ACADEMIC OPINION IN RELATION TO A BILL FOR THE ENACTMENT OF THE *BELIZE CONSTITUTION (NINTH AMENDMENT) ACT 2011.*

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This is opinion was prepared pursuant to a request from the Bar Council of Belize. It is not a formal legal advice but rather an academic opinion for the assistance of the Bar Council's own legal consideration on the matter. (The opinions expressed herein are those of the writer and not those of the Faculty of Law of the University of Sydney or the University itself.)

This opinion is divided into two parts. Part I is based on the assumption that the separation of powers is a fundamental constitutional doctrine to which even amendments to the Constitution are subject. Part II examines the very issue as to whether the separation of powers is indeed such a fundamental doctrine. The opinion relates to the constitutional validity of the Bill for the enactment of the *Belize Constitution (Ninth Amendment) Act 2011.*

PART I

Assuming the existence of an entrenched doctrine of the separation of powers as a primary fundamental constitutional principle in the Constitution of Belize and which cannot be breached by amendments to the Constitution:

Introductory Comments

1. As discussed in Part II below, it is not entirely clear whether the doctrine of the separation of powers can be regarded as a primary constitutional doctrine which prohibits the enactment of amendments to the Belize Constitution inconsistent with it, even if otherwise validly enacted procedurally. The most recent constitution amendment bill, however, will now be examined on the assumption that it is.

2. The Revised Bill for the enactment of the *Belize Constitution (Ninth Amendment) Act 2011* ("the Revised Bill"; the corresponding original bill will be referred to as "the Original Bill") no

longer contains the provision in the originally proposed s 69 (9) that expressly ousted the jurisdiction of the courts to enquire into the constitutional validity of any amendment "passed in conformity with this section [s 69]". In the Original Bill, the jurisdiction of the courts was allowed to extend only so far as the procedural aspects of any proposed amendment; that is, whether the amendment procedure set out in s 69 had been duly followed. The courts were expressly prohibited from entertaining a challenge on the basis that the substance of an amendment was inconsistent with the existing Constitution. This would have excluded the courts from determining constitutional validity pursuant to any one, or a combination, of, the following: an interpretation of s 1 establishing Belize as a "democratic State"; an interpretation of s 2 which did not permit amendments to be substantively "inconsistent" with the existing Constitution; a combined reading of ss 68 and 69 (as in *Bowen v AG of Belize*, Claim No. 445 of 2008); and/or a general conclusions based on "Basic Structure of the Constitution" arguments, including the separation of powers and the inviolability of the rights protected in Part II, and the rule of law.

3. Similarly, the ouster clauses in the proposed new s 145 in the Original Bill, to be inserted in a new Part XIII of the Constitution, have also been removed. These will be referred to as "the original s 145 clauses" which consisted of the final clause in the initial form of the proposed s 145 (1) (following the word "property") and the proposed original subsection 2. The proposed s 145 (1) provided in the Original Bill, and so provides in the Revised Bill, that any acquisition pursuant to the stated Acts (*Electricity Act* and *Belize Telecommunications Act*, as amended) is to be regarded as "duly carried out for a public purpose in accordance with the laws authorising the acquisition of such property". The Original Bill (though not now the Revised Bill) then purported to remove any jurisdiction from the courts to enquire into "the *constitutionality*, legality or validity" of the acquisitions (emphasis added). The Original Bill strengthened this by purporting to render ss 17 and 20, and indeed "any other provision of this Constitution or any other law or rule of practice", subject to the new s 145.

4. Thus, a very clear intention was expressed to remove the jurisdiction of the courts despite the fact that this jurisdiction was otherwise *expressly and singularly* provided for in this precise Part of the Constitution, Part II, by s 20 thereof; and not by mere implication from

the establishment of a Supreme Court and Court of Appeal elsewhere in the Constitution. Part II provides "Protection for Fundamental Rights and Freedoms". Although s 96 (in Part VII) already provides for reference of constitutional questions to the Supreme Court, and thence to the Court of Appeal, it was deemed necessary to make special provision for judicial review in order to protect the rights contained in Part II.

5. This is indicative that the Constitution was intended to be particularly solicitous toward these "Fundamental Rights and Freedoms." This view is reinforced by the degree of detail contained in s 20, which, it is emphasised, is made applicable only to alleged breaches or "likely" breaches of sections 3-19 in which the fundamental rights and freedoms are enshrined. Indeed, the Supreme Court, in s 20(2), is given "original jurisdiction" with respect to such matters 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." Section 20(4) provides for a right of appeal to the Court of Appeal in relation to these matters. It is also worthy of note that provision (s 20 (7)) is made to enable the National Assembly to *strengthen* the Court's hand in relation to the protection of rights and freedoms by permitting it to invest the Court with *additional* powers in this regard.

6. The detailed provisions of s 20 might form the basis for a very strong implication and presumption that in the constitutional arrangements of Belize, the Supreme Court (and Court of Appeal) are to have a special place to decide on the constitutional validity of legislative and executive action where fundamental rights and freedoms are at stake. Indeed, the jurisdiction of the Courts in relation to such matters is expressly vested, unlike the position in, for example, the United States and Australia, where judicial review of constitutional issues is implied from the entrenchment of the doctrine of the separation of powers, not expressly granted by the Constitution as it is in Belize. While such an implication may certainly be derived from the structure of the Belize Constitution, its position is strengthened by the express constitutional provisions for judicial review.

7. It is somewhat inconsistent with this apparent original intention that the original s 145 clauses purported to weaken the Court's power in this regard. Express reference was made

in the Original Bill to s 20, purporting to render it *subject* to the new s 145. It then proceeded in the original s145 (2) to make "absolute" the bar on the jurisdiction of the courts and to state that "no court shall assume jurisdiction on any ground whatsoever including, without limitation, any alleged ground of lack of jurisdiction in the persons making the said Acquisition Orders, or any ground alleging breach of the rules of natural justice". This clearly runs contrary to the specific provisions of s 20 and is, to that extent, incongruous and inconsistent with them. Whether it is unconstitutional will depend on how the courts determine the issue of the supremacy of the existing Constitution, that is, whether the stated amendment procedure, if followed, overrides all else, or whether the substance of the amendment must itself be consistent with the existing Constitution.

8. As the provisions which made explicit reference to the courts were removed from the Revised Bill, the jurisdiction of the courts in relation to constitutional questions, including questions arising under Part II, is left intact. In relation to constitutional challenges based on substantive issues, as there is no longer any express removal of their jurisdiction in relation to these matters, the courts may still entertain these and proceed to determine for themselves whether the Constitution requires judicial review on more than merely the procedural grounds in s 69, including judicial review of the new provisions which the Revised Bill seeks to insert into the Constitution.

9. I have nevertheless been asked to express my academic opinion on the Original Bill and will accordingly proceed to comment on that Bill, and in particular the aspects thereof which removed, limited or otherwise interfered with the constitutional jurisdiction of the courts of Belize.

Relevant Constitutional Principles

10. In the context of a written constitution which entrenches the separation of powers, the legislature is not permitted to remove the jurisdiction of the courts in relation to constitutional matters. It has been axiomatic since *Marbury v Madison* (5 US (1 Cranch) 137 (1803) that, at least with respect to the highest court in the judicial system under a written

constitution which entrenches the separation of powers, judicial review of legislative and executive actions to determine constitutional validity is a fundamental jurisdiction which cannot be removed. This jurisdiction remains fundamental and uncontroversial in the United States, and indeed Australia (see e.g. *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affirmed *sub nom Attorney-General for Australia v R* (1957) 95 CLR 529; [1957]AC 288) and other similar jurisdictions which maintain an entrenched separation of powers in the Commonwealth (see e.g. *Liyanage v R* [1967] 1 AC 259.) Ordinary legislation purporting to oust this jurisdiction would clearly be invalid, as would purported constitutional amendments to this effect which themselves were subject to the overriding primacy of the separation of powers doctrine in the constitutional scheme.

10. Such a jurisdiction could only be removed by an express, and otherwise valid, constitutional amendment which made it clear that the separation of powers would be subject to such exceptions as stated in the Constitution, that it was not to be regarded as an entrenched doctrine, and/or that it (the separation of powers) was subject to other provisions in the constitution, including otherwise valid constitutional amendments. Of course, if the separation of powers was somehow fundamentally entrenched in the constitution and given primacy over other provisions pursuant to "Basic Structure" notions or otherwise, then it could not then be removed even by such a constitutional amendment. In these latter circumstances, unless there was provision made for amendment to the Basic Structure, there would need to be a fundamental reshaping of the whole constitutional structure to achieve the desired result, that is, a "revolution".

11. In the Constitution of Belize, one need not rely alone on the axiomatic status of *Marbury v Madison.* The jurisdiction of both the Supreme Court and the Court of Appeal ("the Courts") in constitutional matters is expressly invested by the Constitution: ss 20 and s 96. There is no suggestion that this jurisdiction can be defined or limited by the legislature, subject to the issues relating to constitutional amendment. The position of the Belize Courts is arguably more secure than that of the Supreme Court of the United States and the High Court of Australia, at least to this extent: its jurisdiction over all constitutional matters is vested unambiguously and directly in them by the Constitution.

12. What then are the precise principles which can be derived from the separation of powers, and an entrenched judicial review jurisdiction, which may be applied to the Original Bill?

13. In a very important article written in 1953 in the *Harvard Law Review*, Professor Henry Hart rehabilitated the importance of *United States v Klein* (80 US (13 Wall) 128 (1871), equivalent in importance to the seminal *Liyanage v R* in Commonwealth jurisdictions, on the issue of legislative interference with judicial process.[1] Professor Hart argued that while Congress, pursuant to Article III of the US Constitution[2], was granted plenary power to remove jurisdiction from the lower federal courts, legislative exceptions to the Supreme Court's appellate jurisdiction "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan".[3] While Hart was referring principally to Congress' apparent unlimited control over the Supreme Court's appellate jurisdiction in matters arising under the general law, *a fortiori*, that essential role which cannot be removed, at least so long as *Marbury v Madison* prevails, is to act as the ultimate arbiter of constitutional issues.

14. The subsidiary limbs to Hart's thesis are equally important. These are applicable not only in the United States, but also within any jurisdiction, such as Belize, where judicial review is constitutionally protected. These subsidiary principles were similarly recognised in Westminster style constitutional contexts in *Liyanage v* R by the Privy Council.

15. The first is that that the legislature may not *direct* a result in any particular case contrary to existing judicial interpretation of the Constitution, no matter which court was hearing the matter.[4] That is, a legislature may not direct the court to interpret and apply a constitutional provision in a way which is contrary to the judicial branch's determination of the proper

[1] HM Hart, 'The Power of Congress to Limit the Jurisdiction of the Federal Courts: an Exercise in Dialectic' (1953) 66 *Harvard Law Review* 1362.
[2] Art III s 2 confers appellate jurisdiction on the Supreme Court with such exceptions as Congress shall make, which exceptions do not of course apply to the Supreme Court's original jurisdiction.
[3] Hart, n 1 above, 1364–5. See also MH Redish and CR Pudelski, 'Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v Klein' (2006) 100 *Northwestern University Law Review* 437.
[4] Hart, above n 1, at 1370–73.

interpretation and application of that principle. This is because the judicial branch is the ultimate arbiter of constitutional validity, not the legislature or the executive.[5]

16. The second is that, once jurisdiction is established, the Constitution through the separation of powers provides "a limitation on the power of Congress to tell the court how to decide it", whether or not the matter involves review of the constitutional validity of statutes or executive action, or simply involves the interpretation of relevant statute and common law[6] (see *United States v Klein*; *Liyanage v R.*).

17. The principles discerned in the above paragraphs have been recognised in other jurisdictions which maintain a separation of powers, including Australia (see *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *R v Humby*; *Ex parte Rooney* (1973) 129 CLR 231), Ireland (see *Buckley v Attorney-General* [1950] IR 67; *Re Camillo* [1988] IR 104) and, on the authority of *Liyanage,* all other Westminster-style jurisdictions in the Commonwealth which do so.

18. It is thus possible to discern a hierarchy of principles which, it would seem, can be applied in Belize. These are can be summarised as follows:

A. The legislature is prohibited from removing the courts' jurisdiction with respect to constitutional matters; that is, matters in which the constitutional validity of legislative or executive action is at issue.

B. Legislative interference, by way of direction or prescription, with the courts' independent adjudication of constitutional matters, is prohibited.

C. *A fortiori*, the legislature or executive may not interfere with, by way of direction or prescription, the court's independent adjudication of any other matter under the general law in relation to which it has jurisdiction.

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[5] See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

[6] Hart, above n 1, at 1373. Other leading commentators agreed. Of the most prominent, Professor Gordon Young saw *Klein* as 'establish[ing] some protection from interbranch intrusion for the federal judiciary' based on the principle of direction: GC Young, "Congressional Regulation of Federal Courts Jurisdiction and Processes: *United States v Klein* Revisited" [1981] *Wisconsin Law Review* 1189 at 1196.

The Constitutional Validity of the Original Bill: Principle A

19. The issues raised by the Original Bill most obviously relate to Principle A. It is clearly a breach of the separation of powers, and unconstitutional, for the legislature to purport to remove, by legislation or otherwise, the jurisdiction of the Belize Supreme Court and Court of Appeal (if not the judicial branch in general) in relation to cases which raise constitutional issues and in which the interpretation and application of the Constitution is involved. The following conclusions would seem to follow:

a) The final clause in the proposed s 69(9) in the Original Bill, contained in s 3 of that Bill, would be unconstitutional and thus invalid because it purported to remove the Courts' jurisdiction in constitutional matters. However, it did not purport to remove the jurisdiction of the Courts to determine whether the constitution amendment procedure in s 69 had been followed. Had it purported to do so, that aspect would also have been invalid.

b) The original s 145 clauses, initially proposed in the Original Bill, (that is, the final clauses of s 145 (1) following the words "such property" and all of the original s 145 (2)) would similarly have been invalid, at least to the extent that they prevented the court from its enquiry "into constitutionality" of the relevant acquisitions of property referred to in the new Part XIII.

The Constitutional Validity of the Original Bill: Principle B

20. It is possible to invoke Principle B above in relation to the ouster clauses in the originally proposed s 69(9) and the original s 145 clauses. These provisions would have been invalid, it is submitted, *to the extent that they can be interpreted as interfering with the Courts' interpretation and application of the Constitution.* Although most obviously construed as a *removal* of jurisdiction, it is arguable that, by these provisions, the legislature itself is prescribing the constitutional validity of any constitutional amendment so long as it complies with s 69, and irrespective of any other constitutional consideration and of any relevant laws or actions authorised under Part XIII. That is, the legislature itself is

purporting to make the final decision on constitutional matters, arguably a form of legislative judgment on such matters, but also impliedly a direction to the courts as to how they are to decide on issues of constitutional validity. This is arguably a usurpation by the legislature of judicial power.

21. Moreover, there need not be a direction which applies to any particularly identified case, although if the legislation is such as to fit "glove-like" around the issues which may arise in any pending (or prospective) litigation or in relation to specified parties or potential issues, then there is a greater likelihood of the direction being unconstitutional.

22. Although an unambiguous legislative direction to the courts as to the constitutionality of legislative or executive acts would clearly breach the separation powers, a middle case also needs to be examined for the sake of completeness. It is submitted that the following examples would most likely be invalid as an unconstitutional interferences with judicial process:

a) legislation which expressly directed the court to adopt a particular method of constitutional interpretation, such as, e.g.,a "functionalist", "purposive", "originalist", or strictly "textual" approach;

b) legislation which expressly required a court to hold all statutes valid unless their unconstitutionality was established beyond reasonable doubt; and

c) legislation which required the highest court in the hierarchy, or indeed any other court, to be bound by its own decisions; although, if this was content neutral and not directed at any specific case, it may have a better chance of surviving constitutional challenge.

23. In the case of Belize, it is arguable that legislative attempts to direct the Courts' constitutional adjudication, which is arguably what the Original Bill was attempting, under the guise of substantive constitutional amendments, might well suffer a similar fate. Much here will depend on the extent to which the separation of powers is entrenched even against a constitutional amendment, as discussed in Part II herein.

24. To avoid any misunderstanding, it is noted that a legislature may enact a law which sets out the *legislature's own intention* with respect to its legislation. Interpretation statutes are of course a common feature in all jurisdictions. For example, in Australia, s 15AA of the *Acts Interpretation Act 1901* (Commonwealth) provides that "a construction that would promote the purpose or object underlying the Act" is to be "preferred" to one which would not. This provision has been applied by the Australian courts without controversy and without any challenge to its validity. Although there is no judicial statement on the point, the reason is that this provision, and other similar provisions in the Act, merely state how Parliament intends its legislation to be interpreted. Clearly, the intention of Parliament extends to those situations when an Act is being construed by a court to determine whether it comes within Commonwealth legislative competence. However, stating its intention is one thing. Directing the courts to adopt a particular form of constitutional interpretation or construction of acts is quite another. So long as the legislature limits itself to the former and does not interfere with the courts own processes and discretion in this regard, there will be no breach of the separation of powers.

25. It is arguable that that is all the amendments in the Revised Bill are purporting to achieve. The Original Bill, however, was seeking to go a lot further, and, it is submitted, was in breach of the separation of powers by directing the courts as to how they were to determine constitutional issues. By removing the offending provisions, it would appear that the jurisdiction of the courts to consider constitutional matters has been preserved in the Revised Bill.

The Constitutional Validity of the Original (and Revised) Bill: Principle C

26. There may be a further constitutional problem with the original s 145 clauses, and indeed with the currently proposed s 145, pursuant to Principle C in paragraph 18 above. I note, however, that I am not familiar with the politics of Belize, nor do I have complete detailed knowledge of all previous (or current) litigation in which the Government has been, or is, involved directly in relation to compulsory acquisition of property (as opposed to related constitutional issues involving the Sixth Amendment Bill etc.) However, I am aware

that the Government has been pursuing a policy of nationalizing Belize Telemedia Limited, in addition to other actions relating to the acquisition of property. Its attempts to do so have been challenged in the courts. I understand that the Court of Appeal has ruled that the 2009 attempt at nationalisation was unconstitutional. It would appear that the National Assembly is not merely attempting to overrule the court to remedy the situation by seeking to amend the relevant law, which is perfectly valid so long as it does not directly seek to overturn or review the actual final judgment of the relevant court. Rather it appears that it may be seeking to remedy this by way of constitutional amendment in order to provide a *constitutional* imprimatur to such conduct, not simply substantive reliance on the relevant law. In other words, it seems that the aim of the Revised Bill is to provide constitutional authorisation to any relevant acquisition of property in pursuance of government policy and to have the Constitution itself declare that the acquisition was carried out "for a public purpose" and "in accordance with the laws authorising the acquisition of such property". In so doing, it is arguably, in substance, seeking to prevent a judicial adjudication of this matter pursuant to the general law.

27. This may go too far and may thus constitute, in substance, an attempt by the National Assembly to achieve a particular result in either pending or prospective litigation in which it has an ongoing interest by seeking to remove and/or interfere with the judicial process. Of course, it might be possible to read down the Revised Bill, especially as it removes any explicit reference to adjudication by the Courts, so that it is construed simply to imply that the ultimate arbiter of the legality of the acquisition under relevant laws remains the courts. However, in light of relevant precedents to which I will refer, this may not be so clear in the Revised Bill's proposed s 145 (1). The relevant words are these: "It is hereby declared that the acquisition of certain property by the Government under the terms of [the mentioned Acts] was duly carried out for a public purpose in accordance with the laws authorising acquisition of such property."

28. Let it be assumed for the sake of argument that the National Assembly has the legislative competence to make ordinary laws with respect to the acquisition of property and to determine what constitutes a public purpose etc. If it has such competence, it may,

for example, by force of its own statutes, declare that a particular acquisition is lawful. What it may not do is direct the judicial branch *to deem* a particular acquisition to be lawful irrespective of any underlying law which would hold the contrary to be the case, and in the absence of an actual amendment to that law to establish legality. And if it is the case that the separation of powers is a fundamental, primary constitutional principle to which constitutional amendments are subject, arguably the amendment may have the same status to it as an ordinary statute has to any constitutional provision to which it is subject and it may therefore be examined in a similar way to determine its consistency with the fundamental constitutional principle to which it is subject.

29. The Australian cases provide an excellent illustration in this regard. In *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* ((1986) 161 CLR 88), the catalyst for the action was a declaration by the Australian Conciliation and Arbitration Commission[7] that a trade union (" the BLF") had engaged in the type of improper conduct which permitted the relevant Minister to order its deregistration.[8] The union applied to the High Court to have the Commission's declaration quashed and to prohibit the Minister from ordering the Registrar of the Commission to proceed with the deregistration. While these proceedings were pending, the Commonwealth Parliament enacted the *Builder's Labourers' Federation (Cancellation of Registration) Act 1986* (Cth), which, pursuant to s 3, cancelled the BLF's registration "by force of this section". The BLF challenged the validity of the legislation on the grounds that, inter alia, it was either an exercise of the judicial power of the Commonwealth, or an interference with judicial functions, in breach of the separation of powers.[9] The Act, it was submitted, abrogated the function that would otherwise have been performed by the High Court in the pending proceedings because Parliament itself had already prescribed the outcome.[10] The High

[7] Upon application by the relevant minister pursuant to s 4(1) of the *Building Industry Act 1985* (Cth) that it was satisfied that the BLF had engaged in conduct that constituted a contravention of certain undertakings it had made and agreements to which it was a party.
[8] The BLF had previously sought relief by way of prohibition in relation to this ministerial application, which relief was refused: *Re Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation (No 2)* (1985) 159 CLR 636.
[9] *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 93.
[10] *Ibid*, at 94.

Court unanimously rejected this submission on the basis 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."[11] Confirming the High Court's previous acceptance of the direction principle, and its essential role in testing the substantively legislative nature of the legislation, it further held that "[i]t is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings."[12] The distinction between a valid legislative act that is a change in the law, on the one hand, and an unconstitutional one which interferes with judicial process, was maintained.

30. The Court did not, however, elaborate on what it precisely meant by "interference with judicial process", although it is possible to discern in its reasoning the critical element of direction to facilitate a desired outcome. In characterising the legislation here as indeed substantively legislative, the Court emphasised the provision's express statement that deregistration was achieved by the force of the statute, that is, by a change in the law. The Court did have regard to the *ad hominem* nature of the legislation and the fact that it addressed an issue, the deregistration of the trade union, which was the key issue in the pending proceedings. However, it did not attempt to address, or indeed fashion itself, to the particular legal issues that the Court had to consider in those proceedings. It merely by-passed them.

31. This is to be contrasted with the analogous State case, *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister of Industrial Relations* ((1986) 7 NSWLR 372), a decision of the New South Wales Court of Appeal. The Court found that the impugned legislation, because of its prescriptive nature, was in breach of the separation of powers as an interference with judicial functions, and would have declared it invalid if the doctrine of the separation of powers had been legally entrenched in the State.[13] The relevant minister had cancelled, by declaration, the registration of the State

[11] *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96.
[12] *Ibid*.
[13] Following *Clyne v East* (1967) 68 SR (NSW) 385; see also in other states: *Gilbertson v South Australia* (1976) 15 SASR 66 at 101 (Zelling J) and *Nicholas v Western Australia* [1972] WAR 168 at 175.

branch of the BLF pursuant to his statutory powers.[14] The union unsuccessfully challenged the decision in the Supreme Court of New South Wales on natural justice grounds, whereupon the BLF appealed. In the week prior to the hearing of the appeal, Parliament enacted the *Builders' Labourers Federation (Special Provisions) Act 1986* (NSW). Section 3(1) thereof provided that the union's registration "shall, *for all purposes*, be taken to have been cancelled" by the ministerial declaration (emphasis added). Section 3(2) provided that the Minister's certificate, as the prerequisite in the deregistration process, "shall be treated, *for all purposes*, as having been validly given from the time it was given or purportedly given' (emphasis added). Section 3(3) provided that this shall be so notwithstanding any decision in any court proceedings relating to the certificate or to the executive declaration. In addition, section 3(4) provided that the costs in any such proceedings should be borne by the party "and shall not be the subject of any contrary order of any court". Although only s 3 (4) makes express reference to the courts, the other subsections do not except the courts from the "for all purposes" mandate.

32. The difference between the wording used in the State Act—"for all purposes"—and the analogous Commonwealth provision—"by force of this section"—should be noted as the significant factor which led to the opposite conclusion of those justices of the State court which considered the issue. Street CJ and Kirby P[15] made approving reference to the High Court decision and the distinction drawn there between unconstitutional interference with judicial functions, and constitutional legislation, which merely altered the substantive rights of parties in pending proceedings. Both justices expressly recognised the vital constitutional issue at stake and the need for discrete principles to deal with it. Street CJ opined: "For Parliament, uncontrolled as it is by any of the safeguards that are enshrined in the concept of due process of law, to trespass into this field of judging between parties by interfering with the judicial process is an affront to a society that prides itself on the quality of its

[14] Industrial Arbitration (Special Provisions) Act 1984 (NSW).
[15] Commencing (1986) 7 NSWLR 372 at 375 and 387 respectively.

justice. Under the Commonwealth Constitution it would ... attract a declaration of invalidity."[16]

33. In holding that there was a breach of the direction principle, Street CJ noted in particular that part of the first two subsections which prescribed the effect that the relevant executive actions "shall for all purposes" have. The phrase did not exempt, and was therefore held to be applicable to, the court's adjudication in the pending (and prospective) proceedings.[17] The impugned provisions were "cast in terms" that "amount[ed] to commands to this Court as to the conclusion that it is to reach in the issues about to be argued before it".[18] The corollary of course is that had the legislation been cast in other terms it may have achieved the same ends without breaching the direction principle. However, "[r]ather than substantively validating the cancellation of the registration and the Ministerial certificate, Parliament chose to achieve its purpose in terms that can be more accurately described as *directive rather than substantive*"[19] (emphasis added). He contrasted this legislation with the corresponding federal legislation that, validly, achieved its purpose by its own force and was therefore a substantive change in the law that the court upheld.

33. In agreement, Kirby P recognised the foundational distinction between a change in the law and mere direction[20] and he accepted that the enquiry was about means and not ends. He approved the position taken by the High Court in the federal case, notwithstanding the "motive [behind] enacting the legislation, even if it were to circumvent and frustrate the proceedings in the Court".[21] Improper motive was not relevant when Parliament acted within the proper bounds of legislative power. In relation to the State legislation, however, both the *ad hominem* nature of the legislation and "the terms in which it was cast" indicated

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[16] *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister of Industrial Relations* (1986) 7 NSWLR 372 at 375–6 (Street CJ). Earlier he stated: 'Fundamental to the rule of law and the administration of justice in our society is the convention that the judiciary is the arm of government charged with the responsibility of interpreting and applying the law as between litigants in individual cases. The built in protections of natural justice, absence of bias, appellate control, and the other concomitants that are the ordinary daily province of the courts, are fundamental safeguards of the democratic rights of individuals' (*ibid*).
[17] *Ibid*, at 376.
[18] *Ibid*, at 378.
[19] *Ibid*.
[20] *Ibid*, at 392.
[21] *Ibid*.

that it was "more apparently a direct intrusion into the judicial process than was the case with the Federal Acts".[22] Highly indicative of direction was the precise tailoring of the legislation to the matters in issue in the pending appeal, including the question of costs. "The 1986 State Act … deal[t] specifically with matters which were then within the judicial domain".[23] By contrast, "in the federal sphere, there was no equivalent matter under appeal which the Federal legislation of 1986 terminated".[24] It was "in perfectly general terms" which did no more than cancel "by legislative act, the registration of the Federal BLF".[25] Even though it was *ad hominem*, it did not reach into the judicial process in such a way as to amount to a direction to the court or to restrict the court's independent adjudication of a matter. As indicated, it merely bypassed the judicial process entirely.

34. Therefore, to the extent that the text of the proposed s 145 (1) in the Revised Bill can be brought within the factual context of the State BLF case above, it may be arguable that it in fact breaches Principle C, in addition also to Principle B. To succeed, however, it would need to be found that these words are not a simple legislative validation of executive action pursuant to its own legislative competence (which can then be determined independently by the courts if challenged) but an actual direction to the courts so to find. My own view is that these words may well be construed as purporting to achieve such a legislative validation of certain acquisitions, at least to the extent that they were carried out for a "public purpose" and is arguably akin to the legislation in the Federal BLF case above which simply deregistered the Union. At the end of the day it will depend on how they are construed by a court.

35. The difficulty that I have here is that, although there does not appear to be an express direction to the courts in the Revised Bill, the proposed amendment seems simply to declare the existence of the public purpose element of particular acquisitions under particular statutes without actually amending the terms of those statutes, that is, without changing the underlying law. Had this been stated in ordinary legislation, there is a real issue here

[22] *Ibid*, at 394.
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid.*

that the legislation may well be in substance a direction to the courts, as opposed to change in the law. Although not as clear cut as the classic facts of *Liyanage*, certain elements indicative of direction may be present: e.g.: it is directed to rather specific acquisitions and potential legal proceedings relating to these; the government has an interest as a party. However, the ad hominem and specificity elements are not quite as obvious as they were in *Liyanage*. Moreover, the text is not obviously directive. In the cases which have considered *Liyanage* (in Commonwealth jurisdictions) and the analogous *Klein* case in the United States, a very high threshold appears to have been set for the establishment of an unconstitutional legislative direction.[26] That is not to say that the point may not be argued, but rather that it is very difficult to say whether the point will be accepted in relation to the wording of s 145(1) of the Revised Bill.

36. Having said this, there is one Australian case which may be of assistance in relation to the precise issue of ousting the jurisdiction of the courts as a breach of the separation of powers and may be particularly relevant in considering the validity of the *Original* Bill. In many respects, the impugned statute in that case is akin to the ouster provisions in the Original Bill. It deserves to be examined in some detail for, to the extent that its principles are accepted to be applicable in Belize, the ouster clauses in the Original Bill may well be held invalid.

37. In *Lim v Minister for Immigration, Local Government and Ethnic Affairs*[27] a number of amendments to the *Migration Act 1958* (Cth) were challenged. Prior to their enactment, the plaintiffs—Lim and 35 other Cambodian nationals who had arrived illegally in Australia—were being held in custody pending the reconsideration of their failed applications for refugee status. They applied to the Federal Court for orders that they be released. Two days prior to hearing, Parliament amended the Act by the addition of s 54R, which provided that "[a] court is not to order the release from custody of a designated person". That s 54R was directed at the plaintiffs was made clear by the definition of "designated person" in section

[26] See e.g. *Nicholas v The Queen* (1998) 193 CLR 173 and in the United States *Robertson v Seattle Audubon Society* 503 US 429 (1992) and *Miller v French* 530 US 327 (2000).

[27] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

54K as referring to illegal immigrants arriving by boat on Australian shores. Sections 54L and 54N were also added, requiring, respectively, that a designated person in custody must be kept in custody until either removed from the country or given an entry permit; and that a designated person not in custody may be arrested without warrant, detained and kept in custody for the purposes of section 54L.

38. In challenging these provisions, the plaintiffs argued,[28] relying on *BLF (Cth)*, that although Parliament may legislate to alter rights in issue in pending litigation (what is referred to as "the Changed Law Rule"), these provisions breached the separation of powers by interfering with the "very judicial process involved in the release proceedings".[29] They likened the legislation to the State legislation in *BLF (NSW)*. "The present Act", it was submitted, "is specifically directed to courts and their processes".[30] Heavy reliance was placed not only on the existence of the pending proceedings as an indication of direction, but also the *ad hominem* nature of the legislation.

39. The Court unanimously upheld the validity of sections 54L and 54N, but by a majority struck down section 54R as unconstitutional.[31] On the question of legislative interference, the majority reasoned that constitutionality was determined by reference to "known or prospective legal proceedings"[32] and whether the legislature was predetermining the outcome of legal disputes under the guise of properly enacted legislation. The enquiry was exclusively concerned with whether the legislature had predetermined the outcome of pending or prospective proceedings, or the legal or factual issues therein, by directing the

[28] *Ibid*, at 4ff.
[29] *Ibid*, at 5.
[30] *Ibid.*
[31] The majority in relation to the s 54R issue consisted of Brennan, Deane, Dawson JJ (in a joint judgment) and Gaudron J in a separate judgment.
[32] *Ibid*, at 34. In addition to pending proceedings, their Honours were also referring to proceedings which had not yet been commenced but which *might* be commenced and which involved a class of persons which was so precisely defined by the impugned legislation that it was possible to identify them precisely. When they used this phrase, their Honours were responding to a submission by the plaintiffs that the impugned sections were invalid as a 'usurpation' of the judicial power of the Commonwealth because they applied only to a class of persons which was 'so limited by definition as to amount in substance to a specification of individuals' and 'were enacted in order to affect the outcome of known or prospective legal proceedings by those individuals'. The difference, however, is not of consequence for present purposes in discovering their attitude on the precise issue of pending cases. It is indicative, however, that the propositions which emanate from the judgment are applicable also to prospective proceedings of the type which would precisely arise relating to issues of release from custody of 'designated persons'.

court to make certain findings, and in so doing acting in a way which was other than substantively legislative. It could also be said that the judicial nature of the power the court was required to exercise was compromised because its independent adjudication on certain critical matters was compromised. It was these considerations in particular which were the basis for the declaration of invalidity of section 54R.

40. That section was expressly addressed to the judiciary, directing it not to order the release of a designated person from custody. It purported "to direct the courts, including this Court, not to order [a designated person's] release from custody regardless of the circumstances."[33] That it was possible that there might be circumstances where such imprisonment may be unlawful was critical to the ultimate conclusion: "[O]nce it appears that a designated person may be unlawfully held in custody in purported pursuance of Div 4B, it necessarily follows that the provision of s 54R is invalid".[34] Brennan, Dawson and Deane JJ, with whom Gaudron J agreed, stated: "In terms, s 54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. *It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of jurisdiction.* The former falls within the legislative power that the Constitution, including Chapter III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates" (emphasis added). [35] The majority thus confirmed the critical distinction between a substantive amendment to the law—which in this context would have been a statute that limited the jurisdiction of the courts in accordance with the Constitution[36]—and a prescriptive act. The fact that the majority did not examine in any detail the usual indicia of direction reflected the clear indication of direction on the face of the statute, as in the

[33] *Ibid.*
[34] *Ibid*, at 36. The other ground for holding the section invalid is that it contravened the direct vesting of jurisdiction pursuant to s 75(v) of the Constitution.
[35] *Ibid*, at 36–7.
[36] Parliament may legislate to limit the jurisdiction of the federal courts in relation to all matters, excepting of course the original jurisdiction of the High Court in s 75 of the Constitution.

BLF (NSW) legislation. The minority[37] can also be said to have been in general agreement on principle because they upheld the validity of section 54R only by reading it down to mean that a court might not release from custody a designated person *lawfully* detained.[38] Otherwise, Toohey J would have regarded it as "clearly an interference with the judicial power [which] cannot be sustained".[39] McHugh J stated that in as much as "it directs a court not to give effect to substantive rights while exercising federal judicial power, it would usurp the judicial power of the Commonwealth and be invalid".[40]

[37] Mason CJ, Toohey and McHugh JJ.
[38] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 11–14, 50–51, and 68 respectively.
[39] *Ibid*, at 50.
[40] *Ibid*, at 68.

Part II

The precise status of the doctrine of the separation of powers in the Belize Constitution: whether it is a primary constitutional principle in relation to which amendments to the Constitution must be subject.

1. The essential issue here is whether the existing Belize Constitution, including the amending procedure in s 69, is supreme, or, whether that Constitution provides for the existence of core fundamental principles, in particular the separation of powers, to which any amendments pursuant to s 69 are ultimately subject (whether derived from notions of Basic Structure, or otherwise implied from the text and structure of the Constitution). I will refer to the latter as the "basic structure argument". This issue reflects a fundamental tension between notions of the supremacy of the constituent body set up by the Constitution to amend itself (whether that be by simple majority, special majority, or special majority plus referendum etc.) and fundamental principles which the Constitution seeks to protect. This raises a number of complex issues across a range of different scenarios. The present discussion will be limited more precisely to the supremacy of a constitutional amendment procedure and the body so constituted and established to amend the Constitution.

2. Section 69 is the relevant constitutional provision and its terms are quite clear. The National Assembly is invested by the Constitution with constituent power if it can achieve the specified majorities in the House of Representatives, being three-quarters of the members in relation to certain provisions, and two-thirds in relation to others. Other procedural matters are set out therein before the amendment can take effect. There is no provision in s 69 itself to the effect that the substance of any amendment, before it can validly take effect, must be consistent with any particular existing constitutional provision, whether express or implied, or indeed any other fundamental constitutional provision or principle within the Constitution.

3. I have some reservation as to whether s 68 provides any limitation as to the *content* of any constitutional amendment pursuant to s 69. It seems to me that s 68 simply confers plenary legislative power on the National Assembly, "subject to the provisions of this Constitution". In relation to ordinary laws, this ensures that they are ultimately subject to the higher law of the Constitution and, to the extent that they are not, are ultimately subject to being declared invalid following judicial review. I note also that the words "peace, order and good government" are not normally regarded as words of limitation. They are simply terms of art in Westminster-style constitutions conferring plenary legislative power.[41] In relation to constitutional amendments, I would normally construe s 68 to mean that any amendment, to become a law, must simply follow the procedure set out in s 69 and thus to effect an amendment to the Constitution. Section 68 could be construed in a broader light to require the *content* of amendments to be "subject to this Constitution" only if the basic structure argument with respect to the Belize Constitution is adopted.

4. To what extent therefore is it possible to maintain some form of "basic structure" argument in relation to the Belize Constitution? Conteh CJ in the *Bowen* case (*Bowen v AG of Belize*, Claim No. 445 of 2008) set out the elements which might be relied on to establish such a principle:

> a) the Preamble to the Constitution might be regarded as actually part of the Constitution itself (see [46] ff) which makes reference to the maintenance of the rule of law and civil liberty. Conteh CJ referred to an "indissoluble line, an umbilical cord, between the Preamble of the Constitution and its dispositive provisions" (at [54]);
>
> b) the autochthonous nature of the Constitution ([47]), that is, the fact that it emanates legally from the people of Belize as opposed to being a legal instrument emanating from the Crown or other "imperial" statute as in the case of many other Commonwealth countries;

[41] See *Union Steamship of Australia v King* (1988) 166 CLR 1; *McCawley v King* [1920] AC 691; *Bribery Commissioner v Ranasinghe* [1965] AC 172; *AG for NSW v Trethowan* [1932] AC 526.

c) an application of s 68 and s 2 to an amendment bill ([91] ff) thus requiring amendments to be consistent with the existing constitution in a substantive way and not just procedurally pursuant to s 69; and

d) the implication of a "basic structure" argument from the express provisions and structure of the Constitution, such as the s 1 requirement that Belize be a "democratic State" ([97] ff), and that its other provisions provide for an independent judiciary, a representative legislature, an executive, protection of basic civil rights etc, from which it might be implied that the Constitution incorporates the doctrine of the separation of powers, representative and responsible government, and the rule of law.

5. This type of basic structure argument finds considerable support in the seminal Indian decision of *Kesavananda Bharati* v. *State of Kerala* (AIR 1973 SC 1461).

6. While I have expressed particular reservations about the argument based on s 68, it is very difficult to ascertain whether these types of arguments will prevail in Belize, especially as appeals to the Privy Council have been abolished, final appeals being now permitted to the Caribbean Court of Justice.

7. However, I venture to note the following: In my own jurisdiction of Australia, at Commonwealth level, the position would seem to be that a constitutional amendment will be valid, irrespective of content, if the proper manner and form, or amendment procedure, stipulated by the Constitution has been followed. This is contained in s 128 of the Commonwealth Constitution and requires that a proposed amending law be passed by an absolute majority of *both* Houses, *and* that the proposed law be approved *by a majority of electors in a majority of the States*. Admittedly, such a procedure does guarantee a certain popular mandate for change, one which involves both the representatives of the people in Parliament and the people themselves, whilst also taking into account the federal structure of the Commonwealth. If nothing else, this significant involvement of the electorate ensures a certain degree of deep entrenchment of fundamental implications in the Commonwealth Constitution such as the separation of powers and representative and responsible government, as well as existing express provisions. Therefore, given this deep

entrenchment, the need to develop basic structure arguments may not appear as urgent in Australia as it may elsewhere, such as Belize. It is therefore most unlikely that the courts in Australia would invalidate any constitutional amendment which followed the s 128 procedure on any substantive grounds, be they based on basic structure arguments or notions such as deeply entrenched common law rights.

8. In Belize, however, this reference to the electorate (i.e. referendum) element in the amendment procedure is not constitutionally prescribed and, accordingly, there may be greater concern to ensure that fundamental constitutional protections are not eroded. The concern therefore is to determine the degree of the supremacy of the National Assembly, with prescribed majorities, in its constituent power. The following cases dealing with issues of the supremacy of a Parliament, even with full constituent power, may be apposite.

9. In *Union Steamship Co v King* (1988) 166 CLR 1, the High Court of Australia expressly left open the question whether otherwise valid laws might be challenged "by reference to rights deeply rooted in our democratic system of government and the common law" (at 10; see also *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399 at 430[70] ff). This appears to suggest that in an extreme case, where extreme laws are being proposed, such as those which undermine basic civil liberties and other fundamental constitutional principles, recourse may be had to these fundamental principles defined by the common thread of democracy and democratic rights, the rule of law, the separation of powers. It is noted, however, that the High Court merely "left the door open" with respect to such matters, and only then in the case of "extreme laws". Absent the extremities, it would appear that there is no limit to the content of the laws which can be enacted by a sovereign Parliament, including laws which may amend the constitution if the relevant manner and form procedure is followed.

10. This confirms the position taken in *McCawley v R* ((1920) 28 CLR 106; [1920] AC 691) in which the Privy Council held that the Parliament of Queensland, which had full constituent power, could pass laws which were contrary to the relevant constitution statute, impliedly repealing the relevant constitutional provision to the extent of the inconsistency. In that case, the impugned legislation provided for the appointment of judges of the new industrial

arbitration court, which judges were capable of being appointed by the Governor to the Supreme Court of the State. However, judges of the arbitration court were appointed only for seven years, whereas the *Constitution Act 1867* (Qld) provided that Supreme Court judges must be granted life tenure. However, although the impugned statute was inconsistent with the Constitution Act, because the Queensland Parliament had plenary legislative power, including constituent power, the law was held valid. The only enquiry made by the Court was whether there was a manner and form provision which had to be followed. If there was, this would have been the only basis upon which the statute could have been successfully impugned.

11. However, the position which was left open in *Union Steamship* appears to be attracting some support, especially in the United Kingdom. Leaving aside questions relating to Britain's European involvement, there are some suggestions that even there the fundamental principle of parliamentary supremacy is itself subject to even more fundamental principles. For example, in *R (Jackson) v Attorney-General* ([2005] UKHL 56) in the House of Lords, it was acknowledged that "strict legalism" would suggest that even a fundamental constitutional amendment, such as the abolition of the House of Lords, would not be capable of challenge in a court if the correct procedure for amendment was followed (referring to the *Parliament Acts* of 1911 and 1949). Lord Steyn nevertheless envisaged a situation where the abolition of an upper house such as would transform Britain's bi-cameral system "would test the relative merits of strict legalism and constitutional principle in the courts at the most fundamental level"[at 101]. Lord Steyne then went on to say: "The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. *In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the*

behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion." (Emphasis added. See also the judgments of Lord Hope and Baroness Hale). In this regard, I note also note the previous observations of Lord Cooke that there may be certain common law rights which are so deeply rooted in the common law system that they cannot be removed by Parliament. (See *Fraser* v *State Services Commission,* [I9841 1 NZLR 116 at 121; *Taylor* v *New Zealand Poultry Board* [I984] 1 NZLR 394 at 398; *New Zealand* Drivers' *Association v New Zealand Road Carnmers* [1981] NZLR 374 at 390.)

12. While it is very difficult to predict whether such views will eventually gain the ascendancy in the courts, there has been support for them amongst some constitutional scholars. The most compelling academic advocate for such fundamental restraints on a sovereign Parliament is Professor TRS Allan of Cambridge. Of particular relevance for present purposes is the fact that Allan[42], together with Professors Colin Munro[43] and Eric Barendt[44] regard the doctrine of the separation of powers as a fundamental underlying constitutional principle which informs the whole British constitutional structure. Munro stated that the doctrine has shaped, and continues to shape, the constitutional arrangements and thinking in the United Kingdom in a number of important ways.[45] Barendt structures his analysis of British constitutional law around the separation of powers but has conceded that "the constitution in England does not strictly observe the separation of powers in either version [pure or modified] of the theory".[46] Moreover, even though in Barendt's view the doctrine plays a much greater role than allowed for by others, the point remains, as he concedes, that "[t]he courts may not control the constitutionality of legislation in England, with the single exception of incompatibility with EC law".[47]

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[42] TRS Allan, *Law Liberty and Justice, The Legal Foundations of British Constitutionalism* (Oxford, Clarendon Press, 1993) chs 3 and 8, and TRS Allan, *Constitutional Justice*, *A Liberal Theory of the Rule of Law* (Oxford, Oxford University Press, 2001).
[43] Munro, *Studies in Constitutional Law* (n 10 above) 328–32.
[44] *An Introduction to Constitutional Law* (Oxford, Oxford University Press, 1998). See also 'Separation of Powers and Constitutional Government' [1995] *Public Law* 599.
[45] Munro, *Studies in Constitutional Law* (n 10 above) 328–32.
[46] Barendt, 'Constitutional Fundamentals, Fundamental Principles' (n 10 above) 39.
[47] *Ibid*, at 40.

13. Allan does take the argument a step further to suggest that the orthodox conception of parliamentary sovereignty, and the positivist assumptions upon which it is based, ought not be followed in all respects. He has argued that the separation of powers doctrine, and other underlying fundamental constitutional principles (especially the rule of law and equal justice[48]), should be relied on in the appropriate case to invalidate Acts of Parliament, particularly when the independence of the judiciary is threatened. It is at this point that the thesis of Allan becomes especially relevant.[49] Allan has written: "If there were ultimately no limits to legislative supremacy, as a matter of constitutional theory, it would be difficult to speak of the British polity as a constitutional state grounded in law. Although the form of the separation of powers may vary between constitutions, the independence of the superior courts from government and legislature seems fundamental to the rule of law. It follows that if we deny all restrictions on legislative competence—even in respect of the adjudication of particular cases—we thereby reject constitutionalism."[50]

14. Allan's thesis deserves far more attention than the scope of the present academic opinion allows. But, in its essentials, it adopts the position that in any polity which claims allegiance to the rule of law and basic tenets of constitutionalism, there are fundamental principles which inhere in the nature of that polity and which can be enforced by the judiciary, even against Parliament. As succinctly stated by Professor Jeffrey Goldsworthy, "[a]ccording to Allan, Parliament's authority ultimately derives from deeper principles, which turn out to be indistinguishable from the deepest principles of the common law. The law is a matter of reason rather than arbitrary will because it is grounded in these principles. It is the responsibility of the judges to ascertain and apply the law, and therefore, its deepest principles. They must reject as mistaken any rule that is inconsistent with those principles, and the doctrine of parliamentary sovereignty is such a rule."[51]

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[48] See Allan, *Constitutional Justice* (n 14 above) chs 1 and 2.
[49] In this regard see also, See also Sir R Cooke, 'Fundamentals' [1988] *New Zealand Law Journal* 158; Lord Woolf, 'Droit Public-English Style' [1995] *Public Law* 57; Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72.
[50] Allan, *Law, Liberty and Justice* (n 14 above) 69.
[51] J Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Oxford, Clarendon Press, 1999) 249.

15. Allan's position manifests a certain scepticism toward the positivist assumptions upon which much of the support for the doctrine of parliamentary supremacy is based. It relies rather on the position taken by Lon Fuller that there exists an "internal morality" to law based on certain fundamental tenets of procedural due process. As Allan himself explains, "[i]nvoking Lon Fuller's explanation of the nature of law, which reflects assumptions about individual dignity and autonomy intrinsic to our conception of constitutional democracy, I have argued that there are modest, but significant, moral constraints on the nature and content of law. An enactment that makes no pretence to generality, identifying specific persons for adverse treatment, cannot constitute a source of legal obligation, properly understood. An assertion of obligation or authority entails an implicit appeal to the citizen's moral assent; but a measure whose discrimination between persons is essentially arbitrary, lacking in any plausible basis in justice or the common good, can make no such appeal: it contradicts on its face its purported claim to obedience."[52] Accordingly, "the principles of procedural due process and equality imposed constitutional limits on the kinds of enactment that can qualify as 'law' ".[53] Moreover, these principles "assume the existence of a separation of powers between the principal organs of government, each responsible for distinctive functions".[54] The separation of powers thus may achieve, in Allan's thesis, the same position as it assumes in constitutions which entrench it as a legal and constitutional rule. "[T]he superior courts must be clearly independent of the legislature, acting as servants of the constitutional order as a whole rather than merely as instruments of a majority of elected members of the legislative assembly. It is ultimately for the courts to determine the validity of statutes in accordance with the principle of equality and with due regard for the other essential constituents of the rule of law. There must be an appropriate reconciliation between the legislative sovereignty of Parliament, as the supreme law-maker, and the legal sovereignty of the courts, as the final arbiters of the law in particular cases."[55]

16. Thus, the judicial branch may enforce these fundamental principles even to the point of declaring invalid the enactments of an otherwise sovereign parliament. Of particular

[52] Allan, *Constitutional Justice* (n 14 above) 202 (footnotes omitted).
[53] *Ibid*.
[54] *Ibid*, at 2.
[55] *Ibid*, at 3.

relevance for Belize is the fact that Allan regards these principles to be so fundamental as to take priority over constitutional amendments to a written constitution. Writing with particular reference to the Constitution of the Commonwealth of Australia, he has argued that certain "freedoms", one of which he stated to be the independence of the judiciary, are "so elementary" as to "arise by implication from the concept of the Commonwealth itself" and are therefore not subject to amendment, even by the process provided for by the constitutional instrument itself.[56] This is very significant and contrary to the position I indicated above would probably be adopted by the Australian courts. This would appear to apply by extrapolation at least to all Westminster-style polities whether or not they maintain a written constitution, as well as to the United States.

17. Acknowledging the difficulty in identifying the precise ambit and scope of these restrictions, Allan's arguments achieve particular clarity in the context of legislation dealing with specific individuals or particularised circumstances and legal disputes.[57] I note, however, that leading constitutional scholars, including Professors Goldsworthy, Zines and Winterton, have not subscribed to the Allan thesis and it cannot be said to be a thesis whose tenets have been broadly accepted.[58]

18. In the case of Belize, however, the case is strengthened that there may be fundamental principles to which constitutional amendments may be subject because of its particular provisions, especially s 1, and other implications which can be drawn from the factors identified above by Conteh CJ in *Bowen.* I do think that the requirement that Belize be a "democratic State" in s 1 may have significance. Although it is of course very difficult to define this term precisely, in light of the other provisions and the interstices of the Belize Constitution, including its protection of fundamental rights and the express vesting of a judicial review jurisdiction in relation to constitutional matters in the Courts, the view that

[56] TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Sydney, Federation Press, 1996) 158.
[57] Allan, *Law, Liberty and Justice* (n 14 above) 69 ff. See also Allan, *Constitutional Justice* (n 14 above) ch 7, esp 238 ff.
[58] See J Goldsworth, *The Sovereignty of Parliament, History and Philosophy* (Oxford, Clarendon Press, 1999; G Winterton, Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in C Sampford and K Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Sydney, Federation Press, 1996) and L Zines 'A Judicially Created Bill of Rights?'(1994) 12 *Sydney Law Review* 166.

the separation of powers is an entrenched and fundamental constitutional doctrine has a lot to commend it.

19. Finally, the Privy Council decision in *State v Khoyratty* ([2006] UKPC 13), an appeal from the Supreme Court of Mauritius, is worth noting. In many respects, the conclusions one might draw from this case mirror the uncertainties referred to above. In one respect it is suggestive that basic structure arguments might succeed in relation to the Constitution of Belize, given the apparent similarities with the Constitution of Mauritius. But at the same time, the Privy Council appears to suggest that judicial review of constitutional amendments is limited to the procedural question only; i.e., as to whether the purported amendment was enacted pursuant to the procedure set out in the Constitution.

20. The Privy Council gave quite some constitutional significance to s 1 of the Mauritius Constitution which provides that "Mauritius shall be a sovereign democratic State." This section, it was held, is "deeply entrenched" in the Constitution because it can only be amended by three quarter majority in a referendum and unanimous approval of the members of the legislature. Referring to the Board's earlier decision of *Ahnee v DPP* ([1992] 2 AC 294, 302-3, Lord Steyne stated "(a) that Mauritius is a democratic state based on the rule of law; (b) that the principle of the separation of powers is entrenched; and (c) that one branch of government may not trespass on the province of any other in conflict with the principle of separation of power" (at [11]). Reference is also made to other decisions of the Board in relation to which similar conclusions are drawn with respect to a number of other Commonwealth constitutions (see [13] ff).

21. In the instant case, the impugned legislative amendment purported to curtail the jurisdiction of the court to grant or withhold bail. Section 5 of the Constitution was to be amended. It was held that the such an amendment provision was contrary to the requirements of a "democratic" state, the elements abovementioned being critical components thereof.

22. However, it is the next step in the reasoning which is important. It is particularly pertinent because the opinion of the Board was delivered by Lord Steyne whose remarks in *R (Jackson) v Attorney-General* were noted above in support of the proposition of that there

are fundamental constitutional provisions which cannot be abrogated. Rather than finding that the purported amendment was contrary to the requirements of a democratic state, or contrary to the basic structure of the Constitution, and thus invalid, he merely held that they constituted a purported amendment to s 1 itself. This, it would seem, was perfectly permissible so long as the manner and form for amending s 1 was followed. Given that it was not followed, the amendment was invalid, not because there was a breach of basic constitutional structure. Thus, while it is significant that the proposed amendment was regarded as being inconsistent not only with the relevant section it was amending, but also s 1 ("democratic" state requirement), this only meant that the more onerous amendment procedure had to be followed, not that amendment itself. This was the reason why the amendment was invalid.

23. If one applies this reasoning to the Original Bill, and indeed the Revised Bill, then so long as the correct procedure in s 69 is followed, these amendments will be valid, despite the fact that in other respects they are inconsistent with fundamental aspects of the existing Belize Constitution, including the separation of powers. Of course, the reasoning of Conteh CJ in *Bowen* would suggest a contrary conclusion. But if the matter is taken further on appeal, it is difficult to predict the outcome. If appeals still lay to the Privy Council, there is a likelihood that the type of reasoning apparent in the *Khoyratty* case would prevail.

24. However, it may be noted that the amendment procedures examined in *Khoyratty* are far more onerous than those in Belize, indeed, onerous to the point of making any constitutional amendment extremely difficult. This means that the fundamental constitutional doctrines which underpin the Mauritius Constitution are far more secure, indeed "deeply entrenched" by the onerous nature of the amendment procedure per se. Moreover, the referendum procedure and the unanimity of the legislature enable a clear expression of the view of the electorate in favour of change. The amendment procedure itself is very "democratic". That being the case, the need to invoke basic structure arguments to secure these principles in that Constitution is not as great, as it is, say, in Belize. Accordingly an argument might be put that this would indicate in Belize that it is not the deep entrenchment of these fundamental principles by an onerous manner and form

provision which protect them. Rather, it is the very existence of an inviolable Basic Structure which protects them, which Basic Structure might be implied from all the various elements indicated in the judgment of Conteh CJ abovementioned.

25. I am afraid therefore that my conclusion with respect to the issue raised in Part II of this academic opinion must remain tentative. For what it is worth, my own view on these matters, at least from within the Australian constitutional context, is the more orthodox view that the constitution is the higher law in the polity. That being so, if the Constitution itself provides the mechanism for its own amendment, and if a proposed amendment law is enacted pursuant to that mechanism, then the content of the amendment cannot be challenged. If there is a constitutional challenge, the court is limited only to examining whether the correct amendment procedure was followed.

26. The position, however, may well be different in Belize. It may be fitting to end with the words of TRS Allan stating that it is "clearly absurd to permit a Parliament whose sovereign law-making power was justified on democratic grounds to exercise that power to destroy democracy."[59] Absurd it may be, but whether it is legally valid or not may be a different issue.

[59] TRS Allan, Parliamentary Sovereignty: Law, Politics and Revolution," (1997) 113 *Law Quarterly Review* 443 at 449.