

## An Induction of Basic Structure Doctrine in Malaysian Jurisprudence and Federal Constitution: An Overview

MUHAMMAD HASSAN  
JOHAN SHAMSUDDIN BIN SABARUDDIN

### ABSTRACT

*This research work explores the historical formation of the Federal Constitution. Further, the object of this study is to elaborate the scope of the sovereignty of the Malaysian parliament and its implied embedded limitation with regard to amending the salient features of the Federal Constitution. The author also discusses the historical background of inception and rejection of the Basic Structure Doctrine in the Malaysian jurisprudence. In pursuance of inception and rejection, three leading cases are also critically discussed. Moreover, the authors also discuss three leading cases wherein the Federal Court formally adopted basic structure doctrine and overlooked its own previous rejection approach. Lastly, it concludes that the scheme of the Federal Constitution indicates that there are various implied substantive limitations over the amending power of the parliament even in the absence of preamble and directive principles.*

*Keywords: Federal constitution; basic structure doctrine; federal court; judicial review*

### INTRODUCTION

Before coming into the independence of the Federation of Malaya, a Merdeka Mission was constituted under the chairmanship of Tunku Abdul Rehman, to negotiate with the British rulers for independence. It was the Constitutional progress towards the ultimate independence and self-government. In this context, meetings were held in London from 18<sup>th</sup> January to 6<sup>th</sup> February 1956<sup>1</sup>. The Commission was constituted and comprised of a four-member delegation, representatives of Malay rulers, and four representatives of the Alliance Government, the Colonial Secretary, the High Commissioner and the British Minister for State. The result of the talks was the appointment of an Independent Constitutional Commission to draw up a Constitution which provides full self-government and independence to the Federation of Malaya<sup>2</sup>.

An independent Constitutional Commission was comprised of numerous renowned Constitutional experts of different countries under the chairmanship of Lord Reid. It was an independent and extremely high-powered Commission. However, the Commission was directed to evaluate the existing constitutional arrangements throughout the Federation of Malaya and 'to make recommendations for a federal form of Constitution for the entire country as a single

self-governing unit within the Commonwealth based on parliamentary democracy with a bicameral legislature<sup>3</sup>. After the accomplishment of the task with the recommendation, the report of the Reid Commission was presented before the Working Party<sup>4</sup>. However, certain recommendations were subsequently incorporated to settle down unresolved issues and accordingly passed by the British parliament. In pursuance of that historical document, accordingly on 31 August 1957, the Federation of Malaya became an independent and sovereign country with a written Constitution.

### THE SCOPE OF SOVEREIGNTY OF PARLIAMENT IN MALAYSIA

Although the Federal Constitution contextually excludes the concept of limited sovereignty, this concept extracted from the British traditional theory and rejected the notion of substantive limitation upon the sovereignty of parliament with regard to amending the Constitution. It empowers the Malaysian parliament to amend or repeal the Constitution subject to required procedural requirements under Article 159 & 161E. Further, the Federal Constitution provides two modes of amendment procedure for amending the Constitution. One general is that any Bill with regard to amending the Constitution shall be passed with at least two-thirds majority of the

total membership of the both Houses, i.e., House of Representative and Senate<sup>6</sup>. Secondly, amendments relating to the matters mentioned in Article 159(4) are required simple majority as the procedure may be followed for passing the federal law as laid down in Article 66 of the Federal Constitution. However, there are few procedural limitations which must be complied with while amending the Constitution by the parliament in a prescribed manner as enshrined in Article 2(b), 38(4), 66, 68 and 159(3) of the Federal Constitution.

While on the face of it, it appears that the Constitution of Malaysia is neither too flexible nor too rigid in practice, but it has been amended almost fifty-seven times to reconcile the tensions in last sixty years<sup>7</sup>. Basically, the amendment is a way for reconciling the issues between flexibility and stability, '*a state without the means of change*'<sup>8</sup>. For reconciling, framers of the Constitution themselves make a balance between stability and flexibility through designing the amending process of the Constitutional provisions<sup>9</sup>. For this purpose, they expressly categorize ordinary provisions and fundamental provisions. In other words, there are certain types of provisions in the Constitution which can be changed by required majority and others which enjoys extraordinary protection in the form of basic structure and cannot be altered even from parliamentarians who have not been manifested for amending such provisions<sup>10</sup>. In short, there are difficulties or prerequisites to amend those extraordinary protected provisions and amendment in such provisions are almost prohibited<sup>11</sup>. Moreover, if provided amendment procedure correctly followed, still there are certain substantive limits over the amending powers of the parliament, which restricts the parliamentarians from changing the salient features of the Constitution because the amendment does not mean to dismantle the identity or repeal the structure of the Constitution<sup>12</sup>.

These substantive limitations either expressly or impliedly imposed the power of secondary constituted Assemblies in various States' jurisprudence by the Constitution itself or by judicial organ, while interpreting the Constitution. Indeed, the concept of implied substantive limitation over the amending power of parliament was formally originated in 1973 in the name of Doctrine of Basic Structure from the Indian jurisprudence in a case titled '*Kesavananda Bharati v. the State of Kerala*'. The Indian Supreme

Court ruled that the right of amending the Constitution does not mean to repeal or abrogate the Constitution or change the basic structure in a drastic way. The parliamentarians being a donee cannot convert the fettered powers into unfettered. This Doctrine migrated to other neighboring states. In certain States, it has been acknowledged whereas, in certain States, it faced difficulties in crossing the borders.

#### THE INCEPTION OF THE BASIC STRUCTURE DOCTRINE IN MALAYSIA

Although like the Indian Constitution, the Federal Constitution, 1957 also excludes the concept of un-amendable provisions. This concept probably extracted from the British traditional theory and rejected the notion of substantive limitation upon the sovereignty of parliament with regard to amending the Constitution. However, the Indian origin Basic Structure Doctrine was presented before the superior courts of Malaysia in various cases. Initially, the Malaysian Federal court rejected this notion by relying on the textual model of the Constitution and granted unlimited powers to the parliament with regard to amending the Constitution.

#### THE GOVERNMENT OF THE STATE OF KELANTAN CASE, 1963

In September 1963 The Malayan parliament passed an Act No. 26 of 1963 which is popularly known as the Malaysian Act 1963. It extended the territory of Malaya and acceded to Singapore, Sabah, and Sarawak and changed the name from Federation of Malaya to Federation of Malaysia. Consequently, extensive amendments were made in the federal Constitution in order to accommodate them within a substantially restructured constitutional framework along with negotiated terms<sup>13</sup>. However, the State of Kelantan filed a petition on 10th September of 1963 and pleaded that Malaysian agreement in term of Malaysia Act, 1963 to be declared null and void or alternatively not binding over the State of Kelantan. The petition was grounded that the State of Kelantan should have been consulted prior to passing the Malaysia Act and Ruler of Kelantan should have been a party to the Malaysian agreement. Accordingly, it was observed that all legislative and executive steps were taken in due course as required by the

Constitution, 1957. This would have been a constitutional conflict with serious ramification if the petition was accepted. However, C.J. Thomson ruled that;

In doing these circumstances I cannot see that parliament went in any way beyond its power or that it did anything so fundamentally revolutionary as to require fulfillment of a condition which the Constitution itself does not prescribe that is to say a condition to the effect that the State of Kelantan or any other State should be consulted. In bringing about these changes has done no more than exercising the powers which were given to it in the Constitution 1957 by the Constituent States including the State of Kelantan<sup>14</sup>.

The C.J. Thomson has opened up two ideas, one is that there might be some Act of parliament so fundamentally revolutionary that, although done in conformity with the federal Constitution, it could be challenged and become invalid unless fulfilling some extra conditions. Such as State consultation even not prescribed in the Constitution. Secondly, the Act of parliament with regard to changing the name of the federation and admitting new States, or doing anything that makes the new federation different from the old one, though passed in conformity with the Constitution might be challenged if contrary to the Constitution<sup>15</sup>. These remarks carry echoes of the doctrine 'basic structure', a doctrine that would have imposed implied substantive limitation over the amending power conferred to the parliament<sup>16</sup>. Additionally, Dr. Shad Saleem Faruqi also stated that the seed of the basic structure doctrine was planted on the soil of Malaysian Constitutional jurisprudence under the case of State of Kelantan. He further argued that although Thomson, C.J. rejected the plaintiff's contention but observed that if Parliament does something "fundamentally revolutionary", that may require "fulfillment of a condition which the Constitution itself does not expressly prescribe"<sup>17</sup>. However, C.J. Thomson did not interpret the word fundamentally revolutionary, because the Malaysian Act, 1963 was declared in accordance with the Constitution and was not in his view 'fundamentally revolutionary'<sup>18</sup>.

#### LOH KOOI CHOON CASE, 1977

The first time, Basic structure doctrine was contended locally in Malaysia in the case titled *Loh Kooi Choon*<sup>19</sup>. The plaintiff was arrested and detained under the provision of Restricted Residence Enactment, 1933 but was not produced

before the magistrate within twenty-four hours as enunciated in Article 5(4) of the Federal Constitution. Consequently, the Malaysian parliament amended the Article 5(4) of the Constitution and extinguished the detenu's right of presenting him before the magistrate within twenty-four hours as provided in Article 5(4) of the Constitution, if he was arrested under Restricted Residence Enactment, 1933. On the inspiration of observation laid down in the name of 'implied substantive limitation' by the Indian supreme court in *Kesavananda Bharati case*, the petitioner contended that there are implied limitations over the amending power of the parliament and being a fundamental right enunciated in Article 5, it was beyond the amending power of the parliament and could not be amended. However, the Federal Court Judge rejected the doctrine of implied substantive limitations and held that there were only certain procedural limitations and by following the required procedural limitation constitutional guarantees might be removed. Further, Raja Azlan Shah (Federal judge) averred that if the framers of the Constitution intended that Part II of the Federal Constitution was unamendable, they would have made it clear expressly. His Lordship further ruled that fundamental rights could be taken away by way of the amendment if the procedure in Article 159 was properly followed<sup>20</sup>.

His Lordship further observed that it is quite unconvincing that there were implied substantive limitations over the amending power of the parliament. In this context, the potent jurisdiction vested to the superior courts, a power of constitutional amendment through judicial verdict than the organ formally chosen under the Constitution for exercising of amending power<sup>21</sup>. However, it is respectfully stating that the doctrine of implied substantive limitation does not include conferring the power of amendment to the judicial organ, but it is a restriction upon the amending powers exercised by the parliament.

Wan Suleman, a member of the Bench stated the same observation but the reasoning was slightly changed. He ruled that fundamental rights can be detached pursuant to the procedure enshrined in Article 159 of the Federal Constitution. However, his lordship further held that although abridgment of constitutional guarantees by the parliament was in accordance with the Constitution, but before taking this step parliament to make ensure reasonableness.

However, it is not the scope of the court to inquire about the wisdom and necessity behind the abridgment of fundamental rights.

Indeed, there is a distinction between amendment and dismemberment<sup>22</sup>. The amendment includes alteration in the Constitution subject to consistent within the constitutional sphere and its spirit. While dismemberment includes changing in term of fundamentally revolutionary or reshaping the existing framework of the Constitution and it is thoroughly transformative, which may be authorized by an extraordinary body<sup>23</sup>. The same notion of the amendment also has been defined by the Indian Supreme Court in its verdict which observed that the word ‘*amendment*’ has Latin origin ‘*emend ere*’ means ‘*to correct*’. In relying on the word amendment in the perspective of Constitutionalism and democracy, it is noted that an amendment corrects the error of commission or omission and it modifies the system without changing of its fundamentals, i.e. an amendment operates within theoretical parameters of the existing Constitution<sup>24</sup>. Besides, in both articles 159 and 161E of the Federal Constitution, the amendment includes addition and repeal<sup>25</sup>. By inserting the term ‘repeal and amendment’ seems to include dismemberment as conceived by Albert. However, there is no separate procedure provided for repealing the provision of the Constitution. Therefore, both terms including ‘amendment’ and ‘repeal’ cannot be extended over the entire Federal Constitution. The framers of the Constitution did not recognize or intend ‘amendment’ or ‘repealing’ to result in the consequences of dismemberment. It is only valid when it was categorically stated through the amendment rules that the Constitution recognizes the various outcomes of amendment and dismemberment<sup>26</sup>. In this context, holistically and organically the foundation of the Constitution is amendment *per se*, particularly when Albert defines dismemberment as thoroughly transformative. Further, Yaniv Roznai has also argued in his book that amendment power is *sui generis power* and it is weaker than constituent power but greater than ordinary legislative power. In this context, it is delegated power granted to the parliament by the Constitution and it acts as trustee to the people<sup>27</sup>.

Moreover, in the presence of a written Constitution, the doctrine of the supremacy of parliament does not apply in Malaysia. The power of Parliament and State Legislatures in Malaysia is limited by the Constitution, and they cannot make

any law they please<sup>28</sup>. Additionally, in the purview of Articles 4(1), 128 and 162(6) which indicate that federal legislative body exercises its powers subject to the provisions of the Constitution. And these limitations are to be found in the scheme of the Constitution. Further, Lord Suffian also affirmed in a case titled *Ah Thian v. Government of Malaysia*<sup>29</sup> that the doctrine of supremacy of Parliament has no place in the Malaysian jurisprudence rather than the supremacy of the Constitution.

#### PHANG CHIN HOCK CASE, 1980

Second-time basic structure doctrine was presented again before the superior courts of Malaysia. Indeed, the appellant was held and charged with illegal possession of ammunition contrary to section 57(1)(b) of Internal Security Act, 1960. Accordingly, he was tried under the provisions of the Essential (Security Cases) Regulation 1975 enacted under the Emergency (Essential Powers) Ordinance, 1969 and sentenced to death. Subsequently, a Constitutional cover was provided to the Ordinance, 1969 by the parliament in the name of Emergency (Essential Powers) Act, 1979 in pursuance of Article 150(5)<sup>30</sup> of the Federal Constitution for the purpose of validating all regulations and all acts done under the Ordinance, 1969<sup>31</sup>.

There were various contentions which were being raised by the counsel of the appellant before the apex court. Firstly, the federal Constitution is the superior law of the State and any Statute enacted after Independence of Malaya which is repugnant with this Constitution shall, to the extent of the repugnancy, be invalid. The word “law” and “federal law” in Art 160(1) includes “any Act of Parliament” any Act of Parliament which amends the Constitution, as is allowed by Art. 159, is valid only if consistent with the Constitution. Secondly, it was also contended that if amendments enacted by Parliament even in compliance with amendment procedure as laid down in Article 159 and if it is repugnant with existing provisions of the Constitution, the Court should bring into consideration those amended provisions on the yardstick of basic structure doctrine and if found inconsistent, liable to be struck down. Thirdly, sections 2(4), 9(3) and 12 of the Emergency (Essential Powers) Act, 1979 (“Act 216”) are void as they destroy the basic structure of the Constitution<sup>32</sup>.

With regard to the contentions of the appellant respectively, the federal court responded that if the framer of the Constitution had intended that their successors should not be empowered exclusively in term of changing the whole Constitution, it would have been perfectly easy to mention expressly in the Constitution, however it does not appear over the face of the Federal Constitution. Further, in the purview of harmonious construction, the Lord President drew a distinction between the constituent power and legislative power and gave effect to both provisions. He observed that legislative power must be consistent with the Constitution as enshrined in Article 4(1) of the Federal Constitution. His Lordship further rejected the doctrine of basic structure theory and ruled that parliament may amend the Constitution in any way as it thinks fit even if inconsistent with the Constitution but that amendment should be pursuant to the required procedure as provided in Article 159 of the Constitution<sup>33</sup>.

Additionally, Lord Suffian responded to the second contention that Indian supreme court derived the implied substantive limitations over the amending power of the parliament from the Constitution which was conceived from Constituent Assembly and had preamble and directive principle of State policies. However, neither the federal Constitution contains preamble nor directive principles from which the same idea and philosophies can be inferred. Further, the Indian Constitution was not gifted by the British rulers. On the other hand, ready-made Federal Constitution was provided when the British surrendered its legal and political role over the Malaya<sup>34</sup>. Hence amendment made to the Constitution liable to be *intra vires* even though it contravened the existing provision of the Constitution. In other words, it seems that fundamental rights may be detached by of amendment even to the extent of total removal of any fundamental liberty by showing a required majority of the parliamentarians.

In contrast, the researcher respectfully disagrees with the aforementioned observations along with certain counter-arguments. The constituted parliament is the creation of Federal Constitution, 1957 and it is delegated by nature with regard to amending the Constitution irrespective of whether the Constitution was drafted by the Constituent Assembly or otherwise. Therefore, in this context, it cannot exercise its delegated powers by unlimited means. Further, it

is the creation of the Federal Constitution and how it can abrogate or change the identity of the same by using the amending powers. In addition, the Indian Supreme Court took the preamble under consideration for highlighting the extraordinary provisions in the Constitution. And it is not mandatory that basic structure must be extracted from the preamble or directive principles. It may be also shown from the whole scheme of the Constitution which may lead to discovering the un-amendable provisions entrenched in the Constitution.

Moreover, Low Hong Ping stated in his research article that the federal court did not hold evidently that parliament can extend its power in term of abrogating the Constitution. It was only observed that the parliament may amend the Constitution as it thinks fit as long as it follows the prescribed manner provided in the Constitution. Additionally, Harding argued as quoted by Ping that the federal court expressed its observation only in *obiter*, not in *ratio*. It is evident over the face of the judgment that question whether the parliament by using the amending power conferred under the Constitution can emasculate the basic structure of the Constitution had been deliberately left open to preserve the Constitution against extreme use of amending power<sup>35</sup>.

Secondly, it was also observed by Lord President that the Indian Constitution was framed by the Constituent Assembly, unlike the Federal Constitution. However, it is argued by the Chahil in his research article that although there is no preamble of the Federal Constitution but it does not mean that it was not a product of the People. It was a joint effort between British authorities and Malaysian people by their representatives of the respective States. Additionally, the Constitutional Commission was constituted popularly known as Lord Reid Commission. The report presented by the Commission went under significant amendments. These amendments were brought upon the basis of dissatisfaction and differences of opinions by the various Malay Rulers and political organizations. Indeed, the recommendations were forwarded by the United Malay National Organization through its General Assembly in order to alter the report drafted by the Reid Commission. In pursuance of these recommendations, the Malay Rulers and the Alliance parties conducted twenty-three meetings and brought certain substantial changings in the

draft which was previously submitted by the Reid Commission. And that was the outcome of the voice and will of the Malay peoples<sup>36</sup>. Furthermore, Lord President Suffian also himself cited that the draft of the Constitution was presented by the Royal Commission presided by Lord Reid. Wherein stated that;

Publish for public discussion and debate; an amended draft was agreed by the British government and the Malay Rulers and also by the then Alliance government; it was approved by the British parliament, by the Malayan Legislative Council (the then federal legislature) and by the legislature of every Malay State<sup>37</sup>

Moreover, his lordship was also observed that Indian Constitution was framed by the people of India in their Constituent Assembly and it is influenced the Indian courts to impose implied substantive limitation over the amending power of the Constitution. In this context, where the Malayan people had ample participation in framing the Malayan Constitution, this may similarly impose implied limitation over the amending power of Malaysian parliament with regard to protecting the Federal Constitution from abrogation of its basic structure<sup>38</sup>. Besides, it is argued by the Low Hong Ping that it is immaterial whether there was a representation of the people while drafting the Constitution in term of Constituent Assembly or not. It is very important that power conferred to the parliament in term of amending the Constitution is delegated by default and it is limited<sup>39</sup>.

#### INDUCTION OF BASIC STRUCTURE DOCTRINE IN THE MALAYSIAN JURISPRUDENCE

##### SIVARASA RASIAH CASE, 2010

The first time a formal entry of doctrine of basic structure was inducted in the Malaysian jurisprudence under the *Sivarasa Rasiah case, 2010*. The appellant preferred an appeal before the federal court and he was an advocate and solicitor. In addition, he was also representing a political party and a Member of Parliament. The appellant intended to contest an election of the Bar Council, the governing body of the Malaysian Bar. However, under sec. 46 A (1) of the Legal Profession Act 1976 he was not qualified. The appellant challenged the legality in the purview of fundamental rights as guaranteed under the

supreme law (i) that it violates his rights of equality and equal protection by Art. 8(1) of the Constitution; (ii) that it violates freedom of association by Art. 10(1)(c); and (iii) that it violates his right to personal liberty guaranteed by Art. 5(1). He prayed that section 46 A (1) of the Legal Profession Act shall be declared unconstitutional on the touchstone of Article 4 of the Constitution. Further, the Counsel of appellant also contended on behalf of the appellant that the fundamental rights guaranteed under Part II is part of the basic structure of the federal Constitution and Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure. Ultimately the federal court dismissed the appeal and ruled that impugned provision of the Legal Profession Act, 1976 was not a violation of fundamental rights as enunciated in the Article 5, 8 and 10 of the federal Constitution respectively<sup>40</sup>.

However, the Federal court forcefully observed by overlooking its own former approach regarding basic structure doctrine<sup>41</sup>. It was held as follows:

“...it is clear from the way in which the Federal Constitution is constructed that 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”<sup>42</sup>.

It was held by the Lord Gopal Sri Ram that unlike the United Kingdom, the doctrine of supremacy of parliament does not exist on the land of Malaysia wherein a written Constitution exists. Therefore, fundamental rights guaranteed under part II of the federal Constitution is a part of the basic structure of the Constitution<sup>43</sup>. Although the basic structure doctrine and amending powers of the parliament was not the prime issue in the contention. However, the federal court nonetheless referred to the basic structure doctrine at the beginning of the judgment. But most importantly it was also held that there is not a comprehensive list as to what amounts to a basic structure<sup>45</sup>.

##### SEMENYIH JAYA CASE, 2017

Secondly, in the next case titled *Semenyih Jaya*<sup>46</sup>, the doctrine was reaffirmed by the federal court of Malaysia. The appellant preferred an appeal before

the federal court against The Land Acquisition Act, 1960 which articulates the legal process by which the government may compulsorily acquire land held in private ownership. Previously, the Act vested the power to the judge of the high court in term of deciding appeals against the value determined by the Land Administrator to compulsorily acquired land. Consequently, Parliament made further various amendments in the Act and inserted section 40D. In the purview of this amendment, the judge is to be assisted by two professional land valuers. Concurrently the same amendment also removed the judge's power with regard to determining the value of the land and vested it solely to 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 arbitral authority is purely vested to the judicial organ. 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 even by the Parliament. Wherein, Parliament passed an Act, 1988 in term of amending Art 121(1) of the federal Constitution. 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 Article 121(1) means that the judicial power of the courts is derived from Federal legislation and not the Constitution.

It was ruled unanimously by the federal court that the doctrine of the basic structure of the constitution applies to our Federal Constitution. Secondly, the principle of the separation of powers and the doctrine of the independence of the judiciary are part of the basic structure of the Federal Constitution. In addition, the amendment in 1988 that purported to remove the judicial power of from the courts and make them subject purely to federal law was invalid because it violated the basic structure of the Constitution. Additionally, section 40D was unconstitutional because it violated the judicial power which was vested prior to 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<sup>47</sup>. Furthermore, Dr. Shad Saleem Faruqi also stated that in the purview of the above judgment the Federal Court summarized that the vesting of judicial power in favor of the civil courts formed part of the basic structure of the Constitution and could not be removed, even by constitutional amendment<sup>48</sup>.

#### INDRA GANDHI CASE, 2018

Thirdly, in *Indra Gandhi Case*<sup>49</sup>, 2018 the federal court's pronouncements speak loudly with regard to the importance of this fundamental doctrine. The appellant, Indra Gandhi was married with Patmanathan on April 10, 1993. The marriage was registered under the Law Reform (Marriage and Divorce) Act, 1976. After solemnizing the marriage three children were born. However, consequently, her husband converted to Islam and left her wife. Later on, the appellant received documents from her husband wherein it was mentioned that her three children had been converted to Islam and in pursuance, thereof the Pengarah Jabatan Agama Islam Perak had issued three certificates of conversion to Islam. The documents also showed that the Registrar of Muallafs had registered their children as Muslims. The appellant filed a petition for judicial review before the concerned high court and argued that the conversion was not in accordance with the prescribed procedure as enunciated in the Syariah Enactment of Perak and therefore impugned certificates were liable to be quashed. She further argued that conversion certificate issued by Muallafs beyond the jurisdiction and unlawful and it was also contravention of the provisions of sections 96, 106(b) of the Administration of the Religion of Islam (Perak) Enactment 2004, sections 5 and 11 of the Guardianship and Infants Act 1961 and Article 12(4) read together with Article 8 (2) of the Federal Constitution. Ultimately, the high court set a side impugned conversion certificate. The high court further ruled that Article 121(1A)<sup>50</sup> of the Federal Constitution does not confer jurisdiction for a constitutional interpretation on the 'Syariah courts<sup>51</sup>' to the exclusion of the civil courts and the high court had exclusive jurisdiction to hear the application<sup>52</sup>.

However, the Court of Appeal reversed the decree of the high court and observed that the ordinary courts had no jurisdiction of judicial review to deal with the impugned subject matter under Article 121 (1A). It is pertinent to mention

here that Article 121 (1A) was inserted through a constitutional amendment in 1988. It was further held that the matter was within the exclusive jurisdiction of the Syariah Court established by the State of Perak. Although, the court of appeal granted leave to prefer the second appeal before the federal court, the highest court of Malaysia. Resultantly, the apex court reversed the appeal and held that judicial power is inherited to the civil courts under Article 121 (1) and it is inextricably intertwined with their constitutional role as a check and balance over the administrative actions. In this context, the Syariah courts are not conferred with the power to review the administrative decision of the executive bodies and it is confined to the persons and subject matters listed in the State List. In addition, it was also observed that the power of judicial review is a basic component of the principle of separation of power and inherited to the basic structure of the Federal Constitution. Therefore, it cannot be abrogated or amended by Parliament even by way of a constitutional amendment. Additionally, it may not be conferred upon bodies other than the High Courts, unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence<sup>53</sup>. Additionally, learned Zainun Ali FCJ stated essential fabric included separation of power, rule of law and protection of minorities and the role of the judiciary was the ultimate arbiter of the lawfulness of State action<sup>54</sup>.

#### IMPLIED LIMITATION OVER THE AMENDING POWER OF THE MALAYSIAN PARLIAMENT

Besides, the above essential fabrics of the Federal Constitution as pointed out in Indira Gandhi Case, 2018 by federal Judge Zainul that there are certain implied substantive limitations which negate the exclusive sovereignty of the parliament as claimed by the parliament over the amending powers. Such as, Elster articulated as quoted by Ping Low that Article 150 (5) of the Federal Constitution states that parliament can enact any law without adopting constitutional procedural requirement over any matter during the course of an emergency. Further, Article 150(6) of the Constitution articulates that any enactment passed during an emergency shall be continued to be valid even if it is repugnant to the Constitution. Moreover, a proviso of the same provision under

156(6A) stipulates six constitutional subjects which shall be remained immune from the unlimited powers of the parliament even during the state of emergency. It includes native laws, the custom of Malays, custom in the State of Sabah or Sarawak, Islamic law, citizenship, and languages<sup>55</sup>. Specifically mentioning these six subjects indicates special importance in the Constitution and it may be helpful in term of identifying the Constitutional spirit and objectives of the framers of the Constitution. Therefore, in the purview of the scheme of the federal constitution, these self-imposed constitutional limitations halt the parliament from unreasonable driving in case of state of emergency and indicate implied substantive limitation over the amending power of the parliament.

Secondly, Article 150(7) states that any enactment made during the state of an emergency cease to effect after the six month's expiration of emergency. In this context, it prevents any enactment provision to be remained a part of the Constitution for long-lasting. In connection of this subclause Dr, Shad Saleem Faruqi also articulated that in the light of Article 150(7) any law enacted or Ordinance promulgated under Article 150(5)(6) cannot be remained a part of Statutes permanently rather than temporarily. Furthermore, Constitutional amendments cannot be made during the state of emergency under Article 150 (5) & (6) of the federal Constitution. However, Proclamation of emergency may be used to suspend the Constitutional guarantees but not to amend the Constitution<sup>56</sup>. If the constitution was amended during the state of emergency, it can be struck down by the superior court.

Thirdly, Article 155 (1) states that an overseas national belongs to Common Wealth countries can sue any national of the Federation of Malaysia on the basis of reciprocity, if the same rights are conferred to the Malaysians in Common Wealth countries. However, Part XV of the Federal Constitution states that any proceeding against or by the Yang Di-Pertuan Agong and the Rulers shall be brought before the special court established under the Article 182(1) of the federal Constitution. The Part XV was inserted through the Constitutional amendment in 1993.

In the above context, a citizen of Singapore had filed a suit against Sultan Haji Ahmad Shah, Sultan of Pahang before a special court in 1996<sup>57</sup>. Initially, a question was raised whether a Singaporean national in his personal capacity has



the right to sue against the Sultan of Pahang. The special court interpreted Article 182 read with Article 155(1) of the federal Constitution. It was ruled by the special court that a national of Singapore cannot be granted a right to sue in his personal capacity against Sultan of Pahang, where the same right had not been conferred to the Malaysian against President of Singapore. Further, Chief Justice of Malaysia, a head of the special court held that “even if parliament were to confer by express language under Article 182, any right on Singapore citizen to sue the Yang di-Pertuan Agong or Ruler, such conferment of right is unlawful under Article 155 and is of no effect”.

Although there is no express correlation between the above two provisions of the Constitution. However, on the basis of the above observation, neither Article 182 can be isolated from the rest of the Constitution nor amended without considering the spirit of Article 155(1) of the Constitution. It is a well-settled rule of the interpretation of Statutes that each document has to be read holistically and organically. Otherwise, observation of Articles and Clauses individually from the rest of the Constitution may mislead the readers, because it is not a merely unconnected bunch of separate provisions and clauses but having different importance that must not be overlooked. In addition, Dr, Shad has also argued that there are echoes of the basic structure doctrine here and it indicates that amending the power of the parliament is substantively limited in the purview of the judgment delivered in the case of *Begum Abdullah v. Sultan Haji Ahmad Shah*<sup>58</sup>. Article 155(1) may be considered pre-requisite qualification for the application of Article 182 (3) of the Federal Constitution.

### CONCLUSION

In the purview of the above discussion, it concludes that the although parliament claims exclusive jurisdiction over amending the Constitution and initially this claim was also endorsed by the superior courts of Malaysia and rejected the notion of doctrine of implied substantive limitation. However, gradually the doctrine of supremacy of parliament does not remain to exist in the jurisprudence of Malaysia. This is true that the Constitution is a living document and it can be changed with the passage of time to achieve the goals in the best interest of the State. This is why the Federal Constitution has

laid down the framework of the amendment as set out in Article 159. However, any amendment that seeks to undermine the Constitutional spirit or its original identity is not merely an amendment but destruction of the same document, which is beyond the jurisdiction of the delegated parliament. Whereas, amendments must be made to make the Constitution more perfect, effective and meaningful.

Besides, in the context of various provisions of the Federal Constitution, it indicates that there are certain Constitutional provisions which are un-amendable and beyond the reach of amending powers of the delegated parliament. If the Parliament goes beyond its jurisdiction, then being a guardian of the Constitution, a judicial organ has to make ensure the identity of the Constitution. Under Article 159 of the Federal Constitution, a word ‘amendment’ and ‘repeal’ cannot be extended over the basic structure of the Constitution. Further, in the purview of certain formal procedural limitations and couple of Emergency Provisions including six subjects, the scheme of the Federal Constitution reflects the concept of implied substantive limitation and the basic structure of the Constitution. Finally, Malaysia has adopted the doctrine of basic structure doctrine and observed that fundamental rights, judicial review, and separation of power are a basic component of the basic structure of the Federal Constitution. However, it does not suffice list and it may vary from case to case in given circumstances.

### NOTES

- <sup>1</sup> Lee, H. P. *Constitutional Conflicts in Contemporary Malaysia* (2nd ed.): Oxford University Press, 2017, p.8
- <sup>2</sup> Report of the Federation of Malaya Constitutional Conference Held in London in January and February 1956 Cmd 9714 (1956).
- <sup>3</sup> Lee, H. P. *Constitutional Conflicts in Contemporary Malaysia* (2nd ed.): Oxford University Press, 2017.
- <sup>4</sup> The Working Committee comprised four representatives of the Malay Rulers, four representatives of the Alliance Government, and the High Commissioner, the Chief Secretary, and the Attorney General representing the British Government.
- <sup>5</sup> Groves, H. E. Notes on the Constitution of the Federation of Malaya. (1962) *Journal South-East Asian History*.
- <sup>6</sup> Article 159(3) of the Federal Constitution
- <sup>7</sup> Hamid, N. A., Ismail, N. N., Salleh, K., Harun, N., & Bidin, A. The Doctrine of Basic Structure of the Malaysian Constitution: A Study of Framework. (2017) 25, *Pertanika Journal of Social Science. & Humanities* 163-170
- <sup>8</sup> Burke, E. *Reflections on the Revolution in France* (L. G. Mitchell Ed.): Oxford University Press, 2009.

- <sup>9</sup> Eisgruber, C. L. *Constitutional Self-Government*. England: Harvard University Press, 2009.
- <sup>10</sup> Albert, R. Amending Constitutional Amendment Rules. (2015) 13(3), *International Journal of Constitutional Law*, 655-685. doi:10.1093/icon/mov040
- <sup>11</sup> Ducháček, I. D. *Rights & Liberties in the World Today – Constitutional Promise and Reality*: Clio Press., 1973, pp.32-36
- <sup>12</sup> Kelbley, C. A. Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality, 2017. *Rawls and Law* (pp. 55-104): Routledge.
- <sup>13</sup> Groves, H. E. The Constitution of Malaysia: The Malaysia Act 1963. (1963) 5(2), *Malaya Law Review*, 245-275.
- <sup>14</sup> The Government of the State of Kelantan v. The Government and Tunku Abdul Rehman Putra Al-Haj [1963] 1 MLJ 355
- <sup>15</sup> Sheridan, L. A. Constitutional Problems of Malaysia. (1964) 13(4), *International & Comparative Law Quarterly*, 1349-1367.
- <sup>16</sup> Lee, H. P. *Constitutional Conflicts in Contemporary Malaysia* (2nd ed.): Oxford University Press, 2017.
- <sup>17</sup> Faruqi, S. S. *Document of Destiny: The Constitution of the Federation of Malaysia*: Star Publications (Malaysia) Berhad, 2008.
- <sup>18</sup> Harding, A. The Death of a Doctrine? Phang Chin Hock v. Public Prosecutor. (1979) 21(2), *Malaya Law Review*, 365-374.
- <sup>19</sup> Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187.
- <sup>20</sup> Ping, L. H. The Doctrine of Unconstitutional Constitutional Amendment in Malaysia: In Research of Our Constitutional Identity. (2018) 45(2), *Journal of Malaysian and Comparative Law*, 53-70.
- <sup>21</sup> Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187.
- <sup>22</sup> Albert, R. Formal Amendment Rules: Functions and Design, 2018.
- <sup>23</sup> Albert, R. Constitutional Amendment and Dismemberment. (2018) 43, *Yale Journal of International Law*, 1-84.
- <sup>24</sup> Shri Raghunathrao Ganpatrao v. Union of India, AIR 1993 Supreme Court 1267
- <sup>25</sup> Article 159 (6) & 161E (5) of the Federal Constitution
- <sup>26</sup> Albert, R. Formal Amendment Rules: Functions and Design, 2018.
- <sup>27</sup> Roznai, Y. *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*: Oxford University Press, 2017.
- <sup>28</sup> Shaari, M. N. G. "Unconstitutional Constitutional Amendments?": Exploring The 1973 Sabah Constitutional Amendment That Declared Islam the State Religion. (2014) 32(2), *Kajian Malaysia*, 1-21.
- <sup>29</sup> Ah Thian v. Government of Malaysia [1976] 2 MLJ 112
- <sup>30</sup> Subject to Clause (6a), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.
- <sup>31</sup> Phang Chin Hock v. Public Prosecutor [1980] 1 MLJ 70
- <sup>32</sup> Harding, A. The Death of a Doctrine? Phang Chin Hock v. Public Prosecutor. (1979) 21(2), *Malaya Law Review*, 365-374.
- <sup>33</sup> Chahil, S. K. A Critical Evaluation of the Constitutional Protection of Fundamental Liberties: The Basic Structure Doctrine and Constitutional Amendment in Malaysia. (2002) *Malayan Law Journal*, 3, xii-xxviii.
- <sup>34</sup> Ananth, S. The Basic Structure Doctrine: Its Inception and Application in Malaysia, (2016) 1, *Malayan Law Journal*, cxlvi-clxx.
- <sup>35</sup> Ping, L. H. The Doctrine of Unconstitutional Constitutional Amendment in Malaysia: In Research of Our Constitutional Identity, (2018) 45(2), *Journal of Malaysian and Comparative Law*, 53-70.
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- <sup>37</sup> Phang Chin Hock v. Public Prosecutor [1980] 1 MLJ 70
- <sup>38</sup> Chahil, S. K. A Critical Evaluation of the Constitutional Protection of Fundamental Liberties: The Basic Structure Doctrine and Constitutional Amendment in Malaysia, (2002) 3, *Malayan Law Journal*, xii-xxviii.
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- <sup>40</sup> Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 2 MLJ 333
- <sup>41</sup> Shaari, M. N. G. 'Unconstitutional Constitutional Amendments?': Exploring The 1973 Sabah Constitutional Amendment That Declared Islam the State Religion, (2014) 2(2), *Kajian Malaysia*, 31-21.
- <sup>42</sup> Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 2 MLJ 333
- <sup>43</sup> Tew, Y. On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics, (2016) 25(3), *Washington International Law Journal*, 673-696.
- <sup>44</sup> Ping, L. H. The Doctrine of Unconstitutional Constitutional Amendment in Malaysia: In Research of Our Constitutional Identity. (2018) 45(2), *Journal of Malaysian and Comparative Law*, 53-70.
- <sup>45</sup> Ananth, S. "The Basic Structure Doctrine: Its Inception and Application in Malaysia" (2016) 1, *Malayan Law Journal*, cxlvi-clxx.
- <sup>46</sup> Semenyih Jaya Sdn Bhd v Land Administrator of the District of Hulu Langat [2017] 3 MLJ 561 (FC)
- <sup>47</sup> Yunus, H. The Malaysian Constitution and the Basic Structure Doctrine. (2018) *Legal Herald*.
- <sup>48</sup> Faruqi, S. S. Restoring Constitutional Supremacy - Reflecting on the Law. *The Star Online*. (2018 February, 15). Retrieved from (Accessed on 2019, June 28).
- <sup>49</sup> Indira Gandhi v The Director of Islamic Affairs Perak [2018] 1 MLJ 545 (FC)
- <sup>50</sup> The high courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.
- <sup>51</sup> There is a parallel system of state Syariah Court, which has limited jurisdiction over matters of state Islamic law (Shariah). The Syariah Courts have jurisdiction only over Muslim in the matters of family law and religious observances, and can generally only pass sentences of not more than three years imprisonment, a fine of up to RM5,000, and/or up to six strokes of the cane.

- <sup>52</sup> Indira Gandhi v The Director of Islamic Affairs Perak [2018] 1 MLJ 545 (FC)
- <sup>53</sup> Indira Gandhi v The Director of Islamic Affairs Perak [2018] 1 MLJ 545 (FC). Pp. 42-51
- <sup>54</sup> Ping, L. H. The Doctrine of Unconstitutional Constitutional Amendment in Malaysia: In Research of Our Constitutional Identity. (2018) 45(2), *Journal of Malaysian and Comparative Law*, 53-70.
- <sup>55</sup> Ping, L. H. The Doctrine of Unconstitutional Constitutional Amendment in Malaysia: In Research of Our Constitutional Identity. (2018). 45(2), *Journal of Malaysian and Comparative Law*, 53-70.
- <sup>56</sup> Faruqui, S. S. *Document of Destiny: the Constitution of the Federation of Malaysia*: Star Publications (Malaysia) Berhad, 2008.
- <sup>57</sup> Faridah Begum Abdullah v. Sultan Haji Ahmad Shah [1996] 1 MLJ 667.
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Muhammad Hassan  
Fakulti Undang-undang  
Universiti Malaya  
Petaling Jaya, Selangor  
Email: Hnsial@gmail.com

Johan Shamsuddin bin Sabaruddin  
Fakulti Undang-undang  
Universiti Malaya  
Petaling Jaya, Selangor  
Email: Johans@um.edu.my