[2015] CCJ 15 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Registry Digitally signed by CCJ Registry Date: 2015.11.03 15:45:15 -04'00'

CCJ Appeal No BZCV2014/002
BZ Civil Appeal No. 27 of 2010

BETWEEN

THE MAYA LEADERS ALLIANCE
THE TOLEDO ALCALDES ASSOCIATION on behalf of the Maya village of Toledo District
JUAN POP on behalf of the Maya village of Golden Stream
DOMINGO CAL on his own behalf and on behalf of the Maya village of Aguacate
LUCIANO CAL on his own behalf and on behalf of the Maya village of Bladen
ALBERTO HUN on his own behalf and on behalf of the Maya village of Blue Creek
CANDIDO CHO on his own behalf and on behalf of the Maya village of Crique Jute
LUIS CHO on his own behalf and on behalf of the Maya village of Crique Sarco
PEDRO CUCUL on his own behalf and on behalf of the Maya village of Dolores
MANUEL CHOC on his own behalf and on behalf of the Maya village of Indian Creek
ALFONSO OH on his own behalf and on behalf of the Maya village of Jalacte
MARIANO CHOC on his own behalf and on behalf of the Maya village of Jordan
EDWARDO COY on his own behalf and on behalf of the Maya village of Laguna
PABLO SALAM on his own behalf and on behalf of the Maya village of Medina Bank
ROLANDO AUGUSTINE PAU on his own behalf and on behalf of the Maya village of Midway
LORENZO COC on his own behalf and on behalf of the Maya village of Otoxha
SANTIAGO COC on his own behalf and on behalf of the Maya village of Pueblo Viejo
SILVINO SHO on his own behalf and on behalf of the Maya village of San Antonio
IGNACIO TEC on his own behalf and on behalf of the Maya village of San Benito Poite
GALO MEJANGRE on his own behalf and on behalf of the Maya village of San Felipe
FRANCISCO CUS on his own behalf and on behalf of the Maya village of San Marcos
MARCOS ACK on his own behalf and on behalf of the Maya village of San Miguel
JUAN QUIB on his own behalf and on behalf of the Maya village of San Vincente
LIGORIC COY on his own behalf and on behalf of the Maya village of Santa Anna
ELIGORIC CUS on his own behalf and on behalf of the Maya village of Santa Theresa

APPELLANTS

AND

THE ATTORNEY GENERAL OF BELIZE **RESPONDENT**

Before The Right Honourable Sir Dennis Byron, President
And The Honourables Mr Justice Nelson
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee

Appearances

Ms Monica Coc Magnusson for the Appellants

Mr Denys Barrow SC, Mr Nigel Hawke and Ms Naima Barrow for the Respondent

JUDGMENT
of
The Right Honourable Sir Dennis Byron, President, and Justices Nelson, Saunders, Wit, Hayton, Anderson and Rajnauth-Lee
Delivered by
The Right Honourable Sir Dennis Byron, President
and the Honourable Mr Justice Winston Anderson, JCCJ
on the 30th day of October 2015

JUDGMENT OF THE RIGHT HONOURABLE SIR DENNIS BYRON, PRESIDENT AND THE HONOURABLE MR JUSTICE WINSTON ANDERSON JCCJ

Introduction

[1] This is an appeal against a judgment of the Court of Appeal of Belize delivered on July 25, 2013, in which that court by majority, affirmed the decision of the Supreme Court that Maya customary land tenure existed in all of the Maya villages in the Toledo District of southern Belize and constituted property within the meaning of the protections guaranteed in sections 3(d) and 17 of the Constitution of Belize. In disposing of the case, however, the Court of Appeal went on to decide that there had been no violation of any constitutional guarantees and, therefore, that the issue of constitutional relief did not arise.

[2] The Appellants are the Maya Leaders Alliance, the Toledo Alcaldes Association, and twenty-three other alcaldes representing separate villages in the Toledo District. They claim that the Government of Belize, represented in these proceedings by the Respondent

who is the Attorney General, has, by its acts and omissions, violated their customary land tenure rights protected by sections 3(a), 3(d), 16 and 17 of the Constitution. They seek a reversal of that part of the judgment of the Court of Appeal which dismissed their constitutional claim and denied them relief. The Respondent initially cross-appealed the entire decision of the Court of Appeal arguing that the court erred in law in holding that Maya customary land tenure gave rise to property rights protected by the Constitution. However, in his written submissions of January 16, 2015, large portions of his cross-appeal were abandoned[1] although the issue of Maya entitlement to indigenous title remained hotly contested on the basis that the Appellants, who are Ketchi and Mopan people, were immigrants from Guatemala and could not satisfy the test of pre-sovereignty occupation and continuity as set out in a number of Commonwealth decisions.[2]

[3] The issues in this appeal have become considerably narrowed by virtue of a settlement negotiated and agreed between the parties and embodied in a Consent Order of this Court entered on April 22, 2015. This Order is reproduced later in this judgment (at [9]). It is now conceded that the Appellants have customary land tenure over Maya lands in the Toledo District, which constitutes property that is protected by sections 3(d) and 17 of the Constitution of Belize. The single issue that remains for decision by this Court is whether the Appellants are entitled to damages for breach of their constitutional rights and the ancillary determination of costs.

[4] It bears emphasis that the Appellants base their appeal for the award of damages squarely and entirely on breach of constitutional rights as distinct, by way of comparison, from being premised on the tort of trespass to land. They claim actual and quantifiable losses, compensatory damages for impairment of their use of customary property, as well as moral and vindicatory damages for violation of their constitutional right to protection of the law (section 3(a)), the right to non-discriminatory treatment (section 16), and the right to non-arbitrary deprivation of property (section 17). The Respondent denies that the Government of Belize has violated any of these constitutional rights and argue that any claim for

[1] Record of Appeal, 10017 where the Government withdraws the chapeau to Ground 2.1, Ground 2.1 (c) and Ground 2.2 (e) of its Notice of Cross-Appeal.
[2] *Delgamuukw v British Colombia* [1997] 3 SCR. 1010; *Members of the Yorta Aboriginal Community v Victoria* [2002] HCA 58 (Austl.); *Mabo v Queensland (No. 2)* [1992] HCA 23.

damages lies in private law against the individuals responsible for any invasion of the Appellants' property rights.

[5] The Constitution of Belize grants power to the courts to provide redress for breaches of the rights guaranteed under the Constitution. Section 20 provides, so far as material, that:

> "(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… then, without prejudice to any other action with respect to the same matter which is lawfully available, that person … may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction-
>
> a. to hear 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…"

[6] The power thus granted to the courts to provide redress for constitutional infractions confers, and again this bears emphasis, a broad discretion to fashion effective remedies to secure the enforcement of constitutional rights. These remedies may consist of, or include, an award of monetary compensation. Numerous precedents were cited to us as affirming and illustrating the availability of an award of compensation by way of redress for breach of constitutional rights.[3] For Caribbean constitutional law the fountainhead of that jurisprudence is undoubtedly *Maharaj v The Attorney General of Trinidad and Tobago (No 2)*,[4] a decision of the Privy Council. Delivering the judgment of the Board, Lord Diplock essayed that the "redress" to which the appellant in that case was entitled must be

[3] *The Attorney General v Ramanoop* [2005] UKPC 15; *Merson v Cartwright & Anor* [2005] UKPC 38, ($100,000); *Takitota v Attorney General* [2009] UKPC 11, ($100,000); *Mahadeo Sookhai v The Attorney General of Trinidad and Tobago* Unreported, Claim No HCA S-184A of 2003, October 15, 2007 (SC TT), ($2,400); *Belize City Council and the Attorney General v Brown*, Unreported, Civil Appeal No 13 of 2003, March 12, 2004 (CA Bze), ($10,000); and *Chawla, Jitendra (Jack Charles) v Attorney General* Unreported, Claim No 208 of 2002, July 29, 2002 ($10,000).

[4] [1978] UKPC 3, [1979] AC 385.

understood as bearing its ordinary meaning as "[r]eparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this"[5] and that an order for payment of compensation "is clearly a form of 'redress'".[6]

[7] In order to obtain a monetary award under section 20, a litigant must satisfy three requirements, namely: (1) the existence of a constitutional right for his or her benefit; (2) a contravention of that right; and (3) that a monetary award is the appropriate remedy or redress for the contravention. These requirements are considered shortly, but first a word about the international dimension to this case.

[8] We are aware of and accord great significance to relevant international law jurisprudence, particularly the 2004 Report of Inter-American Commission on Human Rights (the IACHR) which made findings on the application of Articles II and XXIII of the American Declaration on the Rights and Duties of Man (the American Declaration) to the claim by the Maya people to protection of their customary land rights (the *Maya Communities case*)[7] However, the international jurisprudence does not and cannot alleviate the duty of this Court to have regard to the actual wording and context of the constitutional provisions in question and to give such interpretations to those provisions as are consistent with the jurisprudence evolving in Belize and other countries with similar constitutional provisions. In short, international jurisprudential prescriptions must be mediated through the peculiar legal traditions and constitutional arrangements which this Court is sworn to uphold.

Does there exist a constitutional right to protection of Maya customary land tenure?

[9] The Consent Order of April 22, 2015, and its antecedents, make it unnecessary to engage in any elaborate examination of the existence of the Appellants' constitutional rights to protection of their land interests. These documents confirm that there does exist a constitutional right to protection of Maya customary land tenure and that this right is for the benefit of the Maya people. It is necessary and sufficient to quote the terms of the Order:

[5] ibid 398.
[6] ibid 399.
[7] *Maya Indigenous Community of the Toledo District v Belize* Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004) [140] – [144].

"By CONSENT IT IS ORDERED AND DECLARED THAT:

1. The judgment of the Court of Appeal of Belize is affirmed insofar as it holds that Maya customary land tenure exists in the Maya villages in the Toledo District and gives rise to collective and individual property rights within the meaning of sections 3(d) and 17 of the Belize Constitution.

2. The Court accepts the undertaking of the Government to adopt affirmative measures to identify and protect the rights of the Appellants arising from Maya customary tenure, in conformity with the constitutional protection of property and non-discrimination in sections 3, 3(d), 16 and 17 of the Belize Constitution.

3. In order to achieve the objective of paragraph 2, the Court accepts the undertaking of the Government to, in consultation with the Maya people or their representatives, develop the legislative, administrative and/or other measures necessary to create an effective mechanism to identify and protect the property and other rights arising from Maya customary land tenure, in accordance with Maya customary laws and land tenure practices.

4. The Court accepts the undertaking of the Government that, until such time as the measures in paragraph 2 are achieved, it shall cease and abstain from any acts, whether by the agents of the government itself or third parties acting with its leave, acquiescence or tolerance, that might adversely affect the value, use or enjoyment of the lands that are used and occupied by the Maya villages, unless such acts are preceded by consultation with them in order to obtain their informed consent, and are in conformity with their hereby recognized property rights and the safeguards of the Belize Constitution. This undertaking includes, but is not limited to, abstaining from:

    a) issuing any leases or grants to lands or resources under the National Lands Act or any other Act;
    b) registering any interest in land;
    c) issuing or renewing any authorizations for resource exploitation, including concessions, permits or contracts authorizing logging, prospecting or exploration, mining or similar activity under the Forests Act, the Mines and Minerals Act, the Petroleum Act, or any other Act.

5. The constitutional authority of the Government over all lands in Belize is not affected by this order.

6. This Court remains seised of the remaining issue in this case, namely the Appellants' claim for damages.

7. There shall be liberty to apply.

8. The Appellants' costs of this appeal and in the courts below shall be agreed by 30th April 2015 or taxed.

9. The Court retains jurisdiction to oversee compliance with this order and sets 30th April 2016 for reporting by the parties."

[10] This is a historic settlement for which both sides are to be enthusiastically commended. Without prejudice to any determinations to be made by this Court in applications brought in separate proceedings for clarification of its terms,[8] it may be said that the immediate effect of the settlement is to undercut the vast majority of grounds of appeal that had hitherto been maintained by the parties. There is consensual recognition that Maya customary land tenure exists in the Maya villages of the Toledo District and are protected by the Constitution, thus rendering moot the contest as to the existence of indigenous property rights or the inclusion of these rights within the compass of the constitutional guarantees for protection against the arbitrary deprivation of property. The contest over the award of mandatory and injunctive relief granted by the Supreme Court but then revoked by the Court of Appeal has been overtaken by the giving and acceptance of the undertakings of the Government to recognize and protect the rights arising from the Maya customary land tenure system, to engage in the agreed consultations to develop the appropriate legal mechanisms, and to cease and abstain from measures that adversely affect Maya land interests. The parties mutually recognize and have given legal and constitutional effect to the umbilical relationship between the Maya people of southern Belize and the land and its resources that have long provided physical and spiritual sustenance to them and their forebears. Indeed, as the Consent Order clearly identifies in paragraph 6, the sole remaining issue for determination by this Court is the Appellants' claim for damages.

[8] Notice of Application for Clarification and Remedies pursuant to paragraph 7 of the April 22, 2015 Order, filed on July 3, 2015.

[11] Nor do we consider that any temporal issue arises regarding the recognition of the constitutional right. Although the Consent Order was formally entered on April 22, 2015, there is, as will shortly appear, a well-documented history to this litigation, ably represented in formal and legal documentary antecedents. These lend credence to the view that the constitutional rights recognized in the settlement were cognizable long before this Consent Order was entered. In this regard it is significant that the very first paragraph of the Consent Order *affirmed* that part of the judgment of the Court of Appeal of Belize delivered on July 25, 2013, that Maya customary land tenure existed in the Maya villages in the Toledo District and gave rise to property rights within the meaning of the Constitution of Belize.

Was the constitutional right to protection of Maya customary land tenure contravened?

[12] We do not consider that the terms of the Consent Order can fairly be said to foreclose examination of the Appellants' claimed breach of their constitutional rights. It is true that paragraphs 2, 3, and 4 of the Consent Order make clear that the nature of Maya customary land tenure is yet to be worked out in the envisaged collaborative process. The precise scope and extent of Maya customary land tenure will therefore necessarily remain inchoate and uncertain until authoritatively identified and codified by the laws of Belize. It is also the case that the Government did not, in the Consent Order or otherwise, admit to any contravention of Maya land rights and that the purport of paragraph 6 of the Consent Order records the agreement of the parties to dispose of all issues in the appeal except, "the remaining issue in this case, namely the Appellants' claim for damages."

[13] However, the hearing before us, both before and after the settlement was agreed and embodied in the Consent Order, clearly proceeded on the premise that the Appellants were entitled to the opportunity to demonstrate contravention of their property rights as a prelude to their damages claim. There was no suggestion that the terms of the Consent Order *per se* rendered the arguments on contravention of constitutional rights moot. To the contrary, the parties entertained and advanced divergent views on the issue of whether there had in fact been a contravention of the right to protection from arbitrary deprivation of property.

[14] The Appellants alleged that the Government contravened their property rights by treating Maya land as unburdened state land. They argued that these contraventions were to be found in the failure to provide a mechanism to recognize and protect Maya customary land tenure despite the Ten-Point Agreement of 2000, the 2004 Recommendations of the IACHR, and the 2007 decision of Conteh CJ (discussed below at [18] as the *Maya Lands Rights case);* and in the issuance of the April 2008 directive to State agencies allowing incursion into lands except those located in Santa Cruz and Conejo villages. The Appellants referred to copious evidence demonstrating two decades of leases, licenses, permits and concessions permitting oil drilling, logging, surveying and cattle grazing by third parties over land situate in Maya villages, and pointed specifically to an incident which could be called the Golden Stream incursion. These acts and omissions are said to have infringed sections 3(a), 3(d), 16, and 17 of the Constitution. The Respondent adamantly denied that any act or omission by the State had caused violations of the Appellants' constitutional rights.[9]

[15] The factual background highlighted by the Appellants will now be examined followed by an assessment of whether these facts have demonstrated the contraventions alleged.

The Factual Background

(a) The Ten-Point Agreement of 2000

[16] The Ten-Point Agreement of 2000 was intended to resolve a battle between the parties in which the Appellants invoked the jurisdiction of domestic courts and international tribunals to secure indigenous rights to their traditional lands. On June 17, 1995, the Government of Belize issued logging concessions over some 500,000 acres of land in the Toledo District almost all of which were used and occupied by Maya villages. The affected Mayan communities lodged a constitutional motion in the Supreme Court of Belize[10] seeking recognition of their customary property rights. The merits of that motion were never the subject of judicial resolution and the Maya communities filed a petition before the IACHR

[9] Record of Appeal, 560, Amended Defence [10].
[10] *Toledo Maya Cultural Council, Toledo Alcaldes Association et al v Attorney General*, Unreported, Action No. 510, November 29, 1996 (SC Bze).

in 1998. While the petition was being considered by the IACHR, the Government and the Maya Leaders signed the Ten-Point Agreement on October 12, 2000. Clause 6 of that Agreement provided that the Government, "recognizes that the Maya People have rights to lands and resources in southern Belize based on their longstanding use and occupation." Clause 7 stated that the first consideration of the partnership between the Government and the Maya Leaders would be:

> "… the establishment of a program to address the urgent land needs of the Maya communities of the south, including the surveying and distribution of lands or establishing and protecting communal lands, … [and the parties shall develop] … within four (4) months after the signing of this agreement, a framework and target dates, as well as administrative and other measures for the implementation of the programme."

(b) The 2004 Recommendations of the IACHR

[17] The IACHR published its Report in the *Maya Communities case* on October 12, 2004.[11] The Report confirmed that Maya customary property interests were "property" within the meaning of the American Declaration and found that the Maya peoples' rights to property, non-discrimination and judicial protection had been violated by the State of Belize. The Report concluded[12] that Belize had violated the right to property enshrined in Article XXIII of the American Declaration by failing to take effective measures to recognize, demarcate and title Maya communal property, and by granting logging and oil concessions to third parties in relation to Maya lands without effective consultations and the informed consent of the Maya people. It also concluded that Belize had violated the right to equality before the law, to equal protection of the law, and to non-discrimination enshrined in Article II, as well as the right to judicial protection prescribed in Article XVIII. The Commission recommended that Belize:

> 1. Adopt in its domestic law, and through fully informed consultations with the Maya people, the legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Maya people have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities.

[11] *Maya Indigenous Community of the Toledo District v Belize* (n 7).
[12] ibid [193] – [194].

2. Carry out the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the Maya people without detriment to other indigenous communities and, until those measures have been carried out, abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment located in the geographic area occupied and used by the Maya people.
3. Repair the environmental damage resulting from the logging concessions granted by the State in respect of the territory traditionally occupied and used by the Maya people."

(c) The Maya Land Rights Case

[18] Neither the prescriptions of the Ten-Point Agreement nor the Recommendations of the IACHR in the *Maya Communities case* were implemented. Accordingly, the Maya communities of Conejo and Santa Cruz filed constitutional motions Nos. 171 and 172 on April 3, 2007, challenging the non-recognition of their customary land rights. The claims were consolidated and heard together by Chief Justice Conteh who delivered judgment on October 18, 2007 in *Aurelio Cal v Attorney General of Belize and Manuel Coy v Attorney General of Belize* (the *Maya Land Rights case*).[13] Having considered the state of the evidence placed before him, the Chief Justice determined that he was "ineluctably bound to conclude that there does exist in the Toledo District Maya customary land tenure".[14] He was fortified in this conclusion by similar findings in the Report of the IACHR, which whilst not binding on the court were "persuasive". Similarly, Clause 6 of the Ten-Point Agreement was "a clear and unequivocal governmental endorsement of the existence of the Maya people's rights to land and resources in southern Belize based on their long-standing use and occupancy".[15]

[19] The Chief Justice went on to hold that the claimants' rights and interests in lands based on Maya customary land tenure were not "outwith the protection afforded by the Belize Constitution" but rather, constituted "a kind or species of property that is deserving of the protection the Belize Constitution accords to property in general."[16] He was again fortified

[13] (2007) 71 WIR 110.
[14] ibid [40].
[15] ibid [46].
[16] ibid [102].

in this conclusion by the findings in the IACHR's Report which considered the Applicants' case in the light of the provisions of Article XXIII of the American Declaration. The learned Chief Justice noted that the American Declaration is an integral part of the Charter of the Organization of American States of which Belize is a member, and which at Article XXIII provides, "in a not dissimilar fashion like the Belize Constitution, for the protection of property."[17] The court ordered the government to "determine, demarcate and provide official documentation of Santa Cruz's and Conejo's title and rights in accordance with Maya customary law and practices, without prejudice to the rights of neighbouring villages" and to "cease and abstain from any acts that might lead the agents of the government itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, or use or enjoyment of the property located in the geographic area occupied and used by the Maya people of Santa Cruz and Conejo unless such acts are pursuant to their informed consent and in compliance with the safeguards of the Belize Constitution."[18]

(d) The April 2008 directive

[20] The Government did not appeal the decision in the *Maya Land Rights case*. On the contrary, that decision occasioned high level meetings between Government officials and leaders of the Maya communities on the issue of the implementation of the judgment. These meetings culminated in the issuance of a Memorandum by the Solicitor General dated March 27, 2008, addressed to all Chief Executive Officers, the Commissioner of Lands and the Departments of Forestry, Fisheries, Environment and Protection and Geology. The memorandum referenced the judgment of the Chief Justice and informed that the Government was in discussions with representatives of the Maya communities of southern Belize with the objective of finding the most appropriate manner of implementing the decision. In order to facilitate this process, the Solicitor General directed the various heads of departments, "to immediately cease all activities and/or operations on, or to otherwise

[17] ibid [100].
[18] ibid [136].

deal with land in the Toledo District … until such time as further instructions of the mechanisms of implementation are issued."

[21] Within one month the Solicitor General issued another directive by way of Memorandum dated April 23, 2008.[19] The April 2008 Memorandum modified the earlier "cease and desist" directive referenced above, restricting it, to land currently occupied and used by the villagers of Santa Cruz and Conejo, i.e.: the actual claimants in the *Maya Land Rights case*. The new Memorandum did acknowledge that, "other Maya communities in Southern Belize **may** consider that they have similar rights and may choose to have such rights recognized" and heads of departments were encouraged, "to give proper consideration henceforward to the above-mentioned possibilities when considering applications for licenses, permits, concessions, etc which would affect Land in the Toledo District." However, what precisely constituted "proper consideration" to which the government officials should have regard was not spelled out in the Memorandum.

[22] The Government's revision of its original position provoked an immediate response from the Maya Leaders Alliance who in a letter dated April 25, 2008, sent directly to the Prime Minister, described the revised directive as a mistake and urged reconsideration and recognition of Maya communal land rights in the wider Toledo District. The Government maintained its position that the orders made in the *Maya Land Rights case* applied in their terms only to the Conejo and Santa Cruz villages. Indirect support for the Government's position came in the form of evidence that some of the Maya villagers preferred to own the land individually rather than on a communal basis.[20] In any event, the Government resumed the issuance of concessions, leases and permits in relation to lands outside these two villages but within the Toledo District which the Appellants regarded as subject to Maya customary land tenure. Non-Maya individuals also took advantage of the revised position in the April 2008 Memorandum to resume incursions and activities in Maya villages.

[19] SGF/40/01/08 (3).
[20] Record of Appeal, 1856 – 1863, Affidavit of Mr Justino Peck of San Jose Village, Chairman of Toledo Cacao Growers Association; Record of Appeal, 1864 – 1953, Affidavit of Mr Manuel Rodriguez, the Commissioner of Lands and Survey; Record of Appeal, 1958 – 2002, Second Affidavit of Mr Manuel Rodriguez.

(e) The Golden Stream Incursion

[23] The catalyst for the present litigation were the actions taken by Mr Francis Johnston in May 2008 in the Maya village of Golden Stream. According to the evidence proffered by the Appellants, which was not specifically contested by the Respondent, Mr Johnston, now deceased, had been farming lands in Golden Stream since early 2004 by virtue of a claimed lease from the Government, despite active protestations of the local alcalde, Juan Pop, that the land belonged to the village and despite the entreaties made to the Lands and Survey Department and the Police. In an effort to expand the area he was actually farming, Mr Johnston began surveying additional lands which were being farmed by Golden Stream farmers, but he was ordered by the police to desist in light of the March 2008 directive. He complied with the order to desist. With the issuance of the second directive in April 2008, Mr Johnston resumed surveying and then began having the newly surveyed lands cleared by bulldozer, thus occasioning damage to farm lands belonging to Mr Alfonso Cal and Mr Salvador Cal (residents of Golden Stream). On May 7, 2008, the Maya leaders of Golden Stream were informed by the Lands Department that Mr Johnston had "a legal lease over some fifty (50) acres of land situated in the Golden Stream Area, along the Southern Highway" and "should not be disrupted from developing his land."[21] On the same day the Toledo Police cautioned the villagers that Mr Johnson had "all rights to continue working on his said fifty (50)+ acres and should NOT be hindered except should a competent authority (Court) so say otherwise in writing."[22]

[24] Following an altercation on May 17, 2008 between the adult male residents of Golden Stream and the bulldozer operator, the village filed an application in the Supreme Court for a preliminary interlocutory injunction to prevent Mr Johnston from resuming the bulldozing. The application was discontinued upon the undertaking to the court by Mr Johnston and by the Attorney General that there would be no further interference with Golden Stream lands until the main issue of entitlement to the land was heard. The Appellants filed suit on June 30, 2008,[23] alleging that the failure of the Government to recognize and protect their customary land rights infringed sections 3, 3(a), 3(d), 4, 16 and

[21] Record of Appeal, 4072, Affidavit of Juan Pop, Alcalde of Golden Stream Village.
[22] ibid.
[23] Claim No. 366 of 2008.

17 of the Constitution of Belize and seeking declarations, mandatory orders, an injunction and damages by way of relief.

(f) The decisions in the courts below

[25] Chief Justice Conteh sitting in the High Court of Belize and understandably confessing to a sense of *déjà vu*,[24] considered an enormous quantity of evidence and documentation (including numerous affidavits with copious exhibits) submitted by the parties.[25] Evidence by experts for the Appellants, notably Professor Richard Wilks, professor of Anthropology and Gender Studies at Indiana University in the United States, described the history of the Maya presence in the Toledo District as well as the connection between present day Maya and historical Maya, and the Maya customary land tenure system. Witnesses for the Government included Dr Awe, Director of Archaeology in the National Institute of Culture and History of Belize whose "manifest expertise in archaeology is undoubted"[26] and Mr Jose Cardona, an attorney at law in private practice but who had previously worked in the Lands and Survey Department and who through years of experience and research had acquired knowledge concerning the Maya people living in Southern Belize.

[26] Having considered all the evidence and testimony at trial, and acknowledging the "manifest link"[27] between the case before him and the *Maya Land Rights case* he had decided in 2007, the Chief Justice came to the conclusion that Maya customary tenure existed in all the Maya villages in the Toledo District and that where it existed, it gave rise to collective and individual property rights within the meaning of sections 3(d) and 17 of the Belize Constitution. The learned Chief Justice issued the requested mandatory and injunctive relief directing the Government to develop a system to accord legal protection to Maya customary land tenure and refrain from any action which might prejudice the rights of the Maya. However, Conteh CJ failed to find any constitutional breach and refused to make an award of damages. He reasoned that his earlier 2007 decision was limited in scope, covering only the Santa Cruz and Conejo villages, and as no lease was produced in evidence showing a grant of lands by the Government to Mr Johnson, he could find no

[24] *Maya Leaders Alliance and Others v Attorney General of Belize and Another* (2010) 77 WIR 108 [71].
[25] ibid [43].
[26] ibid [51]
[27] ibid [53].

state action which fell afoul of the Appellants' constitutional rights. The Appellants appealed the failure to find that their constitutional rights had been breached and to award constitutional relief, whilst the Respondent cross-appealed the finding that Maya customary land tenure gave rise to property rights protected by the Constitution.

[27] The Court of Appeal was divided in its decision. President Sosa wrote the dissenting opinion. Having reviewed and analysed the evidence in painstaking detail, the learned President disagreed with the Chief Justice's finding that there existed the required historical and ancestral links between the original inhabitants of the Toledo District and the Appellants. The Appellants had, "not shown, and cannot show, to the required standard, links to and with the original inhabitants of the lands presently occupied by them in the Toledo District for the purpose of establishing continuity to…ground their claim to customary rights and interests to these lands."[28] As such, no issue of breach of constitutional rights, far less questions of constitutional redress, arose. The learned President was therefore of the view that the orders of the Chief Justice should be set aside and that the parties should bear their own respective costs.

[28] The majority decision, given by Morrison JA with whom Alleyne JA agreed, dismissed the Government's case that, "upon the assertion of Spanish sovereignty over the Settlement, now known as Belize in 1540 and in any event upon the assertion of British sovereignty…the ancestors and the inhabitants of the villages the claimants purport to represent did not occupy lands in the Toledo District nor practice or enjoy customary land rights over those lands."[29] Morrison JA reasoned that the test for ascertainment of indigenous title relating to pre-sovereignty occupation laid down in *Delgamuukw v British Colombia*,[30] was a restrictive test that did not apply invariably. He also noted that there was general agreement among all the experts and witnesses that the original inhabitants of what is now the Toledo District were forcibly removed to what is now Guatemala sometime after the first contact with the Spanish in the 16th Century and that the current inhabitants by and large only began to repopulate the Toledo District during the 19th Century. In his

[28] *Maya Leaders Alliance and Others v Attorney General and Another* (2013) 85 WIR 95 [98], [2015] 2 LRC 355 [98].
[29] ibid [281].
[30] *Delgamuukw* (n 2).

view, there was sufficient evidence to find that the current inhabitants were connected, through intermarriage over close to two centuries, and by historical, ancestral and social links to the original inhabitants to satisfy the requirement of pre-sovereignty occupation.

[29] However, Morrison JA found that sections 3, 16 and 17 of the Constitution, interpreted in the light of such decisions as *Ong Ah Chuan v Public Prosecutor*[31] and *Attorney General of Trinidad and Tobago v McLeod*[32] could not provide the basis for ordering the State to take affirmative action for the protection and furtherance of constitutional rights. He held that the mandatory order and injunctive relief issued against the Government could not stand. The learned Justice of Appeal also considered that there was no evidence that the Chief Justice had taken into account, "more general considerations in granting injunctive relief."[33] It followed from this that the Appellants' contention that an award of damages was justified could not succeed. In a separate judgment, the Court of Appeal awarded the Appellants sixty-five percent (65%) of their costs.[34]

Assessment of contravention

[30] The constitutional provisions which the Appellants say have been contravened may be conveniently discussed under the rubrics of (a) protection against arbitrary deprivation of property; (b) rights to equality and non-discrimination; and (c) right to protection of the law. In order to establish any entitlement to constitutional relief the Appellants must show that the factual evidence on which they rely establish a breach of one or more of these categories.

(a) Was there arbitrary deprivation of property?

[31] Sections 3 (d) and 17 are relevant to the claimed arbitrary deprivation of property. Section 3 (d) states that:

[31] [1981] AC 648, [1980] 3 WLR 855.
[32] [1984] 1 All ER 694.
[33] *Maya Leaders Alliance* (n 28) [325].
[34] *Attorney General of Belize and Another v Maya Leaders Alliance and Others*, Unreported), Civil Appeal No. 27 of 2010. March 14, 2014 (CA Bze).

> "3. Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (d) protection from arbitrary deprivation of property.

Section 17(1) provides that no property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that includes the principles upon which the payment of reasonable compensation is to be assessed and the provision of access to the courts.

[32] In order to establish the claimed violation the Appellants must prove that the Government has deprived them of their property and that such deprivation was arbitrary. The notion of deprivation of property is often discussed in the context of the compulsory acquisition of property. It is evident that compulsory acquisition which does not meet the conditions specified in section 17 undoubtedly amounts to arbitrary deprivation of property. However there may be an arbitrary deprivation of property even where there is no compulsory acquisition. In other words, section 3 is not a mere preamble or introduction but rather is an enacting provision that recognizes and declares rights in property outside the boundaries contemplated by section 17. As used in section 3, 'deprivation' of property is akin to the concept of 'taking' of property rights which has received a broad interpretation in the case law of the United States Supreme Court, (*Pennsylvania Coal Co. v Mahon et al.*),[35] the Supreme Court of Canada (*Manitoba Fisheries Ltd v the Queen*);[36] and the European Court of Human Rights (the ECtHR) (*Case of Papamichalopoulos and Others v Greece*).[37] The ECtHR has repeatedly held that in order to give practical effect to the right of peaceful enjoyment of property it is necessary not only to consider whether there has been a formal taking or expropriation of property but to look behind the appearances and investigate the realities of the situation complained of.[38]

---

[35] 260 US 393.
[36] [1979] 1 SCR 101, 1978 CanLII 22 (SCC).
[37] App no 14556/89 ECtHR, June 24, 1993.
[38] *Sporrong and Lönnroth v Sweden*, [1982] ECHR 7151/75; *Brumărescu v. Romania* (1999) 33 EHRR 862; *Depalle v France* [2010] 54 EHRR 535.

[33] Against a background of constitutional provisions similar to sections 3(d) and 17 of the Constitution of Belize, the Privy Council held in *Société United Docks v Government of Mauritius*[39] that relief for arbitrary deprivation of property was not restricted to providing protection against loss caused by compulsory acquisition but extended to loss caused by damage and destruction. Their Lordships noted that loss caused by damage and destruction was, "the same in quality and effect as loss caused by compulsory acquisition."[40] The fact that the claimants' business had not been compulsorily acquired did not of itself prevent them from claiming compensation. Ultimately the claimants were refused compensation only because they could not show any State action which had led to a depravation of property. Rather their business had become irrelevant and non-existent as a result of a separate and independent cause, namely the advancement of technology.

[34] In the present appeal, the Appellants rely on *The Indigenous Peoples' Alliance of the Archipelago (AMAN) v Government of Indonesia*[41] and *Thomas and Arau Village Council v Attorney General of Guyana*,[42] as demonstrating that the grant by the State of mining licences and forestry concessions to third parties which significantly impaired and interfered with the use and enjoyment of the lands occupied by Maya communities amounted to an arbitrary deprivation of property within the meaning of the Constitution. In *AMAN* the Constitutional Court of Indonesia appears to have accepted that the wording of provisions in the Forestry law caused deprivation and the destruction of the rights of indigenous peoples in contravention of the Constitution. In *Thomas* Chang CJ (Ag) agreed that state issuance of permits, licences and concessions could so interfere with customary usufructuary rights as to amount to deprivation of property in contravention of Article 142 of the Guyana Constitution. However the Acting Chief Justice decided that the facts presented did not permit a finding of deprivation, albeit he did go on to grant constitutional relief to the applicants on the basis that Article 149G of the Constitution placed a positive duty on the State to protect and preserve the way of life of the Arau people as an indigenous people and that this duty had been breached.

[39] [1985] AC 585, 599.
[40] ibid 600.
[41] Unreported, No. 35/PUU-X/2012, (CC Ind).
[42] GY 2009 HC 7 (CARILAW) April 30, 2009 (HC Guy).

[35] Clearly, the Maya have suffered loss but we prefer to assess this loss in the context of their right to protection of the law which we shall shortly do. In this case, however, these Appellants face two substantial hurdles in successfully pursuing their claim relating to arbitrary deprivation of property. The first is that the nature of the property rights they enjoy is still to be precisely defined. The Consent Order records the undertaking of the Government to adopt affirmative measures to identify and protect those rights. In these circumstances it would be somewhat incongruous for this Court to award damages against the Government for breaching rights which the Maya accept are still to be identified. The second hurdle is related to the first. Until the rights are defined this Court cannot satisfy itself as to the nature and extent of the entitlement of the particular Appellants before it.

(b) Were the rights to equality and non-discrimination infringed?

[36] The Appellants allege that the actions/omissions of the State also resulted in a breach of their rights to equality, equal protection of the law and non-discrimination. They contend that the current legal framework of Belizean property law, as contained in the General Registry Act CAP 327 and the Registered Land Act CAP 194, is discriminatory owing to its failure to provide any mechanism for documenting Maya customary title. They further assert that the Government has an affirmative duty to eliminate all forms of discrimination against indigenous people based on the decision of the IACHR in the *Maya Communities case* and the international obligations under the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

[37] We agree with the Government that there is no evidence of discriminatory treatment of the Maya on the basis of race or ethnicity either in the Golden Stream incident or otherwise. In our view, the disadvantages faced by them are best addressed in the context of their claim that their right to protection of the law was infringed.

(c) Was there a breach of the right to protection of the law?

[38] Section 3(a) of the Constitution provides as follows:

> "3. Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
>
> (a) life, liberty, security of the person, *and the protection of the law*;
>
> ….
>
> the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms..." (Emphasis added).

[39] Section 3(a) has been traditionally understood as guaranteeing access to courts and tribunals which are independent and impartial. This is further underscored by the words of section 6(7) of the Constitution:

> "Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

[40] In delivering the majority judgment in the Court of Appeal, Morrison JA found that the notion of protection of the law spoke to:

> "…the availability of processes for the vindication of rights rather than to substantive rights themselves. Appearing as it does in what is in fact the preamble to Part II of the Belize Constitution and the detailed elaboration of the fundamental rights and freedoms which it contains, the phrase 'protection of law' in section 3(a) is in my view an assurance to persons in Belize of a continued … right of access to the courts of Belize, under a system of law that is fair for declarations of the invalidity of executive or legislative action."[43]

[41] We would respectfully disagree that this narrow interpretation is properly to be given to the wide spectrum of rights entailed in section 3(a). Undue emphasis should not be placed on the location of the provision. It is the case that the detailed provisions of Part II of the Constitution must be construed in light of the provisions of section 3, but those provisions do not thereby curtail the ambit of the section. As noted above at [32] the wording of section 3 is not that of a mere preamble or introduction but rather that of an enacting provision

[43] *Maya Leaders Alliance* (n 28) [316].

which recognizes that there has existed, and declares that there shall continue to exist, the right of the individual to, among other things, the protection of the law.

[42] We wish to be clearly understood as affirming that the right to protection of the law does encompass access to and the enjoyment of the fundamental rules of natural justice. We agree with the views of Lord Diplock in *Ong Ah Chuan v Public Prosecutor*,[44] who, having considered Article 12(1) of the Singapore Constitution which guaranteed all persons equality before the law and equal protection of the law, continued:

> "In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be a misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties…"

[43] Similarly, in *Attorney General of Trinidad and Tobago v McLeod*[45] the Privy Council held that the challenge by a member of the House of Representatives against the constitutionality of Act No. 15 of 1978 (the Amendment Act) and the request for an injunction restraining the Speaker of the House from taking action against him pursuant to the Amendment Act, could not stand. Speaking for the Board, Lord Diplock said:

> "In his originating motion however the only infringement of his fundamental rights that Mr McLeod alleged was his right to 'the protection of the law' under s 4(b) of the Constitution. The 'law' of which he claimed to have been deprived of the protection was s 54(3) of the Constitution, which he contended (successfully in the Court of Appeal) prohibited parliament from passing the amendment Act, except by majorities specified in that subsection. This argument, although it was accepted by Hyatali CJ and Kelsick JA in the Court of Appeal, is in their Lordships' view fallacious. For parliament to purport to make a law that is void under s 2 of the Constitution, because of its inconsistency with the Constitution, deprives no

[44] *Ong Ah Chuan* (n 31) 670-671.
[45] *McLeod* (n 32).

> one of the 'protection of the law', so long as the judicial system of Trinidad and Tobago affords a procedure by which any person interested in establishing the invalidity of that purported law can obtain from the courts of justice, in which the plenitude of the judicial power of the state is vested, a declaration of its invalidity that will be binding on the parliament itself and on all persons attempting to act under or enforce the purported law. Access to a court of justice for that purpose is itself 'the protection of the law' to which all individuals are entitled under s 4(b)."[46]

[44] But whilst we readily accept that access to independent and impartial courts or other judicial bodies is perhaps the most visible aspect of the right to protection of the law, we are of the opinion that this right goes well beyond the issue of access to judicial or quasi-judicial proceedings. In *Alleyne v Trinidad and Tobago*[47] the High Court appears to have accepted that the right to protection of the law could in principle encompass an obligation on the State to make subsidiary legislation and to institute administrative arrangements to promote the right of municipal police officers to receive similar benefits as regular police officers. The Court of Appeal affirmed this decision, holding that equal protection was not limited to the right of access as set out the *McLeod* decision.[48] This Court in *Attorney-General v Joseph and Boyce*, per de la Bastide P and Saunders JCCJ said "the right to the protection of the law is so broad and pervasive that it would be well-nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed."[49]

[45] The scope of the right to protection of the law was most recently considered by this Court in the case of *Lucas and Carillo v The Chief Education Officer et al*[50] from Belize in which the Appellants had challenged the constitutionality of their suspension from the Escuela Secundaria Técnica de México School by the Chief Education Officer. The majority judgment of the Court (Nelson, Hayton and Anderson JCCJ) found that the suspensions were procedurally improper in that the power of suspension resided with the school board rather than the Chief Education Officer. The majority agreed with the Court of Appeal that there was, in the circumstances of the case, no breach of the right to protection of the law

[46] ibid 701.
[47] TT 2005 HC 99 (CARILAW) November 9, 2005 (HC TT).
[48] *Attorney General v Oswald Alleyne*, Unreported, Civ. App. No 52 of 2003, December 20, 2011 (CA TT). See also *Alleyne v Attorney General of Trinidad and Tobago* [2015] UKPC 3, [2015] All ER (D) 135 (Jan).
[49] [2006] CCJ 3 (AJ) [60], (2006) 69 WIR 104 [60].
[50] [2015] CCJ 6 (AJ).

given the preliminary stage in the formal disciplinary process at which the investigations and suspensions had occurred, given that the matter had been fully addressed by the lower courts in quashing the suspensions, and given that there had been no disruption in the Appellants' financial benefits. In light of this conclusion there was no need to address the protection of law guarantee in any detail. However the majority did make clear that the right to protection of the law is a "broad spectrum right" and that it is "arguable that the protection of the law includes not only access to the court… but also [access] to administrative tribunals with power to affect constitutional rights or rights under the Constitution of an individual."[51]

[46] In separate dissenting opinions, Saunders and Wit JCCJ emphasized the broad parameters of the right to protection of the law, rooted in the concept of fairness and the rule of law. Both judges found that the Appellants had established a breach of this right given their unjust and unfair treatment at the hands of the State which had injured their reputations. Given their view that the unfair treatment amounted to gross violations of the fundamental rights to be treated fairly and to have their reputations respected, and that the injury could not properly be remedied through administrative relief, the dissentients would have awarded damages as affording the appropriate measure of redress.

[47] The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However the concept goes beyond such questions of access and includes the right of the citizen to be afforded, "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."[52] The right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in

[51] ibid [59].
[52] *Boyce* (n 49) [20]. See also Lord Diplock, "The Protection of the Law" October (1978) WILJ 11, 13.

order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the State may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy.

[48] In the context of the application of the protection of the law to land rights, it is to be noted that the landowner bears the primary responsibility to take reasonable steps to protect his property, but even so, the State may be constitutionally liable for failing to ensure protection. In *President of the South Africa v Modderklip Boerdery (Pty) Ltd.*,[53] the State's constitutional liability was engaged in circumstances where the owners of property (Modderklip) had obtained an eviction order against some 40,000 squatters and the police refused to enforce the order. The constitutional arrangements in that case were different from those in the present appeal in that, for example, the South African Government had a constitutional duty to provide access to adequate housing. Nonetheless, we find apposite the observations of the court that section 34 of the South African Constitution required that the State take reasonable steps to ensure that Modderklip was provided with effective relief. It was, "unreasonable of the state to stand by and do nothing in the circumstances"[54] and the failure of the State to do anything, "breached Modderklip's constitutional rights to an effective remedy as required by the rule of law and entrenched in section 34 of the Constitution."[55]

[49] The possibility of remedies in private law against the perpetrators of incursions onto Maya lands does not answer the point that there is a quite separate and distinct avenue available to the Maya people of suing the State for breach of the constitutional right to protection of the law where State responsibility is established. We accept the basic premise of the judgment of the Inter-American Court of Human Rights (the IACtHR) in *Saramaka People v Suriname*[56] that the mere possibility of relief under the common law is no answer to a

[53] [2005] ZACC 5, 2005 (5) SA 3 (CC).
[54] ibid 48
[55] ibid 51.
[56] (2007) Ser. C no 172.

claim for conventional, and we would add, constitutional, redress. In *Saramaka* the IACtHR put the matter thus:

> "The Court observes that although so-called judge-made law may certainly be a means for the recognition of the rights of individuals, particularly under common-law legal systems, the availability of such a procedure does not, in and of itself, comply with the State's obligation to give legal effect to the rights recognized in the American Convention. That is, the mere possibility of recognition of rights through a certain judicial process is no substitute for the actual recognition of such rights. The judicial process mentioned by the State is thus to be understood as a means by which said rights might be given domestic legal effect at some point in the future, but that has not yet effectively recognized the rights in question. In any case, the right of the members of the Saramaka people in particular, or members of indigenous and tribal communities in general, to collectively own their territory has not, as of yet, been recognized by any domestic court in Suriname."[57]

[50] Similar findings of responsibility for recognizing and protecting indigenous property rights were made by the IACtHR in *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*,[58] where the court pointed out the need for indigenous communities possession of the land to obtain official recognition of ownership, and for consequent registration. It was found that the failure by Nicaragua to provide a system for recognition of customary titles constituted a breach of Article 25 of the American Convention.[59] In *Case of the Moiwana Community v Suriname*,[60] the IACtHR considered that the members of the Moiwana Community were the "legitimate owners of their traditional lands"[61] although they did not have possession of the land because they had left it as a result of the acts of violence perpetrated against them. In *Case of the Indigenous Community Yakye Axa v Paraguay*,[62] the IACtHR considered that the members of the community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as a measure of reparation, to individualize those lands and transfer them free of cost.

[51] In the present case the Appellants allege that their right to protection of the law has been infringed by actions of the Government in granting leases, licences, permits and

[57] ibid [105].
[58] (2001) Ser. C no. 79.
[59] ibid [136] – [139].
[60] (2005) Ser. C no. 124.
[61] ibid [134].
[62] (2006) Ser. C no. 142.

concessions that deprive the Maya people of the enjoyment of their rights and in failing to affirmatively recognize and protect Maya customary land tenure despite the affirmation of the existence of these rights in the *Maya Land Rights* case, the findings and recommendations of the IACHR and the Government's own admission of the existence of Maya customary rights in the Ten-Point Agreement.

[52] It also bears note that the right to protection of the law encompasses the international obligations of the State to recognize and protect the rights of indigenous people. A recognized sub-set of the rule of law is the obligation of the State to honour its international commitments. This ideal was expressed by the late Lord Bingham, delivering the Sixth Sir David Williams lecture in 2007. Recognising the inherent elusiveness that attends any definition of the rule of law, Lord Bingham proposed a list of eight sub-rules which can be derived from the rule of law, the last of which posits that "the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations."[63]

[53] It is beyond dispute that international law recognizes and protects the rights of indigenous peoples. This is implicit in the Universal Declaration of Human Rights (the UDHR) which records and protects the inherent dignity of all human beings[64] and the basic human rights and freedoms which are assured to them.[65] The rights of indigenous peoples are also recognized in other general human rights treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide (Article 2), the International Covenant on Civil and Political Rights (Article 27), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 1) and the Convention on the Rights of the Child (Article 30). The international community has established specific bodies to deal with the protection of the human rights of indigenous peoples such as the United Nations Working Group on Indigenous Populations, the Permanent Forum on Indigenous Issues and the Special Rapporteur on Indigenous Peoples. Articles 26 to 28 of the United Nations

[63] Lord Bingham, 'The Rule of Law' (2006) 66(1) C.L.J 67 at 81.
[64] Article 1.
[65] Article 2.

Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007 (the 2007 UN Declaration) refer specifically to the land rights of indigenous peoples.

[54] While the UDHR and the 2007 UN Declaration are not binding, they are relevant to the interpretation of the Constitution of Belize which in its preamble explicitly recognizes that state policies must protect the culture and identity of its indigenous peoples but also must promote respect for international law and treaty obligations.[66] The preamble of a Constitution cannot be treated as mere surplusage. This Court has recognized the normative functions served by the preamble in the *Boyce* decision with Wit JCCJ noting that, they "fill the Constitution with meaning reflecting the very essence, values and logic of constitutional democracies in general"[67] and further that "[t]hese normative parts of the Constitution breathe, as it were, life into the clay of the more formal provisions in that document."[68]

[56] In fact the very section of the preamble cited above was used by the courts of Belize in the *Maya Land Rights case*,[69] where the collective land rights of the Maya people were first accorded constitutional protection. It should be noted that the State never appealed this judgment. In fact it has now conceded much the same ground in the Consent Order in this appeal.

[57] It is not disputed that the current system of Belizean land law does not extend protection to the individual and collective land rights which arise under the Maya system of customary land tenure. Despite being alerted to this deficiency as far back as 1998 when the Maya people first filed a petition with the IACHR alleging a breach of the right to property as contained in the American Declaration, the system of Belizean land law remains unchanged. Whilst the complexities and intricacies involved in attempting to reconcile two competing systems of land tenure are readily understandable, the delay of the Government of Belize in resolving the issues of indigenous title cannot go unchecked.

[66] See (e) of the Preamble of the Constitution of Belize.
[67] *Boyce* (n 49) [18].
[68] ibid [19].
[69] *Cal* (n 13).

[58] In light of the foregoing, this Court is clearly of the view that the Appellants' right to protection of the law, founded on the concept of the rule of law, which itself imports an obligation to adhere to international law commitments, has been breached. We emphasize in this connection the failure of the Government of Belize to recognize and protect Maya customary land tenure rights.

[59] The critical distinguishing features of this case include its history of litigation, the formal agreements between the Government and the Maya leadership, and the decisions of the courts of Belize. We place particular emphasis on the Findings and Recommendations of the IACHR in the *Maya Communities case* which created legal obligations for Belize at the international level and legitimate expectations for the Maya people in the domestic sphere. These features all support the inescapable conclusion that the Government of Belize was under a duty to take positive steps to recognize Maya customary land tenure and the land rights flowing therefrom and, without detriment to other indigenous communities, to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect these rights in the general law of the country. We recognize the historical fact that the agreements between the Government of Belize and the Maya leadership were indications of intent to bring the legal regime on property rights inherited from the pre-independence colonial system, which did not protect the traditional or customary rights of the Maya people, into conformity with the Constitution of Belize. The nature of traditional or customary rights in land, the history of litigation, the informal as well as formal acknowledgements by the State, and the fact such rights nonetheless remain invisible in the general laws of the country, suggest the obligation to put in place special measures to give recognition and effect to these rights so that the protection of the law can be enjoyed.

[60] We emphasize that the obligation on the State necessarily follows from the recognition that Maya customary land tenure, a species of property rights not provided for in the current legal system of Belize, is protected under sections 3(d) and 17 of the Constitution. The concessions made by the Government in the Ten-Point Agreement and in the Consent Order, lead to the unavoidable conclusion that the existing property regime fails to adequately protect Maya interest in the land within Maya villages, and that claims based on adverse possession would not do full justice to the nature or extent of the customary

land tenure rights of the Maya. In particular, the statutory regimes in the General Registry Act CAP 327 and the Registered Land Act CAP 194 fail to provide a mechanism for identifying, documenting and titling Maya customary property, as indeed it does for non-Maya customary land tenure. There has undoubtedly been a failure to recognize and protect Maya land rights and this is one of the implied concessions in the Consent Order.

Is monetary compensation an appropriate remedy for the contravention?

[61] An award of monetary compensation is not the invariable relief for a breach of constitutional rights. Section 20 empowers the court to fashion an appropriate remedy for the infraction which, to repeat the words of Lord Diplock in *Maharaj*, may be, "reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this."[70] An order for payment of compensation is only one of the forms of redress to which the court may consider that an applicant is entitled, and he or she must convince the court that the award is appropriate in the particular circumstances of the case. In the case of *James v Attorney General of Trinidad and Tobago*[71] the Privy Council underscored that to treat entitlement to monetary compensation as automatic where violation of a constitutional right had occurred would be to undermine the discretion that was invested in the court by section 14 of the Trinidad and Tobago Constitution (the equivalent of section 20) and would run directly counter to jurisprudence in the area. In that case the Board stopped at the award of a declaration and did not award monetary compensation because the applicant had suffered no material disadvantage from the violation.

[62] In the present case the Appellants put forward claims for two distinct categories of damages, namely pecuniary and non-pecuniary damages. These categories are considered in turn.

[70] *Maharaj* (n 4) 398.
[71] [2010] UKPC 23.

(a) Pecuniary damage

[63] The Appellants seek compensation for the actual damage and destruction caused as a result of the Government's denial of their rights over decades. The losses sustained in the Golden Stream incident of May 2008 are referenced. The Appellants also go on to allege more generally, material losses to Maya communities and that these losses include the direct loss of valuable timber and other forest products from their lands, the indirect loss in crop and wildlife abundance from extraction activities occasioned by the concessions licences and permits granted by the Government. They claim the opportunity costs of being unable to make economic use of their resources due to the lack of recognition of their property. They also claim direct, actual loss of the use of lands leased to, and occupied by third parties, and the indirect loss of the benefit of security that official ownership provides in negotiations with third parties in economic development partnerships.

[64] The preliminary difficulty with the claim for pecuniary damages is the lack of forensic evidence of the precise losses sustained and identification of the specific individuals who might have suffered loss. A total award of $250,000 is sought for all pecuniary losses of the Maya villages including the May 2008 Golden Stream incident but evidential support for this claim is far from satisfactory. There are fairly detailed reports for the quantification of $61,711 in respect of the Golden Stream incursion but these reports are not supported by the required documentary evidence such as expert valuation, for example. There is even less evidence to support the arrival at the figure proposed for losses suffered in the other villages. The Appellants provide mere anecdotal reports of some seventeen incursions into Maya villages over the past twenty years together with limited description of damages caused by some of these incursions. There is no specific quantification of the total pecuniary losses and Mr Barrow, Counsel for the Respondent, quite properly pointed to the difficulties inherent in responding to such opaque and generalized claims.

[65] The discretion granted to a court under section 20 to award damages cannot be used to bypass entirely the requirement that claims for special damages need to be specifically pleaded and proven. Given that the claim is for pecuniary losses sustained over a twenty-year period we do not consider that any useful or just purpose would be served in remitting

the matter for further and better particulars of the losses sustained. Accordingly, we reject the application for an award of pecuniary damages.

(b) Non-Pecuniary Damage

[66] The Appellants seek damages to "vindicate [their] constitutional right and address the intangible harms endured by the Maya people as a result of the long and ongoing struggle for the legal recognition of their right to the territory they have traditionally used and occupied."[72] They seek both 'moral damages' and 'vindicatory damages' without making any distinction between the two. Reliance is placed on numerous precedents which illustrate the availability of an award of moral or vindicatory damages by way of redress for breach of constitutional rights.

[67] It is noteworthy that the constitutional cases on indigenous property rights cited by the Appellants have studiously avoided awards of non-pecuniary damages. In *Thomas*,[73] Chang CJ (Ag) found that there had been a violation by the Government of Guyana of the positive duty imposed under Article 149G of the Constitution to protect and preserve the way of life of the Arau people as an indigenous people and made the relevant declarations. However, the claim for damages in excess of $1,000,000.00 for breach of those constitutional rights was refused. Similarly, no damages were awarded in the *Maya Land Rights* case. And in the present case, Conteh CJ refused the claim for damages on the basis that the declarations and orders granted were sufficient to secure the enforcement of the Appellants' constitutional rights. The Court of Appeal found no breach of constitutional rights and therefore did not, in the words of Morrison JA, "find it necessary to consider the very interesting submissions made by Mrs Moore in support of the claim for damages."[74]

[68] It is the case, as Ms Moore points out, that awards of moral or vindicatory damages have been sanctioned by international human rights jurisprudence to take account of reparation, distress and suffering caused, and the violation of the core values and the special relationship between indigenous communities and their territory. In the *Case of Kichwa*

[72] Record of Appeal, 10338, Appellants Reply Submissions [100].
[73] *Thomas* (n 42).
[74] *Maya Leaders Alliance* (n 28) [327].

Indigenous People of Sarayaku v Ecuador,[75] the IACtHR awarded US$1.25m as compensation for non-pecuniary damages to a single community of 1,200 people who had faced incursions by loggers and seismic testing. The applicants in the *Case of the Indigenous Community Yakye Axa v. Paraguay*[76] were awarded US$950,000.00 in moral damages for a community of 319 people who were dispossessed of their lands and living in dire circumstances. Similarly in the *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*[77] US$1m was awarded to a community of 407 persons had been dispossessed of their lands and living in extreme poverty with insufficient access to food and medical care, lack of access to clean water and high rates of mortality due to disease and epidemics among members of the community.

[69] An important case from the Caribbean Community is the *Saramaka* case[78] in which the IACtHR found that the rights of the Saramaka people living in the tribal community of Upper Suriname had been violated by the failure of the State to adopt effective measures to recognize their land rights under the Surinamese Civil Code and by the logging and gold mining concession granted by the State over indigenous land, and awarded damages for these violations. The IACtHR held that the claimants were entitled to share in the benefits of the activities relating to exploration and exploitation of valuable natural resources in circumstances where those activities had left a legacy of environmental destruction, despoiled subsistence resources and spiritual and social problems.

[70] The IACtHR recognized that the judgment itself was a form of intangible reparation but considered that in the circumstances it was appropriate to award US$75,000.00 in compensation for the valuable timber removed by the logging activities and the significant property damage caused by the mining operations, and, on equitable grounds, to order a further US$600,000.00 to be paid into a community development fund created and established for the benefit of the members of the Saramaka people in their traditional territory to finance educational, housing, agricultural, and health projects, as well as to provide electricity and drinking water, if necessary, for the benefit of the Saramaka people.

[75] (2012) Ser. C no. 245 [323].
[76] *Yakye Axa* (n 62) 69.
[77] (2003) Case 0322/2001, Report No. 12/03.
[78] *Saramaka* (n 56).

[71] Ms Moore sought to bring the claim of the Maya people within the ambit of the indigenous people who succeeded in their damages claim before the IACtHR. She made reference to the words of the IACtHR in granting substantial moral damages in *Saramaka* case, when that court said:

> "…the suffering and distress that the members of the Saramaka people have ensured as a result of the long and ongoing struggle for the legal recognition of their right to the territory they have traditionally used and occupied…, as well as their frustration with a domestic legal system that does not protect them against violations of the said right…, all of which constitutes a denigration of their basic cultural and spiritual values. The Court considers that the immaterial damage caused to the Saramaka people by these alterations to the very fabric of their society entitles them to a just compensation."[79]

[72] Ms Moore contended that in their struggle for land recognition, the Maya have endured the same suffering, distress, uncertainty and frustration. She quoted the words of Domingo Chub, of Santa Ana village:

> "If the government continues to sell our land, we will have no place for the younger people when it comes time for them to make their own farms. Last year, the community stopped somebody from surveying. Because the government would not help us protect our land, the whole village was forced to take action. We approached the man and told him to stop surveying the land we live and farm on. He listened to us and stopped. Nobody is presently surveying, but tomorrow, somebody could show up and begin; there is nothing stopping people from doing this and there needs to be."[80]

[73] Learned Senior Counsel also cited Liberato Choc of Pueblo Viejo village who lamented the undermining of Maya cultural values in the following words:

> "[W]hen Pueblo Viejo villagers were cutting logs, the government police officer began threatening them. He told them that cutting the trees without permission from the Forestry Department is illegal. He was going to report them to the Forestry Department or arrest them. He told us that the way we do things, our customary law, means nothing, and we have to ask Forestry Department for permission. I have explained our process may times but the officer does not want to listen."[81]

[74] Senior Counsel also cites Emilino Cho of San Jose Village who states:

> "We have some problems in our village because some people got leases and then work the land in the same area as others who work the land in the traditional way.

[79] ibid [200].
[80] Record of Appeal, 579, First Affidavit of Domingo Chub [4].
[81] Record of Appeal, 734, First Affidavit of Liberato Choc [8] – [11].

> I believe the villages who have done this know that it is wrong, but they just think that the government will allow them [to] take people's land. Since the government doesn't respect Maya ways, those people also lose respect for our ways. This is very sad and causes problems that are difficult to solve."[82]

[75] The judicial conscience cannot but be moved by these expressions of indigenous concern for the damage to and the marginalization of Maya culture. We remind ourselves of the solemn pledge in the preamble to the Constitution to ensure that State policies protect the identity, dignity, and social and cultural values of Belize's indigenous peoples. This judgment, and the Consent Order of April 22, 2015, undoubtedly represent a form of reparation and satisfaction in the recognition of the customary land tenure rights of the Maya people in southern Belize, and in the judicial finding that those rights have been contravened by the Government of Belize. It also is a form of redress for the centuries of oppression endured by the Maya people since the arrival of the European colonizers.

[76] However, we do not consider that judicial recognition by itself is a sufficient remedy pursuant to section 20 of the Constitution. In *Maharaj* Lord Diplock emphasized that the clear intention of the redress clause was "to create a new remedy whether or not there was already some other existing remedy"[83] and further that the term 'redress' was to be construed in accordance with its natural and ordinary meaning.[84] Thus the Privy Council for the first time made an award of damages by way of constitutional relief. However, the boundaries of redress are not to be viewed as circumscribed by the concept of damages. As noted by Margaret Demerieux:

> "Whatever be the status of the new monetary compensation, the courts should in principle have at their disposal all the traditional forms of relief; new forms of relief … can be conceived and formulated; and more probably, traditional forms of relief adapted as necessary to the new constitutional action."[85]

[77] In the light of these statements of the law in respect of the breadth of the redress clause, we consider that an appropriate if innovative use of the powers granted under section 20 would

---

[82] Record of Appeal, 591, First Affidavit of Eligorio Cus of Santa Teresa [14].
[83] *Maharaj* (n 4) 398.
[84] ibid.
[85] Margaret Demerieux, "Fundamental Rights in Commonwealth Caribbean Constitutions" (Faculty of Law, UWI, 1992) 460.

be to order that the Government of Belize establish a fund of BZ$300,000.00 as a first step towards compliance with its undertaking at paragraph 3 of the Consent Order of April 22, 2015 to protect Maya customary land tenure. In so doing, we have taken into account that the Government of Belize will be required to engage in considerable expense in order to meet its obligations under the Consent Order.

[78] We feel obliged to add a note of caution. The contributors to *Reparations for Indigenous Peoples*[86] assert that moral damages or reparations for historical injustices to indigenous peoples are emerging as a centrally important aspect of international human rights and humanitarian law and that the term 'reparations' is deliberately used to recall the status of indigenous peoples as original sovereign entities over their ancestral land that never totally lost their sovereignty. Whatever may be the purport of these developments in international jurisprudence, our award in this case is not to be taken as encouraging or providing implicit support for Maya communities to operate as a state within the state of Belize. As the Consent Order clearly recognizes in paragraph 5, the constitutional authority of the Government of Belize over all lands in Belize is not affected by that order and, we would add, by this award.

Conclusions

[79] This Court concludes that the decision of the Court of Appeal on the issue of damages must be reversed on the grounds that:

a. The Consent Order of April 22, 2015 confirms that Maya customary land tenure rights fall within the ambit of the Constitution of Belize and are protected by the Constitution;
b. The Government of Belize contravened the constitutional guarantee of the Appellants to the protection of the law;
c. Section 20 of the Constitution of Belize grants to the courts the power and discretion to fashion effective remedies, including monetary awards, in order to secure the enforcement of rights protected by the Constitution; and

[86] Federico Lenzerini, "Reparations for Indigenous Peoples: International and Comparative Perspectives" (Oxford University Press, 2008) 8, 11, 51, 54, 113.

d. Pursuant to c. above, the Government of Belize shall establish a fund of BZ$300,000.00 as a first step towards compliance with its undertaking at paragraph 3 of the Consent Order of April 22, 2015 to protect Maya customary land tenure.

Orders

[80] This Court orders that:

a. The Government of Belize shall establish a fund of BZ$300,000.00 as a first step towards compliance with its undertaking at paragraph 3 of the Consent Order of April 22, 2015 to protect Maya customary land tenure; and

b. The Government of Belize shall pay seventy-five per cent (75%) of the costs the Appellants to be taxed if not agreed within four weeks of the date of this judgment.

/s/ D Byron

The Rt Hon Sir D Byron (President)

/s/ R F Nelson

The Hon Mr Justice R Nelson

/s/ A Saunders

The Hon Mr Justice A Saunders

/s/ J Wit

The Hon Mr Justice J Wit

/s/ D Hayton

The Hon Mr Justice D Hayton

/s/ W Anderson

The Hon Mr Justice W Anderson

s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee