



“The Basic Structure Doctrine and its Implications Concerning the Belize Constitution: Interrogating the BISL Decision”

The Honourable Mr Justice Peter Jamadar,
Judge of the Caribbean Court of Justice

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Remarks

By

The Honourable Mr Justice Peter Jamadar, Judge of the Caribbean Court of Justice,

on the occasion of

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INTRODUCTION: IMAGINING REALITY

What matters most is often what is sometimes unseen.

Einstein famously said in an interview: ‘Imagination is more important than knowledge. For knowledge is limited to all we know and understand, while imagination embraces the entire world, and all there ever will be to know and understand.’¹

Take a tree, say the Big-leaf Mahogany tree, the Caoba (*Swietenia Macrophylla*), Belize’s national tree. This tree takes 60-80 years to mature and grows to heights of 75-100 feet. Its leaves can grow to 17 inches in length. It is depicted centrally and as an overarching presence in the national emblem of Belize, representing the country’s economic foundation.

Also consider the Logwood or Bloodwood tree (*Haematoxylum Campechianum*), used by the Maya in the architecture of their temples, and a valuable source of black, blue, and purple textile dyes, derived from the tree’s red heartwood. From the 1500s Spanish and then English ships were transporting large quantities of logwood to England and Europe as a valuable trade commodity. Indeed, logwood cutters are also depicted in the national emblem of Belize, which appears on the national flag and on some currency.

¹ In, *Cosmic Religion: With Other Opinions and Aphorisms*, 1931.

In Belize, trees are central to not just your flora and landscapes, but also to your economy and survival. And it would seem, to your very identity! This has been so from the earliest times and continues to be so in your post-independence era.

The majestic Mahogany, Caoba, and the lustrous Logwood, Campeche, stir up our imaginations and mythological remembrances. Yet even for these trees, what is unseen may be most important. Neither, and no tree, can exist, or grow, without roots – that anchor them and source their life-giving nutrients. **Trees can teach us a lot about constitutionalism, if we are willing to look, and have the eyes to see.**

A constitution is like the Caoba or the Campeche trees. We see, turn to, and harvest the fruit of its text most often, but need to constantly remember, and at times recall, its roots. There can be no Caoba or Campeche without roots. Going deep into the earth, roots anchor, support, give life to, enable growth and development, and sustain trees. Roots grow into trunks, into branches, into leaves, flowers and fruit. **The roots of a written constitution do likewise.**

CONSTITUTIONAL ROOTS: THE BASIC STRUCTURE

What then are these constitutional roots? The Basic Structure Doctrine, what I have called the ‘basic deep structure’ of constitutions such as in Belize, attempts to answer this question. And to provide practical guidance on how this basic deep structure impacts governance, legislation, and public-authority decision making and actions.

How can we understand this concept? The analogy of a tree and its roots is a useful analogy, and a good entry point. The text of the constitution itself is like the tree that we see above ground – trunk, branches, leaves, flowers, fruit and seeds. The basic deep structure of a constitution is comparable to the roots, lying mostly, though not entirely, below the surface of the earth and not always readily apparent, **but in fact the constitutive superstructure out of which what we see and experience as ‘tree’ emerges and is sustained.** Without this basic deep structure, these roots, the constitution as we know it would fall apart.

SOME EXAMPLES

Let us take a few examples to begin to get a feel for this basic deep structure and how it functions. A long line of case law asserts that the separation of powers is part of the basic structure of Belizean constitutionalism. This is no longer disputable. Yet, nowhere in the actual Constitution is there any mention of a separation of powers. It cannot be readily seen, yet it exists! The same applies to the independence of the judiciary, and to the rule of law. Though in the case of the rule of law there are preambular clauses, some visible indicators, that mention it.²

Notice how these three, the separation of powers, the independence of the judiciary, and the rule of law, are integral to the creation and sustainability of a sovereign democratic state as envisaged by the People of Belize and as prescribed in its Constitution.³

These constitutional features are so fundamental, that without them Belizean constitutionalism, as we take for granted, would cease to exist. If there was no separation of powers, the police could maybe, be permitted to sentence criminals. And if the independence of the judiciary did not exist, then ministers of justice could maybe, appoint and remove judicial officers. And if the rule of law was not fundamental, then maybe, rule by law could become manifest.

Indeed, without these basic deep features, the Belizean State as we know it territorially could conceivably be changed by act of parliament! And the status of Belize being a constitutional democracy could also be changed! Thus, the constitutive notions of sovereignty of the State, and the supremacy of the Constitution, could both be altered.

How do we make sense of this? Of **the idea that there are certain principles that are so fundamental to Belizean constitutionalism that even if unwritten, they cannot be changed.** It all makes perfect sense by way of the basic structure doctrine that undergirds, underpins, and ‘in-forms’ (from the inside, out) Belizean constitutionalism.

FROM IMAGINATION TO THEORY

² Constitution, Preambular Clause (d): ‘recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and upon the rule of law;’

³ Constitution, Preambular Clause (c): ‘believe that the will of the people shall form the basis of government in a democratic society ...’; and s 1 (1): ‘Belize shall be a sovereign democratic State ...’

A little politico-legal theory may assist our understanding. It is theory grounded in constitutionalism. This was discussed in *BISL v. AG of Belize*,⁴ as follows:

There can no longer be credible debate disputing the widespread juridical acceptance of **an essential basic ‘deep’ structure that is the foundation of, confers integral identity to, and constitutes the essential core of, democratic participatory constitutionalism** in Caribbean states such as Belize. The extent to which these basic features, principles and values are constitutive of what is considered the ‘sovereign democratic State’ of Belize, ultimately sounds in whether they can be undermined, altered, or removed without radically changing what it means to be Belizean.

This is because the State of Belize is constituted by its Peoples. It is their consent to be governed, and to be governed in a particular context and way, that brings into being what is agreed to, accepted, and recognised nationally and internationally, internally and externally, as the State of Belize. It is this consent that bestows integrity, legitimacy, and identity to what is understood to be Belize. Hence, the Constitution of Belize commences with a Preamble, that begins: ‘WHEREAS the people of Belize’.

The shapes, contours, textures, and contents of that agreed context and way are what underpin and inform the Constitution of Belize. Thus, the Constitution emerges from and arises out of these *a priori* basic features, principles, and values. Features, principles, and values, that in turn evolve out of the history, cultures, traditions, and experiences of Belizeans. Some of which were and are unwritten.

To this extent **they, together, form the essential foundation, framework, and superstructure of Belizean constitutionalism**. They are discoverable. And, until changed legitimately, they are non-negotiable. Moreover, they **form and inform the standards and lenses through which, generally, all governmental, legislative, executive, and public administrative actions are to be judged and held accountable**.

In the *BISL* case, I went to great lengths to justify and explain this basic structure doctrine.⁵ I do not think I need to rehearse those arguments here. I do however encourage you to consider them further. At heart lies the distinctions between constitutive and constituted powers, principles, and structures. The former is often indicative of constitutional basic deep structures, as in the case of the separation of powers, the independence of the judiciary, and the rule of law. These three are **so**

⁴[2020] CCJ 9 (AJ) BZ, [299] – [301]

⁵ [302] – [305], [318] – [331]

integral and fundamental to what constitutes the kind of democratic state that is Belize, that they are almost inviolable – unalterable, in the sense that to change them would be to fundamentally change what is constitutive of Belize’s identity as a sovereign and independent democratic state.

What is worth repeating however, is what was said about sovereignty and supremacy.⁶

Two fundamental constitutional principles feature ... : the principles of sovereignty and supremacy. The Belizean Constitution affirms in section 1, that Belize is a ‘sovereign democratic State’, and in section 2, that ‘[t]he Constitution is the supreme law... and if any other law is inconsistent with (it) that other law shall, to the extent of the inconsistency, be void’.

To understand, interpret and apply the meanings of sovereignty and supremacy, historical context is important. Belize was a former colony. It was ruled from the outside. The assertion of sovereignty is a declaration of internal self-governance in which the People of Belize are sovereign. It is their will alone, their consent freely given, that is determinative of what is constitutive of the State of Belize. The first and paramount non-derogable basic ‘deep’ structure principle in Belize is thus sovereignty, and sovereignty in the framework of democratic self-governance. The declaration of supremacy, of the Constitution itself, and of Belizean basic ‘deep’ structure constitutional features, principles, and values, must therefore be fully appreciated in the context of this democratic sovereignty.

However, the real import of the conjoint effect of these two principles ... is to deem all law that is inconsistent with both the text and basic structures of Belizean constitutionalism void to the extent of those inconsistencies (*Nervais and Severin*); and, *a fortiori*, all State actions that are similarly inconsistent. In this particular constitutional context, the greater includes the lesser, or put another way, the whole includes its parts. If laws passed by the legislature can be struck down as unconstitutional and outwith constitutional legitimacy, conceivably so can State actions which are always assumed to be premised on legality and lawfulness; that is to say, on constitutional propriety.

The decision of the CCJ in *Nervais and Severin v. The Queen*,⁷ is an apt illustration of the point. In BISL this is what was said about *Nervais and Severin*:⁸

⁶ [353] – [354]

⁷ [2018] CCJ 19 (AJ)

⁸ [320] – [321]. And note, included in the reliance on the supremacy of the rule of law was the inclusion of human rights.

In effect, the decision in *Nervais and Severin* is monumental in Caribbean jurisprudence, because it establishes that even the literal text of a constitution is not inviolable and is at once subject to certain ‘basic underlying principles’. What becomes normative, and authoritative, is ultimately not the letter of the text, but the basic ‘deep’ structure (certain non-derogable features, principles, and values) that underpins, informs, and constitutes the text as a constitution.

This is clear, because in *Nervais and Severin* the general savings clause that was whittled away and considered subordinate to the unwritten and/or preambular value of the rule of law, was a part of the Constitution itself. Thus, even though the Constitution as the explicitly avowed supreme law contained a general savings clause, that specific clause was deemed subject to this ‘basic underlying principle’ of the rule of law, which was ultimately considered to be the (more) supreme constitutional principle (law). It is therefore this basic ‘deep’ structure that constitutes a written constitution as such, and not the other way around, even as the enactment of the text is also constitutive.

Commenting on the general effect of *Nervais and Severin*, I said:⁹

It points to the existence of a basic ‘deep’ structure, that underpins, informs and constitutes certain non-derogable features, principles, and values of Belizean constitutionalism, that are **so foundational and essential to the identity and nature of the State of Belize, that the Constitution itself as text, and all executive, legislative and state administrative actions can be subject to it.**

EXPLORATION AND DISCOVERY

In BISL two clear pointers that help us discover these basic deep structure constitutional principles¹⁰ were explained as follows:

- (1) First, the Preamble to the Constitution of Belize reveals some of the basic principles and values that have been averred to above. Indeed, the first clause ‘affirms that the Nation of Belize shall be **founded upon principles ...**’. Some of these fundamental principles are explicitly stated in that first clause, including human rights, freedom, dignity, and equality. As one progresses through the Preamble, one discovers many others, such as social justice, participatory democracy, freedom based on moral/spiritual values and the rule of law, state unity and sovereignty, territorial integrity, non-discrimination, social security and welfare, protection of the environment, and, respect for

⁹ [319]

¹⁰ [302], [304]

(and co-operation with) other nations, as well as for international law and treaty obligations (fundamental international values).

- (2) Second, clues as to what is constitutive of the basic and fundamental features, principles, and values of Belizean constitutionalism, are not limited to the literal content of the Constitution as text *per se*. Some are predictably unwritten, to be discerned from overall structure, context, and content, albeit of the Constitution itself, as well as from broader historical, cultural, and socio-legal contexts. Constitutional common law, as developed by independent Caribbean Judiciaries (as the third arm of Government) and elsewhere, has also discovered and revealed structural and substantive features and values that constitute this basic ‘deep’ structure. Three are now uncontroversial – the separation of powers, the rule of law (as including both due process and protection of the law), and, the independence of the judiciary (with the associated power of judicial review in relation to both constitutional and administrative actions).

In relation to the Preamble of a constitution, it is now well accepted that: ‘In fact, in reading the Constitution as a whole, the Preamble adds essential context to and informs the meaning, intention and purpose of the entire constitutional text.’¹¹

Returning to the distinctions between constitutive and constituted powers, in BISL it was explained¹² that:

... the People who constituted the Constitution as text, mandated by the Preamble, in its ultimate clause, ‘that their Constitution should therefore enshrine and make provisions for ensuring the achievement of the same in Belize.’ That is, the achievement of what the People of Belize declared, in their Preamble, to be the basic and fundamental features, principles, and values that are constitutive of Belizean constitutionalism.

What really makes the basic deep structure, ‘basic’ and ‘deep’, are its constitutive sources.

First and foremost, the aspirations and consent of the People of Belize. And as well its constitutive nature. **It constitutes the underpinning and overarching architecture and superstructure that anchors, gives shape to, and holds everything in balance in a particular context. That context**

¹¹ BISL, [303]

¹² [303]

being a sovereign democratic state embodying preambular values and rooted in the local *sitz im leben* (the Peoples' collective lived experiences).

IMPLICATIONS

The implications of this theory (basic structure doctrine) should be self-evident. In BISL these were summarised as follows¹³:

Moreover, they form and inform **the standards and lenses through which, generally, all governmental, legislative, executive, and public administrative actions are to be judged and held accountable.**

The courts, as guardians of the Constitution, are also guardians of Belizean constitutionalism, and as such, the agents of the People. This 'constitutional species' of judicial review of legislative and executive actions, is the means by which this standard-keeping and accountability is rendered.

A specific and central implication also worth highlighting is **the premium this approach places on human rights and the impetus to a constructive review of colonial laws** which may be challenged if they infringe the basic deep structure principles. The case of McEwan is instrumental on this point.¹⁴

NOTHING NOVEL, NOTHING NEW

The theory is not new, nor is it novel. Three Belizean cases pre-date BISL and applied the basic deep structure of Belizean constitutionalism to strike down legislation.

First:

'... in *Bowen v AG*, the Supreme Court of Belize made use of this basic 'deep' structure doctrine, placing reliance on *Kesavananda Bharati v State of Kerala*, to hold that a proposed amendment to the fundamental right to property in the Belizean Constitution was unconstitutional. Essentially, Conteh **CJ upheld the idea that any amendment to the Constitution was invalid if it derogated from the essential features and overall identity of Belizean constitutionalism, and the enshrined human rights values.** As he explained: 'the basic structure doctrine is at bottom the affirmation of the supremacy of the Constitution in the context of fundamental rights'. He

¹³ [301], [305]

¹⁴ *McEwan v Attorney General of Guyana*, [2018] CCI 30 (AJ) GY.

identified six features of the basic ‘deep’ structure of Belizean constitutionalism, to wit, Belize is a sovereign, democratic state, the Constitution is supreme, enshrined fundamental rights demand protection, the separation of powers, the limitation of legislative powers, and, most importantly, the rule of law. He grounded his analysis in the fundamental principle of constitutional supremacy. In all of this Conteh CJ was refreshingly prescient.¹⁵

Second:

In *British Caribbean Bank Ltd. v AG*, an Act which purported to amend the supreme law clause in the Constitution to prevent the courts from declaring void amendments passed in conformity with the procedural requirements, was struck down by Legall J:

[E]very provision of the Constitution is open to amendment, provided the foundation or basic structure of the Constitution is not removed, damaged or destroyed. The basic structure includes ... the rule of law, judicial review ... all of which are protected and safeguarded by the Preamble.¹⁶

Third:

In *Bar Association of Belize v Ag*, Legall J held that amendments that undermined the independence of the Judiciary were void. This he held, was because the independence of the judiciary was protected by the rule of law, and as such, a part of the basic ‘deep’ structure of Belizean constitutionalism.¹⁷

LOOKING DEEPER: POINTERS TO HELP US SEE

How can one discover what are these basic deep structures? Arif Bulkan (‘The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the Perfect Nation’, 2013) suggests the following pointers¹⁸:

- (a) Reading a constitution’s substantive provisions holistically and functionally as guideposts, in their historical and legal contexts, to

¹⁵ BSL, [325]

¹⁶ BSL, [326]

¹⁷ BSL, [327]

¹⁸ BSL, [328]

- discover common values and a consistent or coherent vision, an essential identity shaped by the totality of its provisions, that manifest its overall (constitutional) philosophy and morality;
- (b) Discovering the root history, values and culture of a state from a constitutional perspective, which includes a consideration of the essential and organising underlying principles identified in preambular clauses, that constitute the most vital assumptions upon which the constitutional text is based;
 - (c) Developing a theory of the nature of law, which distinguishes between constituent and constituted law-making powers, and placing constitutionalism and constitution making and amending in the category of ‘higher order’ constituent law making power (as compared to constituted powers – such as those exercised by the legislature and the executive); and finally,
 - (d) Applying the ‘principle of integrity as the most appropriate interpretative technique’, whereby ‘[w]ritten constitutions, as an exercise of constituent power, represent an original commitment by the people to be governed by certain fundamental laws and (to) live within a certain juridical structure.’

Former Canadian Chief Justice Beverly McLachlin also offers some useful guidance (‘Unwritten Constitutional Principles: What is Going On?’ 2005), as follows¹⁹:

The contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law. Like those conceptions of justice, the identification of these principles seems to presuppose the existence of some kind of natural order. Unlike them, however, it does not fasten on theology as the source of the unwritten principles that transcend the exercise of state power. It is derived from the history, values and culture of the nation, viewed in its constitutional context.

It rests on the proposition that there is a distinction between rules and the law. Rules and rule systems can be good, but they can also be evil. Something more than the very existence of rules, it is argued, is required for them to demand respect: in short, to transform rules into law. The distinction between rule by law, ... and rule of law, ... succinctly captures the distinction between a mere rules system and a proper legal system that is founded on certain minimum values. The debate about unwritten constitutional principles can thus be seen as a debate about the nature of the law itself and what about it demands our allegiance.

¹⁹ BSL, [330]

As was summarised in BISL²⁰:

McLachlin also offers practical and concrete advice, like Bulkan, after surveying a corpus of case law, for identifying this basic ‘deep’ structure of unwritten constitutional principles: ‘At least three sources of unwritten constitutional principles can be identified: customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal instruments to which the state has adhered.’

An excellent and long-standing example of the search for and discovery of a basic deep structure, is *Hinds v the Queen*, 1977.²¹ The overall structure and text of the constitution were carefully examined in their legal-historical contexts and cultures, to assert the existence of the separation of powers as a basic deep structure feature of Caribbean constitutionalism. It is a case well worth reading.

FURTHER DEVELOPMENTS: FROM BISL TO MARIN AND GGMC

What began in BISL has been further elaborated on in two more recent opinions that I gave in 2021: (a) *Solomon Marin v. The Queen*, a criminal appeal from Belize,²² and (b) *GGMC v. BK International & Baboolal*, a public law, judicial review, appeal from Guyana.²³ Time only permits the most cursory of examinations.

In *Marin*, the CCJ confirmed, following a line of its prior decisions, that ‘the centre point of this Court’s approach to Caribbean constitutional interpretation’, lies in **the understanding and application, as an interpretative methodology, of the insight ‘that Caribbean constitutions are *sui generis*.’**²⁴ This approach thus ‘becomes **the primary lens through which one must view, read, interpret, and apply constitutional provisions, values, and principles.**’²⁵

²⁰ [331]

²¹ [1977] AC 195 (PC); Lord Diplock noted that “it is well established as a rule of construction...that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.” [212]

²² [2021] CCJ 6 (AJ) BZ

²³ [2021] CCJ 13 (AJ) GY

²⁴ *Marin*, [30]

²⁵ *Marin*, [31], [35]

In Marin²⁶ it was further explained:

However, something more needs to be said about this *sui generis* centre point. Ultimately it facilitates, in the sphere of constitutionalism, the search for meaning. A search that for the process of interpretation a) begins with ‘a recognition of the character and origin of the instrument’, b) is grounded in a regional and local *sitz im leben* (the contexts in which constitutions as text are created and located, including indigenous legal customs, traditions, conventions, culture, and history), c) reaches simultaneously backwards-and-forwards temporally into local and incorporated international intentions and aspirations, and d) is also in-formed by unique ideological interpretative approaches.

Arising out of a constitution’s *sui generis* character and grounded in local and regional socio-politico-legal contexts, are the in-forming ‘core and deep structure influences.’²⁷ It is an approach to Caribbean constitutionalism that has ‘a constitution and rights centric focus’,²⁸ anchored in Caribbean identities.²⁹

In GGMC, it was explained that in Guyana, as in most Caribbean States that have written constitutions with supremacy clauses (including Belize), judicial review of administrative actions and decisions has, as its source of jurisdiction and power, the core constitutional value and imperative of the rule of law. Therefore, in jurisdictions where there is constitutional supremacy, **courts must ensure that administrative decisions conform with fundamental constitutional and human rights values and principles.** Further, that viewing judicial review through the lens of Caribbean constitutionalism can: (a) broaden the scope of inquiry bringing it squarely under the umbrella of constitutionalism and the rule of law; and (b) influence the nature of the inquiry, making it a more primary form of inquiry. And, finally that this reorientation is by no means an abandonment of the existing grounds for judicial review, as they are all encompassed and included under the umbrella of constitutionalism and the rule of law.³⁰

As I opined in that case³¹:

²⁶ [31]

²⁷ Marin, [36]

²⁸ Marin, [38]

²⁹ Marin, [38]

³⁰ GGMC, [63], [64], [74], [75], [77], [82], [88], [89], [93]-[97]

³¹ [72], *Lex Supremus* – ‘the Supreme Law’, *Summus Princeps* – ‘Supreme Ruler’

The Constitution as the supreme law enjoys what may be analogously and uncontroversially be described as the status of *Lex Supremus* in relation to all other laws, and as such it is also very much the *summus princeps* in relation to all branches of government. In relation to its core principles and values, including fundamental rights enshrined in it, the principle of legality applies in similar fashion, though arguably with enhanced reach and compulsion.

And to ground this in what we are interrogating today, the basic structure doctrine, in GGMC the point and connection was made, that³²:

In Guyana, as in most Caribbean States that have written constitutions with supremacy clauses, judicial review of administrative actions and decisions has as its source of jurisdiction and power, the core constitutional value and imperative of the rule of law. The rule of law is part of the inviolable basic deep structure of Guyanese constitutionalism. It is the true foundation upon which judicial review of administrative actions and decisions in Guyana is premised.

And again³³:

The overarching rationale being, from a rule of law perspective, judicial review is constitutionally warranted to ensure that all governmental power is exercised (and therefore supervised) in accordance with norms that are constitutionally fundamental. Constitutional supremacy suggests that legislation must conform with these standards, and consequently, all governmental action, whether by statutory authority or otherwise, must do so likewise. This then is the true basis for judicial review of administrative actions and decisions in Guyana.

Finally,³⁴ that:

What ought to be beyond dispute in Guyana, as in most Anglo-Caribbean states with written constitutions, is that courts, in furtherance of constitutional democracy and by way of constitutional warrant, now properly enforce values and principles considered to be inherent in Caribbean constitutionalism. These values arise from both the basic deep structures and the texts of these constitutions, and form part of the essential framework of their democratic organisational models. Parliamentary and statutory intent and meaning are sub-sets of this broader ethos, subject to it, and intentionally to be aligned with its values and principles.

³² [75]

³³ [78]

³⁴ [82]

BISL directly asserted the centrality and salience of basic deep structure principles in Caribbean constitutionalism. Marin and GGMC point to the centrality of constitutional sovereignty-supremacy (as opposed to parliamentary supremacy), and the implications for both constitutional and judicial review of executive and statutory-authority decisions and actions, and do so pointedly by including and incorporating the context of the basic structure doctrine.

In GGMC, Wit JCCJ eloquently summarised this understanding and orientation as follows³⁵:

This is so because these constitutional values and principles, being part of the Supreme Law, permeate the entire Guyanese legal order. Consequently, in Guyana (as in other constitutional democracies) **the interpretation and application of statutory law is thereby brought under the inescapable influence of constitutional law.** This is not limited to public law; **private law also requires to be looked at through a constitutional lens.** And **not only written law but also “unwritten” common law cannot escape the scrutiny of constitutional law.** Also, the common law, judge made as it is, must be interpreted and, if need be, further developed to meet the challenges of both the times and the Constitution.

As Justice Barak stated, ‘the world is filled with law’³⁶. In Guyana this is no different. But the law must be in tune with the Constitution, which not only imbues the law with meaning but also commands that it must be complied with.

ALL MUST WORK TOGETHER FOR GOOD

Certain caveats are apposite. As was explained in GGMC³⁷:

Clearly it is not the primary role or function of courts to make prescriptive evaluations of what is substantively necessary or best for the public good. That is pre-eminently the province of the legislature. Equally so, in relation to the execution of executive policy and function, whether directly or indirectly through governmental ministries, departments, organs, agencies and the like. This accords with the organisation of the democratic state according to a separation of powers.

³⁵ [55], [56]

³⁶ Justice Aharon Barak, 'Judicial Philosophy and Judicial Activism' (1993) 17 Tel Aviv U L Rev 475, 477, 485.

³⁷ GGMC, [83], [85]

Nevertheless, the political principle of constitutional comity that the separation of powers arrangement expects provides for a check and balance on judicial overreach ...

CAUTIONS

As was noted in BISL³⁸:

Robinson, Bulkan and Saunders, in 'Fundamentals of Caribbean Constitutional Law', (2015), in what is essentially a commentary on the Belizean jurisprudence, warn however that: 'What the Belizean cases fail to do is offer clear guidance and restraints on when this exceptional power of judicial review will be exercised; in other words, what is the threshold for the doctrine?'(In the context of striking down constitutional amendments that satisfy procedural requirements but run afoul of the basic structure.) In this specific context, they seem to suggest that the basic 'deep' structure doctrine should only be invoked if a constitutional amendment 'amounts to a substantial threat' to these basic 'deep' structure constitutional values and principles. While that may be true in such instances, this is not a case of constitutional amendments. However, their caveat is important; the use of the basic 'deep' structure to review governmental action ought not to be lightly invoked, and is most justifiable when what is at stake is a serious threat to, or undermining of, fundamental and core constitutional values and principles.

THINGS SOMETIMES UNSEEN, MATTER

This then ends our sojourn with the basic structure doctrine as explored in the BISL opinion and as it implicates Belizean constitutionalism. Remember the majestic Mahogany, Caoba, and the lustrous Logwood, Campeche, and think about their roots. We may all understand much more by doing so, in spite of all that I may have said.

And bear in mind, that what matters most is often what is sometimes unseen.

SEVEN KEY TAKEAWAYS

³⁸ [329]

To conclude, and by way of recap, what are some implications, key takeaways, from this interrogation of BISL and its exposition of the basic structure doctrine? I would like to share and highlight seven key takeaways.

First. The doctrine is a part of Belizean constitutional law, asserted by its local courts and confirmed by its apex court, the CCJ. The unavoidable implication of this is that it must be considered by the executive, legislative, and judicial arms of state in the discharge of their functions.

Second. The doctrine imposes minimum standards of governance, decision making, and action that ensure the creation and sustainability of Belizean democracy as constitutively envisaged and intended by the People of Belize (the most fundamental source of constitutive power in Belize).

Third. The courts, as guardians of Belizean constitutionalism, have the jurisdiction, power, and duty to ensure that these basic deep structure standards of governance are met and upheld.³⁹

Fourth. Belize is a constitutional democracy in which the Constitution and constitutional basic deep structure values and principles are supreme. Parliament is not supreme.⁴⁰ Thus, laws and law making, executive behaviour, decisions and actions, and public/statutory authorities are all subject to these governing basic deep structure values and principles, and must conduct themselves and their affairs in accordance with them.

Fifth. The Judiciary is also subject to and governed by these basic deep structure values and principles and must conduct its affairs and discharge its duties and responsibilities in accordance with them.

Sixth. The three main branches of government (parliamentary, executive, judicial) co-exist as autonomous, inter-related, and complementary institutions in the context of the separation of

³⁹ GGMC, [97] 'It is the constitutional role of courts in the organisational arrangements of Caribbean states to supervise governmental administrative actions and decisions and to ensure that they are rule of law compliant.'

⁴⁰ GGMC, [89] 'Parliament is presumed to legislate and empower/enable actions consistent with the Constitution.'

powers arrangement, and do so proximally as constituted authorities under the constitutive authority of the Constitution.⁴¹

Seventh. Constitutional comity among the branches of government, characterised by mutual regard, respect, and practiced margins of appreciation, is assumed. Working through and applying the basic structure doctrine requires sensitivity, nuance, and regard for the constitutional roles and functions of all arms of government, if there is to be effective democracy in Belize.

THE CALL OF THE CAOBA AND THE CAMPECHE

It has been said that: **‘We do not see things as they are, we see them as we are.’**⁴² As enigmatic as this may be, it is an invitation to look deeply into what is before us and all around us, and to do so with open minded imagination.

Can you hear the call of the Caoba and the Campeche? They are inviting us to look deeply into them. ‘Come’, they say, ‘look, and look again, what do you see?’ Can you see the sky and the clouds, the sun and the rain, the earth – in them, as them? Can you see your Peoples’ history, your own stories, your joys, and sorrows, hopes, needs, and aspirations – in the Caoba and the Campeche?

We can see many things if we take the time to look deeply into them. This is as true for constitutions, as it is for trees!

The Hon. Mr. Justice Peter Jamadar, JCCJ



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⁴¹ GGMC, [73]

⁴² Anais Nin, ‘Seduction of the Minotaur’, 1961