UNRAVELLING THE BASIC STRUCTURE DOCTRINE IN MALAYSIA

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Abstract

In simplest terms, a constitution of a nation sets out the form of government, the limits of government and the goals for exercise of governmental power. Being a country's foundational charter delineating its structural framework, it should be a 'living document' ie something that is able to adapt and change to remain ever relevant with the 'changing circumstances, needs and aspirations of a nation and its people'. In Malaysia the Federal Constitution provides for a mechanism to amend itself, to keep up with the evolution of time. These powers of amendment are vested solely with the Malaysian Parliament. However, in recent times, there has been raging an extremely intriguing battle within the highest echelons of the Malaysian Judiciary on the invisible limitations on the powers of the Malaysian Parliament to amend the Federal Constitution. This invisible limitation has come to be known as the 'basic structure doctrine'. In a nutshell, what this doctrine entails is that there are covert limitations on Parliament's powers to amend the Federal Constitution, if those amendments result in the 'basic structure' of the Federal Constitution being destroyed. This article intends to seek the meaning of a 'basic structure' of a constitution, what this means in the context of the Malaysian Federal Constitution, how the Malaysian Judiciary has dealt with this issue, and the future of the basic structure doctrine in Malaysia.

Keywords: Basic structure doctrine, Federal Constitution, constitutional amendment, implied limitation on amendment powers, constitutional supremacy

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I INTRODUCTION

In simplest terms, a constitution is a nation's 'document of destiny'[1] setting out the form of government, the limits of government and the goals for exercise of governmental power.[2] It is said to have an abstract and a concrete meaning.[3] In an abstract sense, a constitution is a system of laws, customs and conventions that define the organs of government, and regulates the relationship between these organs among themselves, and with the citizens of a country.[4] It lays the philosophical basis of the fundamental or core values on which a society is founded, embracing political, economic, religious, moral and cultural values. In other words, it is the very identity of a country. In a concrete sense, a constitution safeguards the fundamental interests of the nation as well as its citizens and regulates the relationship between the Federation and the component States.[5] In Malaysia, our 'document of destiny' is known as the Federal Constitution.

Being a country's foundational charter delineating its structural framework of a nation, it should be a 'living document' i.e. something that is able to adapt and change to remain ever relevant with the 'changing circumstances, needs and aspirations of a nation and its people'.[6] It is therefore perhaps apt that the Federal Constitution itself provides for a mechanism to amend itself, to keep up with the evolution of time. These powers of amendment are vested solely with the Malaysian Parliament. However, in recent times, there has been raging an extremely intriguing battle within the highest echelons of the Malaysian Judiciary on the invisible limitations on the powers of the Malaysian Parliament to amend the Federal Constitution. This invisible limitation has come to be known as the 'basic structure doctrine'. In a nutshell, what this doctrine entails is that there are covert limitations on Parliament's powers to amend the Federal Constitution, if those amendments result in the 'basic structure' of the Federal Constitution being destroyed.

The primary objective of this article is to trace the development of the basic structure doctrine within Malaysia. Although its origins may be found in Indian jurisprudence, the doctrine has undergone a process of localisation. For this reason, this article does not undertake a comparative study of constitutional law between India and Malaysia. References to cases from other jurisdictions,

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1 Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia* (Star Publications (Malaysia), 2008) page 1.

2 Kenneth Clinton Wheare, *Modern Constitution* (Oxford University Press, 1982) 1.

3 O H Phillips, P Jackson and P Leopold, *Constitutional and Administrative Law* (Sweet & Maxwell, 8th ed, 2001) 5[1-005].

4 Ibid.

5 J C Fong, *Constitutional Federalism in Malaysia* (Sweet & Maxwell, 2nd ed, 2016) 219.

6 Ibid.

particularly Indian authorities, are made only insofar as they provide context to the evolving interpretations of the basic structure doctrine by Malaysian courts, and are by no means intended as a comparative analysis. In Malaysia today, the basic structure doctrine has evolved into a uniquely Malaysian concept, tied closely to the principle of constitutional supremacy in *Article 4 of the Federal Constitution*. This article therefore seeks to examine the doctrine as it stands within the Malaysian constitutional framework, independent of its foreign beginnings.

II THE BASIC STRUCTURE DOCTRINE

In order to understand the meaning of the basic structure doctrine, we must turn to the Indian case of *Kesavananda Bharati v State of Kerala* ('*Kesavananda Bharati'*),[7] which, to all intents and purposes, started the entire 'basic structure' ball rolling in Malaysia. According to this case, all provisions of a constitution, including fundamental rights, can be amended. However, Parliament cannot alter the *basic structure* of a constitution: the amendment power does not 'include the power to abrogate or change the identity of the constitution or its basic features.'[8] The Court in this case went on to declare that the basic structure of the Indian Constitution includes the supremacy of the Constitution, rule of law, judicial review, access to justice, secularism, republican and democratic forms of government, federalism, separation of powers and the federal character of the (Indian) Constitution.

Subsequently, in *State of Bihar v Bal Mukund Sah and Ors,*[9] the court went on to name the separation of powers between legislature, executive and judiciary, and an independent judiciary to be basic structures of the Indian Constitution. In *Kihoto Hollohan v Zachilhu*,[10] the court went further and declared that free, fair and periodic elections form the basic structure of the Indian Constitution. In *M. Nagraj v Union of India*,[11] the court tried to formulate a general test to decide if an amendment is against the basic structure of the constitution: it should not be an amendment of any particular article but an amendment that adversely affects or destroys the wider concepts or principles in the constitution, or changes the identity of the constitution. In *R. Coelho v State of Tamil Nadu*,[12] the rights guaranteed under Part III of the Indian Constitution (Fundamental Liberties), were declared to be a basic structure of the Indian Constitution.

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7 [1973] AIR 1461. ('*Kesavananda Bharati*').
8 Ibid, 1572.
9 [2000] AIR 1296.
10 [1993] AIR 12.
11 [2007] AIR 71.
12 [2007] AIR 861.

In Singapore, Sundaresh Menon CJ in *Yong Vui Kong v Public Prosecutor* opined that:

> …in order for a feature to be considered part of the basic structure of the Constitution, it must be something fundamental and essential to the political system that is established thereunder…[13]

> …silence is not probative either way of the existence of the basic structure as the basic structure is not tied to the framers' intentions but to the function inherent to any constitution. The basic structure represents the core minimum of what is required for any constitution to work.[14]

From the above authorities, it can be seen that the basic structure doctrine seeks to protect the very foundation of a constitution; and therefore, the very foundation of a nation: this includes concepts such as the supremacy of the constitution, rule of law, fundamental liberties, that all discretionary power is subject to legal limits, good and orderly government, judicial power, judicial review and free and fair elections.

However, although paved with good intentions, there are inherent uncertainties shrouding the basic structure doctrine in the Malaysian context. The first question to be asked is, what is the basic structure of the Malaysian Federal Constitution? Must it only refer to what is expressly provided for in the Federal Constitution (for example federalism and fundamental liberties), or can it also include abstract concepts which are not specifically mentioned in the Federal Constitution but are nevertheless practised (for example separation of powers, rule of law and independence of the judiciary)? Secondly, who is to decide what is the basic structure of the Federal Constitution – Parliament or the Judiciary? This, it is submitted, is the biggest problem with the basic structure doctrine – it is so subjective that sometimes neither Parliament nor the Judiciary are equipped to decide; for example, the special rights given to Sabah and Sarawak when these States federated with the Federation of Malaya to form Malaysia – these may be a basic structure to East Malaysians but not to West Malaysians. In such a situation, who is the most competent arbiter for these issues – Parliament, whose members are voted in directly by the citizens of Malaysia, or the Judiciary, whose function is to be the 'first vanguard and the final bastion of defense against any challenge to the [Federal Constitution] and the laws legislated by Parliament'?[15]

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13 [2015] SGCA 11.

14 Ibid 11.

15 *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan* [2021] 3 MLJ 759, 855 [285] (Hasnah Hashim FCJ).

III THE MALAYSIAN POSITION

A *The Federal Constitution*

On 1 February 1948, the Federation of Malaya was established pursuant to the Federation of Malaya Agreement entered into between the British Government and the Malay rulers. The Agreement established a Constitution of the Federation which provided for a federation consisting of the Malay States and Malacca and Penang, with a strong central government.[16] In essence, the aim of the Federation of Malaya was for self-government in Malaya.[17] Under the 1948 Agreement, each of the Malay states would have a Malay officer known as '*Menteri Besar'*.[18] In other words, each State and Settlement was to retain its own individuality but all were to be united under a strong central government.[19]

In July 1955, the first elections to the Federal Legislative Council were held. The Alliance, consisting of the three political parties representing the three main races in the Federation of Malaya ie the United Malay National Organisation (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC), won fifty-one of the fifty-two seats for elected members. Y.T.M. Tunku Abdul Rahman Putra al-Haj, the President of UMNO and leader of the Alliance, became the Chief Minister of the new Government.[20]

In 1956, the Reid Commission was set up to 'make recommendations for a form of constitution for a fully self-governing and independent Federation of Malaya within the Commonwealth'.[21] The commission recommended, among others, for the inclusion of provisions establishing a strong and central government without neglecting the autonomous powers of the states, safeguarding the rights and privileges of the rulers in their own states, the appointment of the head of states from among the state rulers and the granting of a general nationality in the Federation while preserving the special rights and privileges of the Malays and the legitimate interests of other communities.[22] This, then, was the birth of the Federal Constitution.

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16 Zuliza Mohd Kusrin, 'The History of the Formation of the Federation of Malaysia' (2010) 4 *Malayan Law Journal* cxxxvi.

17 Ibid at page cxxxvii.

18 Ibid.

19 Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission*, (Report, 1957) ch 2 para 22 ('*Reid Commission Report*'). See also *Federation of Malaya Agreement 1948*.

20 Ibid ch 2 para 32.

21 Ibid ch 1 para 1.

22 Ibid ch 1 para [10]–[11].

On 9 July 1963, the Malaysia Agreement was signed in London for the formation of Malaysia, which would consist of, among others, the Federation of Malaya, Sabah and Sarawak.[23] The Malayan Parliament then made changes to the 1957 Federal Constitution to make it a Federal Constitution for Malaysia. Malaysia was officially formed on 16 September 1963. Perhaps the most important provision in the Federal Constitution is *Article 4(1)* which declares the supremacy of the Constitution (as opposed to the supremacy of Parliament). As boldly stated in *Ah Thian v Government of Malaysia*,[24] 'the doctrine of Parliamentary supremacy is not applicable in Malaysia as the Federal Constitution is the supreme law of the land'. Therefore, all laws passed by Parliament or any of the State Legislatures must be consistent with the provisions of the Federal Constitution.

The Federal Constitution drafted for the self-governing Federation of Malaya, as later extensively amended for the formation of Malaysia, is therefore the document that gives Malaysia its identity as a nation. Seen in this light, one could say that the entire Federal Constitution is the basic structure of the Federation. This, in turn, would mean that the entire Federal Constitution cannot be amended. But there is *Article 159*.

B *Amending the Federal Constitution*

The Federal Constitution is not cast in stone. It may be amended to keep up with changing times. In this regard, the Reid Commission in drafting the original Constitution wrote:

> Method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the Constitution provides – by way of Act of Parliament to amend the Constitution, must be passed in each House by a majority of at least two-thirds of the members voting. This is a sufficient safeguard for the States because the majority of members of the Senate will represent the States.[25]

The conditions and procedures for amending the Federal Constitution are provided for in the Constitution itself, primarily in *Articles 159* and *161E*. *Article 159 of the Federal Constitution* envisages four ways in which the Federal Constitution may be amended. Firstly, some parts of the Constitution may be amended by a simple majority in both Houses of Parliament such as

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23 Singapore was initially part of the newly formed Malaysia in 1963, but left the federation in 1965. See Mohamed Suffian, *Tun Mohamed Suffian's An Introduction To The Constitution of Malaysia* (Pacifica Publications, 3rd ed, 2007) 14.

24 [1976] 2 MLJ 112, 113.

25 *Reid Commission Report* (n 19) ch IV para 80.

that required for the passing of any ordinary law, as enumerated in *Article 159(4)*. Secondly, articles which are set out in *Article 159(5)* may be amended by a two-thirds majority in both Houses of Parliament and with the consent of the Conference of Rulers. These articles include, among others, the status of the national language.[26] Thirdly, articles which are of special interest to the East Malaysian States as set out in *Article 161E* which requires a two-thirds majority in both Houses of Parliament and additionally, the consent of the Yang di-Pertua Negeri of the State concerned. This includes, among others, the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court, as well as the powers of the State Authority to control the entry of, or residence by persons who do not belong to these States.[27] Lastly, amendments made pursuant to *Article 159(3)* (which is basically all other Articles in the *Federal Constitution* apart from those excepted under *Article 159(4))*, and amendments to any law passed under *Article 10(4)*) requires a majority of two-thirds in both Houses of Parliament.[28]

C (*Riveting) Case law*

According to a leading constitutional expert in Malaysia,[29] the 'seeds of the idea that Parliament can amend the Constitution but cannot destroy its basic structure' was planted in the shores of Malaysia as early as 1963 in the case of *The Government of the State of Kelantan v The Government of The Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*.[30] After the Malaysia Agreement was signed on 9 July 1963, the Federal Parliament passed the Malaysia Act to amend *Article 1(1) and (2) of the Federal Constitution* to provide, *inter alia*, for the admission of the new States and for the alteration of the name of the Federation to that of 'Malaysia'. The Government of the State of Kelantan commenced proceedings for declarations that the Malaysia Agreement and the *Malaysia Act* were null and void or alternatively, not binding on the State as the Malaysia Act would abolish the 'Federation of Malaya' thereby violating the Federation of Malaya Agreement 1957.

It was argued, *inter alia*, that the Ruler of Kelantan should have been a party to the Malaysia Agreement, and that the proposed changes needed the consent of each of the constituent States including Kelantan, and this had not

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26 *Federal Constitution* (Malaysia) art 152 ('*Federal Constitution*').

27 Ibid arts 161E (2), (4).

28 See *Federal Constitution* (n 26) art 159. See *also Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (Raja Azlan Shah FJ).

29 Shad Saleem Faruqi, 'Restoring constitutional supremacy', *The Star* (Kuala Lumpur, 15 February 2018).

30 [1963] 29 MLJ 355 *('The Government of the State of Kelantan')*.

been obtained. The High Court held that Parliament in enacting the Malaysia Act acted within the powers granted to it by *Article 159 of the Federal Constitution*. The Malaysia Agreement was signed for the 'Federation of Malaya' in accordance with *Articles 39 and 80(1) of the Federal Constitution* and there is nothing in the Federal Constitution requiring consultation with any State Government or the Ruler of any State. Thomson, CJ held as follows:

> …In doing these things [passing the Malaysia Act] I cannot see that Parliament went in any way beyond its powers or that it did anything *so fundamentally revolutionary as to require fulfilment 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. It is true in a sense that the new Federation is something different from the old one. It will contain more States. It will have a different name. But if that state of affairs be brought about by means contained in the Constitution itself and which were contained in it at the time of the 1957 Agreement, of which it is an integral part, I cannot see how it can possibly be made out that there has been any breach of any foundation pact among the original parties. In bringing about these changes Parliament has done no more than exercise the powers which were given to it in 1957 by the constituent States including the State of Kelantan.[31] (emphasis added)

The judgement appears to imply that there may be instances where Parliament does something (for example, amend the Federal Constitution) in a manner so 'fundamentally revolutionary' so as to impinge upon the Federal Constitution itself, in which case that act of Parliament may be impermissible and untenable.

However, in *Loh Kooi Choon v Government of Malaysia ('Loh Kooi Choon')*,[32] the Federal Court deigned to recognise the concept of a basic structure doctrine in Malaysia and held that Parliament can amend any provision of the Federal Constitution as long as the procedures for amendment are adhered to:

> 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

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31 Ibid 359.

32 [1977] 2 MLJ 187 ('*Loh Kooi Choon*').

> 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. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies…[33]
>
> When this is done [the amended article] becomes an integral part of the Constitution, it is the supreme law, and accordingly it cannot be said to be at variance with itself.[34]

The Federal Court went on to state that the doctrine of implied restrictions on the power of constitutional amendment 'concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power'.[35] This statement, it is submitted, is not very accurate, because in checking the substance of a constitutional amendment, the court is not making a 'judicial legislation', in that it is not replacing the constitutional amendment with another of its own drafting; but merely checking Parliament's scope of duty which is in fact the duty of the Judiciary.

However, the Federal Court in this case was full of surprises; as having all but declared the non-existence of the basic structure doctrine in Malaysia, the Federal Court nevertheless identified three basic concepts evident in the Federal Constitution:

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.[36]

This case is problematic for several reasons. Firstly, it left open the question as to whether the power to amend includes the power to abrogate a fundamental right. In this case, the Federal Court said that 'whilst abrogation of the fundamental rights may not come within the ambit of *Article 159*, reasonable abridgment of such rights are constitutional; that Parliament should decide

33 Ibid 189.
34 Ibid.
35 Ibid 190.
36 Ibid 188.

when such amendment is necessary and it is not for this court to question the wisdom or need for such amendment',[37] which means that it is for Parliament to decide whether a fundamental right should be abrogated, presumably to the exclusion of any interference by the Judiciary. However, the Federal Court also said that the 'ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it'. Who, then, is to decide whether an amendment to the Federal Constitution is constitutional – Parliament or the Judiciary?

Secondly, whether intentionally or otherwise, the Federal Court left the question of whether the Constitution has a basic structure open:

> In my view, a distinction must be made between those parts of the Constitution which the framers thought should not suffer change and those that can be changed.[38]

The anomalies in this case leave the question of whether there is a basic structure to the Federal Constitution wide open, which question is still left a mystery till to date.

In *Phang Chin Hock v Public Prosecutor ('Phang Chin Hock')*[39] (another case against any implied limitation on Parliament's powers to amend the Federal Constitution and hence against the basic structure doctrine), it was held as follows:

> Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding the manner and form prescribed by the Constitution itself…
>
> If amendment made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, Article 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention.[40]

This dictum has a dangerous meaning, i.e. that an amendment is valid even if it is inconsistent with the Federal Constitution, as long as it complies with the procedures for amendment set out in the Federal Constitution itself. This must

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37 Ibid 193.
38 Ibid 189.
39 [1980] 1 MLJ 70 (*'Phang Chin Hock'*).
40 Ibid 75.

be read with caution, because procedure is one thing, but surely the substance of the amendment is also important.

The Federal Court in this case also distinguished the Indian cases relied on for the importation of the basic structure doctrine into Malaysia by stating that unlike India which had a Preamble in the Indian Constitution assuring the dignity of the individual and the unity of the nation, 'so much so that there are limits in the powers of the Indian Parliament to amend the Constitution of that country',[41] there is no Preamble in the Malaysian Federal Constitution and therefore it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as it is in India.

In this case the Federal Court declined to draw a conclusion whether there is an implied limitation on the power of Parliament in not destroying the basic structure of the Constitution, stating that the fear of abuse of power by Parliament is no bar for denying its existence.

However, one important and enduring feature of this case is the interpretation of the word 'law' in *Article 4(1) of the Federal Constitution*. In this case, the Federal Court drew a distinction between Acts affecting the Constitution and ordinary laws enacted in the ordinary way, and held that it is only federal law of the latter category that is meant by 'law' in *Article 4(1)* i.e. only such law must be consistent with the Constitution. It follows that an Act of Parliament amending the Constitution may be valid even if inconsistent with the Constitution. If that is the case, does that mean that judicial powers are ousted from ever having to interpret federal laws amending the constitution, as there will no longer be a question of constitutionality of these laws? If so, does this not amount to a usurpation of the court's power, thereby suborning the courts to Parliament?

In *Mark Koding v Public Prosecutor* ('*Mark Koding'*),[42] the Federal Court held that the accused's (a Member of Parliament) right of free speech in Parliament given by *Article 63(2) of the Federal Constitution* does not form part of the basic structure of the Constitution. Therefore, the Court found it unnecessary to decide whether the Constitution may be so amended as to destroy its basic structure.[43]

In *Public Prosecutor v Dato' Yap Peng ('Dato' Yap Peng')*,[44] the respondent was charged with criminal breach of trust. The Deputy Public Prosecutor tendered a certificate issued by the Public Prosecutor under S*ection 418A of the Criminal Procedure Code* ('CPC') to transfer the case to the High Court. The Respondent argued that *Section 418A of the CPC* violates *Article*

41 Ibid 73 (Suffian LP).
42 [1982] 2 MLJ 120 ('*Mark Koding*').
43 Ibid 123.
44 [1987] 2 MLJ 311.

121(1) of the Federal Constitution as the power to transfer cases is a judicial power. The Supreme Court held that *Section 418A of the CPC* which gave power to a non-judicial officer (Public Prosecutor), was void for being *ultra vires* of *Article 121(1) of the Federal Constitution*. Here, then, was a semblance of recognition of a basic structure of the Federal Constitution – that the doctrine of separation of powers dictated that the judicial power of the Federation vested in the Judiciary and the Judiciary alone.

Then came the dark ages of the judicial crisis in 1988 in Malaysia, which ultimately resulted in the unceremonious removal of three Supreme Court judges, including the then Lord President.[45] Following closely in the heels of the judicial crisis, in 1988 two significant amendments were made to the Federal Constitution via the *Constitution (Amendment) Act 1988 ('Act A704')*.

The first was the amendment to *Article 145* to give more power to the Attorney-General to, *inter alia*, determine the courts in which any proceedings shall be instituted.[46] This then begs the question: since *Article 145* had been successfully amended to give more power to the Attorney-General, in particular in choosing the venue in which to institute proceedings, has this now become a basic structure of the Federal Constitution? Or is it the case that since *Article 145* could be amended in the first place, that the powers of the Attorney-General were never, and is not, a basic feature of the Federal Constitution?

The second (and arguably more controversial) amendment was to *Article 121(1)* dealing with the judicial power of the Federation. Previously, *Article 121(1)* provided that the judicial power of the Federation vested in the two High Courts and in such inferior courts as may be provided by federal law. Presently, *Article 121(1)* provides that the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.[47] The pivotal question that is the subject of many subsequent decisions of the Federal Court is, whether the amendment to *Article 121(1)* of the Federal Constitution abrogated judicial power so that the Judiciary was suborned to Parliament?

About 20 years later, the scope of 'judicial power' as provided in the post-amended *Article 121(1)* was given due consideration in the majority decision of the Federal Court in *Public Prosecutor v Kok Wah Kuan ('Kok Wah Kuan')*.[48] The issue was whether *Section 97(2) of the Child Act 2001* was unconstitutional for contravening the doctrine of separation of powers

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45 See Mohamed Salleh Abas, *May Day for Justice: The Lord President's Version* (Magnus Books, 1989).

46 See *Constitution (Amendment) Act 1988* (Malaysia) s 10 ('*Act A704*'); *Federal Constitution* (n 26) art 145(1A).

47 See *Act A704* (n 46) s 8.

48 [2008] 1 MLJ 1 ('*Kok Wah Kuan'*).

embodied in the Federal Constitution by consigning to the Executive, judicial power vested in the courts. The question which was a thorn on the side of the Federal Court was what really is the doctrine of separation of powers; since it is not expressly found under any specific provision in the Federal Constitution. In this case, the Federal Court held that 'no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine [of separation of powers]:[49]

> …But, to what extent such 'judicial powers' are vested in the two High Courts depend on what Federal law provides, not on the interpretation of the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?[50]

The Federal Court drew an analogy with democracy and stated as follows:

> The Constitution provides for elections, which is a democratic process. That does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore void… So, in determining the constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matter, not a political theory by some thinkers.[51]

The Federal Court in this case stated that the doctrine of separation of powers was not definite or absolute, by citing the example of various Malaysian statutes which allow a Minister in charge of an Act of Parliament to make rules or regulations. A Minister comes under the Executive organ; regulations are by-laws and thus within the realm of the Legislature. Finally, the Federal Court in this case held that even if judicial power still vested in the courts, in law, the nature and extent of the power depended on what the Constitution provides, not what some political thinkers think 'judicial power' is.[52] In respect of the two High Courts, the Constitution provides that they shall have such jurisdiction and powers as may be conferred by or under federal law. Therefore, reference must be made to the federal law to know the jurisdiction and powers of the High Courts.[53]

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49 Ibid 16 [17].
50 Ibid 14–15.
51 Ibid 16–17 [17]–[18].
52 Ibid 17 [22].
53 Ibid 17 [21].

However, it is worthwhile to point out the strong dissenting judgment of Richard Malanjum, CJ (Sabah and Sarawak) (as he then was) who opined that to restrict the jurisdiction of the Courts to what Parliament may provide by way of Federal law, not only infringes the doctrine of separation of powers, but suborns the Judiciary to Parliament, which cannot be the case:

> The amendment… should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the 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'.[54]

The basic structure doctrine was officially accepted into Malaysian jurisprudence in the Federal Court case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor ('Sivarasa')*[55] where the Federal Court declared that the fundamental liberties guaranteed under *Part II of the Federal Constitution* formed part and parcel of the basic structure:

> Further, 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.*[56] (emphasis added)

Very unfortunately, the basic structure doctrine and the power of Parliament to amend the Constitution were not issues in this case. Hence, while it was laudable that the Federal Court exercised some judicial activism in recognising the basic structure doctrine as a solid concept in Malaysia, it remains an *obiter* in the annals of Malaysian jurisprudence.

In the celebrated Federal Court case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case ('Semenyih'),*[57] the appellant challenged the constitutionality of *Section 40D of the Land*

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54 Ibid 21 [38].

55 [2010] 3 CLJ 507 (*'Sivarasa'*).

56 Ibid 517 [8]. This paragraph was cited in the Court of Appeal case of *Muhammad Hilman Idham & Ors v Kerajaan Malaysia & Ors* [2011] 9 CLJ 50.

57 [2017] 3 MLJ 561.

Acquisition Act 1960[58] which provided that two assessors who are valuers are to sit in the High Court with the Judge; they and not the Judge are the final arbiters on the amount of compensation to be awarded. One of the issues before the Court was whether *Section 40D of the Act* contravenes *Article 121(1) of the Federal Constitution*.

It would be noted that notwithstanding Act A704, the words 'judicial power' remains in the shoulder note of *Article 121*. In declaring that 'the shoulder note in a written Constitution furnishes some clue as to the meaning and purpose of the article',[59] the Federal Court held that *Article 121(1) of the Federal Constitution* vests judicial power (i.e. the power to adjudicate in civil and criminal matters)[60] only in the courts:

> The key question should be: Who can exercise judicial powers, i.e. decision-making powers, in the civil courts…? The answer is obvious. Only judges as appointed under art 122B of the Federal Constitution and no other, can exercise decision making powers in our courts…[61]

The Federal Court went on to state that the amendment to *Article 121(1)* had the effect of undermining the judicial power of the Judiciary and impinges on the doctrine of separation of powers and the independence of the Judiciary.[62] Parliament does not have power to amend the Federal Constitution to the effect of undermining these features as this appears to install Parliamentary supremacy and consequently, allowed the Executive a fair amount of influence over the matter of the jurisdiction of the courts:[63]

> With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in Article 4(1).[64]

> The judicial power of the court resides in the Judiciary and no other as is explicit in Article 121(1) of the Constitution.[65]

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58 *Land Acquisition Act 1960* (Malaysia) s 40D was included by way of the *Land Acquisition (Amendment) Act 1997* ('*Act A999'*) which came into force on 1 March 1998.

59 *Semenyih* (n 57) 588 [66].

60 See also Public *Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 which defined 'judicial power' as being the power vested in the court to adjudicate on civil and criminal matters brought to it.

61 *Semenyih* (n 57) 586 [54].

62 Ibid 590 [74].

63 Ibid 591 [75]–[77].

64 Ibid 591 [75].

65 Ibid 593 [86].

> The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are as sacrosanct in our constitutional framework.[66]

Finally, the Federal Court found *Section 40D of the Land Acquisition Act 1960* to be *ultra vires* the Federal Constitution and was to be struck down.

The renaissance of the basic structure doctrine was further heightened in the Federal Court decision in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam & Ors and other appeals ('Indira Gandhi').*[67] This case concerned the judicial powers of the civil courts vis-à-vis the Shariah courts in the light of *Article 121(1A)* which appeared to curtail the powers of the former in favour of the latter. In this case, Zainun Ali FCJ (the same Judge in *Semenyih*) held that judicial power could not be removed from the civil courts, and it could not be bestowed on a statutory body. This is because the power of judicial review could be gleaned from *Articles 4(3), 4(4), 128(1), 128(2) and 130 of the Federal Constitution:*

> Thus the amendment inserting cl. (1A) in art. 121 does not oust the jurisdiction of the civil courts nor does it confer judicial power on the Syariah courts. More importantly, Parliament does not have the power to make any constitutional amendment to give such an effect; it would be invalid, if not downright repugnant, to the notion of judicial power inherent in the basic structure of the Constitution.[68]

> The powers of judicial review and of constitutional or statutory interpretation are pivotal constituents of the civil courts' judicial power under art. 121(1). Such power is fundamentally inherent in their constitutional role as the bulwark against unlawful legislation and executive actions. As part of the basic structure of the Constitution, it cannot be abrogated from the civil courts or conferred upon the Syariah courts, whether by constitutional amendment, Act of Parliament or State legislation.[69]

> It cannot be excluded from the civil courts and conferred upon the Syariah courts by virtue of Article 121(1A).[70]

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66 Ibid 593 [90].
67 [2018] 3 CLJ 145 ('*Indira Ghandi'*).
68 Ibid 186 [86].
69 Ibid 189–90 [98].
70 Ibid 190 [101].

It was further held that the basic structure of a constitution is 'intrinsic to, and arises from, the very nature of a constitution',[71] that the Federal Constitution was premised on certain underlying principles, and that the features of the basic structure could not be abrogated or removed by a constitutional amendment. The Federal Court held that the basic structure of the Federal Constitution includes the separation of powers, the rule of law, the protection of minorities and the judicial power of the civil courts:

> The power of the Judiciary to ensure the legality of executive action is consistent with its constitutional role in a framework based on the separation of powers, which as discussed above, forms the basic structure of the Constitution. As civil courts are courts of general jurisdiction, the exclusion of their jurisdiction is not to be readily inferred.'[72]

The Federal Court went on to state that 'the role of the Judiciary is as the ultimate arbiter of the lawfulness of state action. The power of the courts is a natural and necessary corollary of the rule of law'.[73] In order to perform this function, 'the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution'.[74]

In *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal,*[75] the issue before the Federal Court was whether the decision of the Attorney-General to grant or refuse his consent under *Section 9 of the Government Proceedings Act 1956* in respect of trust proceedings was justiciable and reviewable by the courts. In unanimously answering this issue in the affirmative, the five-man panel of the Federal Court affirmed the pronouncement of the Federal Court in *Semenyih Jaya* that 'the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the constitution.'[76]

In *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) ('JRI Resources')*,[77] a panel of nine Federal Court judges were tasked with considering whether *Sections 56 and 57 of the Central Bank of Malaysia Act 2009* were unconstitutional for empowering the Shariah Advisory Council to give rulings on Shariah issues, thereby usurping the court's judicial powers. In

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71 Ibid 169 [33].
72 Ibid 195 [120].
73 Ibid 166 [27].
74 Ibid 172 [42].
75 [2019] 3 MLJ 443 ('*Chin Chee Kow*').
76 Ibid 469 [81].
77 [2019] 3 MLJ 561 ('*JRI Resources'*).

a majority of six to three, the Federal Court decided that *Sections 56 and 57 of the Central Bank of Malaysia Act 2009* were not unconstitutional as the final decision still lay with the courts. However, what is important to note in this case is that all nine judges expressly agreed with the decision in *Semenyih Jaya* and *Indira Gandhi* that the doctrine of separation of powers forms the basic structure of the Federal Constitution, so that the judicial power of the Federation vests with the courts and the courts alone.[78] This was reiterated by the Federal Court in *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor,*[79] where it was held that all 'judicial power vests solely in the civil superior courts as per the basic structure of our [Federal Constitution] ingrained in [article] 121.'[80]

In *Alma Nudo Atenza v Public Prosecutor & Anor Appeal ('Alma Nudo Atenza')*,[81] a panel of nine Federal Court judges recognized the principle of separation of powers and the power of the ordinary courts to review the legality of State action as being sacrosanct and form part of the basic structure of the Federal Constitution:[82]

> In fact courts can prevent Parliament from destroying the 'basic structure' of the [Federal Constitution]… And while the [Federal Constitution] does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the [Federal Constitution] but also for violation of the doctrines or principles that constitute the constitutional foundation.[83]

The Federal Court in this case also declared the rule of law as a 'constitutional fundamental'.[84] Up until this point, it would appear that the basic structure doctrine had taken root in Malaysian jurisprudence and embraced concepts such as separation of powers, rule of law, independence of the judiciary, fundamental liberties of individuals and protection of minorities. The basic structure doctrine continued to be consistently upheld by some judges of the Federal Court even when they were delivering minority judgments.

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78 See *JRI Resources* (n 77) 579 [4], 583 [17] (Richard Malanjum CJ) (dissenting); 608 [115]–[116], 610 [121]–[122] (David Wong CJ) (Sabah and Sarawak); 617 [154] (Azahar Mohamed FCJ); 650 [284]–[285] (Mohd Zawawi Salleh FCJ).

79 [2021] 2 MLJ 181 ('*Rosliza bt Ibrahim*').

80 Ibid 217 [103].

81 [2019] 4 MLJ 1('*Alma Nudo Atenza'*).

82 Ibid 26 [72]. See also *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765, 818 [112] (Richard Malanjum CJ).

83 Ibid 26 [73].

84 Ibid 35 [108].

For example, in *The Speaker of the Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v Ting Tiong Choon & Ors and other appeals*,[85] David Wong, CJ (Sabah and Sarawak) in delivering the minority judgement of the Federal Court, reiterated that the separation of powers is a basic structure of the Federal Constitution, along with the rule of law which encompasses natural justice:[86]

> The point here is that just because the Federal Constitution does not say something expressly, that in itself does not mean that it is not there, impliedly. If we study our Federal Constitution properly and appreciate it in context, then one would realise that there is implied in that supreme document the doctrine of separation of powers.[87]

In *Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener)*,[88] David Wong, CJ (Sabah and Sarawak) and Nallini Pathmanathan, FCJ (both delivering dissenting judgments), held that federal civil law is 'intrinsically secular in nature and applicable to all citizens':

> The structure of the Federal Constitution in the present context is such that a clear divide is maintained between civil law, which is intrinsically secular in nature and applicable to all citizens on the one hand, and Muslim personal law on the other, which is confined to State legislation promulgated in accordance with the State List and applicable only to Muslims. This clear demarcation between the Federal and State Legislatures is an essential or intrinsic feature of the Federal Constitution, and ought not to be violated or transgressed. To assimilate or import state law or List 2 matters in the construction, implementation or application of Federal Law would be to violate the internal architecture of the carefully constructed and circumscribed structure of the Federal Constitution…[89]

However, the tide turned against the basic structure doctrine in Malaysia in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor ('Maria Chin').*[90] In this case, the majority of four Federal Court judges in a seven-man panel rejected the basic structure doctrine outright as being a foreign concept which had no place in Malaysian jurisprudence. The issue in this case centred around the constitutionality of an ouster clause contained in *Section 59A of the Immigration Acts 1959/63*. The majority took the view that the impugned section was constitutionally valid.

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85 [2020] 4 MLJ 303 ('*Ting Tiong Choon*').
86 Ibid 347 [104].
87 Ibid 338 [74].
88 [2020] 2 MLJ 277 ('*Jabatan Pendaftaran Negara v A Child*').
89 Ibid 349–350 [275]. See also the judgment at 338 [213] (David Wong CJ) (Sabah and Sarawak).
90 [2021] 1 MLJ 750 ('*Maria Chin*').

The majority decision of the Federal Court in this case held that the second part of *Article 4(1) of the Federal Constitution* (laws that are inconsistent with the Federal Constitution are void to the extent of the inconsistency) 'requires it to be read in conjunction with any other article of the Federal Constitution before it can take effect'; it 'does not operate by itself and on its own'.[91] On *Article 121(1) of the Federal Constitution*, while the Federal Court accepted that 'judicial power remains and will always remain with the Judiciary', the availability of remedy for enforcement of rights may be abrogated or limited by federal law.[92]

With regard to the basic structure doctrine, having identified it as an 'Indian concept',[93] the Federal Court stated as follows:

> The difficulty with the doctrine is that 'basic structure' is not confined to the written terms of the Federal Constitution. It has been extrapolated to include a doctrine of law, in this case the doctrine of separation of powers. This leads to a situation where a law that is duly passed by Parliament is rendered void for offending the doctrine of separation of powers even where it is not inconsistent with the express terms of the Federal Constitution. Herein lies the paradox.[94]
>
> What the proposition amounts to is to elevate the status of the doctrine of separation of powers above that of the Federal Constitution. This is a dangerous proposition as it practically transforms the doctrine of separation of powers into the supreme law of the land in place of the Federal Constitution, effectively putting an end to constitutional supremacy that this country subscribes to as enshrined in art 4(1) of the Federal Constitution which declares that 'This Constitution shall be the supreme law of the Federation.[95]
>
> …The most far-reaching implication of the decision [in Sivarasa] is that Parliament has no power by any means whatsoever to amend or remove any 'basic structure' of the Federal Constitution, not even by recourse to art 159… This means all 'basic structures' of the Federal Constitution, whatever they are and without exception, must remain untouched by Parliament forever and in perpetuity, for better or for worse.[96]

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91 Ibid 899 [523].
92 Ibid 906 [542].
93 Ibid 918 [580].
94 Ibid 915 [571].
95 Ibid 922 [600].
96 Ibid 919 [585].

The Federal Court was also unamused with the fact that what is a 'basic structure' is open to interpretation and is to be determined by the courts on a case-to-case basis:

> …More will no doubt be added to the list. The proposition if accepted means that the stable doors are now wide open and the horses are ready to bolt out.[97]

With the greatest of respect, it is submitted that these statements by the majority in the Federal Court are not accurate. It is a matter of interpretation for articles in the Federal Constitution to be construed in line with accepted jurisprudential principles forming the backbone of any and every sovereign, democratic and independent nation. Therefore, it is open for the Federal Court to interpret *Articles 4 and 121 of the Federal Constitution* as housing the doctrine of separation of powers and independence of the judiciary, so that when there is a complaint of infringement of the doctrine of separation of powers affecting judicial powers, it could in fact be said to be an infringement of *Articles 4 and 121*.

It is interesting to note that the Federal Court in this case nevertheless appears to have embraced the idea of constitutional supremacy housed in *Article 4(1)*, even though the term 'constitutional supremacy' is not expressly spelt out in *Article 4(1)*. Imagine if Parliament amends this article to say that 'all laws passed by Parliament shall be the supreme law of the Federation', can this be allowed? Would it not offend the very identity of the Federal Constitution, rendering it all but illusory? Is it not the duty of the courts to protect the integrity of the Federal Constitution at all costs?

The total rejection of the basic structure doctrine continued in *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals ('Rovin Joty')*,[98] where the majority of the Federal Court said that there is 'no single provision in the [Federal Constitution] that can claim superiority over the other provisions'.[99] In other words, all articles in the Federal Constitution are equally important.

On the separation of powers, the Federal Court said that since our constitutional structure is based on the Westminster model, there are bound to be certain overlapping functions and powers of the three branches of government so as to say that there exists a lesser degree of separation.[100] On the basic structure, the court asked the question what are the provisions that form the basic structure of the Constitution? There is no basis or underlying

97 Ibid 921 [595]–[596].
98 [2021] 2 MLJ 822 ('*Rovin Joty'*).
99 Ibid 915 [346].
100 Ibid.

power to enable the courts to do this. As the concept of basic structure is vague and indefinite, it would be left open to each Judge to come up with what each of them would term as 'basic structure', which leads to uncertainty. Further, there is no definite or applicable test of guidance as to what is, and how to define the basic structure.[101] The Federal Court went on to say that in the matters of interpretation, between the implicit concept and the express textual provision, the express textual provision shall take precedence in the principles of interpretation.[102] Therefore, to hold the view that what constitutes basic structure in our Federal Constitution cannot be amended, would go against the clear and express provision of *Article 159*.[103] Challenging the constitutionality of an Act of Parliament must be against any of the provisions of the Federal Constitution itself; it cannot be against 'some foreign basic structure concept'.[104]

The Federal Court, in a strongly worded judgment, stated thus:

> One must bear in mind of the dangers of relying on concepts/theories which had developed mostly in foreign countries, as they evolved from the historical, social and political context of foreign nations. The basic structure concept which took root in an alien soil under a distinctly different Constitution and differs from our own historical and constitutional context, should not be pressed into use in aid of interpretation of our very own [Federal Constitution]. There is a need for deeper analysis of the rationale and specific historical background which underpins such foreign doctrines, no matter how popular in may seem…[105]

The Federal Court also, it is respectfully submitted, superficially differentiated *Sivarasa*, *Semenyih* and *Indira Gandhi* by stating that in those cases, there were no attempts to amend any of the provisions of the Federal Constitution to warrant the importation of the basic structure concept.[106] However, there still appears to be some rays of hope for the basic structure doctrine – the Federal Court also said that 'the concept of basic structure may be applicable where the impugned legislation seeks to amend the Constitution'.[107]

It should also be pointed out that there is in *Rovin Joty* a very strong, robust and powerful dissenting judgment by Nallini Pathmanathan, FCJ, where Her Ladyship, in accepting *Semenyih*, *Indira Gandhi* and *Alma Nudo Atenza* to

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101 Ibid 939–940 [409]–[414].
102 Ibid 939 [412].
103 Ibid 940 [413].
104 Ibid 940 [414.
105 Ibid 940 [415].
106 Ibid 941–942 [419].
107 Ibid 955 [470].

be the 'current and trite position',[108] declared that *Article 4(1) of the Federal Constitution* 'enshrines the twin fundamental pillars of a constitutional democracy, namely the rule of law and the doctrine of separation of powers'.[109] According to Her Ladyship, it is *Article 4(1)* that empowers the judiciary to ascertain the constitutionality of a legislation or statutory provision enacted by Parliament,[110] because it is impossible to 'ascertain whether a law is consistent or inconsistent with the [Federal Constitution], until and unless a challenge is made as to its constitutionality on the basis of'[111] *Article 4(1)*. In other words:

> …Parliament under art 121 may enact laws specifying, arranging and describing the powers of the courts, which are not detailed in the [Federal Constitution], in accordance with the foundational principles of the rule of law and separation of powers as set out in art 4(1) of the [Federal Constitution].[112]

Any other interpretation would render Article 4(1) 'otiose' and 'nugatory'.[113]

One last thing to note about *Rovin Joty* is that it is no longer considered to be good law, because a review application[114] was allowed, and the case is now pending re-hearing in the Federal Court.[115]

In *Zaidi bin Kanapiah v ASP Kahirul Fairoz bin Rodzuan and other cases ('Zaidi')*,[116] the basic structure doctrine was given the kiss of life and resurrected by the Federal Court in a majority judgment. Tengku Maimun, CJ (majority on the basic structure doctrine, minority on the constitutional validity of *Section 4 of the Prevention of Crime Act 1959*) valiantly held that in rejecting the basic structure doctrine, the majority in *Maria Chin* and *Rovin Joty* 'decided on a point which parties were not at variance and which point was not therefore an issue' before the court and therefore, those decisions do not form the *ratio decidendi*, and 'cannot be treated as having any binding effect on subsequent cases'.[117]

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108 Ibid 858 [106].
109 Ibid 846 [70].
110 Ibid 846 [66].
111 Ibid 846 [68].
112 Ibid 860 [116].
113 Ibid 846 [68].
114 Pursuant to the *Rules of the Federal Court 1995* (Malaysia) r 137.
115 See *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 5 MLJ 320 (unanimous decision of the Federal Court comprising of five judges). See also *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356, 376 [47].
116 [2021] 3 MLJ 759 ('*Zaidi*').
117 Ibid 793 [67].

Her Ladyship then went on to extrapolate that the basic structure doctrine was not solely a creation of the Indian Courts, but could be attributed in principle to the *Grundnorm* theory developed by the Austrian jurist Hans Kelsen in his 'Pure Theory of Law':

> …Changing the basic features of the [Federal Constitution] would result in a change of the *Grundnorm* or the first Constitution of this country and thus effectively eliminate the very foundation of Malaysia itself. That, in essence, is the thrust of the [basic structure doctrine].[118]

Her Ladyship also distinguished *Phang Chin Hock* and *Maria Chin* which stated that the word 'law' in *Article 4(1) of the Federal Constitution* only referred to ordinary law and not laws that amended the Constitution. In this case it was held that 'law' includes any constitutional amendment effected via federal law.[119] The Chief Justice also explained that the basic structure doctrine means that Parliament may amend the Constitution without amending the central tenets of the Constitution which is supreme, and that this does not mean that any doctrine, foreign or otherwise, is more supreme than the Federal Constitution:[120]

> In other words, we need not look elsewhere to know that basic structure or basic concept, whatever term one may want to use, is engraved within the very fabric of our art 4(1)[121]

Her Ladyship stated that *Act A704* was not in itself unconstitutional; but the effect of the interpretation given to it by the courts was unconstitutional. Hence, it was a question of interpretation and in holding that judicial powers must at all times be vested in the courts, the courts looked at the concept of separation of powers and that it is a concept ingrained in the basic structure of our Constitution.

However, it should be noted that one of the Federal Court judges in this case, Hasnah Hashim FCJ, stated in no uncertain terms that the position taken in *Maria Chin* and *Rovin Joty* ie that the basic structure doctrine had no place in Malaysia is the true position of the law and thus binding.[122] Subsequently, the basic structure doctrine was rejected yet again in a majority judgment in *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors*.[123]

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118 Ibid 795 [72].
119 Ibid 797 [82]–[85].
120 Ibid 798 [88].
121 Ibid 800 [95].
122 Ibid 850 [272].
123 [2021] 5 MLJ 474,494 [36]; 537 [160]; 538 [162–3]; 539 [165–6].

Then in *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor*,[124] a panel of seven Federal Court judges were tasked to consider whether the constitutional amendments to *Article 66,*[125] that deemed a Bill of Parliament as being assented to by the Yang di-Pertuan Agong ('YDPA') 30 days after it was presented to him, violated the basic structure of the Federal Constitution for interfering with the YDPA's traditional role in the legislative process. The Federal Court unanimously held that the constitutional amendments to *Article 66* were constitutional. This is because before and after the constitutional amendments, there was no removal of the YDPA's assent, which is still necessary in order for a Bill to become law.[126]

Be that as it may, on the issue of the basic structure doctrine, the majority of five judges rejected the basic structure doctrine, stating in no uncertain terms that it was not a part of Malaysian jurisprudence[127] but that even if it was (for a moment), the royal assent 'does not and is not a feature of that principle'.[128]

Vernon Ong, FCJ, in delivering the dissenting judgment, stated that the Federal Constitution in essence embodies three basic concepts (which is reminiscent of the Federal Court judgment in *Loh Kooi Choon*): (i) an individual's fundamental civil, cultural, economic and political rights; (ii) the distribution of sovereign power between the States and the Federation; and (iii) distribution of sovereign power among the Executive, Legislative and Judicial branches of government…[129]

In *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener),*[130] a panel of nine Federal Court judges unanimously declared that judicial power of the Federation (which includes judicial review) remains solely reposed in the civil courts, as ingrained in *Articles 4(1) and 121(1) of the Federal Constitution*.[131] In specifically referring to *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*,[132] and rejecting the majority decision in *Kok Wah Kuan*,[133] the Federal Court had thus clearly and unequivocally revived the basic structure doctrine not as a foreign or alien concept, but one that is housed in our *Article 4(1) of the Federal Constitution*.

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124 [2021] 6 MLJ 68 ('*Anwar Ibrahim*').

125 See *Constitution (Amendment) Act 1983* (Malaysia) s 13 ('*Act A566*'); *Constitution (Amendment) Act 1984* (Malaysia) s 2 *('Act A585'); Constitution (Amendment) Act 1994* (Malaysia) s 8 *('Act A885')*.

126 *Anwar Ibrahim* (n 124) 94 [51].

127 Ibid 123 [134].

128 Ibid 124 [139].

129 Ibid 88 [30].

130 [2022] 2 MLJ 356.

131 Ibid 369 [24]–[27].

132 Ibid 369 [24], 377 [64].

133 Ibid 377 [64].

In *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors ('Dhinesh')*,[134] the Federal Court unanimously reiterated that the basic structure doctrine is housed in our very own *Article 4(1) of the Federal Constitution*,[135] thereby dispelling the fears of some of the more xenophobic judgments that Malaysia does not need foreign or international doctrines landing on our shores:

> In summary therefore, in this jurisdiction there is no real necessity to invoke the basic structure doctrine as it is encompassed within art 4(1) of the [Federal Constitution]. The concern of the incorporation of a 'foreign' doctrine is unwarranted given art 4(1) of the [Federal Constitution]. In point of fact, the existence of art 4(1) of the [Federal Constitution] affords a clear, definitive and express basis for ensuring that the structure and function of the [Federal Constitution] are not altered beyond the limits set out in the [Federal Constitution] itself.[136]

The Federal Court also held that the doctrine of separation of powers is housed in *Article 4(1) of the Federal Constitution*, as it empowers the courts to render enacted law void if inconsistent with the Federal Constitution,[137] and further declared the following as the basic structure of the Federal Constitution:

> …art 3 of the [Federal Constitution] relating to religion, the fundamental liberties in Part II of the [Federal Constitution], the citizenship of the state, the role of the YDPA and the Malay rulers as the heads of religion, the division of power between the Executive, Legislature and the Judiciary with the YDPA at the head, all comprise the basis on which the state and social order was prescribed, which are central and fundamental to the peace and stability of the nation,[138] constitutional supremacy,[139] judicial review,[140] judicial power and separation of powers.[141]
>
> The content of the [Federal Constitution] therefore ensures permanence, validity and durability to the basis of governance in the state.[142]

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134 [2022] 3 MLJ 356 ('*Dhinesh*').
135 Ibid 394 [120].
136 Ibid 409 [193].
137 Ibid 394 [118].
138 Ibid 395 [123].
139 Ibid 411 [201].
140 Ibid 411 [199].
141 Ibid 412 [201].
142 Ibid 395 [124].

Therefore, the source or root of judicial power is conferred by *Article 4(1) of the Federal Constitution* 'as expounded or articulated further' in *Article 121 of the Federal Constitution*.[143] As explained by Her Ladyship, this would make sense for two significant reasons. The first is that if judicial power can be confined to, or be limited by federal law, it would follow that the judiciary would have no power to strike down that very same federal law for inconsistency with the Federal Constitution.[144] Secondly, if ouster clauses were to be given effect to as being part of 'federal law', it follows that the judiciary would be precluded from scrutinizing the constitutionality of such a provision.[145] Therefore, the Federal Court ruled that the only harmonious way of dealing with these anomalies is by interpreting *Article 4(1)* as the source of judicial power, and that the word 'law' in *Article 4(1)* cannot be confined to ordinary law, but must necessarily include constitutional amendments.

D *What is the basic structure of our Federal Constitution?*

The Federal Court's statement in *Rovin Joty* that no one article is superior over another article in the Federal Constitution is attractive in its own way, in that if all articles in the Federal Constitution are equally important, it may then be said that the entire Federal Constitution *is* the basic structure of Malaysia. However, it is respectfully stated that this statement is inaccurate. This is because within the Federal Constitution itself, it becomes apparent that some articles are more important than others. This can be seen from the amendment procedures in *Articles 159 and 161E of the Federal Constitution* which clearly state that some articles may only be amended by two thirds majority in both Houses of Parliament, plus the consent of the Conference of Rulers, or the Yang di-Pertua Negeri of Sabah and Sarawak. When compared to articles that may be amended only by simple majority or two thirds majority, it can be said that the former articles are more important than the latter.

Areas which need special majority *plus* the consent of Conference of Rulers include: (i) *Article 10(4)* allowing Parliament (with the consent of the Conference of Rulers) to pass laws to restrict freedom of speech or public discussion over certain 'sensitive' issues such as the status and sovereignty of Rulers, national language and language of other communities, citizenship and special rights and privileges accorded to the Malays and the native population of Sabah and Sarawak;[146] (ii) *Articles 38, 70 and 71(2)* on the status, privileges, honours and dignity of the institution of the Rulers; (iii) *Articles 63(4) and*

143 Ibid 843 [270].
144 Ibid 413 [205]–[206].
145 Ibid 414 [211].
146 See *Constitution (Amendment) Act 1971* (Malaysia) ('*Act A30'*) which came into force on 10 March 1971.

72(4) to remove parliamentary privilege from any member of Parliament or State Legislature when he is charged with an offence under a law enacted under *Article 10(4)*, or under the *Sedition Act 1948* as amended by the *Emergency (Essential Powers) Ordinance No. 45 of 1970*;[147] (iv) *Article 152* on national language; and (v) *Article 153* on the special protection of Malays and natives of Sabah and Sarawak.

Meanwhile, amendments requiring two thirds majority in both Houses of Parliament as well as the concurrence of the Yang di-Pertua Negeri of Sabah or Sarawak include the following matters:[148] (i) Malaysian citizenship and the equal treatment of persons born or resident in the State; (ii) the constitution and jurisdiction of the High Court in Sabah and Sarawak, and the appointment, removal and suspension of its Judges; (iii) the State's legislative and executive powers and financial arrangements between the Federation and the State; (iv) religion and language in the State, and the special treatment of natives of the State; (v) the quota of Members of Parliament allocated to the State in proportion to the total number of Members of Parliament; and (vi) immigration issues.[149]

Finally, the rights of States vis-à-vis their boundaries may also be considered as a basic structure, as the alteration of State boundaries requires the consent of the State whose boundary is affected and of the Conference of Rulers,[150] and the consent of the State must be expressed by a law passed by the Legislature of that State.[151]

On the other hand, while cases like *Sivarasa* declares fundamental liberties under *Part II of the Federal Constitution* as being part of the basic structure, *Articles 149* (on subversion) and *150* (on emergency) allows for certain fundamental liberties to be suspended, including *Articles 5, 9, 10 and 13*,[152] except with regard to seven matters: Islamic law, Malay customs, native law or customs of Sabah and Sarawak, religion, citizenship and language. Thus, it can be said that even among the fundamental liberties of individuals, some rights are more important than others.

147 PU(A) 282/70.
148 See *Federal Constitution* (n 26) art 161E(2).
149 See ibid art 161E(4).
150 See ibid arts 2(b), 1(4).
151 See *Selangor Enactment No. 4 1973* (Malaysia); *Federal Territory of Labuan Enactment 1984* (Malaysia).
152 *Federal Constitution* (n 26) arts 149(1), 150(6).

Quite apart from the express wordings of the Federal Constitution, our Federal Court has declared the following to be basic structures of the Federal Constitution:

Concepts	Cases
Fundamental liberties of individuals, distribution of power between the States and the Federation, separation of powers between the Executive, Legislative and Judiciary branches of government	• *Loh Kooi Choon* (1977) • *Datuk Seri Anwar Ibrahim* (2021) (minority) • *Dhinesh* (2022)
Separation of Powers	• *Dato' Yap Peng* (1987) • *Semenyih Jaya* (2017) • *Indira Gandhi* (2018) • *JRI Resources* (2019) • *Alma Nudo Atenza* (2019) • *Maria Chin* (2021) (minority) • *Dhinesh* (2022)
Judicial Powers of the Federation vests with the Judiciary (civil courts) (Art 4 and Art 121)	• *Dato' Yap Peng* (1987) • *Semenyih Jaya* (2017) • *Indira Gandhi* (2018) • *JRI Resources* (2019) • *Rosliza bt Ibrahim* (2021) • *Maria Chin* (2021) (minority) • *SIS Forum* (2022) • *Dhinesh* (2022)
Fundamental Liberties in Part II of the Federal Constitution	• *Sivarasa* (2010) • *Dhinesh* (2022)
Judicial independence	• *Semenyih Jaya* (2017)
Rule of Law	• *Indira Gandhi* (2018) • *Alma Nudo Atenza* (2019) • *Maria Chin* (2021) (minority)
Judicial Review	• *Indira Gandhi* (2018) • *Alma Nudo Atenza* (2019) • *Chin Chee Kow* (2019) • *Maria Chin* (2021) (minority) • *Zaidi bin Kanapiah* (2021) • *Dhinesh* (2022)

Protection of minorities	• *Indira Gandhi* (2018)
Federal civil law is secular and applicable to all citizens	• *Jabatan Pendaftaran Negara v A Child* (2020) (minority) • *Dhinesh* (2022)
Constitutional democracy	• *Maria Chin* (2021) (minority)
Supremacy of Constitution in Art 4	• *Maria Chin* (2021) (minority) • *SIS Forum* (2022) • *Dhinesh* (2022)
Citizenship	• *Dhinesh* (2022)
Role of YDPA and Malay rulers as heads of religion	• *Dhinesh* (2022)

However, it should be noted that some amendments to the Federal Constitution, whilst arguably significant enough to change its basic structure, were, or still, may not be viewed as such. Some of the more important amendments are discussed in the paragraphs below.

1 *Formation of Malaysia*

Malaysia was formed on 16 September 1963 when the two states in East Malaysia (Sabah and Sarawak) and Singapore federated with West Malaysia or Peninsula Malaysia (then known as the Federation of Malaya). The *Malaysia Act 1963* was enacted by the Malayan Parliament not only to amend, but to essentially restructure the entire constitutional framework of Malaya. A total of 151 amendments were made to the Federal Constitution[153] to accommodate Sabah, Sarawak and Singapore into the new Federation of Malaysia. Similarly, when Singapore left the Federation of Malaysia in 1965, significant amendments were once again made to the Federal Constitution to accommodate Singapore's separation.[154]

These amendments definitely changed the basic structure of the Federal Constitution. And yet, it would be unimaginable for any person to challenge the constitutionality of the *Malaysia Act 1963*. Perhaps one could argue that as significant as the amendments were to the Federal Constitution via the *Malaysia Act 1963*, the philosophical or abstract context of the Federal Constitution, embracing concepts such as separation of powers, rule of law,

153 Shad Saleem Faruqi, *Our Constitution* (Thomson Reuters Asia, 2019) 19.

154 See *Federal Constitution* (n 26); *Malaysia (Singapore Amendment) Act 1965* ('*Act 53/65*').

judicial independence and fundamental liberties were still intact. Therefore, whilst the *Malaysia Act 1963* may well have changed the basic structure of the Federal Constitution, it did not *destroy* it.

2 *Judicial powers*

The Federal Court in *Semenyih*, *Indira Gandhi*, *Zaidi* and *Dhinesh*, whilst openly embracing the basic structure doctrine, stopped short at declaring the provisions in *Act A704* amending *Article 121 of the Federal Constitution* as unconstitutional. However, it should be noted that *Article 161E(2)(b) of the Federal Constitution* provides that no amendments affecting the 'constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court' may be affected without the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak. The amendment to *Article 121(1)* and the addition of *Article 121(1A)* arguably also affects the constitution and jurisdiction of the High Court in Sabah and Sarawak. Therefore, the consent of the Yang di-Pertua Negeri of Sabah and Sarawak was required. This is arguably a breach of *Article 161E(2)(b),*[155] and the offending provisions in *Act A704* ought to be struck down as unconstitutional for the simple reason that it did not follow the amendment procedures prescribed in the Federal Constitution itself.

Then there is also the amendment to *Article 122AB of the Federal Constitution* on the appointment of judicial commissioners to the High Court in Sabah and Sarawak.[156] In *The Government of Malaysia v Robert Linggi* ('*Robert Linggi*'),[157] the respondent argued, among others, that the amendments to *Article 122A(3) and (4) of the Federal Constitution*, and the new *Article 122AB of the Federal Constitution* are null and void in so far as they concern the removal of the power of the respective Yang di-Pertua Negeri of Sabah and Sarawak to appoint judicial commissioners. In particular, the respondent argued that the amendments were contrary to *Article 161E(2)(b) of the Federal Constitution* as the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak were not obtained as is required. In allowing the appeal, the Court of Appeal held that the appointment of judicial commissioners does not amount to the appointment of 'judges of that Court' within the meaning of *Article 161E(2)(b) of the Federal Constitution*.

The effect of *Article 122AB of the Federal Constitution* is that the appointment of judicial commissioners to the High Court in Sabah and Sarawak is now no longer within the purview of the Yang di-Pertua Negeri of Sabah and Sarawak. Instead, the appointment of judicial commissioners is now

155 See J C Fong (n 5) 143.

156 See *Constitution (Amendment) Act 1994* (Malaysia) ss 15, 16 ('*Act A885*').

157 [2015] 1 LNS 1515 ('*Robert Linggi*').

vested in the Yang Di-Pertuan Agong acting on the advice of the Prime Minister, and is within the purview of the Judicial Appointments Commission established under the *Judicial Appointments Commission Act 2009*, a Federal Act that applies throughout Malaysia. This appears to be an abrogation of the power of the Yang di-Pertua Negeri of Sabah and Sarawak to appoint judicial commissioners. Further, the amendment itself appears to have been made without the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak as required under *Article 161E(2)(b) of the Federal Constitution*. As the concurrence of the Yang di-Pertua Negeri and/or the Chief Ministers of Sabah and Sarawak were added into the Federal Constitution as additional safeguards for Sabah and Sarawak when federating with Malaya in 1963, an argument could be made that these safeguards are basic structures of the Federal Constitution.

Arguably, the effect of *Article 122AB of the Federal Constitution* is that the appointment of judicial commissioners to the High Court in Sabah and Sarawak is now no longer within the purview of the Yang di-Pertua Negeri of Sabah and Sarawak. This is then something which goes against the spirit of *Article 161E(2)(b) of the Federal Constitution*, and arguably, the basic structure of the Federal Constitution (additional safeguards for Sabah and Sarawak), but has been condoned by the Court of Appeal in the *Robert Linggi* case.

3 *Immunity of rulers*

The immunity of rulers was curtailed by the *Constitution (Amendment) Act 1993 (Act A848)*. By *Act A848*, a new *Part XV* was incorporated into the Federal Constitution dealing with the establishment of a Special Court for Rulers.[158] It also provided that the YDPA or a Ruler of a State shall cease to exercise such functions if charged with an offence.[159] In 1994, further amendments were made to the Federal Constitution[160] to, among others, effectively remove the discretionary powers of the YDPA and the Rulers of States in that where they are acting on advice, they must accept and act on such advice.[161]

The question to be asked now is, whether these amendments are unconstitutional for offending the basic structure doctrine in affecting or destroying (at least partially) the traditional sovereignty, prerogatives, powers and jurisdiction of the YDPA and the Rulers of States as contained in the original Federal Constitution. Conversely, can these amendments be seen as

158 A new art 183 was also added to the *Federal Constitution.*

159 See *Federal Constitution* (n 26) art 33A, sch 8 pt I para 1A.

160 See *Act A885* (n 156).

161 See *Federal Constitution* (n 26) art 40(1A), sch 8 pt I para 1(1A).

acceptable in a modern constitutional monarchy in that all institutions, whether traditional or otherwise, have limits on their powers?

4 *Composition of Senate*

It would be remembered that the Reid Commission in drafting the original procedures for amending the Constitution for the Federation of Malaya, wrote that the safeguards put in place are sufficient for the States because '*the majority of members of the Senate will represent the States'*.[162]

However, the safeguard envisioned by the Reid Commission, i.e. that the majority of members of the Senate will represent the States is no longer true today because appointed senators now outnumber State senators 44 to 26. *Article 45(1)* originally provided for a majority of State representatives on the Senate – 22 members as against 16 Federally appointed members. *Article 45(4)* allows Parliament to increase the number of Senators from two to three to be elected by each State Assembly and to reduce the number of, or indeed abolish, Federally appointed Senators.

However, Parliament has done the exact opposite of *Article 45(4)*: By the *Malaysia Act 1963*, it increased the number of Federally appointed Senators from 16 to 22; in 1964, this was further increased to 32;[163] in 1978, this was again increased to 40;[164] and in 2001, a new clause (aa) was included into *Article 45(1)* for two members for the Federal Territory of Kuala Lumpur, and one member each for the Federal Territories of Labuan and Putrajaya.[165] Therefore today, State representatives in the Senate (numbering 26) are outnumbered by 44 Federally-appointed Senators, making it much easier for the Federal Government though their appointees in the Senate to push through constitutional amendments in Parliament to the detriment of State interests.

Again, it could be argued that all these amendments are unconstitutional because it goes against *Article 45(4) of the Federal Constitution*, and more importantly, it goes against the basic structure of the Federal Constitution as envisaged by its very drafters (the Reid Commission) which sought to protect State interests in the Senate.

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162 *Reid Commission Report* (n 19) ch IV para 80.

163 *Constitution (Amendment) Act 1964* (Malaysia) ('*Act 19/64*').

164 *Constitution (Amendment) Act 1978* (Malaysia) ('*Act A442*').

165 *Constitution (Amendment) Act 2001* (Malaysia) ('*Act A1095*').

IV CONCLUSION

It is evident that the basic structure doctrine continues to generate sharp divisions within Malaysia's apex court. While some judges view it as being firmly rooted in *Article 4(1) of the Federal Constitution*, others reject it as an uncertain and foreign import unsuited to the Malaysian context. This ongoing judicial discourse reflects the delicate balance between constitutional supremacy and parliamentary sovereignty in Malaysia's unique constitutional order.

The Federal Constitution was carefully designed to hold together a diverse and plural society, and its endurance is a testament to the strength of its framework. Whether or not the basic structure doctrine is explicitly embraced, it is undeniable that certain core principles such as judicial power, separation of powers, and the rule of law, remain indispensable to the constitutional identity of Malaysia. The challenge lies in ensuring that these principles are preserved while still allowing the Constitution to adapt to the changing needs of society.

Ultimately, the debate on the basic structure doctrine may be less about the adoption of a 'foreign' concept and more about recognising that the Federal Constitution itself, through *Article 4(1*), enshrines limits to the exercise of power. In this sense, the courts, as guardians of the Constitution, play a vital role not in asserting superiority over Parliament, but in upholding the supremacy of the Constitution over all organs of state. The future of Malaysian constitutional law will therefore depend not only on the judicial acceptance or rejection of the basic structure doctrine, but also on the continuing search for a workable balance between flexibility in constitutional amendment and fidelity to the foundational principles of the nation.

It is submitted that this essence, spirit or soul of the Federal Constitution *is* the basic structure of the Federal Constitution. It is crucial for there to be recognition of this concept, so that generations to come will always know what it took, and what it still takes, for us to stand united and loyal to Malaysia. In this regard, the words of the late Tun Suffian, former Lord President of Malaysia, in his Braddel Memorial Lecture in 1982, when speaking of the Malaysian Judiciary to a Singapore audience are especially pertinent:

> In a multi-racial and multi-religious society like yours and mine, while we judges cannot help being Malay or Chinese or Indian; or being Muslim or Buddhist or Hindu or whatever, we strive not to be too identified with any particular race or religion – so that nobody reading our judgment with our name deleted could with confidence identify our race or religion, and so that the various communities especially minority communities, are assured that we will not allow their rights to be trampled underfoot.

It is submitted that in a country with a supreme Constitution, questions of unconstitutionality can never be removed from judicial purview. After all, since Parliament's power to amend the Federal Constitution is in itself derived from the Federal Constitution, it must follow that such powers must have certain limits within the boundaries of the Federal Constitution.

The judicial crisis of 1988 led to the unfortunate dismissal of the then Lord President, Tun Salleh Abas. It is therefore perhaps apt to end this manuscript with a quote from His Lordship in the case of *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad*:[166]

> The courts have a constitutional function to perform and they are the guardians of the constitution within the terms and structure of the constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review – a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the constitution over both. The courts are the final arbiter between the individual and the state and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.[167]

166 [1987] 1 MLJ 383.
167 Ibid 386–7.