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The Malaysian Constitution and the Basic Structure Doctrine

by Dato' Seri Mohd Hishamudin Yunus[1]

The Federal Constitution is a document of the highest importance in the Malaysian legal system; it is the fundamental law that provides for the framework of government and how it should operate, the source of legitimate authority and rights and duties of citizens.[2] Although the Constitution is hierarchically superior to other laws, just like any other law, the very purpose of its existence demands that it be capable of evolving with the times. Article 159 of the Constitution thus exists for the purposes of that flexibility; it provides for the procedures of amending the Constitution by Parliament.[3]

However, with the express provision of Art 159, does it mean that any political coalition with a two-thirds majority is given *carte blanche* to amend the Constitution according to its whims and fancies? Even if it renders the Constitution so unrecognisable and self-eradicated? The answer to these questions lies in the doctrine of basic structure of the Constitution.

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2 S A De Smith, *Constitutional and Administrative Law* (Penguin Books, 5th Ed, 1986) at p 15

3 Article 159(1) provides that:

"Subject to the following provisions of this Article and to Article 161e, the provisions of this Constitution may be amended by federal law."

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Genesis of basic structure doctrine

The doctrine of basic structure has its origins in Indian jurisprudence, and was subsequently accepted in other jurisdictions such as Bangladesh, Norway and the US. *Kesavananda*[4] is the landmark Indian Supreme Court decision that firmly laid down the basic structure doctrine. In order to better appreciate that case though, *Golaknath*[5] must first be discussed.

In *Golaknath*, the validity of the 17th Constitutional Amendment Act was in question. It was argued that this Act abridged the fundamental rights guaranteed by the Indian Constitution.

Article 13(2) of the Indian Constitution provides:

> "The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of such contravention, be void."

Article 368 of the Indian Constitution prescribes the procedure to be followed by Parliament if it is desirous of amending the Constitution. The majority of the Indian Supreme Court declared that Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge fundamental rights enshrined therein.

This remarkable ruling also means that a constitutional amendment abrogating a fundamental right would be hit by Art 13(2) and so would be void. This decision overruled the earlier case of *Shankari Prasad*,[6] in which the Supreme Court held that Parliament under Art [368] can also amend the fundamental rights enumerated under the Indian Constitution.

In sustaining the Constitution (First Amendment) Act 1951, the court pointed out:

> "Although 'Law' must ordinarily include constitutional law, there is a clear demarcation between ordinary law which is made in the exercise of legislative power and constitutional law, which is made in the exercise of constituent power. In the context of art 13, 'law' must be taken to mean rules or regulations made in the exercise of ordinary legislative power and not amendments to the constitution made in the exercise of the constituent power with the result that art 13(2) does not affect amendments made under art 368."

The government of India was unhappy with the decision in *Golaknath*. In 1971, Parliament passed the Constitution (Twenty-fourth Amendment) Act 1971, which was aimed at abrogating the Indian Supreme Court's decision in *Golaknath* and restoring to Parliament the power to amend the fundamental rights provisions of the Constitution. This amendment Act amended Arts 13 and 368 by inserting the following new clauses:

> "13(3) Nothing in this article shall apply to any amendments to this Constitution made under art 368.
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> ...
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> "368(1) Notwithstanding anything in this constitution, Parliament may in exercise of its constituent power amend by way of addition, variation, or repeal any provisions of this Constitution in accordance with the procedure laid down in this Article."

The constitutionality of the Constitution (Twenty-fourth Amendment) Act 1971 was challenged in *Kesavananda*. The plaintiff in that case succeeded in his challenge. The

4 *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225
5 *Golaknath v State of Punjab* 1967 AIR SC 1643
6 *Shankari Prasad Singh v Union of India* [1952] SCR 89

Supreme Court, comprising a bench of 13 judges (at the time, the largest bench constituted in India), held that the Twenty-fourth Amendment Act was unconstitutional and therefore void. The Supreme Court propounded the famous "Basic Features Doctrine".

The doctrine propounded is to the effect that there is an implied restraint on the amending power of Parliament, such that the power could not be exercised so as to destroy the basic structure of the Constitution. According to the majority judgments, the basic features of the Indian Constitution are:

(1) supremacy of the Constitution;

(2) republican and democratic form of government and sovereignty of the country;

(3) secular character of the Constitution;

(4) separation of powers;

(5) federalism; and

(6) dignity of the individual guaranteed by Parts III and IV of the Constitution.

In this regard, the decision in *Golaknath* was partially overruled by *Kesavananda* because the latter found that fundamental rights may be limited by lawmakers so long as the amendments do not infringe upon the basic features of the Indian Constitution.

In enunciating the above principle, the hurdle was that it is Parliament's power to amend the Constitution pursuant to Art 368(1). And Art 368(1) makes no mention of any "basic structure" of the Constitution that could not be amended by Parliament. In fact, the "basic structure" was nowhere mentioned in the text of the Indian Constitution. Thus, the majority judgments and the pronouncements therein displayed a classic case of judicial activism by the Supreme Court of India.

The government was most displeased with this judgment. Immediately after the decision, the post of Chief Justice fell vacant following the retirement of Chief Justice Sikri. The government indicated its displeasure by appointing Justice Ray as the new Chief Justice, bypassing three other senior judges who had ruled against the government in *Kesavananda*. Coincidentally, Justice Ray was one of the six judges who ruled in favour of the government. Following these developments, the three judges who were bypassed immediately resigned from the bench.

Despite these repercussions, the basic structure doctrine has since flourished in Indian jurisprudence. In *Indira Nehru Gandhi*,[7] the Supreme Court struck down laws that violated two main features of the Indian Constitution, i.e. the separation of powers and democracy. In *Minerva Mills*,[8] the Constitution Amendment Act which removed the limitations on Parliament's power to amend the Constitution was challenged, and the Supreme Court ruled that the amendment was invalid because a limited amending power on Parliament is one of the basic features of the Indian Constitution.

Malaysian Constitution and its basic structure

In order to determine whether the doctrine of basic structure applies to the Malaysian Constitution, it is necessary to analyse the nature of our Constitution. The starting point is to recognise it as a Westminster model constitution, which is based on the system of parliamentary democracy.

7 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299
8 *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789

In *Hinds*,[9] the Board of the Privy Council dealt with the doctrine of separation of powers in the context of a Westminster model constitution. It is clear from the advice of the Board, as delivered by Lord Diplock, that the separation of powers doctrine forms part of the basic structure of a constitution modelled along Westminster lines. His Lordship said that such constitutions:

> "… were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom."

And because of this:

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

The case of *Hinds* was adopted in *Abdool Rachid Khoyratty*,[10] where Lord Steyn observed that:

> "The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary."

It may be gathered from the pronouncements in the foregoing cases and the authorities cited therein that at least three essential elements form the basic structure of a Westminster model constitution — the doctrine of separation of powers, the rule of law and an independent judiciary.

Depending on the peculiarities of the particular constitutional document, there may be other elements that may form part of the basic features of a constitution. For example, in the context of the Malaysian Constitution, the existence of constitutional monarchy is part of its basic structure. It is for the Malaysian judiciary to decide on the basic features of our Constitution on a case-by-case basis, which also means this aspect of our jurisprudence is still open for further development.

9 *Hinds v The Queen* [1976] 1 All ER 353
10 *State of Mauritius v Abdool Rachid Khoyratty* [2007] 1 AC 80

Rejection of the doctrine in Malaysia: *Loh Kooi Choon*

Initially, our Federal Court showed reluctance to accept the doctrine of the basic structure of the constitution, as demonstrated in *Loh Kooi Choon*.[11] In that case, the plaintiff was arrested and detained under a warrant issued under the provisions of the Restricted Residence Enactment, but was not produced before a magistrate within 24 hours of his arrest as required by Art 5(4) of the Federal Constitution. He then brought an action for wrongful imprisonment. However, his action was dismissed on the ground that the police officers who made the arrest were protected from liability in tort by the Police Act 1967. Pending the appeal by the plaintiff, the Federal Constitution was retrospectively amended to exclude the application of Art 5(4) to an arrest and detention under the Enactment. This amendment was argued to be unconstitutional but the court decided otherwise.

Reliance was placed principally upon two decisions of the Indian Supreme Court, namely, *Shankari Prasad*[12] and *Sajjan Singh*,[13] which rejected the argument that an Act amending the Indian Constitution could be struck down on the ground that it offended the latter's basic structure. Raja Azlan Shah FJ (as he then was), in delivering the judgment of the Federal Court, held:

> "It is therefore plain that the framers of our constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly armed Parliament with 'power of formal amendment'. They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later.
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> …
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> "The framers of our Constitution have incorporated fundamental rights in Part II thereof and made them inviolable by ordinary legislation. Unless there is clear intention to the contrary, it is difficult to visualize that they also intended to make those rights inviolable by constitutional amendment. Had it been intended to save those rights from the operation of cl (3) of art 159, it would have been perfectly easy to make that intention clear by adding a proviso to that effect.
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> …
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> "There have also been strong arguments in support of a doctrine of implied restriction on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power."

The author views that the legal position on applicability of basic structure doctrine as propounded in *Loh Kooi Choon* was not conclusive for Malaysian jurisprudence. There are subsequent cases that arguably have left some room for the application of the basic structure doctrine. For example, in *Phang Chin Hock*,[14] the court did not rule that the basic structure doctrine was inapplicable in Malaysia:

11 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC)
12 *Supra*, n 6
13 *Sajjan Singh v State of Rajasthan* [1965] 1 SCR 933
14 *Phang Chin Hock v PP* [1980] 1 MLJ 70 (FC)

> "Finally, whatever the features of the basic structure of the Constitution may be, it is our view that none of the amendments complained of and none of the impugned provisions of Act 216 have destroyed the basic structure of the Constitution; and it is for this reason that we find it unnecessary to express our view on the question whether or not Parliament has power to so amend the Constitution as to destroy its basic structure."

Moreover, in *Mark Koding*,[15] the Federal Court held again:

> "As regards the argument that the amendments complained of affected the basic structure of the constitution and are therefore unconstitutional, with great respect to Mr Heald, we have no difficulty in holding that they do not; and it was therefore unnecessary for us to consider the question whether or not Parliament has power to so amend the constitution as to alter its basic structure whatever that may be."

Gradual change of judicial attitude

The next development is the separate judgment of Richard Malanjum CJ (Sabah & Sarawak) (as his Lordship then was) in *Kok Wah Kuan*.[16] The accused, then a minor, intentionally killed another child. He was later found guilty of murder. The trial court, acting under s 97(2) of the Child Act 2001, ordered the accused to be detained at the pleasure of His Majesty the Yang di-Pertuan Agong. The Court of Appeal, relying on the decisions of the Privy Council in *Liyanage*,[17] *Hinds*[18] and *Mollison*,[19] struck down s 97(2) on the ground that it violated the doctrine of separation of powers, one of the basic features of the Federal Constitution.

The Federal Court reversed the judgment of the Court of Appeal. Except for Justice Richard Malanjum, four other Federal Court judges held that an Act of Parliament could not be struck down because it violated the doctrine of separation of powers as there was no express provision setting out the doctrine in the Constitution. The judgment by Abdul Hamid Mohamad PCA adopted a literal interpretation of Art 121 of the Constitution, an interpretation that is inconsistent with the spirit of the Constitution.

Nevertheless, Justice Richard Malanjum differed from the other four judges. Although his Lordship concurred with reversing the decision of the Court of Appeal,[20] his Lordship maintained that notwithstanding Art 121 of the Federal Constitution, the judicial power of the judiciary remains intact in the Constitution; that the jurisdiction and powers of the courts cannot be confined to federal law; and that the doctrines of separation of powers and the independence of the judiciary are basic features of our Constitution. The following portion of his Lordship's judgment is pertinent:

> "[37] At any rate I am unable to accede to the proposition that with the amendment of Article 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to the law for those who come before them.

15 *Mark Koding v PP* [1982] 2 MLJ 120 (FC)
16 *PP v Kok Wah Kuan* [2007] 6 CLJ 341 (FC)
17 *Liyanage v The Queen* [1967] 1 AC 259
18 *Supra*, n 9
19 *Director of Public Prosecutions v Mollison* [2003] UKPC 6
20 Justice Richard Malanjum held that s 97 of the Child Act 2001 is constitutional because it is still the court which imposes a sentence on a child convict consequential to its conviction order. In other words, his Lordship opined that s 97 of the Child Act 2001 is not inconsistent with the doctrine of separation of powers.

> "[38] The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

Not too long after, the change in judicial attitude became more apparent. The first judicial pronouncement by our judiciary regarding acceptance of the basic structure doctrine is the case of *Sivarasa Rasiah*.[21] Gopal Sri Ram FCJ, in delivering the unanimous decision of the Federal Court, said:

> "… it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that **the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution**. See ***Kesavananda Bharati v State of Kerala*** AIR 1973 SC 1461." [*Emphasis added*.]

The Court of Appeal in *Muhammad Hilman bin Idham*[22] subsequently followed this legal position:

> "In this regard I feel that I should add that the Federal Court also went further to hold that the fundamental rights guaranteed by Part II of the Federal Constitution form part of the basic structure of the Federal Constitution, thereby giving recognition for the first time, albeit in a limited fashion, to the doctrine of basic structure of the Constitution as enunciated by the Supreme Court of India almost 40 years ago in the landmark case of *Kesavananda Bharati v State of Kerala* 1973 AIR SC 1461."

Another step forward: *Semenyih Jaya*

The next case was *Semenyih Jaya*.[23] The Land Acquisition Act 1960 ("the Act") provides for the legal process by which the government may compulsorily acquire land held in private ownership. Initially, the Act vested the power to determine appeals (by way of a procedure called "land reference") against the value determined by the Land Administrator to compulsorily acquired land in a judge of the High Court. Later, Parliament made several amendments to the Act and inserted s 40D. By this amendment, the judge was to be assisted by two professional land valuers. The amendment also removed the judge's power to determine the value of the land and vested it in the assisting valuers. The appellant whose land was acquired under the amended procedure challenged the constitutionality of this amendment.

The Federal Court held that s 40D was unconstitutional as it purports to corrode the judicial power of the judiciary. The court even went further to hold that the constitutional amendment of 1988 was void as the judicial power is a basic structure of the Federal Constitution that cannot be taken away by Parliament.

21 *Sivarasa Rasiah v The Malaysian Bar* [2010] 2 MLJ 333
22 *Muhammad Hilman bin Idham v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507
23 *Semenyih Jaya Sdn Bhd v Land Administrator of the District of Hulu Langat* [2017] 3 MLJ 561 (FC)

In order to appreciate the judgment of the Federal Court, we have to understand our constitutional history. Originally, prior to the constitutional amendment of 1988, Art 121 of the Federal Constitution provided that the "judicial power of the Federation" shall be vested in the two High Courts, namely, the High Court of Malaya and the High Court of Sabah and Sarawak. The phrase "judicial power" was discussed in *Dato' Yap Peng*.[24]

In that case, the Public Prosecutor, acting pursuant to s 418A of the Criminal Procedure Code ("CPC"), tendered his certificate requiring the case to be transferred to the High Court for trial without a preliminary inquiry, which was otherwise necessary. The constitutionality of this section was challenged. The (then) Supreme Court upheld the challenge and struck down the section. The principal ground was that the power to transfer a case was eminently a judicial power and, hence, the vesting by Parliament of that power in the hands of the Executive rendered the section invalid.

At the time this decision was made, the government was commanding a two-third majority in Parliament — sufficient in strength to pass an Act to amend any provision of the Constitution. Therefore, in 1988, Parliament passed an Act amending Art 121(1). It removed the phrase "judicial power". The article then merely declared that there shall be two High Courts (one in Malaya and the other in the States of Sarawak and Sabah), which are to have such jurisdiction and powers as may be conferred by federal law, that is to say, an Act of Parliament. This amendment to Art 121(1) means that judicial power of the courts is only derived from federal legislation and not the Constitution.

The unanimous decision by the Federal Court in *Semenyih Jaya*, as delivered by Justice Zainun Ali, may be summarised as follows:

1. The doctrine of the basic structure of the constitution applies to our Federal Constitution.

2. The doctrine of the separation of powers and the doctrine of the independence of the judiciary are part of the basic structure of the Federal Constitution.

3. The amendment in 1988 that purported to remove the judicial power of the Federation from the courts and make them subject purely to federal law was invalid because it violated the basic structure of the Constitution.

4. Section 40D was unconstitutional because it violated the judicial power of the Federation which was vested in the High Courts by vesting that power in the professional valuers, whose only duty was to assist the court and not to usurp the function of the judge.

Indira Gandhi

So far as the application of the doctrine of basic structure in Malaysia is concerned, the case of *Indira Gandhi*,[25] involving a Hindu couple with three children, is the most important of them all. Several years into the marriage, the couple's relationship soured. The husband left, converted to Islam and took physical custody of the youngest child, who was just 11 months old at the time.

He then took steps to convert the children to Islam. The conversion was registered. The wife sought to set aside the conversion in judicial review proceedings on the grounds that the conversion was not in accordance with the procedure as prescribed by the relevant Syariah Enactment of Perak. At the High Court, Justice Lee Swee Seng granted the relief sought. However, the Court of Appeal by majority reversed the decision on the ground

24 *PP v Dato' Yap Peng* [1987] 2 MLJ 311 (SC)
25 *Indira Gandhi v The Director of Islamic Affairs Perak* [2018] 1 MLJ 545 (FC)

that the ordinary courts had no jurisdiction to deal with the subject matter of the review. It held that the matter was within the exclusive province of the Syariah Court established by written law enacted by the State of Perak.

On further appeal, the Federal Court reversed and restored the decision of the High Court. The brilliant judgment was once again delivered by Justice Zainun Ali. It restored in full the judicial power that was removed by Parliament through the amendment in 1988. The rulings made by the Federal Court are as follows:

1. As a matter of interpretation, it is "the foundational principles of a constitution" that shape its basic structure.

2. The principle of separation of powers is part of the basic structure of the Constitution.

3. The judicial power of the Federation is part of the basic structure of the Constitution. As such, the constitutional amendment Act that amended Art 121 in 1988 which curtailed and purportedly eliminated the judicial power vested in the judiciary is confirmed void.

4. The power of judicial review forms part of the basic structure of the Constitution. As such, any attempt by Parliament to oust or exclude the power of judicial review is ineffective. It follows that ouster clauses are unconstitutional and void.

5. The features of the basic structure cannot be abrogated or removed by a constitutional amendment.

6. Since the power of judicial review is part of the basic structure of the Constitution, Art 121(1A) cannot, and does not, prevent the ordinary courts from reviewing the acts of Islamic institutions established under statute to ascertain whether they have acted *ultra vires* their statutory powers, including the erroneous treatment of a subject as falling within the jurisdiction of a Syariah Court.

Once and for all, the Federal Court — through its decision in *Indira Gandhi* — put an end to the disturbing developments of the amendment to Art 121(1) in 1988 and the Federal Court decision of *Kok Wah Kuan*[26] as far as the doctrine of separation of powers and the concept of "judicial powers" are concerned. Its significance is far-reaching and this decision is one of the most important judgments in our constitutional jurisprudence.

Only by restoring judicial powers can the judiciary act as an effective check and balance on Parliament and on the Executive, and the independence of the judiciary restored. With the basic structure doctrine, our constitutional framework and its essential features may be maintained and the three branches of government, i.e. the Executive, the Judiciary and Parliament, kept within their constitutional limits. **LH-AG**

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26 *Supra*, n 16