognize. There is though a limitation on the power of amendment by implication by the words of the Preamble and therefore every provision of the Constitution is open to amendment, provided the foundation or basic structure of the Constitution is not removed, damaged or destroyed. The basic structure includes the judiciary, the Legislature, the Rule of Law, judicial review, separation of powers, and maintaining the balance and harmony of the provisions of the Constitution, all of which are protected and safeguarded by the Preamble. I therefore rule that even though provisions of the Constitution can be amended, the National Assembly is not legally authorized to make any amendment to the Constitution that would remove or destroy any of the basic structures of the Constitution of Belize.

(c) Cases on basic structure doctrine

46. In ***Minerva Mills v. Union of India*** above Chief Justice ChanDrachud held that: "The balance and harmony between two integral parts of the Constitution form a basic element of the Constitution which cannot be altered." The judge proceeded to say that the word 'amendment' occurring in Article 368 of the Indian Constitution, giving power to amend the Constitution, must therefore be construed in such a manner as to reserve the power of the Parliament to amend the constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution, and consequently there was thus an implied limitation in the amending power which precluded parliament from abrogating or changing the identity of the Constitution or any of its basic features: see page 626 of the judgment.

47. In ***IR Coelho*** above the court had to consider a provision interestingly close to section 3 of the Eighth Amendment, (section 69(9) of the Constitution) namely Article 368(5) of the Indian Constitution as follows:

> "368(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provision of this Constitution under this article."

The above provisions, on the basis of the basic structure doctrine, were struck down in the ***Minverva Mills*** above. In ***Coelho*** the court said that provisions dealing with altering the Indian Constitution had implied limitations, and therefore the legislature did not have unlimited power to amend the Constitution to alter the basic structure or framework of the Indian Constitution: see ***Coelho*** at paragraph 21. Though the Constitution of Belize is different in several respects from the Indian Constitution, both Constitutions have basic features such as the Judiciary, Rule of Law, fundamental rights and separation of powers; and in my view, the views of the cases above, are not only applicable to Belize but makes constitutional sense and intent as shown above.

48. In ***Glanrock Estates Ltd. v. Tamil Nadu*** the court had to decide whether a statute deprived persons of their rights over their forest lands on which they had full proprietorship. The claimants in that case argued that the whole purpose of the statute was the acquisition of the forest lands for the government on payment of nominal compensation which would amount to confiscation of their property. The only question the court had to decide was whether the acquisition or vesting of the land in the state under the sections of the statute violated any fundamental rights of the claimants under the Constitution, and if that was so, whether the sections abrogated, destroyed or were contrary to the basic structure of the Constitution. The defendants in this case urge that ***Glanrock Estates*** decided that abridgment or abrogation of even a fundamental right did not necessarily violate the basic structure because the test is "whether the

abridgment or abrogation has the effect of nullifying the over arching principles comprising the basic structure." The court in ***Glanrock*** states that "Right not to be deprived of property, save by authority of law, is no longer a fundamental right, but only a Constitutional right, which has never been treated as part of the basic structure of the Constitution." But the court still considered firstly, whether the Act violated a fundamental right, and if the answer was in the affirmative, whether secondly, the violation so found abrogated the basic structure of the Constitution. Having found that the Act did not violate any fundamental rights guaranteed to the claimants, the court found that the claimant failed to satisfy the first test above.

49. As I see it, ***Glanrock*** teaches us that fundamental rights in a Constitution are inherent and cannot be extinguished by a constitutional or statutory provision; and any law that abrogates or extinguishes such rights would be violative of the basic structure; but the actual effect and impact of the law on the fundamental rights guaranteed by the Constitution have to be taken into account in determining whether or not the law abrogates or extinguishes the basic structure of the Constitution. The court ruled that to determine whether particular features of a Constitution are part of the basic structure, the court ought to consider the scheme, object and purposes of the Constitution, and its integrity as a fundamental instrument for complete governance: see ***Glanrock Estates*** at paragraph 14.

50. The submission that the National Assembly of Belize can, subject to the limitations contained in section 69(2)(3)(4) of the Constitution,

make any amendment to the Constitution seems, as shown above, to ignore the intention of the makers of the Constitution as propounded in its Preamble. The Preamble is the root of the tree from which the provisions of the Constitution spring, and which forms the basis of the intent and meaning of the provisions. The framers of the Preamble could not have intended, that the National Assembly with the required majorities under section 69 could make literally any amendment to the Constitution to, for instance, abolish the judiciary, or expropriate private property without compensation, or imprison its enemies without trial. It is not conceivable that a legislature in the democratic State such as Belize would attempt to accomplish the above matters; but, if the submission of the defendants is correct, such accomplishments are legally attainable which I do not think is consistent with the intention of the Constitution. The Constitution was made by, and for the protection of all the people of Belize, and its intention could not be that a required majority of the people, as represented by the government, in the National Assembly could take away or destroy fundamental or basic structures of the Constitution enjoyed by the people. I have no doubt that the basic structure doctrine is a feature or part of the Constitution of Belize.

Academic Opinions

51. The defendants in submissions to persuade the court from adopting principles, such as the basic structure doctrine, from different jurisdictions and jurisprudence, quoted studies entitled: "How Constitutions Change" edited by Carlo Jusaro and Dawn Oliver with

contributing articles by legal scholars; and "Judicial Review of Constitutional Amendments – a Comparative study" by Kenrick Gozler. Based on the first study, the defendants' submission is that different constitutions have different provisions for alterations, which cannot be denied. But the defendants proceed to urge that "it is therefore misconceived for the claimants to argue for the court to adopt approaches and principles that belong to different jurisdictions and jurisprudence." It is to be noted though that the defendants themselves have, as shown above, submitted that the court should follow principles enunciated by courts in different jurisdictions and jurisprudence such as Australia and India. The Supreme Court of Belize is authorized to consider decisions from any court or jurisdiction or their jurisprudence and apply them to Belize, if they are consistent with the Constitution and laws of Belize. The basic structure doctrine, though came out of a different jurisdiction, India, and arguably, different jurisprudence, makes legal and constitutional sense as far as the Constitution of Belize is concerned, as shown above, and therefore, in my view, can properly be adopted. The authors put forward certain theories on constitutional change which are commendable; and are a starting point for academic and erudite debate. But I am not persuaded, for the reasons above, that the jurisprudence above on basic structure is not applicable to Belize.

52. In the second study the author looked at constitutional amendments in different jurisdictions including France, Hungary, Germany, Austria and Turkey and the court's power of review. Based on the theories of this author, the defendants submit that "The short point is that absent

limits on the substance of constitutional amendments, the court cannot review the substance of amendments …."The views of the author are not consistent with the several decisions quoted above on the basic structure doctrine.

Is the EighthAmendment Void?

53. The question is whether the Eighth Amendment itself violates, in anyway, the basic structures of the Constitution or sections 3(d), 6, and 17(1) of the Constitution as was submitted by the claimants. We have already seen above that the courts have jurisdiction to declare a provision of the Constitution contrary to another provision of the said Constitution: see ***Yearwood*** and ***Taione*** above. It was urged by the claimants that section 145 of the Constitution inserted therein by the Eighth amendment violated the Preamble, Separation of Powers, and section 3(d) 6 and 17(1) of the Constitution and its basic structure. It is also said that the Eighth Amendment failed to comply with the manner and form requirements of section 69(5) of the Constitution, and by amending section 2 and 69 of the Constitution it also breaches the basic structure doctrine.

54. Section 3(d) confers on every person in Belize protection from arbitrary deprivation of property and section 17(1) given above provides that no property shall be compulsorily acquired or taken possession of except by a law that prescribes principles of compensation and, among other things, secures to the person access to the courts for the purposes of determining whether the acquisition was

done for a public purpose. It is urged by the claimants that section 145(1) of the Constitution when it states that the acquisition was duly carried out for a public purpose, is in breach of the separation of powers doctrine of the Constitution. The root of section 3(d) 6 and 17 of the Constitution is, as we saw above, the Preamble. Section 145(1) on the ground above, according to the submission, is contrary to the Separation of Powers as guaranteed by the Constitution. Before examining the separation of powers, the legal status of a Preamble should be considered. In ***The Attorney General v. Jeffery Joseph and Lennox Royce CCJ Appeal NO CV2 of 2005***, the CCJ considered and acted on the Preamble in the Barbados Constitution, though it is differently worded from the Preamble in the Belize Constitution. In that case the court spoke of "rights listed' in the Preamble: see paragraph 58 and 59. In addition section 40 of the Interpretation Act Chapter 1of the Laws of Belize states that the Preamble may be referred to for assistance in explaining the scope and objects of an Act.

(a) <u>Separation of Powers</u>

55. It is said by the French philosopher Montesquieu that tyranny pervades where there is no separation of powers and that there would be an end of everything, "were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing public resolutions and that of trying the cause of individuals." In ***Hinds v. The Queen 1977 A.C. 1995 at page 212***, Lord Diplock says that it is taken for granted that the basic principle of separation of powers will apply to the exercise of their

respective functions by the three organs of government, the executive, legislature and the judiciary.. His Lordship says that it is well established as a rule of construction applicable to constitutional instruments under which the constitutional structure is adopted, that the absence of express words to that effect does not prevent the legislature, the executive and judicial powers of the new state being exercisable exclusively by the legislature by the executive and by the judicature respectively. There is no doubt that the doctrine of separation of powers is a basic or fundamental part of the Constitution of Belize.

56. Section 145(1) says that the acquisition of the claimants' properties "was duly carried out for a public purpose." Is this a judicial decision made by the legislature – a "legislature judgment" on a matter which is within the domain of the judiciary. What is a public purpose within the meaning of section 17(1) of the Constitution is a matter of law and the interpretation of that section; and it is therefore for the judiciary and not for the National Assembly. Since section 17(1) was not amended by section 145(1), it is submitted, the latter section breaches the separation of powers doctrine and the basic structure doctrine of the Constitution and sections 3(d) 6 and 17(1)(b) of the Constitution. The claimants rely on ***Jeffrey Prosser v. the Attorney General; Claim No. 338 of 2005; Bowen v. the Attorney General above; The Queen v. Liyanage 1967 1 AC 259; United States v. Klein 80 US 128 and Lim v. Minister for Information 1992 176 CLR 1***.

57. In ***Bowen*** above the issue was whether clause 2 of the Sixth Constitutional Amendment Bill 2008 which stated that property was "exclusively vested and shall be deemed always to have been so vested in the Government of Belize" was contrary to the separation of powers doctrine bearing in mind the provisions of section 17(1) of the Constitution. Conteh CJ, after analyzing section 17(1), held that clause 2 sought "to exclude the judicial process provided for in section 17(1) …," and was a "legislative judgment … by which the legislature is trying to exercise a judicial power contrary to the separation of powers doctrine." ***Bowen*** correctly expounds the separation of powers doctrine, and Conteh CJ made his decision based on a clause similarly, but not identically, worded as section 145(2) of the Eighth Amendment above. ***Prosser*** has a distinguishing feature in that section 22 A(1) of the Public Utilities Commission Act, as amended, purported to empower the Minister to declare certain entrenched rights "to be unlawful and of no effect" a function which is clearly judicial in nature.

58. In ***Klein*** the President of the United States by proclamation of July 17th 1862, at a time of rebellion and insurrection in the United States, extended to certain persons who had participated in the rebellion, pardon and amnesty on such conditions he deemed expedient for the public welfare. On the issue whether the legislature of the State could change the effect of such pardons and amnesty granted by the proclamation, the Supreme Court of the United States, having paid tribute to the principles of the separation of powers between the legislature, executive and judiciary, says that "Now it is clear that the

Legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration." In ***Chu Kheng Lim*** above the plaintiffs Cambodians arrived in Australian territorial waters by boat without valid entry permits and were detained in custody and their boats were confiscated and burned. According to the Migration Act 1958 such person arriving in Australia unlawfully, "must be kept in custody and was only to be released if he was removed from Australia or was given an entry permit. Another section of the Act, section 54R prohibited the court from ordering the release of such persons. The plaintiffs submitted that the sections were invalid, among other things, because they constituted a usurpation of the Commonwealth judicial power which was vested by the Constitution in the Federal judicature. It was held the section 54R was invalid and unconstitutional. Brennan J said:

> "A law of Parliament which purported to direct, in unqualified terms, that no court, including the High Court, should order the release from custody of a person whom the Executive of the Commonwealth had imprisoned, purported to derogate from the direct vesting of judicial power by the Constitution and to remove ultra vires acts of the executive from the control of the High Court."

59. In ***Liyanage v. The Queen*** it was alleged that specific Acts were directions to the judiciary to secure the conviction and sentence of several persons charged with staging a coup against the government.

The Acts had legalized their imprisonment while they were awaiting trial and they amended the fundamental law of evidence so as to get convictions. Lord Quest said:

> "As has been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity."

60. In all the cases above, except ***Bowen***, on the point, the courts were considering legislation fundamentally different from section 145(1) of the Eighth Amendment. However, it must be noted that each case has to be decided on its own facts and circumstances including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is therefore necessary to consider closely the nature of the challenged legislation.": see ***Liyanage*** above.

61. Section 17(1) states that a person has a right of access to the court for a determination of a public purpose. Section 145(1) takes away that right guaranteed to the claimants by section 17(1) of access to the

court to determine whether their properties were acquired for a public purpose. The legislature in section 145(1) has decided that the properties were acquired for a public purpose, a decision which is clearly conferred on the court by section 17(1) of the Constitution. The legislature in section 17(1) uses the phrase "public purpose" but chose not to define it in the Constitution. Since Parliament did not give it a definition, it is clearly for the court to say what is meant by the phrase, public purpose, as the courts have done from time immemorial. It is not for the legislature, to interpret words or phrases used in another statutory provision, though the legislature is authorized in a statute to state the meaning of words or phrases used in the said statute. In a common law jurisdiction, it has always been the function of the court to interpret legislation. In my view, section 145(1) violates the separation of powers doctrine, which is part of the basic structure of the Belize Constitution when it purported to interpret "public purpose" as used in section 17(1) of the Constitution and when it proclaimed that the acquisition was carried out for a "public purpose in accordance with the laws authorizing the acquisition of such property.

62. Section 145(2) of the Eighth Amendment when it states that the property vests absolutely and continuously in the government seeks to prevent the court from holding differently in the exercise of its express power under section 17(1)(b)(i) of the Constitution. I am therefore of the view that section 145(2) breaches the separation of powers doctrine. The separation of powers doctrine and the basic structure doctrine are also violated by section 2 and 3 above of the

Eighth Amendment, as these sections seek to prevent the court from holding such other law as contrary to the Constitution, (section 2) and from holding that limitation exists outside section 69, on the amending powers of the National Assembly, limitation such as the basic structure of the Constitution.

63. The claimants had also urged that the 2011 Act reversed the CA judgment in their favour and amounted to a legislative judgment in breach of the separation of powers doctrine. The defendants on the other hand urge that the claimants are under a "fundamental misconception" in relation to the separation of powers doctrine, which is the "failure to distinguish between interfering in the judicial process and interfering with rights that may be the subject of court proceedings." The defendants rely on ***Australian Building Construction Employees And Builders Labourers Federation v. Commonwealth 1986 HCA 47, 1986 161 CLR 88***. In this case, the legislature passed an act that cancelled the registration of the claimant who argued, inter alia, that the Act therefore was either an exercise of judicial power or was an interference with it, as it may suggest that the claimant is not a fit and proper organization to participate in the system of conciliation and arbitration, subjects considered under the Act. The court stated that it was entirely appropriate for Parliament to select the organization which shall be entitled to participate in the system of conciliation and arbitration so it was appropriate for Parliament to decide whether an organization so selected should be subsequently excluded, and, if needed, to exclude that organization by an exercise of legislative power. The Court held that on the facts the

Act did not deal with any aspect of the judicial process. But the court proceeded to express views on which the defendants rely as follows:

> "17. It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution. So, in Nelungaloo Pty Ltd. v. The Commonwealth 1947 HCA 57; 1948 75 CLR 495, esp. at pp 503-504 and 579-580, the validity of the Wheat Industry Stabilization Act (No. 2) 1946 (Cth) was upheld, notwithstanding that the Act validated an order for the acquisition of wheat, the validity of which was in issue in the proceedings."

64. The submission of the defendants, following ***Australian Building*** above, is that the 2011 Act did not interfere with the judicial process. I agree. The New Provisions in the 2011 Act show the legislature purporting to make provision in relation to the acquisition of property, which had previously not been acquired in accordance with the Constitution, according to the Court of Appeal. These New Provisions are not a judicial decision by the legislature, or interfering with the judicial process but are in accordance with the law making of power conferred on the legislature by the Constitution.

65. It is further urged by the claimants that the 2011 Act reversed the judgment and denied the claimants the fruits or benefits of the victory in the Court of Appeal in breach of the enforcement of protective provisions of the Constitution namely section 20 of the Constitution.

There are examples where the court made decisions about which the legislature passed laws, the effect of which changed or varied or reversed the decisions of the court. A good example is the ***Queen v. Davis 2008 3 WLR 125*** where the House of Lords held that the use of anonymous witnesses in a criminal trial breached the rights of the accused to a fair trial under the common law, because it prevented him from examining his accusers. About one month after the decision of the court, the UK Parliament passed the Criminal Evidence (Witness Anonymity) Act 2008 which permits the use of anonymous witnesses in criminal trials in special circumstances, thus reversing the decision of the House of Lords.

66. In ***Burma Oil Company Limited v. Lord Advocate 1965 AC 75*** the plaintiffs' oil companies had large installations with accumulations of oil in Rangoon Burma during the war, and General Alexander, commander of the British Army, ordered the demolition of the plaintiffs' installations, so that they would not fall into the hands of the advancing Japanese Army after the British Army had retreated. On a claim by the plaintiffs, the House of Lords held that the plaintiffs were entitled to compensation for the destruction of their property. The government felt that, paying the plaintiffs compensation, would put them in a more favourable position than that applicable under local legislation, to persons who had suffered war damage in Great Britain rather than overseas; and introduced The War Damage Bill 1964 in the House of Common in effect to prevent the plaintiffs from getting compensation for acts lawfully done by the Crown during a war in which the Sovereign was engaged. This legislation was, after

much debate, passed with retrospective effect and became the Damage Act 1965 which in effect changed the decision of the House of Lords.

In Belize the written Constitution gives the National Assembly, subject to the Constitution, the authority to make laws for the peace, order and good Government of Belize, and I do not accept that where the National Assembly exercises that constitutional power to reverse a decision of a court, it would amount to a breach of the separation of powers principle and the constitution.

67. It is also stated that the 2011 Act and the Eighth Amendment sought to prevent the court from reviewing the compulsory acquisition of the claimants' property. These pieces of legislation have not prevented this court from reviewing the acquisition and declaring as the court did above, that section 2(a) and (b) of the 2011 Act and the 2011 Order and sections 2, 3, 145(1)(2) of the Eighth Amendment are void.

(b) Retrospective

68. The next question is whether section 63(1) of the 2009 Act as allegedly amended by section 2 of the 2011 Act was revived or given new life by section 145(2) of the Eighth Amendment. It must be recalled that under the said section 63(1), the 2011 Order acquiring the claimants' properties was purportedly made. We know from ***Yearwood*** that a Constitutional amendment that is expressly given retrospective effect can revive an unconstitutional statute. In ***Yearwood*** the court agreeing with the jurist Basu said that:

> "An unconstitutional statute cannot be revived by subsequent amendment of the Constitution, unless it is expressly retrospective. It is void ab initio and is not therefore revived even if the Legislature acquires legislative power over the subject by a subsequent amendment of the Constitution, unless, of course, the constitution amendment is expressly given retrospective effect." Emphasis mine.

69. The question is whether the Eighth Amendment is expressly given retrospective effect in relation to the said section 63(1) of the Principal Act, inserted by the void 2009 Act as allegedly amended by the 2011 Act. Section 145(2) of the Constitution inserted by the Eight Amendment, states that property acquired under the 2011 Order shall be deemed to be vested in the government from 25th August, 2009, thereby making the amendment retrospective, according to the defendants. But, as we saw above, no property was acquired by the 2011 Order. There was no section 63(1) that would have statutorily authorized the making of that Order. Section 145(2) is not expressly retrospective in relation to the 2011 Order. Moreover, section 145(2) by stating that the property is vested absolutely and continuously in the government seems to be a dictate from the legislature that the judiciary cannot hold differently which is not permitted by the separation of powers doctrine as shown above.

70. It has been further submitted that the side note to section 145(1) of the Eighth Amendment which states "Act 16 of 02, 29/05; 9 of 09 and 8 of 11," is expressly retrospective or has express retrospective effect in

relation to the 2009 Act and revives the sections of that Act including section 63(1) thereby making the 2011 Order valid and consequently the acquisition of the claimants' properties. The effect of side notes, according to the submission, is the reviving or re-enacting the provisions stated in the side notes. In the first place, these side notes of the various statutes or legislation are not marginal notes, but are indications to the reader where to find the legislation referred to in section 145(1). Secondly, for the Eighth amendment to revive section 63(1) or any void statute it has to be "expressly retrospective" or "by clear and definitive words" see ***Akar*** and ***Yearwood*** above. The side notes to section 145(1)(b) are not expressly retrospective in relation to the Acts referred to therein. For the above reasons section 145(1) is not retrospective and therefore did not revive section 63(1) of the Principal Act, as inserted by the 2009 Act, and did not revive the 2011 Order.

(c) Procedural issues

71. But the claimants further focused their attack on the Eighth Amendment at its root: That the Eighth Amendment was not validly passed by the National Assembly in that there was non-compliance with section 69(5) of the Constitution. Section 69(5) states:

> "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."

The Eighth Amendment Bill was previously introduced to the National Assembly as the Ninth Amendment Bill which complied with the ninety days requirement of section 69(5). Provisions of the Ninth Amendment Bill were amended and provisions deleted after which it became the Eighth Amendment Bill. The claimants' argument, as I understand it, is that the deletion resulted in a requirement of a new ninety days period under section 69(5). The Ninth Amendment is the same as the Eighth Amendment, except the amendments and deletions, and I do not think that the amendments and deletions can be classified as a "Bill" under section 69(5). I hold that the ninety day period applied to the Eighth Amendment.

72. For all the reasons above, I hold that sections 2, 3, and 145(1)(2) of the Eighth Amendment breach the basic structure of the Constitution and the separation of powers doctrine. The 2011 Order is ultra vires the Principal Act and null and void. The New Provisions of the 2011 Act are valid. Section 2(a) and (b) of the 2011 Act are void.

Compensation

73. The issue now is whether the valid provisions of the 2011 Act, referred to above as the New Provisions make provisions for

reasonable compensation to the claimants within a reasonable time. Section 17(1)(a) of the Constitution states that no property shall be compulsorily acquired except by a law that prescribes the principles on which reasonable compensation is to be determined and given within a reasonable time. Section 145(3) above, acknowledges the right of a person whose property was compulsorily acquired to receive reasonable compensation within a reasonable time, but this section is meaningless as section 145(1) and (2) are void. The claimants urged firstly that the law, section 71(3) of the 2011 Act breaches section 17(1)(a) of the Constitution because it ties payment of compensation to the exigencies of public finance. Section 71(3) states:

> "71. (3) Where the exigencies of public finance do not allow the immediate payment to the claimant of the compensation awarded by the Court, the Attorney General, representing the Minister of Finance, may apply to the Court for approval of a schedule of payments by installments, provided that any such amortization schedule shall not exceed a period of five years, unless the claimant agrees."

74. Section 71(3) of the 2011 Act, applies only where the exigencies of public finances do not allow the immediate payment to the claimant. It does not necessarily mean that under section 71(3) compensation payment in full as soon as reasonably practicable or within a reasonable time cannot be accomplished. Under the section, it is the court that is authorized to approve a schedule of payment of compensation after hearing all parties concerned; and it is premature,

in my view, to say that the court would approve a schedule that would not result in payment within a reasonable time. The burden is on the claimants to prove that under section 71(3) approved payment by the court would not be within a reasonable time; and I do not think that they have discharged this burden.

75. It is also urged that section 71(3) does not provide for the court to hear the property owner. The court, under the Supreme Court (Civil Procedure) Rules 2005, has the authority to call or summon witnesses, such as the property owner before making a decision under the section, and no court would make such an order under the section without hearing the property owner, as the words "unless the claimant agrees" appearing in the section imply.

76. It is also urged by the claimants that section 71(5) of the 2011 Act is violative of section 17 of the Constitution, in that the section makes provision for the payment of compensation "by the issue of one or more Treasury Notes to an amount equal to the amount of compensation." It is provided in the section that the treasury note so issued shall:

> "(a) be redeemable within a period not exceeding five years from the date of issue;
> (b) bear interest at the rate paid by commercial banks in Belize on fixed deposits at the date of acquisition; and
> (c) subject to paragraphs (a) and (b) above, be governed by the provisions of the Treasury Bills Act."

It is said that since treasury notes are issued subject to the direction of the Minister, the Minister may include conditions which "render the treasury note incapable of constituting reasonable compensation within a reasonable time." Moreover, since the maximum limit of treasury notes is two hundred and fifty million Belize dollars, where the issuing of treasury notes, as compensation, is in excess of the limit, parliamentary approval is required, which, according to the claimants, may be refused by the legislature. Once again, the claimants are assuming matters, not accompanied by facts that the minister and the legislature would act or likely act in the way submitted. I am not satisfied on a balance of probabilities that this submission has merit.

77. It is further submitted that section 71(5)(b) of the 2011 Act which states that the treasury note shall bear interest at the rate paid by commercial banks in Belize on fixed deposits at the date of acquisition, is contrary to section 17 of the Constitution, and is not reasonable compensation. The claimants rely on ***San Jose Farmers Cooperative Society Ltd. v. Attorney General 1991 43 WIR 63*** in which the Court of Appeal of Belize held that the payment of interest on debentures representing the unpaid portion of compensation at a fixed rate of 6% did not constitute reasonable compensation in accordance with section 17(1)(a) of the Constitution. In ***San Jose***, the statute had fixed the rate of interest at 6%, and it seems that the Court of Appeal took the view that the Attorney General, the defendant, did

not show that this rate amounted to reasonable compensation. In this case before me, the interest rate is not specifically fixed in section 71 5(b), but tied to the rate paid by commercial banks in Belize at the date of acquisition. In the absence of evidence of the specific rate of interest payable, the court would be engaging in conjecture to hold that it does not amount to reasonable compensation. Interest tied to the rate of interest paid by, not one bank, but by commercial banks in Belize, would seem prima facie to be reasonable, rather than stating a specific figure in the legislation, not knowing from whence it came or the basis for it. I am not satisfied that the claimants have showed that connecting the interest payable to the rates by commercial banks, the section failed to satisfy section 17 of the Constitution requiring reasonable compensation within a reasonable time.

78. It is also urged that payment of treasury notes in Belizean dollars does not amount to reasonable compensation because the claimant bank is not a domestic bank, and does not carry on business in Belizean dollars. Moreover, the unavailability of US dollars could prevent the claimant bank from being able to convert the Belize dollars to US dollars, and a loss will be suffered by the claimants in making the conversion. Section 17 of the Constitution does not state the currency in which compensation is to be paid. The makers of the Constitution of Belize could not have intended that compensation for property located in Belize, and acquired in Belize, has to be paid, for instance, in US dollar or some other foreign currency, and not the Belizean dollar, because the Constitution of Belize is operative within the territory of Belize as defined in the Constitution, and to exclude the

Belizean dollar as an effective means of payment for property acquired in Belize would be denying, in my view, the intent of the Constitution.

Majority Ownership

79. As we saw above, sections 2, 3, 145(1)(2) of the Eighth Amendment are contrary to the Preamble and separation of powers and contrary to the basic structure of the Constitution of Belize. This leaves sections 143 and 144 inserted by the Eighth Amendment in the Constitution. Section 143 is an interpretation clause defining words and phrases used in section 144 and 145 of the Constitution. The claimants contend that the Eighth Amendment is unconstitutional, and made specific objections to sections 2, 3, 145(1) and (2), but made no specific complaint or submissions against the said section 143. In relation to section 144(1), I repeat it for convenience without the Proviso:.-

> "144. (1) **From the commencement of the Belize Constitution (Eighth Amendment) Act, 2011, the Government shall have and maintain,** at all times **majority ownership and control of a public utility provider**; and any alienation of the Government shareholding or other rights, whether voluntary or involuntary, which may derogate from Government's majority ownership and control of a public utility provider shall be wholly void and of no effect notwithstanding anything contained in section 20

> or any other provision of this Constitution or any other law or rule of practice: **Emphasis mine**.

(a) Severability

80. Before considering section 144(1) above, a word must be said about the doctrine of severability, which briefly holds that if an offending provision is contrary to the Constitution, and if the offending provision standing separate from the rest of the provisions, and the whole provision remains workable without the offending portion, the court will invalidate only the offending part instead of the entire provision. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive: see ***San Jose*** above. Sections 2, 3, 145(1) and (2) and the portion of section 144(1) not underlined, when removed from the rest of the Eighth Amendment Act, section 143 and the underlined portions of section 141(1) remain; and, as I see it, the remaining parts are workable without the offending portions, and in my view, can independently survive.

(b) Underlined Portion of 144(1)

81. According to the underlined portion of section 144(1) of the Constitution, which was not specifically challenged, the government shall have and maintain majority ownership of the Belize Telemedia Limited from the commencement of the Eighth Amendment, that is 23rd July 2011. Although parts of the 2011 Act and the 2011 Order are void as shown above, and although sections 2, 3, 145(1)(2) of the

Eighth Amendment are also void, section 143 and the underlined portion of section 144 above, are binding on the court as the supreme law. The claimants made submissions on the Eighth Amendment specifically focusing on sections 2, 3, and 145(1)(2) of the amendment. Section 143 and the underlined portions of 144(1) were not specifically shown to be void. But even assuming that the submissions on the Eighth Amendment are specifically applicable to section 143 and the underlined portion of 144(1), I do not see these provisions in breach of the Preamble, separation of powers, or the basic structure of the Constitution. The underlined portion of section 144(1), and section 143 do not prevent judicial review of them. These provisions do not prescribe, as in ***Bowen,*** that the property acquired is absolutely and continuously vested and shall be deemed always to have been so vested in the government; and they are not in terms of section 145(2), thereby bringing them in breach of the separation of powers doctrine or the basic structure doctrine. These provisions do not prescribe that the government shall maintain ownership and control for all times, or absolutely and continuously: they therefore leave an opening for judicial review of them by the court.

82. The government has control and ownership of Belize Telemedia, and a provision of the Constitution, the underlined portion of section 144(1) states that "the government shall have and maintain majority ownership and control" of BTL. Could the court in light of that constitutional provision which is not invalid, make an order to derogate or remove that ownership and control from the government, and grant consequential reliefs applied for, even though part of the

2011 Act and the 2011 Order are void? The Constitution is superior to the 2011 Order, and the 2011 Act; and, as I see it, I am therefore bound to comply with the underlined portion of section 144(1) of the Constitution. I am not satisfied that section 143 and the underlined portion of section 144(1) are invalid; and therefore consequential reliefs applied for are not granted

83. Since the severed parts of section 144(1) are not there, subsection (2) of that section becomes inapplicable and meaningless and cannot survive on its own.

Conclusion

84. Section 63(1) of the Belize Telecommunications Act 2002, inserted therein by the 2009 Act which the Court of Appeal declared void, was not in existence when the minister made the 2011 Order purportedly on the basis of the said section 63(1). Therefore, the 2011 Order is void, unless sections of the Eighth Amendment gave section 63(1) new life and consequently validated the 2011 Order. The Eighth Amendment is not expressly retrospective as it would have had to be to give section 63(1) new life. In addition, sections 2, 3, 145(1) and (2) of the Eighth Amendment are in breach of the separation of powers doctrine and the basic structure of the Constitution of Belize.

85. Sections 63(3)(4)(11)(12); section 64(3) and (4); section 67(f) and (g); sections 71 and 75 of the Belize Telecommunications Act 2002, as inserted therein by the 2011 Act, are valid. Section 143 of the Eighth Amendment is valid. The following portion of section 144(1) namely

"From the commencement of the Belize Constitution (Eighth Amendment) Act, the government shall have and maintain majority ownership and control of a public utility provider," is not in breach of the Constitution and is valid. The court is therefore bound by this provision and therefore consequential reliefs are not granted. As regard costs, the basic principle is that costs follow the event. In these claims both parties were partly successful. I would therefore order all parties to bear their own costs. I therefore make the following orders:

1. A declaration is granted that sections 2(a) and (b) of the Belize Telecommunications Amendment Act 2011, (the 2011 Act) are unlawful null and void.
2. A declaration is granted that sections 2 (c) (d) (e), 3, 4, 5, and 6 of the 2011 Act are valid.
3. A declaration is granted that the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order 2011, No. 70 of 2011, (the 2011 Order) is unlawful, null and void.
4. A declaration is granted that sections 2 (2), 69(9), 145(1) and (2) of the Constitution as inserted by the Belize Constitution (Eighth Amendment) Act 2011 are contrary to the separation of powers and the basic structure doctrine of the Constitution and are unlawful, null and void. Section 145(3) is declared meaningless.
5. A declaration is granted that section 143 of the Constitution as inserted by the Eighth Amendment is valid.
6. A declaration is granted that the following portion of section 144(1) of the Constitution is valid, namely "From the commencement of the Belize Constitution (Eighth Amendment)

Act 2011, the government shall have and maintain majority ownership and control of a public utility provider."

7. A declaration is granted that the remaining portions of section 144(1) of the Constitution, beginning from the words "and any alienation" to the words "rule of practice" (both inclusive) are null and void and severed from the subsection. Section 141(2) is therefore declared useless or meaningless.
8. The claims by the claimants in both claims for declarations and orders to the effect that the government shall not have and maintain majority ownership and control of BTL and for consequential reliefs are dismissed.
9. The claims for damages and injunctions are dismissed.
10. A declaration is granted that from the commencement of the Belize Constitution (Eighth Amendment) Act 2011 the Government shall have and maintain majority ownership and control of Belize Telemedia Limited.
11. The claimants in both claims and the defendants in both claims, along with such other persons as the claimants and the defendants may think fit, shall meet and enter into discussions, commencing from 1st August, 2012, with respect to any matter relevant to the case, including the payment of reasonable compensation to the claimants within a reasonable time for the properties of the claimants in the ownership and control of the Government.

12. All parties to bear their own costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
11th June, 2012

APPENDIX

Item 1	
The 2011 Act	Paragraph 7
Item 2	
The 2011 Order	Paragraph 8