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Judicial Power and Constitutional Supremacy —Basic Features of Written Constitutions?

The Right Honourable
Dato' Seri Chan Sek Keong

Former Chief Justice of Singapore

This long-standing lecture series,
conceived in the name of
His Royal Highness Sultan Azlan Shah,
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Judicial Power and Constitutional Supremacy —Basic Features of Written Constitutions?

Chan Sek Keong
(*b.* 5 November 1937)

Dato' Seri Chan Sek Keong was the first Singaporean law graduate to be appointed the Attorney-General and Chief Justice of Singapore. He has been described as one of Singapore's greatest jurists and legal minds.

Dato' Seri Chan was born in 1937 in Ipoh, Malaya. He received his early education in Anderson School in Ipoh. He was a member of the inaugural class of students admitted to the Law Faculty of the then University of Malaya (now National University of Singapore) in 1957, graduating in 1961 as one of the top students in his class.

Dato' Seri Chan was admitted to the Malayan Bar on 31 January 1962 and practised law in Malaysia and Singapore before he was appointed the first Judicial Commissioner of Singapore on 1 July 1986. A mere two years later, he was appointed a Judge of the Supreme Court of Singapore in 1988.

In 1992, Dato' Seri Chan was appointed the Attorney-General of Singapore, a position that he held for nearly 14 years. In that role, he enhanced the capabilities of the Attorney-General's Chambers by strengthening the Civil and Criminal Divisions and creating the International Affairs Division, as well as the Law Reform and Law Revision Division. Dato' Seri Chan was also instrumental in introducing major statutory enactments that had a significant impact on Singapore law, including the Application of English Law Act 1993 which provides a statutory basis for the development of the common law in Singapore.

Dato' Seri Chan was appointed the third Chief Justice of Singapore on 11 April 2006. He retired as Chief Justice on 6 November 2012 at the age of 75, and having spent 26 years in legal service. In the course of his judicial career, Dato' Seri Chan displayed a steadfast commitment to the rule of law, constitutional supremacy and the separation of powers, and substantially contributed to the principled and incremental development of Singapore law. He authored several hundred learned and scholarly judgments spanning all areas of Singapore law, many of which contain authoritative statements of the law which continue to influence the development of jurisprudence in Singapore.

In *Mohammad Faizal bin Sabtu v PP* [2012] 4 SLR 947, Chan CJ set out a masterly analysis of Singapore's constitutional framework, particularly on separation

of powers, and the scope and nature of judicial power. Chan CJ observed that

> … the principle of separation of powers requires that each constitutional organ should act within the limits of its own powers. This entails, in so far as the judicial branch is concerned, that the legislative and the executive branches of the State may not interfere with the exercise of the judicial power by the judicial branch.

In *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189, Chan CJ held that the Supreme Court had "jurisdiction to adjudicate on every legal dispute on a subject matter in respect of which Parliament has conferred jurisdiction on it, including any constitutional dispute between the State and an individual. In any modern state whose fundamental law was a written Constitution based on the doctrine of separation of powers, and where the judicial power was vested in an independent judiciary, there should be few, if any, legal disputes between the State and the people from which the judiciary was excluded."

In the area of private law, Chan CJ also delivered a number of outstanding judgments.

Chan CJ's judgment in the case of *Lam Chi Kin David v Deutsche Bank AG* [2011] 1 SLR 800 contains an examination of the principle of promissory estoppel. Chan CJ observed that the principle is particularly relevant in the context of private banking where, if the banks and financial intermediaries engaged in the business of wealth management cannot be trusted with their words, they should not be allowed to be in this business.

In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100, Chan CJ delivered

the landmark judgment of the Singapore Court of Appeal where, departing from the position under English law, the court held that a single test should determine the imposition of a duty of care in all claims arising out of negligence, irrespective of the type of the damages claimed, *viz* a two-stage test comprising of, first, proximity and, second, policy considerations, which were together preceded by the threshold question of factual foreseeability.

In 2015, Dato' Seri Chan was appointed as a Senior Judge, and sat as a Judge of Appeal of the Singapore Supreme Court and as a Judge of the Singapore International Commercial Court, until the completion of his three-year term on 4 January 2018.

In 1999, Dato' Seri Chan was conferred the Darjah Dato' Seri Paduka Mahkota Perak (SPMP) by His Royal Highness Sultan Azlan Shah, the Sultan of Perak.

Dato' Seri Chan was conferred the Order of Temasek (Distinction) by the Singapore government on 9 August 2008 for his outstanding contribution as Attorney-General and later Chief Justice. In 2012, the Singapore Academy of Law published a book in his honour, entitled, *The Law in His Hands: A Tribute to Chief Justice Chan Sek Keong*.

Dato' Seri Chan is the first Singaporean law graduate to be made an Honorary Bencher of the Honourable Society of Lincoln's Inn. He is also the first Asian jurist to be given the International Jurists Award in recognition of his outstanding contributions to the administration of justice.

Dato' Seri Chan was appointed a Pro-Chancellor of the National University of Singapore in 2015. He holds Honorary Doctor of Laws (LLD) degrees from the National University of Singapore and the Singapore Management

University. In October 2013, he was appointed the first Honorary Distinguished Fellow of the National University of Singapore's Faculty of Law.

Dato' Seri Chan is a keen student of philosophy, and history, in particular the history of Malaya and the Straits Settlements. His collection of South-east Asian history books is one of the largest in Singapore.

Dato' Seri Chan is married to Datin Seri Elisabeth Chan, a law graduate from the Class of '64 of the National University of Singapore. She is the author of a number of books on tropical plants, including *Tropical Plants of Malaysia & Singapore* (2000).

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34 Judicial Power and Constitutional Supremacy —Basic Features of Written Constitutions?

Dato' Seri Chan Sek Keong
Former Chief Justice of Singapore

**Advance copy of the Thirty-fourth Sultan Azlan Shah Law Lecture scheduled for delivery on 8 December 2020 in the presence of His Royal Highness Sultan Nazrin Shah and Her Royal Highness Tuanku Zara Salim.*

Your Royal Highness Sultan Nazrin Shah, Your Royal Highness Tuanku Zara Salim, distinguished guests, ladies and gentlemen. Tuanku, I would first like to express my heartfelt appreciation to you for your gracious invitation extended to me to deliver the Thirty-fourth Sultan Azlan Shah Lecture this evening, in honour of your father.

This long-standing lecture series, conceived in the name of His Royal Highness Sultan Azlan Shah, has gained an international reputation, and is widely regarded as one of the most prestigious law lecture series in the common law world. The leading legal luminaries who have delivered the past thirty-three lectures are a clear testament to this.

It is therefore a great honour for me to be invited as the thirty-fourth speaker, more so as I had the privilege of having known His Royal Highness Sultan Azlan Shah for many years.

I have followed his brilliant legal career, and have read all his many outstanding judgments in the field of public law. As a learned jurist, as the Head of State, and, for a certain period of time, as Head of the Federation, Sultan Azlan Shah was placed in a unique situation not only to stress the importance of the rule of law, but also to ensure its adherence by all actors in the public sphere. His judgments and speeches on the rule of law, good governance and public accountability have most certainly left an indelible mark on the consciousness of many generations of Malaysians.

Tuanku, may I finally add that as an "*anak Perak*" who completed his entire school education in the State, I am doubly privileged to be able deliver this lecture in honour of the Sultan of Perak, which I do so with great humility.

Ladies and gentlemen, this evening I will be speaking on the basic structure doctrine, a principle of constitutional law that has been the subject of passionate and fascinating debate in many Commonwealth countries that have written constitutions, such as India, Malaysia, Singapore, Pakistan, Bangladesh, Canada, Belize, South Africa, and Uganda. The doctrine is recognised as an axiom by the Indian Supreme Court.

As this lecture is being delivered in Kuala Lumpur, I thought it may be of particular interest to all of you if I share with you some general observations on the origins and current status of the doctrine, particularly, under the Federal Constitution, in the light of several important

judicial pronouncements of the apex court in Malaysia, ie the Federal Court.

Introduction

This lecture is an inquiry into the question whether the judicial power and constitutional supremacy are basic features of the Malaysian Federal Constitution (Federal Constitution) for the purposes of the basic structure doctrine. The term "basic features" refers to those concepts or features in a constitution that are essential and fundamental to the constitution, and gives it an identity or personality.

> The basic structure doctrine is the constitutional principle that the basic features or basic structure of a constitution cannot be destroyed or emasculated by a constitutional amendment duly passed by Parliament in accordance with the prescribed procedures.

In *Loh Kooi Choon v Government of Malaysia*[1] (*Loh Kooi Choon*), Raja Azlan Shah FJ enumerated three such features in the Federal Constitution:

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three *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. [emphasis added]

The basic structure doctrine is the constitutional principle that the basic features or basic structure of a constitution cannot be destroyed or emasculated by a constitutional amendment duly passed by Parliament in accordance with the prescribed procedures. The doctrine is of Indian origin. It was created by the Indian Supreme Court in a 7:6 majority in 1973 in the famous case of *Kesavananda Bharati v State of Kerala*[2] *(Kesavananda)* to limit the amendment power of the Indian Parliament under Article 368(1)[3] of the Indian Constitution, which was not expressed to be limited. Any amendment that breaches the doctrine is void. The doctrine is an implied substantive limitation on the amendment power. The doctrine does not apply to express limitations, the breach of which would be void under the ultra vires doctrine.

The basic structure doctrine is relevant to the Federal Constitution because it shares a common ancestry with the Indian Constitution. Both Constitutions are based on the Westminster model constitution, so called because the model incorporates the constitutional norms, principle and practices of the British Parliament at Westminster, London. Hence, both Constitutions also have the same or similar basic features.[5] It is therefore not surprising that three years after the doctrine surfaced in the Indian Supreme Court, it also surfaced in the Malaysian Federal Court (Federal Court).

The basic structure doctrine was first referred to in Malaysia in 1977 in *Loh Kooi Choon*, in 1980 in *Phang Chin Hock v PP*,[6] and in 1983 in *Mark Koding v PP*.[7] In each case, the Federal Court declined to decide whether the doctrine was applicable to the amendment power in the Federal Constitution. In 2007, 30 years after, the Federal Court by a 4:1 majority in *PP v Kok Wah Kuan*[8] rejected the doctrine. In 2017, 10 years later, the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[9] disagreed with the majority judgment in *Kok Wah Kuan* and held that the doctrine was applicable to the Federal Constitution. *Semenyih Jaya* was approved one year later in 2018 by the Federal Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors.*[10] Both judgments were unanimous judgments. In October 2019, Chief Justice Tengku Maimun, in an *ex-curial* special address, set out her views as to why "the doctrine of basic structure is so fundamentally necessary in Malaysia, specifically within the context of the doctrine of separation of powers."[11]

It has taken more than four decades for the Federal Court to adopt the basic structure doctrine as a principle of law under the Federal Constitution, starting from a position of doubting its legitimacy or relevance to fully accepting its necessity. How and why has this happened? The doctrine is all about limiting the amendment power of Parliament. So, let me start with a short general discussion of the relationship between a constitution and its amendment power to provide the backdrop to the constitutional issues.

The nature of a constitution and its amendment power

A constitution is the organic law of a state. It may be described as a set of fundamental legal-political-social principles or rules that:

(1) bind the people and the state as the supreme law of the land,

(2) establish the structure and operation of the institutions of government based on certain political principles and the rights of citizens; and

(3) set out the social, moral or religious values and the aspirations of the people.

Hence, a constitution is a legal instrument, a political instrument and a social contract or charter of shared values and aspirations. Together, they make up the Constitution.[12]

A nation state is meant to endure, and so is its constitution, not only for the first generation but also for the generations to come. But, society changes, and no man-made constitution is perfect. Hence, a constitution must be amendable to update its relevance to the people and the state. In *Loh Kooi Choon*, Raja Azlan Shah FJ said:

> … the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with "power of formal amendment". They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later.[13]

The questions that arise are: Who should be given the amendment power and to what extent? Should it be given to the people directly, or to a delegate, such as Parliament? If the power is to be limited, how should it be limited? Drafting the amendment power clearly is the best way to answer these questions. Some constitutions provide for a referendum to amend specific provisions. Amending the constitution of a democratic state is a very serious matter if the amendment affects the structure or system

of government or fundamental rights. An amendment of such nature inevitably raises disputes between citizens who may hold different views. Many constitutions provide for a special tribunal, such as a constitutional court, to adjudicate such disputes (for example, South Africa). However, under the Federal Constitution (as under the Indian Constitution), this function is delegated to the judiciary under the separation of powers. Hence, the courts must be vested with the constitutional power to adjudicate these disputes.

The separation of powers, judicial power, judicial review

(a) The separation of powers doctrine

The separation of powers is a political theory of government which can be traced back to Aristotle. It was systematically developed in the 18th century by Baron de Montesquieu, a French political philosopher, based partly on his observations of the system of government in Britain. The theory is that if all the powers of the state are vested in one person or entity, it will inevitably lead to despotism or dictatorship, and so they must be separated. In a speech made in 1987 to the Harvard Club of Malaysia, HRH Sultan Azlan Shah quoted Montesquieu's theory as follows:

> Political liberty is to be found only where there is no abuse of power. But constant experience shows that every man invested with power is liable to abuse it and to carry his

> authority as far as it will go … To prevent this abuse, it is necessary from the nature of things that one power should be a check on another … When the legislative and executive powers are united in the same person or body there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and the executive … There would be an end to everything if the same person or body, whether of nobles or of the people, were to exercise all three powers.[14]

The truth of the theory is self-evident. But whether it works in practice is another thing. It is, however, manifested in the constitutions of all modern democratic states. The sovereign power of the state is divided and distributed among three branches of government, *viz*, the legislature (Parliament) to make laws, the executive (government) to govern under those laws, and the judiciary (courts and judges) to interpret and apply the laws in controversies between people and between the state and the people. Power is distributed to and exercised by the three institutions as co-equal branches of government to provide a system of checks and balances against misuse of power by the state.

The Federal Constitution incorporates the separation of powers. Article 44 vests the legislative authority of the Federation in Parliament. Article 39 vests the executive authority of the Federation in the Yang di-Pertuan Agong, exercisable by him, or by the Cabinet, or any Minister authorised by the Cabinet. Article 121(1), until 1988, expressly vested the judicial power of the Federation in two

High Courts and such inferior courts as provided by federal law. The separation of powers is basic or fundamental to the structure of the Constitution.

> The doctrine of separation of powers predates the basic structure doctrine, and operates as an independent and free-standing principle.

Article 39 also provides that "Parliament may by law confer executive functions on other persons". In contrast, Article 44 does not provide that Parliament may by law vest legislative functions on other persons. Similarly, Article 121(1) does not provide that Parliament may by law vest judicial functions in other persons. The judicial power is therefore exclusive to the judiciary, just as the legislative power is exclusive to Parliament. It follows that, by implication, Parliament may not vest judicial power in any body or person other than the courts. This is settled law.[15] The doctrine of separation of powers predates the basic structure doctrine, and operates as an independent and free-standing principle.

(b) Judicial power

The judicial power is part of the sovereign power of the state that is vested in the judiciary so that it can perform

its constitutional function. The vesting may be express or implied (or inherent). The term "judicial power" is not defined in the Federal Constitution, but it has been interpreted[16] to mean "the power which every sovereign authority [ie the state] must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property". In the context of constitutional disputes, it is the power to determine whether any legislative or executive actions contravene the Federal Constitution or any of its provisions.

The power is exercised in court proceedings by way of judicial review. The judicial power is indispensable for this purpose. If it is destroyed or curtailed, the court cannot perform its constitutional function. Hence, judicial review is an integral part of the constitutional system. Without it, there is no rule of law. If the court has no jurisdiction or power to review a law, including an amendment, for unconstitutionality, the rule of law becomes the rule of Parliament. The courts will become "servile agents" of Parliament and the executive.[17] Constitutional government provided under the Constitution will cease to exist. Absent judicial power, Parliament is no longer subject to the Constitution, and/or the executive is no longer subject to the law. For these reasons, judicial power and judicial review are fundamental to the Constitution.

Why the Indian Supreme Court invented the basic structure doctrine

It may be said that the basic structure doctrine was invented by the Indian Supreme Court, initially to preserve, protect and defend the Constitution and to prevent its provisions from being amended out of existence by Parliament. Subsequently, it may be said that it was to preserve and safeguard its own existence as the guardian of the Constitution. "*What started as a struggle between the court and the government on property rights expanded into a battle for the soul of the Constitution.*" [18] The struggle began with the judgment of the Supreme Court in *Golaknath & Ors v State of Punjab* [19] *(Golaknath)* that the 17th Amendment (which affected the fundamental right to property) was void as a "law" under Article 13(2) to the extent that it took away or abridged the fundamental rights in Part III of the Constitution.[20]

This judgment triggered a powerful political reaction from the Indira Gandhi Government and "signified the opening shot of a 'great war … over parliamentary versus judicial supremacy'".[21] Parliament, under the control of the Government, enacted the 24th Amendment in 1971 to annul *Golaknath*. Article 368(1) was inserted to provide that Parliament could "amend by way of *addition, variation or repeal of any provision of this Constitution* in accordance with the procedure laid down in this article". It should be noted that Article 368(1) refers to "any provision of this Constitution", and not "this Constitution". Article 13(4)

was also inserted to provide that Article 13 shall not apply to any amendment made under Article 368. The effect was that Parliament could by amendment take away all the fundamental rights set out in Part III of the Constitution.

The 24th Amendment, together with two other Amendments,[22] were challenged in *Kesavananda*. The Supreme Court unanimously agreed that the 24th Amendment (amending Article 368) was valid, and that under the amended provision (Article 368(1)), all the provisions of the Constitution including those enshrining fundamental rights could be amended. However, seven of the 13 judges added a rider that any amendment must not affect the basic structure or features of the Constitution.[23] The rider is the basic structure doctrine, without which all the provisions of the Constitution could be amended by way of addition, variation or repeal.

What are the basic features or basic structure of the Indian Constitution?

The Indian Supreme Court grounded the basic structure doctrine on the identity or personality of the Constitution.[24] The Canadian Supreme Court has used the expression "internal architecture" to describe the basic features of the Canadian Constitution. Every constitution has its own basic features or internal architecture. In *Kesavananda*, the Supreme Court could not agree on every basic feature. Each judge had his own views.[25] There was a 7:6 majority

(including Sikri CJ) for (1) supremacy of the Constitution; (2) republican and democratic form of Government; (3) secular character of the Constitution; (4) separation of powers; and (5) federalism. Others were (6) sovereignty of India; (7) unity and integrity of the nation; (8) essential fundamental rights; (9) democracy; and (10) mandate to build a welfare state. Others since added are (11) limited amendment power; and (12) judicial review and judicial power. The list is not closed. Every constitution has its own basic features or internal architecture. What a basic feature is has to be decided on a case by case basis, according to its circumstances.

38th Amendment—Judicial review held to be a basic feature

In June 1975, the Indian High Court nullified Indira Gandhi's 1971 election to Parliament for electoral misconduct, and barred her from standing for elections for six years. The Government reacted by proclaiming a state of emergency, after which Parliament enacted (a) the 38th Amendment to provide that the President's decision to issue a Proclamation of Emergency and any laws adopted during the emergency were immune from judicial review, and (b) the 39th Amendment to amend, retroactively, the laws under which Indira Gandhi was convicted and prohibited any court from adjudicating any issue on the election of the President, Vice-President, Parliament Speaker and Prime Minister, even if such a matter was already pending before

a court. These amendments were immediately challenged. In *Indira Nehru Gandhi v Raj Narain*,[26] the Supreme Court of five judges unanimously confirmed the basic structure doctrine, and nullified the 39th Amendment on the ground that, in excluding judicial review, it violated three essential features of the constitutional system: fair democratic elections, equality, and the separation of powers.

42nd Amendment—Judicial power held to be a basic feature

In 1976, Parliament retaliated and enacted the 42nd Amendment which, inter alia, inserted (1) Article 368(4) to provide that any Constitution Amendment Act shall be immune from judicial review altogether, whether on substantive or procedural grounds, and (2) Article 368(5) to provide that there are no limitations whatsoever to the power conferred by Article 368. These amendments were challenged in 1980 in *Minerva Mills v Union of India*.[27] The Supreme Court held (by a majority) that a limited amendment power was itself a basic feature of the Constitution, and that Parliament could not under Article 368 expand its amendment power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features.[28] The Court declared both amendments invalid as they conferred on Parliament the power to destroy the Constitution's essential features or basic structure. The Court explained that if Parliament were granted unlimited power of amendment,

it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity. *Minerva Mills* established once and for all that the judicial power could not be destroyed or ousted by constitutional amendment. Consequently, it may be said that the basic structure doctrine is supreme.

Basic structure and the concept of identity of the Constitution

In *Kesavananda*, the majority judges reasoned that the basic structure doctrine was justified by the Constitution having an identity or personality that could be discerned from its basic features.[29]

> CJ Sikri said:
>
> (c) The expression "amendment of this Constitution" does not enable Parliament … to completely change the fundamental features of the Constitution so as to destroy its identity.[30]
>
> Hegde and Mukherjea JJ said:
>
> If one or more basic features of the Constitution are taken away, to that extent the Constitution is abrogated or repealed. If all the basic features of the Constitution are repealed and some other provisions inconsistent with those features are incorporated, it cannot still remain the

> Constitution referred to in Article 368. *The personality of the Constitution must remain unchanged*.[31]

Khanna J used the term "basic structure" instead of "basic features":

> The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed or done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the *basic structure* or framework of the old Constitution … it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the *basic structure* or framework of the Constitution.[32]

How did the majority judges come up with the concept of identity or personality? The concept is not a figment of judicial imagination or of, one might say, a beautiful Indian mind. The concept is one of the oldest in Western philosophy, stemming from Heraclitus and Plato (circa 500–400 BCE). The identity of the ship of Theseus, the mythical founder of Athens, was the subject of a famous Greek philosophical thought exercise which goes like this: Theseus' ship begins to fall apart, and is gradually replaced by new wooden

planks. When all the old planks are replaced, is the ship still the ship of Theseus? New technology enables the old planks to be restored which are then used to build a replica of the original ship. Is the replica the ship of Theseus? [33]

> If the basic features are destroyed, the identity or personality or internal architecture of the constitution is destroyed.

Two thousand five hundred years later, the concept of identity surfaced in discussions on the Basic Law or Constitution of the Federal Republic of Germany. Article 79(3) expressly forbids Parliament from amending Articles 1–20, which set out the political system and values and principles of the Basic Law. This Article, known as the "eternity clause", gives the German Constitution its distinct identity as a constitutional democracy founded on certain basic values and principles. From Germany, the concept came to India in 1965 when Professor Dietrich Conrad, a German law professor, delivered a lecture to the faculty of law at Banaras Hindu University on the subject "Implied Limitations on Amending Power". In his lecture, Professor Conrad examined the amendment power in the Indian Constitution, and posed some simple questions such as: Could Parliament (a) abrogate Article 21 (no person may be deprived of his of life or personal liberty except by law)? [Malaysia, Article 5(1)]; (b) amend Article 368 to

vest the amendment power in the executive? [Malaysia, Article 159]; or (c) abolish the Constitution itself and reintroduce monarchy? Professor Conrad's lecture was first cited to the Indian Supreme Court in *Golaknath* and subsequently in *Kesavananda*. Given the ramifications of Professor Conrad's questions, the majority judges would have realised that an unlimited amendment power could be misused by an authoritarian government to abolish the Constitution itself. The Constitution cannot be allowed to destroy itself. As they say: the rest is history. A legal scholar has observed:

> Few could have known that the impact of that lecture would be of epic proportions and would change the future of Indian Constitutional law permanently.[34]

To recap, if the basic features are destroyed, the identity or personality or internal architecture of the constitution is destroyed. The concept of identity as the internal architecture of a thing is much easier to grasp in the physical world than in the realm of philosophy. Here are two examples. If this hotel were converted into a condominium, it is still a building, but its identity would not be the same. If a Proton Saga is fitted with a Volvo engine, it is still a car, but it is not so clear that it is still a Proton Saga. However, Professor Conrad's examples show that indeed the identity of a constitution can change if its basic features are changed.

The current state and global status of the basic structure doctrine

The basic structure doctrine is less than 50 years old, an infant in the history of government and political systems. Concepts such as the rule of law, the separation of powers, fundamental human rights and supremacy of the constitution, have taken over 800 years to be incorporated as essential features of the constitutions of "first world" or developed states, whether in the West or the East, beginning with (1) the Magna Carta in 1215; (2) the UK Bill of Rights 1688; (3) the incorporation of the separation of powers in the US Constitution in 1789 and the Bill of Rights; (4) judicial review in *Marbury v Madison*[35] in 1802; and (5) the UN Universal Declaration of Human Rights 1948. The basic structure doctrine is the next development in constitutional jurisprudence to prevent democratic constitutions from being subverted by its amendment power. The doctrine has been declared by the Indian Supreme Court as "an axiom of our constitutional law"[36] and many legal scholars regard it as the Indian judiciary's finest and greatest contribution to constitutional law.

The doctrine is, however, not without its critics. Its opponents say that it is an illegitimate doctrine, as it is not found in any provision of the Indian Constitution, that it is anti-democratic or anti-majoritarian, that it makes the Supreme Court a super-legislature, and also lacks certainty as a legal principle. Its proponents assert that it has a solid legal basis since Parliament is constituted by and derives its legislative powers from the Constitution. Such powers,

including the amendment power, may be expressly limited by the Constitution, or impliedly limited by its very existence. In theory, an amendment cannot abolish the Constitution because it is predicated on the existence of the Constitution. Parliament is merely an agent or delegate. As such, it cannot have more powers than its principal. It is therefore not surprising that the doctrine has gained adherents among the judiciaries of common law jurisdictions, such as Belize (formerly Honduras), Kenya, Uganda, Bangladesh and Pakistan.[37] It has been considered, but not rejected in South Africa and Tanzania. Malaysia is the latest adherent of the doctrine.

The basic structure doctrine in Malaysia

As mentioned earlier, the Malaysian Federal Court did not decide whether the basic structure doctrine was applicable to the Federal Constitution in three cases between 1977 and 1983. In the first case, *Loh Kooi Choon*,[38] Loh was arrested under a restricted residence enactment and not brought before a magistrate within 24 hours as required by Article 5(4) of the Constitution. He was released 90 days after he commenced *habeas corpus* proceedings against the Government, and was promptly re-arrested the same day. He sued the Government for damages for wrongful detention. He appealed to the Court of Appeal after the High Court dismissed his claim. Pending the hearing of the appeal, Parliament amended[39] Article 5 retrospectively to Merdeka Day to disapply Article 5(4) to restricted residence enactments, thereby nullifying Loh's appeal.[40]

Loh argued that since the amendment had deprived him of his fundamental rights under Article 5(4), which was an absolute right, the amendment was void for inconsistency with the Constitution as the supreme law as declared by Article 4(1).[41] The Federal Court rejected Loh's arguments and dismissed the appeal. The Court held that a constitutional amendment can never be inconsistent with the Constitution for the reason that upon the amendment Bill receiving the royal assent after being passed by Parliament, the amendment would become an integral part of the Constitution which, being the supreme law, could not be at variance with itself. [42] The Court observed that if the constitution framers had wanted the fundamental rights to be made inviolable by constitutional amendment, they would have provided for it.[43] The Court did not find it necessary to decide whether the power to amend included the power to abrogate the fundamental rights.[44]

The second case, *Phang Chin Hock*,[45] was concerned with the fundamental right to life. Phang had been convicted and sentenced to death for the offence of unlawful possession of ammunition under section 57 of the Internal Security Act. He was tried in accordance with the Essential (Security Cases) Regulations 1975, which had been validated by the Emergency (Essential Powers) Act 1979 (Act 216), which was passed under Article 150(5) of the Constitution. Phang argued that (1) Article 150(5), which was itself a constitutional amendment, was inconsistent with Article 4(1) and void to that extent—an argument rejected in *Loh Kooi Choon*; (2) Parliament had no power to enact any amendment that would destroy the basic structure

of the Constitution; and (3) sections 2(4), 9(3) and 12 of Act 216 had destroyed the basic structure of the Constitution and were therefore void under the basic structure doctrine.

The Federal Court rejected all three arguments. The Court held: (1) if any amendment was valid only if it were consistent with its existing provisions, the Constitution could never be amended, and Article 159 would be superfluous.[46] Accordingly, Article 4(1) and Article 159 should be read harmoniously to give effect to both provisions, ie Article 4(1) should be read to apply only to ordinary laws, so that no amendment passed under Article 159(1) could be inconsistent with the Constitution. The Court did not adopt the reasoning in *Loh Kooi Choon* that an amendment is integrated into the Constitution upon receiving the royal assent. The Court held further: (2) Parliament had power under Article 159(1) to amend the Constitution in any way it thought fit, provided all the procedural requirements were complied with,[47] and it was not necessary to decide whether the amendment power extended to destroying the basic structure of the Constitution. Finally, the Court held: (3) none of the constitutional amendments or the impugned provisions of Act 216 had destroyed the basic structure of the Constitution.

In the third case, *Mark Koding*,[48] Parliament enacted Amendment Act A30/1971 to curtail the absolute freedom of speech in parliamentary proceedings under Article 63(2) of the Constitution to the extent of making it an offence

for MPs to utter seditions words in such proceedings.[49] Koding, an MP, was charged for that offence. He challenged the validity of the amendment. The Federal Court held (1) that the amendment was valid in the circumstances; and (2) that, even if the basic structure doctrine were applicable to the Federal Constitution, an MP's absolute freedom of speech in parliamentary proceedings was not a basic feature of the Constitution.[50]

It needs to be pointed out that these three cases were decided at a time when the judicial power of the Federation was still expressed to be vested in the two High Courts under Article 121(1). Hence, judicial power was not affected by the amendments in these cases.

Public Prosecutor v Dato' Yap Peng (1987)

The next case on the judicial power was in *Public Prosecutor v Dato' Yap Peng*,[51] where the issue was whether section 418A of the Criminal Procedure Code involved exercise of the judicial power. Section 418A required a subordinate court to transfer a *pending* criminal case before it to the High Court upon the certificate of the Public Prosecutor. The court had no discretion in the matter. If the power to transfer cases in such circumstances was a judicial power, then it would be unconstitutional as it was effectively exercised by the Public Prosecutor and not the court, contrary to the separation of powers doctrine. The Federal Court held, by a 3:2 majority, that the power to transfer under section 418A was a judicial

power and therefore the provision was void for inconsistency with the Constitution under Article 4(1).[52]

Constitution (Amendment) Act 1988 (Act A704/1988) amends Article 121(1)[53]

The Government was not happy with the outcome in *Dato' Yap Peng* [54] and reacted by procuring Parliament to enact the Constitution (Amendment) Act 1988 (Act A704/1988) which, inter alia,[55] removed the words "*Subject to Clause (2), the judicial power of the Federation shall be vested in …*" from Article 121(1), so that Article 121(1), as amended, read:

> There shall be two High Courts of co-ordinate jurisdiction and status and such inferior courts as my be provided by federal law, and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.[56]

What was Parliament's intention in omitting the words of vesting from Article 121(1)? In moving the Amendment Bill in the House of Representatives, the Prime Minister said:

> With the provision vesting the judicial power of the Federation, the boundary between the judiciary and the executive or the legislature is vague. *With this amendment, the Government hopes to demarcate that boundary clearly.* This is essential so that the executive, legislature and

judiciary can perform their responsibilities without disturbing or being disturbed by the others. …

This Bill is not intended to take power from the Judiciary, or from the Courts. It is only to ensure that we in this House can make laws, and the Judges can determine matters in accordance with the law … *this Bill does not give judicial power to us.* It only ensures that the Judges, in sentencing and judging, must be guided by the law made by this House, which is regarded as Federal Law. That is all we are doing, nothing more than that.[57] [emphasis added]

> If the courts have no judicial powers except those conferred by federal law, then constitutional supremacy would have been replaced by parliamentary supremacy.

It can be seen that there is a disconnect between the words of explanation and the explanation itself. If the Bill was not intended to take power from the judiciary, why was it necessary to remove the words of vesting? If the Bill did not give judicial power to "us" (which may refer to the legislature or the executive), where has the judicial power gone? If it had gone nowhere, it would mean that it had been destroyed, and along with it the separation of powers, and

the constitutional standing of the judiciary as a co-equal branch of government with the legislature and the executive. If the courts have no judicial powers except those conferred by federal law, then constitutional supremacy would have been replaced by parliamentary supremacy—just like what the Indira Gandhi Government tried, but failed, to achieve in India.[58]

His Royal Highness Sultan Azlan Shah's 2004 postscript and consequent developments

In 2004, His Royal Highness Sultan Azlan Shah wrote a postscript to his Harvard Club speech[59] to express his concerns on the effect of the amended Article 121(1) as follows:

> Article 121 was amended so as to take away the judicial power from the two High Courts. It was further provided that the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
>
> The precise reasons for this amendment remain unclear. But the consequences may be severe. With this amendment, it would appear that the judicial power is no longer vested in the courts, and more importantly, the High Courts have been stripped of their inherent jurisdiction. The powers are only to be derived from any federal law that may be passed by Parliament.

> The effect of this change may have far-reaching consequences on the separation of powers doctrine under the Federal Constitution. …
>
> Though it may be said that despite this amendment, following the Privy Council decision in *Liyanage v R,* … the judicial power still vests in the judiciary, it is my hope that Article 121 will be reviewed to reinstate the position as it was before the amendment in 1988.[60]

(a) PP v Kok Wah Kuan (2007)

In 2007, three years later, the far-reaching consequences His Royal Highness feared were realised. In *PP v Kok Wah Kuan*[61] the Federal Court held that by reason of the amended Article 121(1) the separation of powers doctrine was not, or no longer, a feature of the Constitution. In that case, the issue was whether section 97(2) of the Child Act 2001, which provided that the court, upon convicting a child for the offence of murder, shall order the offender to be detained in a prison during the pleasure of the Yang di-Pertuan Agong, was a judicial power or a legislative power. The Court of Appeal[62] held that section 97(2) was a sentencing power and therefore unconstitutional under the separation of powers doctrine. Parliament could not by law direct the court to sentence the offender in the manner provided in section 97(2). However, to arrive at this conclusion, the Court of Appeal decided that the judicial power of the Federation remained in the two High Courts in spite of the amended Article 121(1) since it did not vest the judicial

power of the Federation in some other arm of the state, and also did not take it away from the two High Courts (as confirmed by the marginal note to the Article).[63] The amendment therefore did not violate the separation of powers doctrine.

The Federal Court overruled the Court of Appeal and held that since the vesting words in Article 121(1) had been removed, they could not be used to interpret the meaning of the amended Article 121(1). The High Court must now look to federal law for its jurisdiction and powers: the only question was "to what extent".[64] The Federal Court held that the extent of the High Court's power was set out in section 97(2). The Court also held that the separation of powers doctrine was not a provision of the Malaysian Constitution, and accordingly the amended Article 121(1) could not be held unconstitutional for contravention of the doctrine.[65] The Chief Judge of Sabah and Sarawak dissented on the ground that the amended Article 121(1) was not, and could not be, the whole and sole repository of the judicial role in this country. Otherwise, the courts would "become servile servants of a federal Act of Parliament".[66] The concern expressed in this dissent can be seen in subsequent developments.[67]

(b) Semenyih Jaya (2017)

Ten years later, in 2017, the majority decision in *Kok Wah Kuan* was decisively rejected by the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu*

Langat [68] as being too narrow. The issue in *Semenyih Jaya* was similar to that in *Kok Wah Kuan*. It was whether section 40D of the Land Acquisition Act 2010 was in the nature of a judicial power. The section provided that the amount of compensation under the Act was to be determined conclusively by two lay assessors sitting with a High Court Judge, whose sole function was to make the formal award. The Federal Court held that section 40D was a judicial power, and that as the power was effectively vested in the two lay assessors, it breached the separation of powers doctrine. Accordingly, section 40D was declared unconstitutional. To arrive at this conclusion, the Court endorsed the decision of the Court of Appeal in *Kok Wah Kuan* that the judicial power of the Federation remained in the two High Courts, notwithstanding the amended Article 121(1).[69]

Additionally, the Court enunciated the following principles: (1) it is not necessary for a constitution based on the Westminster model to expressly vest the judicial power of the state in the courts, so long as the constitution manifested an intention to secure the independence of the judiciary;[70] (2) the Federal Constitution has a basic structure which is protected by the basic structure doctrine; (3) the amendment power of Parliament in Article 159 is subject to the basic structure doctrine; (4) the amended Article 121(1) had the effect of undermining the judicial power and impinged on the separation of powers and the independence of the judiciary;[71] and (5) the removal of judicial power from the inherent jurisdiction of the judiciary would render it subordinate to Parliament, a result

which "was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in Article 4(1)".[72]

> The removal of judicial power from the inherent jurisdiction of the judiciary would render it subordinate to Parliament, a result which "was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in Article 4(1)".

Semenyih Jaya is truly a ground-breaking decision for its stated propositions of law. Given that the amended Article 121(1) did not remove the judicial power of the two High Courts, there is merit in His Royal Highness Sultan Azlan Shah's suggestion that Article 121(1) be reinstated to its position before 1988 to harmonise the original constitutional expression of the separation of powers. Of greater import is the holding that the amendment power in Article 159(1) is not unlimited, with its implications for the preservation of constitutional government and the social contract under the Constitution.[73]After its endorsement in 2018 by the unanimous Federal Court judgment in *Indira Gandhi*,[74] *Semenyih Jaya* stands as the most important judgment in the history of the Malaysian judiciary for its forceful and principled stand preserving, protecting and defending the Constitution.

The Constitution and its basic features or structure

In *Loh Kooi Choon*, Raja Azlan Shah FJ enumerated the fundamental rights, federalism and separation of powers as basic features of the Federal Constitution. *Semenyih Jaya* has identified judicial review, the judicial power and the independence of the judiciary as basic features. In her Special Address, Chief Justice Tengku Maimum has observed that constitutionalism, or constitutional government, is part of the basic structure of the Constitution. On the basis of these authoritative statements, it may therefore be said that the Constitution has a basic structure or an internal architecture. What is the Constitution made up of but its basic features or structure? What else can it be?

Meaning of "this Constitution" and "law" in Article 4(1)

Article 4(1) of the Federal Constitution states:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

If the identity of the Constitution is made up of its basic structure, then the reference to "this Constitution" in Article 4(1) is also a reference to its basic features or structure. It follows that an amendment inconsistent with the basic features or structure of the Constitution is also

inconsistent with the Constitution, and is void to that extent.

The word "law" in the expression "any law" in Article 4(1) is defined in Article 160(2) to include "written law", and "written law" as defined includes "this Constitution".[75] Therefore, an amendment to the Constitution is a law as defined. It follows that Article 4(1) contemplates that an amendment may be inconsistent with the Constitution, and to that extent void.

As mentioned earlier, the Federal Court in *Loh Kooi Choon* held that an amendment cannot be inconsistent with the Constitution for the reason that an amendment is integrated into the Constitution upon receiving the royal assent. The Constitution, being the supreme law, cannot be inconsistent with itself. The reasoning assumes that an amendment upon receiving the royal assent is always a valid law. It is submitted that this assumption is contestable. The royal assent is only the last procedural act that completes the legislative process.[76] It says nothing about the validity or otherwise of the amendment. The Federal Court in *Phang Chin Hock* did not appear to have adopted this reasoning. There, the Court decided that Article 4(1) and Article 159(1) should be read harmoniously to give effect to both articles: otherwise Article 159(1) would be superfluous. The reasoning here is also contestable. Article 159(1) is not superfluous as not every amendment is necessarily inconsistent with the Constitution.

It is beyond argument that an amendment can be inconsistent with the Constitution or its provisions. Consider the following hypothetical amendments:

(1) "This Constitution is repealed and …" or "This Constitution shall cease to have effect from … "
(2) Article 4: "The Constitution of XYZ Party shall be the supreme law of the Federation."
(3) Article 5(1): "A person may be deprived of his life or personal liberty by decree of the Government."
(4) Article 44: "The legislative authority of the Federation shall be vested in the Executive."
(5) Article 55: "The Yang di-Pertuan Agong shall not dissolve Parliament without the consent of all its Members."
(6) Article 121(1): "The judicial power of the Federation shall be vested in Parliament."

Amendment (1) destroys the Constitution. Amendments (2) to (6) destroy the corresponding provisions of the Constitution.

The only question is whether any such amendments would be void for inconsistency with the Constitution as the supreme law of the Federation. It is submitted that they would be. Amendment (1) is inconsistent with the Constitution because it abolishes the Constitution. It is also ultra vires Article 159(1) which expressly limits an amendment to addition, variation and repeal of any

provision of the Constitution, and not the Constitution itself. The provisions corresponding to Amendments (2) to (6) which are abrogated by those amendments are basic features of the Constitution. Not only are the amendments inconsistent with the provisions they abrogated, they would also be void under the basic structure doctrine.

The Federal Constitution and the Indian Constitution as supreme laws

There is a fundamental difference between the structure of the two Constitutions. It is this. The Federal Constitution is the supreme law of the Federation because Article 4(1) says so. The Indian Constitution is the supreme law of the Union of India because the Supreme Court says so in *Kesavananda*,[77] by identifying it as a basic feature. However, a constitutional declaration is a law of a higher order than a judicial declaration. It is suggested that if the Indian Constitution had the equivalent of Article 4(1), the Supreme Court might not have had to invent the basic structure doctrine to limit the amendment power in Article 368(1) of the Indian Constitution. The Federal Constitution is the supreme law of the Federation. No amendment can be more supreme than the supreme law. Hence any amendment inconsistent with the Constitution is void under Article 4(1), to the extent of the inconsistency. Article 4(1) is a better foundation and more principled than the basic structure doctrine for the purpose of invalidating any amendment that affects the basic features of the Constitution.

Conclusion

To conclude, I would recall the following words of Raja Azlan Shah FJ in *Loh Kooi Choon*:

> Whatever may be said of other Constitutions, they are ultimately of little assistance because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions.[78]

Article 4(1), properly interpreted, makes void to the extent of the inconsistency, any amendment that affects the Constitution or any of its basic features or structure. For this reason, it is submitted that it is not necessary to import the basic structure doctrine to limit the amendment power in Article 159(1). Article 4(1) expressly limits the amendment power of Parliament under Article 159(1).[79]

Editor's note

*The text of the lecture included in this volume was prepared for delivery at the Thirty-fourth Sultan Azlan Shah Law Lecture scheduled for 8 December 2020. It discusses the judgments of the Federal Court in *Semenyih Jaya* and *Indira Gandhi*, but does not refer to *Alma Nudo Atenza v PP* [2019] 4 MLJ 1. On 7 January 2021, the Federal Court delivered the judgments in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* (unreported), which may have an impact on the reception of the basic structure doctrine in Malaysia. The speaker has indicated that the latter two cases, and any relevant new cases will be incorporated in the re-scheduled lecture to be delivered in 2021, possibly under the title "Basic Structure Revisited".

Endnotes

1 [1977] 2 MLJ 187.

2 [1973] INSC 258; AIR 1973 SC 1461; (1973) 4 SCC 225.

3 Article 368(1) of the Indian Constitution reads:

> "(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article."

It should be noted that the amendment power in this article does not extend to repealing the Constitution. Article 159(1) of the Federal Constitution is expressed in similar terms.

4 Article 159(1) of the Federal Constitution does not affect the operation of express limitations to the amendment power. Examples of express limitations are Article 38(4) and Article 159(5):

> "**Article 38(4)**
> No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers.
>
> **Article 159(5)**
> A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, Clause (4) of Article 63, Article 70, Clause (1) of Article 71, Clause (4) of Article 72, Article 152, or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers."

It has been argued that express and implied limitations are not mutually exclusive, and are mutually reinforcing. Express limitations on the amendment power may be viewed as confirmation that the amendment power is limited, but not as an exhaustive list of limitations. See D Jothi Jagarajan, "A Study on the Relevance of Basic Structure Doctrine in a Globalized World With Reference to India", http://hdl.handle.net/10603/229373, Chapter IV (*Chapter IV*) at page 223, https://shodhganga.inflibnet.ac.in/bitstream/10603/229373/7/07_chapter%204.pdf (accessed on 7 October 2020).

5 The model was the template for the constitutions of the former British territories upon becoming sovereign and independent states during the period of decolonisation in the 1950s and after. The model would be drafted to suit local conditions and circumstances, after consultations with the local people. In 1961, SA de Smith, a leading expert in English constitutional law, described some of its basic features as:

(a) representative government under a parliamentary system of government;
(b) the separation of powers;
(c) the entrenchment of fundamental human rights; and
(d) supremacy of the constitution and the rule of law.

See SA de Smith, "Westminster's export models: The legal framework of responsible government", (1961) *Journal of Commonwealth Political Studies* 1:1, 2-16. These four features are present in the Indian Constitution and the Federal Constitution. As both India and Malaysia are federal states, federalism is another basic feature of their respective Constitutions.

6 [1980] 1 MLJ 70.

7 [1982] 2 MLJ 120.

8 [2008] 1 MLJ 1.

9 [2017] 3 MLJ 561; [2017] 4 AMR 123.

10 [2018] 1 MLJ 545; [2018] 2 AMR 313. See, however, Tun Abdul Hamid Mohammed: (1) "Not for judges to rewrite constitution", New Straits Times, 14 June 2017, https://www.nst.com.my/opinion/columnists/2017/06/248725/not-judges-rewrite-constitution; (2) "No judge is a parliament", *New Straits Times*, 15 June 2017, https://www.nst.com.my/opinion/columnists/2017/06/249016/no-judge-parliament (accessed on 7 October 2020).

11 "The Importance of Constitutionalism in Public Institutions" delivered on 5 October 2019 at The LAWASIA Constitutional & Rule of Law Conference 2019 – Constitutional Government, The Importance Of Constitutional Structure & Institutions, http://www.kehakiman.gov.my/sites/default/files/2020-03/SPECIAL%20ADDRESS%20-%20LAWASIA%20CONSTITUTIONAL%20%26%20RULE%20OF%20LAW%20CONFERENCE.pdf (accessed on 7 October 2020).

12 The International Institute for Democracy and Electoral Assistance, "What Is a Constitution? Principles and Concepts" (August 2014), http://constitutionnet.org/sites/default/files/what_is_a_constitution_0.pdf (accessed on 7 October 2020).

13 [1977] 2 MLJ 187 at 189.

14 "Checks and Balances in a Constitutional Democracy", published in *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches of HRH Sultan Azlan Shah*, Professional Law Books and Sweet & Maxwell Asia, 2004, at page 104.

15 See *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 and authorities cited therein.

16 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (per Griffith CJ). The definition has been adopted by many courts in the Commonwealth.

17 Richard Malanjum CJ (Sabah and Sarawak) in *PP v Kok Wah Kuan* [2008] 1 MLJ 1 at [38].

18 *Chapter IV*, note 4 above, at page 288.

19 [1967] INSC 45; AIR 1967 SC 1643; 1967 (2) SCR 762.

20 Article 13(2) provides:

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

21 *Chapter IV*, note 4 above, at page 216.

22 25th and 29th Amendments.

23 K Subba Rao (Former Chief Justice of India) in his article "The Two Judgments: *Golaknath* and *Kesavananda Bharati*" (1973) 2 SCC (Jour) 1 summarises the decision as follows:

> "(1) All the Judges agreed that the 24th Amendment, amending Article 368 of the Constitution, was valid and under the amended section, all the Articles of the Constitution including those enshrining fundamental rights could be amended.
>
> (2) Seven of the Judges, Sikri, C.J., Shelat, Hegde, Grover, Jaganmohan Reddy, Khanna and Mukherjea, JJ., held that the provisions, including those providing for fundamental rights could not be amended, if they affected the basic structure of the Constitution.
>
> (3) Six of the said seven, excluding Khanna, J., held that the 'core' of the fundamental rights, formed part of the basic structure of the Constitution. Four Judges, Mathew, Beg, Dwivedi and Chandrachud, JJ., held that the fundamental rights were the basic features of the Constitution, though they held that the said fact did not keep them beyond the reach of the amendatory process.
>
> (4) Khanna, J., held that the right to property was not a part of the basic structure of the Constitution. In his view the validity of the amendment of the other fundamental rights would depend upon the fact, whether the nature of the amendment of such a right or rights affects the basic structure of the Constitution.
>
> (5) Six Judges, Ray, Palekar, Mathew, Beg, Dwivedi, Chandrachud, JJ., did not accept his limitation on the plenary power of the Parliament to amend the Constitution. But three of them, Ray, Mathew and Beg, JJ., held that the said power could not enable the Parliament to destroy the Constitution without retaining a bare mechanism of Government."

24 See *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2018] 1 MLJ 545 at [29], where the Malaysian Federal Court quoted the judgment of the Supreme Court of Canada in *Reference re Senate Reform* [2014] 1 SCR 704; (2014) SCC 32 (at paragraphs [25–26]).

25 For a good summary of the history of the basic structure doctrine and a list of the basic features of the Indian Constitution, see GKTODAY (12 September 2016), https://www.gktoday.in/gk/basic-structure-doctrine/#:~:text=Once%20the%20constitution%20was%20in,known%20as%20Basic%20Structure%20Doctrine (accessed on 7 October 2020).

26 [1975] INSC 128; AIR 1975 SC 1590; 1975 (2) SCC 159.

27 [1980] INSC 141; AIR 1980 SC 1789; 1981 SCR (1) 206.

28 The majority judges in *Minerva Mills*, *viz*, Chandrachud CJ, and Gupta, Untwalia and Kailasam JJ said (1981 SCR (1) 206 at 240):

> "Indeed, a limited amending power is one of the basic features of our Constitution, and therefore, the limitation on that power cannot be destroyed. In other words, Parliament cannot under Article 368 expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features."

29 See *Chapter IV*, note 4 above, at page 253, *viz*, Sikri CJ, Shelat and Grover JJ, Hegde and Mukherjea JJ, Jaganmohan Reddy J.

30 [1973] INSC 258 at [506].

31 Ibid, at [690].

32 Ibid, at [1480].

33 Ship of Theseus, https://en.wikipedia.org/wiki/Ship_of_Theseus (accessed on 7 October 2020).

34 *Vicissitudes and limitations of the basic structure doctrine* (Winter Issue 2016 ILI Law Review) at page 111.

35 5 U.S. (1 Cranch) 137 (1803).

36 *IR Coelho (Dead) By Lrs v State of Tamil Nadu and Others* AIR 2007 SC 861.

37 See Wilson Tze Vern TAY, "Basic Structure Revisited: The Case of *Semenyih Jaya* and the Defence of Fundamental Constitutional Principles in Malaysia" [2019] *Asian Journal of Comparative Law* 113, at 127–128.

38 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

39 See Constitution (Amendment) Act 1976 (Act A354/1976).

40 The Government could have settled the claim for damages as it was not a substantial claim, and enacted the amendment with prospective effect. If the amendment power could be used to deprive a claimant of his right to property (claim for damages for wrongful deprivation of his liberty), it did not augur well for constitutional government and the rule of law. In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at 148, Raja Azlan Shah FJ famously said that "Every legal power must have legal limits, otherwise there is dictatorship". Although made in the context of administrative law, this statement applies equally to a constitutional amendment under Article 159.

41 Loh's arguments were as follows: (1) the amendment was a "law" under Article 4(1) and was therefore void for inconsistency with the Constitution as the supreme law of the Federation; (2) Parliament had no power by amendment to abrogate or restrict the fundamental rights except as expressly provided by the Constitution, such as for example, Article 9(3) (freedom of movement), Article 10 (freedom of speech, peaceful assembly and association), in the interest of national security, public order, international relations, etc.; Article 5(4) was not subject to any such restrictions; (3) Parliament had no power to enact a retrospective amendment.

In *Loh Kooi Choon*, Wan Suleiman FJ summarised Loh's argument (1) at page 192 as follows:

> "In this country, Federal law, he points out, includes (under Article 160) any Act of Parliament. A law passed under Article 159 would have to follow the same legislative procedure as is prescribed in Article 66, like any other Act of Parliament, before it becomes Federal law. He arrives at the conclusion that the power under Article 159, though seemingly wide, is in truth non-existent since any law passed to amend the Constitution must inevitably be inconsistent with the Constitution, and must therefore because of Article 4, be void."

42 In *Loh Kooi Choon*, Raja Azlan Shah FJ said at page 190:

> "I concede that Parliament can alter the entrenched provisions of cl (4) of Article 5, to wit, removing the provision relating to production before the magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in cl (3) of Article 159 is complied with. When that is done it becomes an integral part of the Constitution, it is the supreme law, and accordingly it cannot be said to be at variance with itself."

Wan Suleiman FJ said at page 192:

> "… when the special requirements of Article 159 have been satisfied … a Constitution amending Bill would become law (under Article 66(5)) on being assented to by the Yang Dipertuan Agung, and … thenceforth becomes part of the Constitution, becomes integrated therein. The situation therefore cannot arise where it can ever be said to be inconsistent with the Constitution."

In *Kesavananda* [1973] INSC 258 at [815], Ray J said in his dissenting judgment:

> "… Constitutional law is the source of all legal validity and is itself always valid ... an amendment being the Constitution itself can never be invalid. An amendment is made if the procedure is complied with. Once the procedure is complied with it is a part of the Constitution."

This statement could be Ray J's interpretation of Article 368(2) which provides that upon the President giving his assent to an amendment Bill "the Constitution shall stand amended in accordance with the terms of the Bill". This interpretation contradicts the basic structure doctrine.

Article 66(5) of the Federal Constitution provides:

> "A Bill shall become law upon being assented to by the Yang di-Pertuan Agong, but no law shall be in force until it has been published, without prejudice, however, to the power of Parliament to postpone the operation of any law or to make laws with retrospective effect."

43 In *Loh Kooi Choon*, Raja Azlan Shah FJ said at page 189:

> "The framers of our Constitution have incorporated the fundamental rights in Part II thereof and made them inviolable by ordinary legislation. Unless there is a clear intention to the contrary, it is difficult to visualise that they also intended to make those rights inviolable by constitutional amendment. Had it been intended to save those rights from the operation of cl (3) of Article 159, it would have been perfectly easy to make that intention clear by adding a proviso to that effect."

Raja Azlan Shah FJ said at page 190, obiter, that the doctrine "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."

44 In *Loh Kooi Choon*, Wan Suleiman FJ said at page 193:

> "I do not feel that the issue before this court would call for my view on whether there are indeed inherent or implied limitations to the power of amendment under Article 159, and must perforce confine myself to the issue before us *viz*. is the amendment to the fundamental right set out in Article 5 by Act A354/76 constitutional? Nor do I feel called upon to answer the broader issue of whether the power to amend includes the power to abrogate a fundamental right."

The Federal Court in *Loh Chooi Koon* did not address the following arguments which counsel for Loh did not appear to have raised: (1) that the basic structure doctrine was applicable to the amendment because it affected his fundamental rights under Article 5(4) and Article 13 (his right to damages); (2) that the amendment abrogated the judicial power of the Court of Appeal as the appeal was pending before it.

45 *Phang Chin Hock v PP* [1980] 1 MLJ 70.

46 In *Phang Chin Hock*, Suffian LP said at page 72:

> "*If it is correct that amendments 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. On the contrary apart from Article 159, there are many provisions showing that they realized that the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) policy, a living document that is reviewable from time to time in the light of experience and, if need be, amended."

It is submitted that it is correct to say that only amendments consistent with the Constitution are valid. But it does not follow from this proposition that, if so, no change can be made to the Constitution. The fact of the matter is that the majority of the amendments made to the Constitution since 1957 or 1963 were consistent with it. The issue is whether there can be amendments that are inconsistent with the Constitution or its provisions. This issue cannot be answered by interpreting the word "law" to mean only ordinary legislation because the interpretation assumes that an amendment can never be inconsistent with the Constitution. This was the very issue before the Court.

47 This holding is much too broad. If the holding is correct, then Parliament could amend Article 4(1) to make Parliament supreme, contrary to the judgment of the Federal Court in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 (also delivered by Suffian LP), where the Court said at page 113:

"The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please."

In *Phang Chin Hock*, Suffian LP also said, obiter, that because of the historical differences in the making of the Indian Constitution and of the Federal Constitution as elaborated in the judgment, it could not be said that "our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution" (at page 73). However, it has to be said that a comparison between the amendment provisions in the two Constitutions show that they are worded in substantially the same terms.

In constitutional theory, the authority to enact a constitution comes from the people. They are the constituent power. A constitution is the

product of the constituent power. India was already an independent and sovereign state when the Constituent Assembly drafted the Indian Constitution. However, this was not the case of the various states in Malaya. Before August 1957, Malaya was not an independent and sovereign state. The people were not the sovereign power, but subjects. The sovereign powers were Her Majesty the Queen in respect of the settlements of Penang and Malacca, and their Royal Highnesses, the Malay Rulers in respect of the nine Malay States. Together, as joint constituent powers, they transferred their respective sovereignty in the 11 territories to establish the Federation of Malaya as an independent and sovereign state under the 1957 Federation of Malaya Constitution.

The Reid Commission did not have a local member because the Alliance Government, who was consulted on the matter, expressed its preference for "a non-Malayan commission, largely because they felt such a body would be able to avoid local prejudices and perform their task with perfect impartiality" (see Joseph M Fernando, "*The Making of the Malayan Constitution*", MBRAS Monograph No 31 at page 103). The Commission, which comprised constitutional law experts and judges from the UK, India and Pakistan, consulted extensively with the local community and organisations. The Alliance Government itself proposed many amendments which were accepted by the Commission. The final report was approved by Her Majesty the Queen and their Royal Highnesses, the Malay Rulers, as the sovereign powers.

The 1957 Federation of Malaya Constitution may be likened to the Basic Law of Germany (or the German Federal Constitution) which was drafted by the three Western Allied Powers after the defeat of Hitler's Germany in World War II. The draft constitution was reviewed by a Parliamentary Council appointed by federal states of Germany and adopted by their respective legislatures as the Basic Law of the Federal Republic of Germany. The constituent power was not the people of Germany. In constitutional theory, it is not necessary for the constituent power to be the people where the people are not sovereign.

48 *Mark Koding v PP* [1982] 2 MLJ 120.

49 Article 63(2) and (4) provide:

> "(2) No person shall be liable to any proceedings in any court in respect of anything said or any vote given by him when taking part in any proceedings of either House of Parliament or any committee thereof.

(4) Clause (2) shall not apply to any person charged with an offence under the law passed by Parliament under Clause (4) of Article 10 or with an offence under the Sedition Act 1948 [Act 15] as amended by the Emergency (Essential Powers) Ordinance No. 45, 1970 [P.U. (A) 282/1970]."

50 The holding in *Koding* did not give any consideration or weight to the legal fact that an MP's freedom of speech in parliamentary proceedings is a higher constitutional right than freedom of speech under Article 10 (which may be restricted by law in the interest of national security, public order, etc.) as it cannot be restricted by an ordinary law. Hence, if freedom of speech under Article 10 is a basic feature of the Constitution, the right in Article 63(2) must, *a fortiori*, be a basic feature of the Constitution because it is a right of a higher constitutional order. The fact that the amendment was a requisite majority of MPs themselves is not relevant to the rights of Koding as an MP. An MP who abuses his parliamentary freedom of speech can be disciplined by Parliament itself, such as expulsion.

51 [1987] 2 MLJ 311.

52 In his majority judgment in *Dato' Yap Peng*, Mohamed Azmi SCJ said at page 324:

"Once the trial has commenced before a court of competent jurisdiction, the Public Prosecutor must be taken to have exercised his choice of venue, and it is unthinkable that he can be given an unfettered power to change the venue without giving the accused person an opportunity to be heard. When that choice has been exercised and the matter is before the court, consistent with our adversary system of criminal justice, the status of the Public Prosecutor or any of his officers as a client of the court, is the same as the counsel for the accused as far as the court is concerned when conducting a trial. Once the trial has commenced, any legislation conferring him as a member of the executive, power which goes further than to 'institute, conduct or discontinue' prosecution in any criminal proceedings would be suspect, and if it constitutes an interference or even a risk of an interference with any judicial power of the court, it must be struck down as being in violation of Article 121 of the Constitution."

In his minority judgment, Salleh Abas LP said at page 327:

> "If the Public Prosecutor purports to exercise his power under s 418A after the trial has commenced in the Subordinate Court, such exercise, I agree, would be unconstitutional because viewed from the Court's angle it interferes with the Court's function of carrying on with the trial to its conclusion and therefore could be regarded as encroaching upon the judicial power of the Court."

In this case the date of the trial in the Subordinate Court had not yet been fixed, nor had any witness given any testimony. All that had taken place was that the respondent was charged before the Subordinate Court and upon the production of the Public Prosecutor`s certificate the Subordinate Court transmitted the case to the High Court and caused the respondent to appear in that Court.

53 See Wilson, note 37 above, at page 141:

> "In the context of Malaysia, it is clear that the amendments to Article 121(1) in 1988 were a travesty borne out of political machinations and an overzealous prime minister who either did not or would not understand the danger of undermining constitutional checks and balances. In fact, it would be quite tenuous even to claim that the government of the day had any democratic mandate to effect amendments of such fundamental implications, for in the General Election immediately prior to that in 1986, the ruling National Front polled only approximately 57.3 per cent of the total votes cast and therefore could only legitimately claim to speak for slightly over half of the turnout, let alone a significant majority of the entire population. Despite this, through the first-past-the-post election system and a highly questionable delineation of constituency boundaries, the ruling party secured 83.6 per cent or 148 out of 177 parliamentary seats, well above the two-thirds majority needed to amend the Federal Constitution. Moreover, notwithstanding the grave concerns articulated both within and outside the legislature at that time, the constitutional amendment bill was rushed through, without alteration, after only two days of debate in the House of Representatives, and another two days in the Senate. Such unseemly haste and unwillingness to consider alternative viewpoints lend no credence to any idea that proper deliberation had taken place resulting in a democratic decision to alter a fundamental feature of the constitutional settlement."

54 See Wilson, note 37 above, at page 120.

55 Act A704/1988 added a new Article 145(3A) to provide that federal law may confer on the Attorney General power to determine which court will hear a particular criminal case or to transfer a case from one court to another. It might be asked why Article 145(3A) was necessary if the 1988 Amendment was intended to divest the two High Courts of the judicial power of the Federation originally vested by the Constitution.

56 The jurisdiction and powers of the High Courts and the Federal Court were conferred by the Federal Constitution which came into force on 16 September 1963, Article 87(1) and (2) of which provided that until other provision was made by and under federal law, their jurisdictions "and (so far as may be) the practice and procedure to be followed by those Courts in the exercise of that jurisdiction, shall, subject to the provisions of this section, be the same as that exercised and followed in the like case immediately before Malaysia Day in the Supreme Court of the Federation…"

57 See Wilson, note 37 above, at page 120.

58 See Tun Mohamed Dzaiddin bin Haji Abdullah, "The Role of the Judiciary as a Key Check and Balance Institution in Malaysia", IDEAS REPORT, February 2012. When compared with the directness of the 42nd Amendment enacted by the Indian Parliament to abrogate the judicial power of the Indian judiciary, the 1988 Amendment would seem to be a model of impressive subtlety and constructive ambiguity.

59 See "Checks and Balances in a Constitutional Democracy", note 14 above.

60 "The Role of Constitutional Rulers and The Judiciary: Revisited", published in *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches of HRH Sultan Azlan Shah*, Professional Law Books and Sweet & Maxwell Asia, 2004, at pages 402–403.

61 [2008] 1 MLJ 1.

62 *Kok Wah Kuan v PP* [2007] 5 MLJ 174; [2007] 4 AMR 568.

63 The Court of Appeal also cited *Liyanage v R* [1967] AC 259 as authority for the principle that an express vesting of the judicial power was not necessary so long as other provisions of the Constitution manifested an intention to secure in the judiciary freedom from political, legislative and executive control. It is not clear as to whether this principle is also a ratio of the judgment.

64 The Federal Court in *Kok Wah Kuan* said at [11], [21]–[22]:

> "[11] After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. … If we want to know the jurisdiction and powers of the two High Courts, we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation 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?
>
> [21] Now that the pre-amendment words are no longer there, they simply cannot be used to determine the validity of a provision of a statute. The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, they 'shall have such jurisdiction and powers as may be conferred by or under federal law.'
>
> [22] So, even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution provides, not what some political thinkers think 'judicial power' is. Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law."

65 In *Kok Wah Kuan*, the Federal Court said at [13]–[14], [17]–[18]:

> "[13] What about the instant appeal? In the instant appeal, even the Court of Appeal's judgment does not, indeed cannot, show which provision of the Constitution s 97 is inconsistent with. Instead the court held that that section violated the doctrine of the separation of powers, which, in its view was an integral part of the Constitution.
>
> [14] What is this doctrine of separation of powers? Separation of powers is a term coined by French political enlightenment thinker Baron de Montesquieu. It is a political doctrine under which the legislative, executive and judicial branches of government are kept distinct, to prevent abuse of power. The principle traces its origins as far back as Aristotle's time. During the Age of Enlightenment, several philosophers, such as John Locke and James Harrington, advocated

the principle in their writings, whereas others such as Thomas Hobbes strongly opposed it. Montesquieu was one of the foremost supporters of the doctrine. His writings considerably influenced the opinions of the framers of Constitution of the United States. There, it is widely known as 'checks and balance'. Under the Westminster System this separation does not fully exist. The three branches exist but Ministers, for example, are both executives and legislators. Until recently, the Lord Chancellor was a member of all the three branches—see generally ECS Wade and AW Bradley: *Constitutional and Administrative Law* (10th Ed); Wikipedia (Encyclopedia).

[17] In other words we have our own model. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly, 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. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy. 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.

[18] 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 matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J, said in *Loh Kooi Choon* said: 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.'"

66 In *Kok Wah Kuan,* Richard Malanjum CJ (Sabah and Sarawak) said at [37]–[39]:

"[37] At any rate I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they

function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.

[38] The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more 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.

[39] It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country …"

67 The amended Article 121(1), as interpreted by the Federal Court in *Kok Wah Kuan*, was the basis on which ouster legislation such as section 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 was held valid by the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 2 AMR 317. Section 72 prohibits any court from reviewing any action of the Corporation under the Act. It provides:

"Notwithstanding any law, an order of a court cannot be granted which (a) stays, restrains or affects the powers or any action taken or proposed to be taken by the Corporation or any specified entity), or (b) compels them to do or perform any act, and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise."

68 [2017] 3 MLJ 561; [2017] 4 AMR 123.

69 The Federal Court also referred to *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158; [2010] 5 AMR 677, where Heliliah FCJ held that in view of the marginal note to Article 121(1), which remained unchanged, the material question was whether there was really an alteration of substance. In her view, there was none. She said at [141]:

> "Part IX of the Federal Constitution establishes courts as the third branch of government. The amendments have not brought about structural or functional changes to the Judiciary. However, granted that the amendments spirited the words 'judicial power' to a marginal note cannot be intended to be inimical to Part IX of the Federal Constitution. Giving the words its normal interpretation, is it possible to state unreservedly that the amendments brought about by Act A704 is derogatory of the Judiciary. In my view Act A704 cannot be said to be repugnant to the Federal Constitution and on the same breadth, it is arguable that a fundamental branch that is the judiciary is still intact. *Ut res magis valeat quam pareat*."

70 See *Liyanage v R* [1967] AC 259.

71 The Court in *Semenyih Jaya* [2017] 3 MLJ 561 at [74], [79] and [90] said:

> "[74] Thus it is clear to us that the 1988 Amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution: (i) the doctrine of separation of powers; and (ii) the independence of the Judiciary.
>
> [79] And again in another case, that of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, the Federal Court speaking through Gopal Sri Ram FCJ said at p 342 that:
>
> > … 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. … Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See *Kesavananda*.
>
> [90] The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework. "

72 *Semenyih Jaya* at [75]. It should be noted that the Court did not hold or say that the amended Article 121(1) had removed the judicial power from the inherent jurisdiction of the judiciary, but only that its removal would render the judiciary subordinate to Parliament. The Court referred to the judgment of the Federal Court in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 (delivered by Suffian LP) where the Court said at page 113:

> "The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislation in Malaysia is limited by the Constitution, and they cannot make any new law they please."

73 See Wilson, note 37 above, at page 134, and the commentaries and articles referred in the footnotes.

74 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2018] 1 MLJ 545. At [42] of the judgment, the Federal Court said:

> "[42] The Federal Court in [*Semenyih Jaya*] has put beyond a shadow of doubt that judicial power is vested exclusively in the High Courts by virtue of art 121(1). Judicial independence and the separation of powers are recognised as features in the basic structure of the Constitution. The inherent judicial power of the civil courts under art 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism."

75 See Thomson CJ in *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355 at 359.

Also, Wan Suleiman FJ in *Loh Kooi Choon* [1977] 2 MLJ 187 at 192 said:

> "Whilst I would agree that the word 'law' in Article 4 means all laws which Parliament is competent to pass, including federal laws passed to amend the Constitution, I fail to note any ambiguity when Articles 4 and 159 are read together."

76 Article 66(1) provides:

> "The power of Parliament to make laws shall be exercised by Bills passed by both Houses (or, in the cases mentioned in Article 68, the House of Representatives) and, except as otherwise provided in this Article, assented to by the Yang di-Pertuan Agong."

77 See also *State of Rajasthan v Union of India* AIR 1977 SC 1361 at [44].

78 [1977] 2 MLJ 187 at 188-189.

79 See Chan Sek Keong, "Basic Structure and Supremacy of the Singapore Constitution" (2017) 29 SAcLJ 619 at 664–665.

Judicial review is an integral part
of the constitutional system.
Without it, there is no rule of law.

Dato' Seri Chan Sek Keong