

**LEGAL OPINION ON THE NINTH AMENDMENT BILL OF BELIZE**

**AND**

**ITS LEGAL IMPLICATIONS/RELATED ISSUES**

**By**

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**1. INTRODUCTION**

1.0 I have been asked by the Belize Bar Association to provide an Opinion on a matter of great import to the Government and people of Belize. The issue revolves around the decision of the Government of Belize to rewrite the public law of Belize by overturning the fundamental cornerstone of constitutional supremacy and replacing it with the once discarded principle of legislative supremacy.

1.1 If the proposals espoused by the Government of Belize succeed, they will have far-reaching consequences for the “peace, order and good government” of Belize as well as its future economic prospects. “Peace, order and good government” is a compendium phrase which represents the exercise of lawful legislative power by a government in power for the general good and orderly development of a nation.

1.2 As the facts and issues will soon disclose, the decision of the Government to alter a fundamental provision of the Constitution as well as to expropriate property without recourse to the law courts has the consequence of stretching the Constitution of Belize into some very grey and untested areas of modern public law, as well as the economic management of the State.

1.3 In preparing this Opinion, therefore, I have sought to deal in a comprehensive manner with all the possible legal issues which could arise from the scenario and the facts presented to me.

1.4 The order in which this Opinion is presented is as follows:

- (a) Factual Background
- (b) Contextual Background
- (c) The Bar Association’s Statement
- (d) The Prime Minister’s Statement
- (e) The Legal Issues Arising From the Brief
- (f) A Discussion of the Legal Issues Seriatim
- (g) Application of the Law to the Identified Issues

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<sup>1</sup> Professor (Emeritus) of Public Law with research assistance from Roland Atta-Kesson, Esq. Of Counsel. In the middle of the preparation of this Opinion, it was drawn to my attention that the Government of Belize was considering changes to the Ninth (Amendment) Bill. By mutual consent, however, it was agreed that the Opinion should proceed on the basis of the original instructions provided.

- (h) Conclusion and Recommendations to the Bar Association
- (i) A Postscript? An ADR Proposal.

1.5 The legal issues identified are as follows:

- (a) Constitutional Supremacy versus Parliamentary Supremacy
- (b) The reach and extent of the power of Judicial review
- (c) Separation of Powers and the Doctrine of Checks and Balances
- (d) Right of the State to acquire property
- (e) The legal effect of ouster clauses
- (f) The legality of the Belize Constitution (Ninth Amendment) Bill 2011
- (g) The legality of Statutory Instrument No.70 of 2011
- (h) Review for Anticipatory Breach
- (i) The legality of the reasons provided by the Government for both the Constitutional amendment and the expropriation of property
- (j) Whether the Constitution of Belize contains inherent provisions which cannot be altered by Parliament alone
- (k) The Irish Case of *Riordan*

## **2. FACTUAL BACKGROUND**

2.0 The Government of Belize has proposed a constitutional amendment to the Belize Constitution, styled Belize Constitution (Ninth Amendment) Bill 2011. This proposed Bill is in response to a ruling of the Court of Appeal of Belize, declaring as unconstitutional the nationalization of the largest telecommunications service provider in Belize. After the ruling, the Government has sought to effect a second nationalization and has now introduced the Bill in order to ensure that the takings will be beyond legal challenge, and therefore, the reach of the courts.

## **3. CONTEXTUAL BACKGROUND**

3.0 The background to an appreciation of the issues in this case lies in the fact that the Belize Constitution<sup>2</sup> has a ‘supreme law’ clause in Section 2 thereof which states plainly that “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.” (Emphasis added).

3.1 In its Long Title, the Belize Constitution (Ninth Amendment) Bill (hereinafter referred to as “The Bill”) says that its purposes are to: (1) amend the Belize Constitution; (2) constitutionally clothe the Government with majority ownership and

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<sup>2</sup> See Belize Constitution Act, Chapter 4 of the Laws of Belize, Revised Edition 2000. Available at <http://www.belize.gov.bz/lawadmin/index2.html> (last accessed on Friday, September 16, 2011)

control of public utilities; (3) clarify constitutional provisions relating to the amendments of the Constitution; and (4) provide for incidental matters connected with (1) to (3).

3.2 The Government has also introduced another Bill, the Belize Telecommunications (Amendment) Bill, 2011 aimed at clarifying the Government's assumption of control over telecommunications in the public interest. What seems to have triggered these legislative and constitutional measures is a 24 June 2011 judgment of the Court of Appeal of Belize declaring as unconstitutional two orders of the Minister of Public Utilities to compulsorily acquire control over the Belize Telemedia Ltd.<sup>3</sup>

3.3 In August 2009, the Belize Telecommunications Act of 2002 was amended with the passage of the Belize Telecommunications (Amendment) Act, 2009. This law enabled the Minister of Public Utilities to acquire control over the Belize Telemedia Ltd. and another company holding shares in the Belize Telemedia Ltd, Sunshine Holding Ltd. The Bank gave separate loan facilities to the Telemedia and Sunshine and executed mortgage agreements with the companies.

The mortgage debenture secured the assets of the companies and also provided, among others, that a change in the management structure amounted to a default which automatically triggered the repayment of the loan. The Minister's Orders effectively constituted the Government of Belize as the majority shareholder of Telemedia; and also the sole shareholder of Sunshine. In addition, rights of the Bank under the mortgage agreements were compulsorily acquired by the Government. The Bank, as creditor and a shareholder of Sunshine, brought an action to challenge the constitutionality of the acquisition Act and the two orders. The Bank lost in the High Court but won in the Court of Appeal. The Court of Appeal allowed their appeal to the effect that the acquisition was in breach of Section 17 of the Constitution. Among others, the Court of Appeal also held that the acquisition was *not in the public interest*.

3.4 It is obvious that the Government is determined to neutralize the effect of the recent Court of Appeal's decision by initiating the constitutional amendments referred to above. The expropriation of the Belize Telemedia and the Belize Electricity Company cannot be questioned in any court and the ousting of the jurisdiction of the court is absolute.

3.5 The new subsection now states that the words "other law" in section 2, "do not include a law to alter any of the provisions of [the] Constitution which is passed by the National Assembly in conformity with section 69 of the Constitution."

In effect, the proposed Ninth Amendment Bill seeks to take out from the purview of the supreme law clause of the Belize Constitution, constitutional amendments by the

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<sup>3</sup> See the consolidated case of BRITISH CARIBBEAN BANK LTD v THE AG AND ANOTHER (Civil Appeal no 30 of 2010; DEAN BOYCE V. THE AG AND ANOTHER (Civil Appeal no 31 of 2010)

National Assembly complying with the dictates of Section 69 of the Belize Constitution.

- 3.6 Section 69 of the Belize Constitution confers on the National Assembly the discretion to alter the provisions of the Constitution in a constitutionally prescribed manner. In the case of an alteration predating the first election after independence, Section 69 required a first reading of such a Bill respectively in the House of Representatives and the Senate. On such first reading, the Bill must have received the respective unanimous votes of members of either House before it could pass.
- 3.7 Section 69 is self regulatory and provides an in-built arrangement for amending itself. It also provides a scheme for amending Schedule 2 to the Constitution, and the contents of Schedule 2. The contents of Schedule 2 are constitutional provisions which include Part II of the Constitution. Part II is a collection of Sections 3 to 22 of the Constitution and it deals generally with the protection of fundamental human rights and freedoms. Section 17, which guarantees the protection from the deprivation of property is of particular interest.
- 3.8 The Bill for the amendment of Section 69 or Schedule 2 or any of its contents requires the votes of at least three-quarters of all the members of the House on its final reading before it can pass into law. Where the Bill is for the amendment of any of the provisions of the Constitution, including Section 2, the proposed amendment Bill must be supported, on its final reading, by the votes of at least two-thirds of all the members of the House. A period of ninety (90) days is allowed between the first reading of the Bill and the start of the second reading of the Bill in the House.

#### **4. BAR ASSOCIATION'S STATEMENT**

- 4.0 On 27 July 2011 the Bar Association of Belize issued a press release stating its position on the Belize Constitution (Ninth Amendment) Bill 2011 and called for its withdrawal by the Government. Clause 3 of the Belize Constitution (Ninth Amendment) Bill 2011 seeks to add a new sub-clause 9 to Section 69 of the Constitution, ousting the jurisdiction of the courts to pronounce on any amendments of the Constitution which are in compliance with the same Section 69. The Bar argues that this arrangement has the effect of jettisoning the constitutional supremacy envisioned in Section 2 of the Constitution, and in its place the supremacy of the National Assembly is being introduced. The net effect is that future amendments of the Constitution cannot be challenged in the courts. It is reasoned that the 90 day gestation period for an amendment Bill is purely arithmetic and may not give sufficient opportunity for people to challenge it.
- 4.1 The Bar also opposes the intended amendment of Section 2 of the Constitution. It argues that this is a constitutional democracy and that any amendment of the Constitution should be subjected to judicial review. According to the Bar, ousting the

jurisdiction of the courts to pronounce on amendments to the Constitution undermines the rule of law. In the same breadth, the Bar argues that the doctrine of separation of powers is recognized as an essential element of the Belize Constitution. The Bar further construes Clause 4 of the Ninth Amendment Bill as violating the right to property. The Bar argues that the total effect of the Belize Constitution (Ninth Amendment) Bill 2011 is to impose a constitutional amendment on the people of Belize without their consent.

4.2 The position of the Bar Association is that the legislative power is made subject to the Constitution in terms of Section 68 of the Constitution. Section 68 provides that “Subject to the provisions of this Constitution, the National Assembly may make laws for the peace, order and good government of Belize.” This, according to the Bar, means that the judiciary has the power of judicial review under the Constitution.

## 5. THE PRIME MINISTER’S STATEMENT

5.0 In two separate letters to Belizeans and the Council of Churches respectively dated July 29, 2011 and August 15, 2011, the Prime Minister explained that the constitutional amendment is to protect public control of the utility companies. His reasoning is that without constitutional amendments, it is not possible to secure such public control.

5.1 Next, the Prime Minister argues that the Constitution does not give the courts the power of judicial review over the merits of constitutional review. The Prime Minister argues that *except for procedural non-compliance, no court can enquire into the merits of, or strike down, a Constitutional amendment*. It is reasoned that where a country has a written constitution, as against an unwritten constitution, the power of the courts to review the merits of any constitutional amendments must be *expressly* stated in the Constitution. That express formulation is missing- so the argument goes- in the Constitution of Belize. Meanwhile, the Prime Minister concedes that the courts can examine and pronounce on constitutional amendments where the National Assembly fails to comply with the procedure for such amendment. He refutes the idea that the jurisdiction of the courts is ousted in this case. According to him, nothing stops anybody from taking a court action to challenge a constitutional amendment by the National Assembly not conforming to the requirements of Section 69. But so long as the National Assembly complies with Section 69 of the Constitution, the courts are enjoined to rule against any applicant.

5.2 The Prime Minister also argues that there is no limit on the powers of the National Assembly to amend the Constitution and that so long as the National Assembly acts within Section 69 of the Constitution, the courts cannot question the exercise of such legislative powers. Again, contrary to what the Bar Association says, section 68 of the Constitution does not give the courts the power of judicial review over merits of

constitutional amendments. He reasons that Section 68 does not place any limitation on the law making powers of the National Assembly. The Prime Minister further reasons that as far as constitutional amendments are concerned, one must not look beyond Section 69.

5.3 In response to suggestions that the unlimited legislative powers to amend the Constitution, and the ousting of the courts' jurisdiction in such cases is likely to be abused, the Prime Minister contends that just as in Canada or the US, there is in Belize the kind of democracy, tradition, and people power that is the ultimate safeguard against abuse. According to him, the true safeguard against such abuse lies in the culture, traditions and the vigilance of the very people that have entrusted the current Government with the majority needed to amend the Constitution. But it is not for the courts to probe or change any duly enacted provision of the Constitution. That is for the people via their elected representatives. Furthermore, in amending the Constitution, the National Assembly is not required to seek the consent of the people of Belize in a referendum. The Prime Minister insists that the situation in Belize is no different from other countries, with the exception of India.

5.4 It has been necessary to set out the respective positions of the parties so as to assist with a comprehensive discussion of the legal issues raised by the differing positions.

5.5 To those legal issues, we must now turn.

## **6. THE LEGAL ISSUES ARISING FROM THE BRIEF**

6.0 The issues implicated in this case go to the roots of well established tenets of liberal democracy. Before now, one could be forgiven for assuming that since Belize is a Commonwealth Caribbean jurisdiction, that the principles of Constitutional Supremacy, the Separation of Powers, Judicial Review and the right to property were firmly guaranteed in Belize by its Constitution and constitutional practice.<sup>4</sup>

6.1 Several issues of great complexity in Public Law arise from the scenario setout above. In my judgment, the legal issues listed in paragraph 1.5 above are directly germane and relevant to this Opinion. They are discussed *seriatim*.

6.2 Before that discussion, however, a point or two may be made about the nature of a Constitution. Trite though this may be, it has become necessary to express this point in the light of the issues which are being suggested as fit and proper subjects to be enshrined in the Constitution of Belize. The matters of concern in this brief relate to the *ad hominem* treatment of some citizens, circumventing the legal process, overriding the Courts and the expropriation of private property, among others.

6.3 Going beyond the usual definition of a Constitution, Prof. S. R. McIntosh suggests that "the constitution is a plan for a way of life. This entails an enunciation of the

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<sup>4</sup> See Fiadjoe, Albert (3rd Ed. 2008); Commonwealth Caribbean Public Law where the author traces the development of public law in the Caribbean region.

range of activities, of those values that would support a certain conception of justice and an elaboration of those institutions by means of which this way of life is best achieved”. He continues: “the constitution speaks to our moral and political life, since it concerns not only the structure of power, and therefore the ways in which government may treat the citizens, but also the way in which individuals may treat each other in society. Thus the constitution must be conceived as defining both a moral and a political community ... It is ideally a collective, public expression of the essential political commitments of a people, of the kind of people they are and wish enduringly to be”.

6.4 It is against this background and these values that the Government’s claim to be legislating for the “peace, order and good government” of the land must be judged.

*(a) Constitutional Supremacy versus Parliamentary Supremacy*

The Belize Constitution provides for the Supremacy of the Constitution. Should ‘any other law’ contravene the Constitution, it is void. This arrangement is similar to many Constitutions of sister Commonwealth Caribbean jurisdictions. The proposed change is about taking amendments of the Constitution by the National Assembly of Belize out of the ambit of the phrase ‘any other law’. This engages the debate as to whether the Constitution of Belize is founded on Constitutional Supremacy or Parliamentary Supremacy. As of now, though the Constitution vests the National Assembly with the power to make laws, this legislative power is however, subject to the Constitution.

Subsumed in the discussion of the above broad issue is the question, whether the Ninth Amendment Bill makes the Belize National Assembly supreme, instead of the Constitution? From the outset this issue may be answered by reference to case law directly on the point.

**Collymore v. AG**<sup>5</sup> which dealt with a constitution that had no express supreme law clause established the supremacy of the constitution over parliamentary supremacy beyond doubt.

As earlier noted, the Belize Constitution provides for the Supremacy of the Constitution, so that ordinarily, should ‘any other’ law contravene the Constitution, such a law is void. Indeed, both sides do not dispute the fact that the Ninth Amendment Bill will exempt future constitutional amendments from the reach of the phrase “any other” in the supreme law clause. On that score, the Bar Association argues that the Ninth Amendment has the effect of defeating constitutional supremacy. The Government on the other hand argues that the National Assembly is an elected body representing the wishes of Belizeans, and that their actions are attributable to Belizeans.

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<sup>5</sup> [1970] AC 538, PC

Now, where the supreme law in the hierarchy of norms in Belize is shorthanded in its reach by the Ninth Amendment Bill, and since all the other laws of Belize cannot be greater than the Constitution, the logical conclusion is that the supremacy or rule of law is no longer guaranteed.

It is also true that the legislature is made up of the elected representatives of the people, and by that fact an amendment of the Constitution by the legislature can be taken to be an amendment by the people. However, it is also true that these elected representatives do not always attain unanimity in their decisions, and that they also decide by majority votes. Meanwhile, majoritarianism has been challenged by standard text on modern constitutional law. It has been argued that majority support for an idea does not necessarily profit the public good. This is because the majority might be ill-informed and a charismatic personality may sway them from taking good decisions.<sup>6</sup>

The lesson here is that it is not enough to have a supreme law clause in a Constitution, if such a clause is susceptible to unilateral amendments by the legislature without recourse to the people in a referendum. In the specific case of Belize, we observe that there is a judicial decision which affirms that the National Assembly is not bound to consult the people of Belize when amending any provisions of the Constitution, including the supremacy clause.

In the case of **Prime Minister of Belize and Another v Alberto Vellos and 3 Others**<sup>7</sup> the Privy Council was confronted with the controversy surrounding the Sixth Amendment Bill of Belize which was introduced by the Government on 25<sup>th</sup> April 2008. Clause 3 of the Sixth Amendment Bill amended, among others, Section 17 of the Constitution, by removing the protection against compulsory acquisition of property by the State without compensation and access to the courts. Meanwhile, section 2 of the Belize Referendum Act, 1999 specifically mandated the conduct of referendum in the case of amendments of any of the constitutional provisions on fundamental human rights and freedoms. In section 3 thereof, the Governor-General is required to issue a Writ of Referendum within 30 days of the request for a referendum by the Prime Minister. This was the position of the law on the matter as at 25<sup>th</sup> April 2008. Hence, when introducing the Sixth Amendment Bill, the Government also introduced the Referendum (Amendment) Bill, 2008 to amend the Referendum Act, 1999 on the same day, removing the requirement for a referendum when amending the human rights provisions in the Constitution. The aftermath of these constitutional and legislative measures was the institution of class actions leading to the decision of the Belize Court of Appeal in the consolidated cases of **Barry M Bowen v Attorney General of Belize**<sup>8</sup> and **Belize Land**

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<sup>6</sup> See LOVELAND, IAN; CONSTITUTIONAL LAW, ADMINISTRATIVE LAW AND HUMAN RIGHTS: A CRITICAL INTRODUCTION (4<sup>th</sup> Ed. 2006) at p. 8 (Oxford University Press, UK)

<sup>7</sup> See [2010] UKPC 7 (Privy Council Appeal No 0091 of 2009). Available at [http://www.jcpc.gov.uk/decided-cases/docs/JCPC\\_2009\\_0091\\_Judgment.pdf](http://www.jcpc.gov.uk/decided-cases/docs/JCPC_2009_0091_Judgment.pdf) (last accessed on Sunday, September 18, 2011)

<sup>8</sup> (Claim No 445 of 2008)



**Owners Association Limited and others v Attorney-General of Belize.**<sup>9</sup>The Belize Court of Appeal held the Sixth Amendment Bill as unconstitutional to the extent that it allowed compulsory acquisition of petroleum, mines and minerals by the State without compensation and without access to the courts.

Meanwhile, during the third reading of the Sixth Amendment Bill, the proviso which barred access to the courts was deleted, so that at the issue was moot at the time of the trial. One other issue was whether the referendum was part of the legislative process? The court of first instance implied in its reasoning that it was not, and that it arose after the legislative process. The Court of Appeal however thought that it was only consultative, and that it arose at the beginning of the legislative process. It held further that the National Assembly was not bound by it, and that the people could hold them accountable at the next elections when they have the power to vote them out. It was from this decision that the Government appealed to the Privy Council. In the Privy Council, it was held that the requirement for a referendum was no fetter on the legislative process and that the two are separate and distinct from each other, and that the referendum was not required before the introduction of the Sixth Amendment Bill in the National Assembly.

Turning to the issue of whether parliamentary sovereignty has not outlived its usefulness even under English constitutional law, the literature is replete with the suggestion that parliamentary sovereignty even in the United Kingdom has lost its awe with the onslaught of the supra-national body, European Union.<sup>10</sup> The effect of community laws on national laws was seen in the case of **R v Transport Secretary Ex p Factortame Ltd**<sup>11</sup> where Lord Bridge stated that long before the United Kingdom joined the EU, the supremacy of Community law over the laws of member States was well established and that “whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary”. It is not entirely correct to say however that parliamentary sovereignty has outlived its usefulness in the UK.<sup>12</sup>

Now, how different or similar is the Belize constitutional supremacy from other Commonwealth countries? This arrangement is similar to many constitutions of

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<sup>9</sup> (Claim No 506 of 2008)

<sup>10</sup> See LOVELAND, IAN; CONSTITUTIONAL LAW, ADMINISTRATIVE LAW AND HUMAN RIGHTS: A CRITICAL INTRODUCTION (4<sup>th</sup> Ed. 2006) at pp. 47-54 (Oxford University Press, UK); see also FIADJOE, ALBERT (3<sup>rd</sup> Ed. 2008)(2<sup>nd</sup> Ed. 1999); COMMONWEALTH CARIBBEAN PUBLIC LAW, p 16, and p 15 respectively (Routledge Cavendish, UK); see also BRADLEY, A.W.; AND EWING, K.D., CONSTITUTIONAL AND ADMINISTRATIVE LAW (14<sup>th</sup> Ed. 2007) at p. 71; see BARNETT, HILAIRE; CONSTITUTIONAL AND ADMINISTRATIVE LAW (3<sup>rd</sup> Ed. 2000) at pp. 247-262 (Cavendish Publishing Ltd, UK).

<sup>11</sup> [1990] 2 AC 85

<sup>12</sup> See WADE, WILLIAM SIR; AND FORSYTH, CHRISTOPHER; ADMINISTRATIVE LAW (8<sup>th</sup> Ed. 2000) at p.28 (Oxford University Press, UK)

Commonwealth countries. With the exception of Jamaica, the doctrine of constitutional supremacy is common to Commonwealth Caribbean countries.<sup>13</sup>

If the Government's position were to be correct, then so long as the Government has the requisite majority its decision on any fundamental amendment to the constitution would be final and binding on its people! No court will be able to review the amendment even if the fundamental freedoms and rights of the citizenry are breached and even if private property of persons is taken away.

This is to stand the public law of Belize on its head!

The law-making power of the State is and must be subject to the provisions of the Constitution.

As the law now stands, it can be firmly submitted that the situation of Belize is not different from what pertains in the Commonwealth Caribbean, as a whole. The case law, legal literature and academic writings establish beyond a doubt that the Constitutions of the Commonwealth Caribbean are founded on the philosophy of constitutional supremacy.

*(b) The Reach and Extent of the Power of Judicial Review*

Without a doubt, Judicial Review is the cornerstone of modern written Constitutions that embrace the philosophy of fundamental freedoms for the citizenry. Even when not expressly stated, judicial review is implied as was established in the case of Marbury v. Madison<sup>14</sup>. The Supreme Court of any nation with a Constitution similar to that of Belize plays a central role in the execution and enforcement of the Constitution. As noted by Professor Simeon McIntosh, "It does this largely through the application and interpretation of the Constitution in the determination of case". In this process of adjudication, the Constitution is given meaning: It is *completed* in the Act of interpretation ... Constitutions are forged every bit as much in adjudication by the Judges of a nation's highest court as they are by the people who first wrote them and by those who have ratified them. In sum then, [these words] suggest the central role of a nation's Supreme Court in the construction of Constitutional meaning and therefore in the inscription of that nation's Constitutional law and political identity."<sup>15</sup>

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<sup>13</sup> See FIADJOE, ALBERT (3<sup>rd</sup> Ed. 2008)(2<sup>nd</sup> Ed. 1999); COMMONWEALTH CARIBBEAN PUBLIC LAW, p. 11 of both (Routledge Cavendish, UK) Elsewhere in Ghana, the supreme law clause in the 1992 Constitution is classified as an entrenched clause in Article 289 thereof. Any amendment requires a referendum of the people of Ghana. To succeed, at least 40% of the registered voters must have voted and of those voting at least 75% must have voted in favor of the proposed amendment.<sup>13</sup> Thus, unlike the situation in Ghana where a referendum is required for the amendment of the supreme law clause, Belize does not have such a requirement.<sup>13</sup>

<sup>14</sup> (1803) 1 Cranch 137

<sup>15</sup> Simeon R. McIntosh, *West Indian Constitutional Authorship – The Role of the Caribbean Court of Justice* (Paper as part of the introductory chapter of *Reading Text and Polity: Essays in Hermeneutics and Constitutional Theory*) Ian Randall Publications 2008.

The author argues that the judicial opinions of a nation's highest court are the authoritative reading of a people's Constitution; they are, therefore, themselves authoritative political texts supplementing the Constitution itself. It means, then that the Judges of a nation's highest court are numbered among the *authors* of a people's Fundamental Law,

The power of judicial review has been recognized since colonial times in the Caribbean<sup>16</sup> and in the Commonwealth at large.<sup>17</sup> In its modern connotation, it has been defined as the jurisdiction of the Superior Courts to review laws, decisions, acts and omissions of government and public authorities in order to ensure that they act within the proper bounds of legality.<sup>18</sup>

The narrow issue implicated by this inquiry is whether this power of judicial review applies to Parliament when it is acting within its proper procedure in effecting amendments to the constitution and other laws. The Government of Belize says no and it is right.

Ordinarily, it is understood that the internal proceedings of the legislature are not open to judicial review. This principle is anchored on the doctrine of the separation of powers. Thus, external influences from the executive and judicial arms of government will have to end at the doorsteps of legislature. However, after a bill becomes law, it is open to the courts to pronounce on them as being constitutional or not. The decision in **Collymore v. AG**<sup>19</sup> and **Hinds v. R**<sup>20</sup> are also applicable to this issue. It has been argued that judicial review is an incident of supremacy of the constitution and that supremacy of the constitution is affirmed by judicial review.<sup>21</sup>

When Parliament has completed its duty, its immunity from judicial review is lifted and there are many reasons why this should be so.

Firstly, the Constitution is a compact between the executive, the legislature, the judiciary and the citizenry. It is based on a set of aspirational norms as to the values of a society, its hopes, even its fears and predilections. No single entity therefore has the *legal or moral* authority to vary that compact unilaterally. Secondly, as Sir Roy Marshall forcefully expresses:

The fact is, however, that Parliament has lost its control over the executive at the same time as the executive has assumed greater control over our social and economic life. Administrators now grant or refuse licenses, permits, subsidies and similar privileges on an ever-increasing scale. And this regime of regulation is augmented by programmes

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<sup>16</sup> M. Shabudeen, *The Legal System of Guyana*, 1973, p. 24

<sup>17</sup> *R.v. Hannan*, (1888) 2 St. R 1284; *Colonial bank of Australia v. William* (1874) LJ 5 PC 417, 440

<sup>18</sup> *FIADJOE, ALBERT* (3<sup>rd</sup> Ed. 2008) (2<sup>nd</sup> Ed. 1999); *COMMONWEALTH CARIBBEAN PUBLIC LAW*, p. 15.

<sup>19</sup> [1970] AC 538, PC

<sup>20</sup> [1977] AC 195

<sup>21</sup> See *FIADJOE, ALBERT* (3<sup>rd</sup> Ed. 2008); *COMMONWEALTH CARIBBEAN PUBLIC LAW*, p. 15 (Routledge Cavendish, UK)

carried out by government departments or statutory corporations, so that the welfare of the individual has come to depend more on his rights against the executive than his rights against his fellow citizens.

It is no answer to say that the electorate, through its elected representatives, controls the executive and the administration. The reverse is true. It is in large measure the executive which controls Parliament. The doctrine of collective Cabinet responsibility buttresses that control at the same time that the decline of individual ministerial responsibility renders it more difficult for Parliament to force the resignation of inefficient and incompetent ministers<sup>22</sup>

Thirdly, the position of the Government of Belize stands against a long line of judicial decisions and academic writings. Long before the case law flourished under independent Caribbean Constitutions, noted academics like A.R. Carnegie and Francis Alexis argued that judicial review was embedded in the Constitution by the sheer prescription of law.<sup>23</sup> These views were quickly vindicated by a long list of cases of high standing.<sup>24</sup>

Fourthly and most powerfully, judicial review must be tied to a set of credible and clearly ascertainable remedies in the event of a breach of rights, hence the maxim *ubi ius, ubi remedium*. Sir Roy Marshall clinches the argument deftly in defence of judicial review in Caribbean Constitutions by saying:

Review is regarded as essential, to ensure that the individual gets justice from the courts where he gets none from the administration. This is not surprising, for administrators lack the independence of judges, are more susceptible to political, ministerial and bureaucratic pressure, make most of their decisions in private, give no reasons, do not always observe the rules of procedural fairness, and are inclined to subordinate the claims of justice for the individual to what they conceive to be the demands of public policy.

Sir Roy Marshall concludes:

...The benefits which the individual gets from judicial review are shared by society as a whole, whose confidence that the administration is being made to act fairly is the best safeguard for the continuance of democracy.

Fifthly, the power of judicial review is expressly conferred in section 20 of the Constitution of Belize. That, without more, is the fountainhead for the application of the power of judicial review in Belize and also the separation of powers doctrine. This entrenches the power and authority of the courts to ensure that all organs of the State operate within the limits of

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<sup>22</sup> F. Alexis, *The Basis of Judicial Review in the new Commonwealth*, 1975

<sup>23</sup> A. R. Carnegie, *The Existence of Judicial Review*, 1971

<sup>24</sup> *Collymore v. A. G.*, *Hinds V. R* and *Maharaj V. A. G.*, among others

legality, nothing more, nothing less. This underscores the doctrine of constitutional checks and balances whereby no organ becomes a law unto itself.

In conclusion, therefore, on the applicability or otherwise of judicial review in the Constitution of Belize, it is submitted that the Government of Belize takes on an extremely high burden to displace the plethora of judicial decisions and high academic writings in favour of judicial review.

Its chances of success in piloting the case against judicial review are, at best, negligible.

*(c) Separation of Powers and the Doctrine of Checks and Balances*

The Belize Constitution (Ninth Amendment) Bill cannot be read in isolation from the 2011 Acquisition Act and Order (nationalizing the phone company for the second time) which were passed after the Belize Court of Appeal declared the first nationalization null and void. The Bill is designed to prevent any court from reversing the second nationalization. As such, it has the effect of rendering nugatory the Court of Appeal decision. Immediately the issue of separation of powers is engaged. Is this permitted by the legislature or are there limits imposed implicitly by the Constitution since there is no express statement of the doctrine in the Constitution?

From the onset, it must be pointed out that the question whether the doctrine of the separation of powers in Caribbean Constitutions is a fundamental principle embedded in the Westminster type Constitutions was, in fact, settled since the decision in Hinds v. R.<sup>25</sup> That decision has been followed and applied in several Caribbean jurisdictions from the Bahamas to Grenada. So, is the situation of Belize different or unique? The answer is no. *Hinds* settled the point that there is indeed a separation of the legislative and executive powers from the judicial power, but that the Supreme Court's jurisdiction is specially protected. As noted in the consultant's text<sup>26</sup>, notwithstanding the possible criticisms that may be leveled against *Hinds*, it still represents a landmark decision in so far as it establishes and reaffirms one of the constitutional fundamentals of West Indian Public Law, especially with respect to the independence of the judiciary.

The simple basis of the doctrine is the patent recognition that unrestrained power is anathema to constitutional governance. Cases such as Benjamin v. Minister of Information<sup>27</sup>, J. Astaphan and Co (1970) Ltd. v. Controller of Customs and A.G. Of Dominica<sup>28</sup>, John v.

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<sup>25</sup> (1975) 24 WIR 326

<sup>26</sup> See FIADJOE, ALBERT (3<sup>rd</sup> Ed. 2008); COMMONWEALTH CARIBBEAN PUBLIC LAW, p. 171.

<sup>27</sup> Saunders J, as he then was in Suit No.56 of 1997, HCT, and Anguilla.

<sup>28</sup> Civil Appeal no.8 of 1994.

DPP<sup>29</sup>, Financial Clearing Corporation v. A.G. of the Bahamas<sup>30</sup> attest to this principle in clear and forthright language. Three quotations from the following cases clinch the point:

Per Lord Diplock in *Hinds*

It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.

Per Lord Roskill in *John v. DPP*

Their Lordships do not doubt for one moment that the Constitution of Dominica, like other similar Constitutions takes for granted the basic principle of separation of powers and they emphatically endorse what was said in this connection by the Board in *Hinds v. R* in the majority opinion by Lord Diplock.

Per Saunders J in *Benjamin*

For our democracy to operate effectively, it has been said that it is necessary that a certain comity should exist between the three branches. Each should respect the role and function of the other. The court is subject to and must enforce laws passed by Parliament that are *intra vires* the Constitution. The executive should respect and obey the decisions and accept the intimations of the court. If this comity does not exist, then the wheels of democracy would not turn smoothly. A jarring and dangerous note will resonate from them.

It is respectfully submitted, therefore, that several weighty and high judicial decisions do recognize and affirm that the principle of the separation of powers is a fundamental feature of West Indian Constitutions, the Constitution of Belize, not excluded.

So, for example, just as the Legislature cannot act as a court of law, so the Judiciary cannot also take over the functions of the Executive. In the same vein, the usurpation of judicial

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<sup>29</sup> (1985) 32 WIR 230, 234 (per Lord Roskill).

<sup>30</sup> Suit no.232/2001, Bahamas.

power by the Executive in acting as “judge and jury” over legal issues is a serious breach of this doctrine.

*(d) Right of the State to Acquire Property*

The Constitution of Belize makes provision for the exercise of a sovereign right to acquire property for public purposes, subject to fair and adequate compensation.<sup>31</sup> For an acquisition to be lawful, three basic conditions must be met: (1) the acquisition must be non-discriminatory, (2) there must be adequate compensation payable within a reasonable time and (3) the acquisition must be for lawful purposes. In **British Caribbean Bank Limited v. AG**<sup>32</sup>, the Court of Appeal of Belize held that the acquisition was not made for a *lawful purpose and not made in the public interest*. That finding is enough to render illegal the intended expropriation.

Later in paragraph (g) of this Opinion, I address the consequences of the intended ‘revival’ of the second expropriation.

*(e) The legal effect of ouster clauses*

Ouster clauses are a source of raging controversy in Caribbean public law because they lie at the intersection of three competing constitutional principles – the right of Parliament to decide on appropriate legislation for the good governance of the polity, the citizen’s right of access to the courts and the protected jurisdiction of the Supreme Court. A review of the literature would seem to suggest that judicial attitudes draw a distinction between finality clauses and partial or limited ouster clauses, the latter receiving more favorable treatment at the hands of the judiciary.<sup>33</sup> In the Caribbean context, though conflicting case law exists,<sup>34</sup> it is fair to say that the better view is that where an ouster clause seeks to protect a breach of natural justice or some *ultra vires* act, the courts will apply judicial review nonetheless.<sup>35</sup> So, the conclusion drawn by Sealey J in the Trinidadian case of **Republic Bank Ltd. v. the Registration, Recognition and Certificate Board**<sup>36</sup> is eminently justifiable. There, she said:

Courts have been reluctant to give up supervisory jurisdiction, and complete ouster clauses have not been the norm. There is always the challenge to jurisdiction which allows the court to say that Parliament never intended to deprive the court of total jurisdiction if the statutory body did not act within the powers granted it by the statute.

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<sup>31</sup> See Section 17

<sup>32</sup> Civil Appeal No. 30 of 2010.

<sup>33</sup> See FIADJOE, ALBERT (3<sup>rd</sup> Ed. 2008); COMMONWEALTH CARIBBEAN PUBLIC LAW, Chapter 3.

<sup>34</sup> Harrikissoon v. AG of Trinidad and Tobago, Civil Appeal no. 59 of 1975; [1980] AC 265; Re Alva Bain, Suit no. 3260 of 1987 (Trinidad and Tobago).

<sup>35</sup> Thomas v. AG [1982] AC 113; AG v. Joseph and Boyce CCI Appeal no. CV 2 of 2006; Neville Lewis v. AG (2000) 57 WIR 275; Re Sarran (1969) 14 WIR 361.

<sup>36</sup> Suit no. 897 of 1993 (Trinidad and Tobago).

Reviewing these authorities and looking particularly at the *Jarvis* and *Endell Thomas* cases, it seems to me that the more realistic and possibly wider interpretations should be afforded these clauses and I would say that the actions of the Board will be reviewable if the Board acted without or in excess of its jurisdiction as granted under the Act.

The ouster clause envisaged in Belize is the sweeping and encyclopedic type that was tested in the *Anisminic* case.<sup>37</sup> The response is that such an ouster clause, shutting out the courts completely, is itself a serious breach of the doctrine of separation of powers, especially since it infringes the right of the citizen to access the courts.<sup>38</sup>

I am of the opinion, therefore, that the Government of Belize would most likely face strong judicial opposition to such a sweeping and encyclopedic ouster clause, as proposed.

(f) *The legality of the Belize (Ninth Amendment) Bill 2011*

Under this heading, the legality of the *Ninth Amendment Bill* is examined. The first point to note is that since the Amendment Bill was tabled, it has been amended during its passage in the National Assembly. Article 69 of the Belize Constitution requires critical reading. It provides that:

69.-(1) The National Assembly may alter any of the provisions of this Constitution in the manner specified in the following provisions of this section.

(2) Until after the first general election held after Independence Day a Bill to alter any of the provisions of this Constitution shall not be regarded as being passed by the National Assembly unless on its final reading in each House the Bill is supported by the unanimous vote of all members of that House.

(3) A Bill to alter this section, Schedule 2 to this Constitution or any of the provisions of this Constitution specified in that Schedule shall not be regarded as being passed by the

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<sup>37</sup> [1969] 2 AC 147.

<sup>38</sup>"An ouster clause as extensive as the one suggested in the Bill is without precedent. As a matter of constitutional principle some form of higher judicial oversight of lower tribunals and executive decisions should be retained. This is particularly true when life and liberty may be at stake." Squire Centenary Lecture , The Rule of Law and a Change in the Constitution, Wednesday 3 March 2004 ,The Rt. Hon. The Lord Woolf, Lord Chief Justice of England and Wales



House of Representatives unless on its final reading in the House the Bill is supported by the votes of not less than three-quarters of all the members of the House.

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

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

It is a requirement of Article 69 therefore that 90 days must elapse 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”. This is a formal requirement. It means, therefore that any material changes and differences in the Bill rob the National Assembly of the waiting period for contemplation which must be observed. On a plain reading of Article 69, the Bill referred to in Article 69(5) must be the same one that is eventually voted upon in accordance with Article 69(3). It is submitted therefore, that the amended Bill in so far as it contemplated material changes from the original draft, cannot be said to be the same Bill contemplated by Article 69 (5).

The second point of relevance is that Article 69 and Schedule 2 of the Constitution list certain entrenched provisions that cannot be amended without satisfying certain requirements; however, Article 2 is not mentioned among them. So, the question is whether section 2 can be amended at all. Granted that Article 2 can nevertheless be amended, it is incongruous for the amending Bill to assert the validity of a law designed to alter the Constitution but which in all material particulars is inconsistent with the very Constitution.

The third point is that if a constitution truly reflects the values, ethos and ideologies of a people, then it is incongruous for the Belizean Constitution to incorporate into it glaring illegalities!

What are the glaring illegalities being referred to here? They are:

- (a) An attempt to subvert and circumvent the judicial process,
- (b) Expropriation of property without lawful basis (so says the Belize Court of Appeal),
- (c) *Ad hominem* legislation, and
- (d) The vesting of majority shareholding in public utilities in the State without prior negotiation.

The simple explanation for this is that the proposed amendment, if passed, would allow to the Government extraordinary powers to trample upon the Constitution, if it was so minded and yet

the same Constitution would be speaking to the protection of fundamental rights for the citizenry. The two cannot co-exist as they are opposite poles!

The fourth point is that there are a number of drafting infelicities with the Bill but these ought not to detain us here.

In conclusion, it is submitted there are enough substantive grounds that could render the Bill invalid.

*(g) The legality of Statutory Instrument No.70 of 2011*

The Court of Appeal of Belize struck down the purported expropriation of Telemedia and declared it as “null and void”. It also made a significant finding that the purported acquisition was neither lawful nor for a public purpose. Statutory Instrument No. 70 of 2011 now seeks to revive the same expropriation. It is submitted that this cannot be lawfully done without first reversing the decision of the Court of Appeal. One cannot revive a void Act which, in law, is a nullity.

Apart from that, whilst the Constitution of Belize allows for retrospective legislation as a general rule, courts frown upon such legislation, much more in subsidiary legislation. In this context, the courts look to clear and unambiguous language leading inexorably to the conclusion that retroactivity was indeed intended. Such retrospective legislation which breached fundamental rights is hardly ever acceptable. In this particular case, Statutory Instrument No. 70 of 2011 breaches at least three fundamental principles of the Constitution- the Right of Access to the Courts, Expropriation of Property (not for public purposes), and the Separation of Powers Doctrine.

It is submitted therefore that Statutory Instrument no. 70 of 2011 cannot cure the illegality of the first expropriation.

I go further. The Statutory Instrument represents a particularly egregious form of legislative interference with judicial functions. [see the case of *[Liyanage v. R]*].

It operates retrospectively, is *ad hominem* while the expropriation has been adjudged by the court **not** to be for a public purpose.

It is respectfully submitted that these issues could not be the subject matter of a legitimate constitutional amendment.

*(h) Review for Anticipatory Breach*

In Section 7 of the Constitution of Belize, makes provision for the anticipatory review of breaches of the fundamental freedoms conferred.

So the Article reads:

20.-(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in

relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction-

a. to bear *[sic]* and determine any application made by any person in pursuance of subsection (1) of this section; and

b. to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution:

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

Precisely because of the doctrine of Separation of Powers as well as the legislative competence of Parliament, courts do not interfere in the legislative process until Parliament's intentions have been transcribed into law.<sup>39</sup> However, this is not an absolute rule. Where the clear intention of Parliament can be construed to be a real and potential breach of the fundamental human rights provisions, then anticipatory review is permissible. Of what use is it to wait until the threatened breach has been "perfected" before mounting a review? It is submitted that any proposal that is in fundamental conflict with the rule of law as well as the provisions of the Constitution itself can be restrained by mounting an anticipatory review.

As noted in paragraph (g) above, the threatened breaches of the Constitution are the Right of Access to the Courts, Expropriation of Property (not for public purposes), and the Separation of Powers doctrine. Those intended breaches of the Constitution provide a legitimate platform for mounting an anticipatory review of the proposed legislation.

(i) *The Legality of the Reasons provided by the Government for the Expropriation of Property*

Public law has so developed in recent times that a review of reasons is now regularly undertaken by the Courts, especially when those reasons are proffered publicly.<sup>40</sup> Belize is not one of the West Indian jurisdictions that have placed a statutory duty on public officials to provide reasons.<sup>41</sup> So, the common law situation applies to Belize. The Prime Minister of Belize made a public disclosure behind the Government's decision to effect

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<sup>39</sup>The Bahamas District of the Methodist Church in the Caribbean and the Americas and ors v. The Hon. Vernon J. Symonette M.P. Speaker of the House of Assembly and 7 Others [2000] UKPC 31

<sup>40</sup>Padfield v. Minister of Agriculture Fisheries and Food [1968] AC 997; Williams Construction Ltd. v. AG of Barbados [1995] 1 WLR 102.

<sup>41</sup> See the Administrative Justice Act of Barbados, 1980 and the Judicial Review Act, 2000 of Trinidad and Tobago.

the Constitutional amendment and also to take command of the public utilities. The two principal reasons given are (i) a desire to assert the sovereignty of Belize and (ii) a just crusade to repair historical wrongs. The Court of Appeal of Belize was not persuaded by these reasons. Indeed, the reason behind these amendments is to reverse the effect of the Court of Appeal decision. So, in law, these in the words of Lord Denning are “bad reasons” and are, therefore, reviewable for procedural impropriety.

The opportunity may be taken here to respond the points made in the Prime Minister’s “Letter” to the “People of Belize”.

On the point that the courts have no power to effect judicial review without “textual support in the language and provisions of the Constitution”, the simple response is that some very fundamental principles are not expressly stated in the Constitution, yet they are enforced by the courts. A very good example is the doctrine of separation of powers. The constitution is a “flowering tree” that grows and takes on new meaning and principles by accretion. Indeed, in a real world, the constitution cannot contain every desirable provision. Respect for a symbiotic relationship for the three arms of government is an important principle for good governance yet it is not stated anywhere in the Constitution.

On the point that the true protectors of democracy are the people, that statement is only partially true with respect to the people’s vote at periodic elections. Good governance also requires enforceable laws administered by an impartial and fair judiciary. The one does not operate to the exclusion of the other.

(j) *Whether the Constitution of Belize contains ‘Inherent Provisions’ which cannot be altered by Parliament alone*

In paragraph (b) of this Opinion, the point was made that a Constitution is a compact between the Executive, the Legislature, the Judiciary and the citizenry and that no single entity can vary that compact unilaterally. Conteh CJ’s decision in Bowen v. AG of Belize<sup>42</sup> has been attacked for making this point. It is submitted that when a Constitution builds on a foundation of a nation’s aspirations and values, those aspirations and values “inhere” in the Constitution to the extent that though they may be changed, such change can only occur through the collective will of all the stakeholders. For the rule of law to apply, a spirit of partnership between the stakeholders is essential. The contrary argument puts the fate of the Constitution in the hands of the legislature that has the requisite majority to effect amendments to it. Indeed, in proposing the Ninth Amendment Bill, the Prime Minister indicated that the Ninth Amendment Bill is designed to ‘overrule’ Conteh CJ’s finding in the Bowen case and the CJ’s view that the basic structure doctrine inheres in the Belize Constitution.

It has been argued that the legislature has no such untrammelled legal authority on its own to effect fundamental amendments to the Constitution because of the “compact” theory

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<sup>42</sup> Claim No. 445 of 2008.

and also because the Constitution of Belize is said to be founded on the doctrine of Constitutional Supremacy.

The other side of the coin is to test the Government's position by the way and manner in which it has exercised its majoritarian power.

Firstly, I have not come across any evidence during my research to suggest that during the last General Elections, the issue of a substantive constitutional amendment was put to the people of Belize. If that is true, then the question arises as to whether these far-reaching amendments can be effected at all without a referendum of the people.

Secondly, it is debatable whether the people of Belize would readily agree that their Parliamentarians should have the power to amend the Constitution without a judicial audit or the consent of the people.

Thirdly, on the one hand, the Government attempts to nullify one court action and on the other shuts out the courts completely from its own people. That does not provide a sufficient level of confidence that power in the sole hands of the legislature will be safely utilized to promote "peace, order and good government" of the land.

In conclusion, it is submitted that untrammelled power in the hands of the Executive and Legislature combined is a real and present danger to the constitutional fundamentals on which the nation of Belize is currently structured. Even with such untrammelled authority, there must be limits to what Parliament can do unless its intentions accord with public policy, public morality and the values and aspirations of the nation. So, Parliament could not lawfully use its power to reintroduce slavery in Belize,<sup>43</sup> or deny the right of education to all women or declare all roads in Belize to be one way streets!

(k) *The Irish Case of Riordan*

In his "Letter" to the "People of Belize", the Prime Minister relies very heavily on the lone Irish Supreme Court case of *Riordan v An Taoiseach* to make the case that except for procedural non-compliance the court cannot inquire into the merits of, or strike down, a constitutional amendment.

With the greatest respect, *Riordan* is no authority for the proposition so vigorously espoused by the Prime Minister.

In that case, the Nineteenth Amendment to the Constitution Bill, 1998, was passed by both Houses of the *Oireachtas* on the 22<sup>nd</sup> April, 1998. The Bill provided for the holding of a referendum on the 22<sup>nd</sup> May, 1998. The applicant sought to prohibit the holding of the referendum. He contended that Article 46 of the Constitution had been violated in the ***procedure*** [**emphasis mine**] which had been adopted by the respondents. The applicant

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<sup>43</sup> Obiter dictum of Justin Hayton in the CCJ Application No. AL 8 of 2011.

objected to the fact that the constitution was only to be amended once certain other events had taken place to the satisfaction of the Government. He contended that Article 46 provided that the Constitution had to be amended once any referendum was passed by the people.

It was held by the High Court that the appropriate *procedures* [emphasis mine] prescribed under Article 46 had been complied with in full in respect of the Bill and there had been no procedural lacuna or departure from the provisions of the Article. The Court further held that there was nothing in the form of the amendment which ran counter either to the letter or the spirit of Article 46, as it was the people who would ultimately decide the issue.

On appeal, the Irish Supreme Court held that it could not interfere because “the amendment had been carried out and was now part of the Constitution”. Also the Supreme Court observed that “as the people had the sovereign right to grant or withhold an amendment to the Constitution, there was no reason why they should not give their approval:

A couple of quick observations may be made.

Firstly, the case was decided purely on *procedural* points only and the court found that the proper *procedures* had been observed. This case, therefore, is no proposition for the conclusion that if there were *substantive* issues or complaints against the amendment – such as is the case in Belize - the court would not have heard the matter.

Next, *Riordan* involved an amendment that was subject to approval by the people in a referendum. In Belize, the Government is taking away the people’s right. That deprivation of the fundamental right of the people cannot be justified on the basis of a case that was settled wholly and exclusively on *procedural* points.

Finally, the Irish case was peculiar, having arisen out of a situation of national emergency. Even then, the Supreme Court was careful to say that it would be wrong - even in those extreme circumstances – to say that the people had delegated to the Government the right to amend the Constitution. So, the people’s right to a referendum was preserved even in an emergency situation. The stronger then will be the argument for the exercise of the people’s right when no situation of emergency exists.

In short then, in the Belizean situation, the Government is erroneously claiming that very power of delegation which the Supreme Court of Ireland denied to the Irish Government! The additional point may also be made that even if *Riordan* was good law for Ireland, it could not be good law for Belize, especially in the light of the overwhelming Commonwealth Caribbean jurisprudence in favor of the view that the power of the legislature to make laws is subject to the Constitution.

There can be no better re-statement of this view than the telling words in the recent Privy Council decision of **Jennifer Gairy v. AG of Grenada [2001] 4 LRC 67:**

No legal or political system today can place the State above the law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent acts of officers of the State without a remedy. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity.

Where the people by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available. It is as much the duty of the State to render justice against itself in favor of citizens as it is to administer the same between private individuals. There is nothing in the constitution envisaging the writing into it of a theory of immunity from suit of the State (a state set up by the People to be governed in accordance with the provisions of the Constitution) **[the compact theory, my words]** stemming from or based upon the immunity of a personal sovereign who was the keystone of a feudal edifice. English common law practices, doctrines or immunities cannot qualify or dilute the provisions of the Constitution.

...it would seem correct to say that the Constitution is not imbued with feudal conceptions of privilege and exemptions but rather with modern conceptions of the duty of the State and the recognition by it of the human rights and needs of those who are the citizens of the State so that, instead of hedging the State with privileges and immunities the general trend is to place obligations on the State.

By Chapter 1 and s 106 of their Constitution the [people of Grenada established a new constitutional order. The constitution has primacy (subject to its provisions) over all other laws which, so far as is inconsistent with its provisions, must yield to it. To read down its provisions so that they accord with pre-existing rules or principles is to subvert its purpose.

These are very strong words indeed, which apply with full force to the situation of Belize. In conclusion on this point then, the case of *Riordan*, as a stand-alone authority on a procedural point, cannot be a string or sufficient or persuasive authority for displacing the existing strong constitutional prescription against parliamentary supremacy in Commonwealth Caribbean Constitutions, Belize included.

## **7. FINDINGS, CONCLUSIONS AND RECOMMENDATIONS**

The following are my Findings, Conclusions and Recommendations.

### **(a) FINDINGS**

In sum, there are cogent and powerful reasons why the Government's resolve to turn the legal evolution of Belize on its head through these radical and far-reaching constitutional amendments, must not be allowed to happen for the following reasons:

- The fundamental right of the citizen to access the courts will be taken away from the people of Belize, if the constitutional amendment is allowed to pass.
- The Parliament of Belize will be left with untrammelled and uncontrolled power in its hands in perpetuity, subject to no legal oversight.
- The fundamental doctrine of Separation of powers which underpins the cognate theory of constitutional supremacy will be overthrown for good.
- The fairly uniform and harmonized approach of the Region to harmonize their laws and legal systems will be undermined.
- The move has the potential to disrupt the development agenda of Belize, especially from the viewpoint of the private sector which remains the real engine of growth in modern economies.

(b) CONCLUSIONS

The conclusions that I have arrived at are as follows:

- In Belize, just as in the wider Commonwealth, the fundamental bedrock of the constitution is the principle of Constitutional Supremacy.
- As a consequence of the above, the doctrine of Parliamentary Supremacy is passé.
- The power of judicial review is entrenched at the highest level in the Belizean constitution and has received express recognition in section 20 thereof
- Though not expressly stated, the doctrine of Separation of Powers is a Fundamental principle of the Belizean Constitution in as much as no one organ can claim the right to exercise the functions of the other.
- The State's right to acquire priority is exercisable subject to lawful restraints, the parameters of which are set out in the Constitution.
- For as long as the decision of the Court of Appeal in *British Caribbean Bank Ltd v AG of Belize* [Civil Appeal No. 30 of 2010] stands, the Government of Belize cannot lawfully revive the second expropriation of property by the introduction of sweeping new legislation.
- Courts in the Commonwealth Caribbean frown upon the encyclopedic , *Anisminic* type of ouster clauses and the courts in Belize are expected to follow suit
- For reasons advanced in the Opinion, the legality of the Belize (Ninth Amendment) Bill 2011 is suspect and may itself be struck down for inconsistency with the Constitution.
- Statutory Instrument No 70 of 2011 also suffers from over-breadth and may also be struck down for want of legality.
- Anticipatory review of laws is permissible in the face of the egregious breaches of the Constitution.



- Where Reasons are proffered for a course of action, it is now legally permissible to review those reasons for legality and procedural impropriety.
- Whether by the “inherent” doctrine or the “compact theory”, the Constitution of Belize contains a fundamental set of negotiated provisions which can only be altered with the consent of the Executive, Legislature, Judiciary and the People. No one entity has the power of unilateral action.
- The Irish case of *Riordan* is not applicable to the Belizean Constitution, being a case that dealt with procedural issues only and special circumstances based on unique facts.

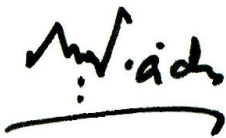
## 8. RECOMMENDATIONS

The following recommendations are hereby made:

The Bar Association of Belize is advised to consider moving the Supreme Court on a constitutional motion for the following declarations –

1. A Declaration that Section 2 of the Belize Constitution(Ninth (Amendment) Bill 2011 and Statutory Instrument No 70 of 2011 are unconstitutional for contravening fundamental rights enshrined in the Constitution,
2. An Order striking down the said Section 2 of the Belize Constitution (Amendment)Bill and Statutory Instrument No. 70 of 2011, and
3. Such other Declarations and Orders and Directions as the court may deem fit.

RESPECTFULLY SUBMITTED



ALBERT FIADJOE  
Professor (Emeritus) of Public Law  
September 28, 2011

## 9. A POSTSCRIPT AND an ADR PROPOSAL?

This Opinion has addressed the legal implications of the Government's decisions as they relate to the amendment of the Constitution in the manner proposed and the purported expropriation of property, as a consequence.

It has not addressed the non-legal issues of economic justice and empowerment for the people of Belize. A government in power must be allowed within the law to fashion out its own vision of the social and economic agenda of the nation.

Since the legal avenue through the courts may no longer be available to the Government for the fulfillment of its social agenda and political philosophy, it is suggested that the Parties may consider exploring the alternative dispute resolution route. A mediated solution to the problem should enable the Parties to reach conclusions and outcomes which meet the legitimate interests of all sides.

If so requested, I could provide further and better particulars.

AKF

SEPT 30, 2011