

## Amendments to the Federal Constitution - An Analysis of the Basic Structure Doctrine

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### Abstract

In drafting the constitution, the Reid Report stated that the Federal Constitution defines the rights of both States and the Federation, and that there should be power to annul these rights. Article 4(1) of the Federal Constitution states that the highest law of the Federation is the Constitution. However, Parliament has the power to amend the Constitution, subject to certain limits. This article attempts to look at the limitations to constitutional amendments, the development of the basic structure doctrine in Malaysia and the applicability of the doctrine in the Malaysian context.

**Keywords:** Constitutional Law, Federal Constitution, Basic Structure Doctrine, Malaysian Constitutional Law

### 1. Introduction

In the *Federalists Papers*,<sup>369</sup> President James Madison stressed that the essence of constitutionalism is reliant on the principle of limited government,<sup>370</sup> where the crux of the constitution should limit the over-exercise of government power and ensure the voice of the people live on through the ages.<sup>371</sup> Constitutional provisions in Malaysia similarly enshrine the authority and powers of the legislature,<sup>372</sup> executive<sup>373</sup> and the judiciary,<sup>374</sup> guaranteeing the separation of powers which provide for effective governance.<sup>375</sup> In upholding constitutional supremacy,<sup>376</sup> amendments are crucial to warrant its relevance and reflect the

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<sup>369</sup> The Federalist Papers is a collection of 85 articles and essays written by Alexander Hamilton, James Madison, and John Jay to promote the ratification of the United States Constitution.

<sup>370</sup> James Madison, *Federalist No 51* (first published 1788, Wesleyan University Press 1961) 23.

<sup>371</sup> Samuel Issacharoff, 'Democracy and Collective Decision Making' [2008] 6 ICON 231, 247.

<sup>372</sup> Federal Constitution of Malaysia [1957] (Federal Constitution), Article 66.

<sup>373</sup> Ibid, Article 39.

<sup>374</sup> Federal Constitution, Article 121(1).

<sup>375</sup> Farid Sufian Suhuab, 'Lessons from a Secular State: Essence of the Constitution and Its Implication on Judicial Interpretation of Human Rights Provisions in Turkey' [2019] 24(2) JIRC 167, 170.

<sup>376</sup> *Ah Tian v Government of Malaysia* [1976] 2 MLJ 112, 113 (Federal Court).

nation's values in a contemporary setting.<sup>377</sup> Thus, the Federal Parliament, comprising of elected representatives, is aptly vested with amending power where its procedural requirements are outlined in Article 159.<sup>378</sup> However, in recent years, the mere reliance on procedural limitations to Parliament's amendment power has become inadequate<sup>379</sup> which prompted courts to implement the substantive measure of the basic structure doctrine as a safeguard against valid, yet unconstitutional amendments.<sup>380</sup> Therefore, this doctrine questions the extent of Parliament's authority in amending the constitution despite the statement in *Phang Chin Hock's case*.<sup>381</sup>

## 2. Procedural Limitations

Articles 159 and 161E of the Federal Constitution lay out four procedures of constitutional amendment. The first is for minor amendments and is passed by a simple majority. Members in both Dewan Rakyat and Dewan Negara would need to vote with a simple majority before the bill assents to the Yang di-Pertuan Agong (YDPA) and this applies to only a handful of matters.<sup>382</sup> The next procedure is by two-thirds majority.<sup>383</sup> The difference is that the votes needed on the second and third readings must be two-thirds of the majority before being assented. If the YDPA refuses assent he could be bypassed after thirty days under the procedure of Article 66(4A). An example of this amendment is the recent lowering of voting age to 18 years old.<sup>384</sup>

The next process is by the assent of the conference of rulers.<sup>385</sup> There are ten provisions that the conference can block, which are limitations on free speech that disallows the questioning of 'sensitive issues' in Article 10(4), citizenship rights in Part III, privileges, position, honours of rulers in Article 38, the applicability of the law of sedition in legislative and parliamentary proceedings,<sup>386</sup> the precedence of Rulers,<sup>387</sup> the rights of ruler's to succession,<sup>388</sup> the Malay

<sup>377</sup> Vladimir N. Dzamic, 'Necessity to Amend the Constitution of the Republic of Serbia: Position and Importance of the National Assembly' (Research Conference, Netherlands, February 2014).

<sup>378</sup> Federal Constitution, Article 159.

<sup>379</sup> n/a, 'My Constitution: Judges and the Judiciary' (*Badan Peguam Malaysia*, 30 December 2010) <<https://www.malaysianbar.org.my/article/about-us/committees/constitutional-law-committee/my-constitution-judges-and-the-judiciary>> accessed 5 October 2020.

<sup>380</sup> Low Hong Ping, 'The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of Our Constitutional Identity' [2018] 45(2) JMCL 53, 67.

<sup>381</sup> *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 (Federal Court).

<sup>382</sup> Federal Constitution, Article 159(4)(a)-(c).

<sup>383</sup> Federal Constitution, Article 159(3).

<sup>384</sup> Trinna Leong, 'Malaysia's Mps Approve Amendment To Lower Voting Age From 21 To 18' *The Straits Times* (Singapore, 2019) <<https://www.straitstimes.com/asia/se-asia/malaysias-federal-constitution-amended-to-lower-voting-age-from-21-to-18>> accessed 28 October 2020.

<sup>385</sup> 'Report Of The Federation Of Malaya Constitutional Commission' (n 361), Article 159(5).

<sup>386</sup> Ibid, Articles 63 and 72.

<sup>387</sup> Ibid, Article 70.

<sup>388</sup> Ibid, Article 71.

language's special position,<sup>389</sup> the privileges of the Malays and the natives<sup>390</sup> and the special procedure of constitutional amendment.<sup>391</sup> The procedure is similar to the two-thirds majority, with the addition of the consent of the conference. The last procedure is by the assent of governors,<sup>392</sup> which are modifications to the special rights of Sabah and Sarawak and require a two-thirds majority, the assent of the YDPA and the consent of the Governors of Sabah and Sarawak, upon the advice of the Chief Ministers.

### 3. The Development of the Basic Structure Doctrine

In determining the extent of the applicability of the doctrine of basic structure in the Malaysian constitutional realm, its origin must be noted. Elements of the doctrine are first mentioned in the Indian case of *Sajjan Singh v State of Rajasthan*,<sup>393</sup> where Mudholkar J observed that it is unusual for fundamental rights that are guaranteed in the Constitution to be easily changed. In *Kesavananda v. State of Kerala*,<sup>394</sup> the majority on the Indian Supreme Court bench articulated that the amendatory power of Parliament is not unlimited and does not extend to alter the basic framework of the constitution. The court further stated that the true basic foundation cannot be abrogated unreasonably as it could affect the public as a whole.<sup>395</sup> Chief Justice Sikri stated that the power to amend the Constitution is wide enough to permit its own amendment as long as its basic elements are not invalidated or 'denuded of their identity'. The Court also listed several basic features of the Indian Constitution which includes constitutional supremacy, the Constitution's secular and federal character and the separation of powers.

The early attempts to transpose this substantive doctrine in Malaysian jurisprudence were met with substantial reluctance. The first mention of this doctrine can be seen in *Government of Kelantan v Government of Malaysia*,<sup>396</sup> whereby Thomson C.J observed that Parliament did not do something radical that may require fulfilment of a condition not stated in the Constitution. This could be implied to refer to the basic structure doctrine. However in *Loh Kooi Choon*,<sup>397</sup> it was equated to fallacy for the potency of amending power to impliedly fall on the judiciary rather than what was textually stated in the constitution.<sup>398</sup> However, Raja Azlan Shah FJ mentioned three concepts that are basic to Malaysia, namely, (i) fundamental rights, (ii) the allocation of sovereign authority between the States and the Federation, and

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<sup>389</sup> Ibid, Article 152.

<sup>390</sup> Ibid, Article 153.

<sup>391</sup> Ibid, Article 159(5).

<sup>392</sup> Ibid, Article 161E.

<sup>393</sup> [1965] 1 S.C.R. 933, 968.

<sup>394</sup> *Kesavananda Bharati v State of Kerala* [1973] AIR SC 1461, 1510 (Indian Supreme Court).

<sup>395</sup> Ibid, 1625.

<sup>396</sup> [1968] 1 MLJ 129.

<sup>397</sup> *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, 190 (Federal Court).

<sup>398</sup> Surendra Ananth, 'The Basic Structure Doctrine: Its Inception and Application In Malaysia' [2016] 1 MLJ 9, 11.

(iii) separation of power amongst the executive, legislative and judicial branches, which is similar to the principles mentioned in *Kesavananda*.

The courts took a more literal stance in which the framers would have included a proviso to have that effect where the procedural and political limitations<sup>399</sup> would be a sufficient deterrent. This was observed in *Phang Chin Hock*<sup>400</sup> where Tun Suffian stated that the harmonious construction rule would protect the integrity of the constitution, where only federal law enacted in an ordinary manner, not under procedural amendment requirements,<sup>401</sup> should be subjected to Article 4(1).<sup>402</sup> The *Mark Koding case*<sup>403</sup> further depicted courts' uncertainty as the basic structure doctrine was deemed unnecessary to be decided on, but even if it were, parliamentary privilege enshrined in Article 63(2)<sup>404</sup> would fail to be considered a basic structure.<sup>405</sup> Thus, the extent of this doctrine was clearly limited in the early stages of implementation and Parliament's amendatory power was not as limited, contrasting with India's Parliament.

#### 4. The Basic Structure Doctrine in Malaysia Post the Judicial Crisis of 1988

Post-1988, the encroachment of judicial power through the amendment made to Article 121(1),<sup>406</sup> saliently affected the propensity of the judiciary to declare amendments made unconstitutional, and reliance on the doctrine of basic structure further became unconceivable. The courts lacked to provide clarity on the extent as seen in *Sugumar's case*,<sup>407</sup> where Justice Gopal Sri Ram reiterated that judicial power lies with the judiciary and no other<sup>408</sup> but the Federal Court overturned the decision and failed to clarify its position. In *Danaharta Urus*,<sup>409</sup> however, it was clear that the dispensation of justice by the courts clearly fell in limitation to Parliament. A sense of consistency was provided in *Kok Wah Kuan's case*<sup>410</sup> where the courts held that laws may be only deemed unconstitutional if it infringes an express provision of the constitution<sup>411</sup> which led to a narrower scope of applying the basic structure doctrine.<sup>412</sup> The textualist approach taken reaffirmed that the jurisdiction of the High Courts

<sup>399</sup> Shukri Shahizam, 'Whither Non-Justiciability? An Argument for Judicial Review of Prosecutorial Discretion in Light of the Basic Structure' [2020] 2 MLJ 21, 26.

<sup>400</sup> *Phang Chin Hock* (n 381), 72.

<sup>401</sup> Federal Constitution, Articles 159 (1), 161 (E), 38(4).

<sup>402</sup> Federal Constitution, Article 4(1).

<sup>403</sup> *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120, 122 (Federal Court).

<sup>404</sup> Federal Constitution, Article 63(2).

<sup>405</sup> *Mark Koding* (n 403), 123.

<sup>406</sup> Constitution (Amendment) Act 1988.

<sup>407</sup> *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 (Court of Appeal).

<sup>408</sup> *Ibid*, 307.

<sup>409</sup> *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 2 MLJ 257, 270 (Federal Court).

<sup>410</sup> *Pendakwa Raya v Kok Wah Kuan* [2008] 1 MLJ 1 (Federal Court).

<sup>411</sup> *Ibid*, 13.

<sup>412</sup> Choo Chin Thye and Lucy Chang Weng, 'Federalism and Restoration of Sarawak's Territorial Waters and Boundaries' [2016] 6 MLJ 34, 43.

was now bound by federal legislation due to the deletion of judicial power from the constitution provision.<sup>413</sup> It should be noted that Malanjum CJSS's dissent paved the way for the acceptance of the doctrine in Malaysia. He disagrees that the High Courts have to look at federal law to see the jurisdiction and powers conferred to him, and instead argues that the doctrine of separation of powers and judicial independence are 'basic features' of the Federal Constitution. This dissent would later form the arguments in favour of the basic structure doctrine.<sup>414</sup>

However, the case of *Sivarasa Rasiah*<sup>415</sup> finally recognised the applicability of the doctrine of basic structure and declared Parliament unable to make laws contrary to it.<sup>416</sup> The Court of Appeal held that the fundamental liberties, in Part II,<sup>417</sup> should be protected by the doctrine and reaffirmed the prismatic form of interpreting fundamentals rights as stated in *Lee Kwan Woh*,<sup>418</sup> strengthening the position of the courts. Cases following it such as *Muhammad Hilman*<sup>419</sup> and the *Nik Nazmi case*<sup>420</sup> establish the bolder approach where fundamental liberties and separation of powers were held to form part of the basic structure doctrine. Despite the progress made, in *PP v Yuneswaran*,<sup>421</sup> the courts in determining whether infringement upon Article 10 of the Constitution arose,<sup>422</sup> departed from *Sivarasa's* stance and dismissed it as merely obiter<sup>423</sup> and thus could be overturned. This marked a stark departure once more where even in *Gan Boon Aun's case*,<sup>424</sup> the Federal Court failed to address and provide coherence as to whether infringement of the judiciary's power to regulate Parliamentary legislation was unconstitutional without further obfuscating the basic structure doctrine and stripping judicial power.<sup>425</sup>

With the lines continuing to blur, the landmark decision of *Semenyih Jaya*<sup>426</sup> secured the permanence of this doctrine and restored judicial power in the courts, limiting Parliament's amendment authoritative stature. The court held that any parliamentary provision contravening the judiciary's ability to award the factum of compensation, or any such breach,

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<sup>413</sup> Ibid, 46.

<sup>414</sup> *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] MLJU 13.

<sup>415</sup> *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, 342 (Federal Court).

<sup>416</sup> Yvonne Tew, 'On The Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics' [2016] 25 Pac. Rim L. & Pol'y J. 673, 685.

<sup>417</sup> Federal Constitution, Part II, Articles 5-13.

<sup>418</sup> *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 312 (Federal Court).

<sup>419</sup> *Muhammad Hilman v Kerajaan Malaysia* (2011) 6 MLJ 507, 521 (Court of Appeal).

<sup>420</sup> *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157, 169 (Court of Appeal).

<sup>421</sup> *Public Prosecutor v Yuneswaran A/L Ramaraj* [2015] 6 MLJ 47, 50 (Court of Appeal).

<sup>422</sup> Ibid, 74.

<sup>423</sup> Sharon K. Chahil, 'A Critical Evaluation of The Constitutional Protection of Fundamental Liberties: The Basic Structure Doctrine and Constitutional Amendment in Malaysia' [2002] 3 MLJ 12, 18.

<sup>424</sup> *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 (Federal Court).

<sup>425</sup> Ibid, 28.

<sup>426</sup> *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561 (Federal Court).

would offend the basic structure of the constitution.<sup>427</sup> It stated that Parliament does not have the authority to undermine distinct features of the constitution especially the rule of law, separation of powers and especially independence of the judiciary.<sup>428</sup> The case of *Indira Gandhi*<sup>429</sup> further entrenched this doctrine as judicial review was deemed a basic structure and cannot be invalidated by constitutional amendments. This then allowed the civil courts to review the issue of Islamic conversion as even the Syariah court's jurisdiction<sup>430</sup> shall not prevent the judicial review application,<sup>431</sup> a basic feature of the constitution. Both cases constructively dealt with the controversy of the 1988-amendment<sup>432</sup> by upholding the basic structure doctrine, with the notion that the independence and vestiture of judicial powers in the judiciary cannot be altered as it remains a foundational feature of the constitution. Therefore, the courts would be effectively able to limit Parliament's amending power and not act as servile agents of the legislature.<sup>433</sup>

Undoubtedly, this has led to a sense of lucidity as to the application of the basic structure doctrine, where a broader determination of what constitutes a form of basic structure in reviewing constitutional amendments can be seen in the recent *Datuk Seri Anwar case*,<sup>434</sup> which argued that the lack of royal assent propagated in the amendment to Article 66(4)<sup>435</sup> violates the basic structure doctrine. However, the amendment of Article 121(1) does still remain valid as the courts have merely taken an interpretive approach in limiting the effect of the amendment<sup>436</sup> which could leave the *Semenyih Jaya* and *Indira Gandhi* doctrine to be overturned by a future bench in the Federal Court.<sup>437</sup> Thus, it is evident that the extent of Parliament's procedural limitation has been side-stepped by the *Kesavananda* doctrine and finally being rooted in Malaysia's constitutional realm. This ultimately reinstates judicial power to an extent back in the judiciary, to ensure the substantive validity of amendments as well.

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<sup>427</sup> The Right Honourable Tan Sri Dato' Seri Utama Tengku Maimun bt Tuan Mat, 'The Importance of Constitutionalism in Public Institutions' (The Lawasia Constitutional & Rule of Law Conference 5 October 2019) MLJ 2019.

<sup>428</sup> *Semenyih Jaya* (n 426), 593.

<sup>429</sup> *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2018] MLJU 68, 94 (Federal Court).

<sup>430</sup> Federal Constitution, Article 121(1A).

<sup>431</sup> Dato' Seri Mohd Hishamudin Yunus, 'The Malaysian Constitution and the Basic Structure Doctrine' *Legal Herald* (Selangor, November 2018) < <https://www.lh-ag.com/wp-content/uploads/2018/12/1-The-Malaysian-Constitution-and-the-Basic-Structure-Doctrine.pdf> > accessed 17 October 2020.

<sup>432</sup> H.P. Lee, 'The Judicial Power and Constitutional Government-Convergence and Divergence in the Australian and Malaysia Experience' [2006] 1 JMCL < <http://www.commonlii.org/my/journals/JMCL/2005/1> > accessed 13 October 2020.

<sup>433</sup> *Kok Wah Kuan* (n 410), 21 per Richard Malanjum CJ (Sabah and Sarawak).

<sup>434</sup> *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133 (Federal Court).

<sup>435</sup> Federal Constitution, Article 66(4).

<sup>436</sup> *Tew* (n 416).

<sup>437</sup> Abdul Fareed Abdul Gafoor, 'Speech by President, Malaysian Bar, at the Opening of the Legal Year 2020' (Putrajaya International Convention Centre, 10 January 2020) MLJ, 2020.

With the gradual acceptance of this doctrine in Malaysian's legal sphere, the role of the judiciary as the gatekeeper of the Federal Constitution is as alive as ever. In *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)*,<sup>438</sup> the court reiterated the vigour of this doctrine as both the Federal and Concurrent list cannot be read as carte blanche for Parliament to make laws contrary to the basic structure principles of separation of powers and the judicial power of the federation. However, this principle is not a wide net as seen in the recent case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor*,<sup>439</sup> where despite the Federal Court affirming this principle, the bench held that the liberty to travel would not be a fundamental liberty that should be outwardly protected by the doctrine of basic structure and hence the Immigration Act can implement laws that limit this right.

## 5. General Rules of Constitutional Amendment

To analyse if the power to amend the constitution is limited, we should first see if there are any provisions in the Constitution that limit Constitutional amendments. Article 150 provides for the proclamation of emergency, and whereby Article 150(5) provides for the Parliament to make any law in regards to any matter during an emergency. Article 150(6) expressly provides that any legislation that is passed under this article should be valid even if it is inconsistent with the Constitution. However, there are certain matters where the powers of the Parliament may not touch under an emergency proclamation, which are Islamic law, Malay customs, native law or customs in the States of Sabah and Sarawak, religion, citizenship and language. It is also worth noting that Article 150(7) provides that all emergency laws cease six months after the end of an emergency. Thus, the argument for the correct view of Article 150 is that it suspends the Constitution, but does not amend it,<sup>440</sup> and although the suspension lasts for several decades it may have a similar effect to a permanent constitutional amendment. Therefore, there may not be explicit limits to unconstitutional constitutional amendments.

## 6. The Importance of Limiting the Amending Power through the Basic Structure Doctrine in Malaysia

The implied substantive limitation of the Constitution via the implementation of the basic structure doctrine is authorised by the judicial power being vested in the High Courts, which limits Parliament's amending power has in turn proven significant in preventing the over-concentration of influence<sup>441</sup> which upholds the doctrine of separation of powers. A check

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<sup>438</sup> *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Bhd; President of Association of Islamic Banking Institutions Malaysia & Anor (Intervenors)* [2019] 3 MLJ 561.

<sup>439</sup> *Ibid*, 47.

<sup>440</sup> Shad Saleem Faruqi, *Document Of Destiny* (Star Publications, Malaysia 2008).

<sup>441</sup> Claudia Derichs, 'Malaysia in 2006: An Old Tiger Roars' [2007] 47(1) *Asian Survey* 148, 150.

and balance mechanism, concentrating on Parliament's constitutional function ensures proper distribution of authority<sup>442</sup> thwarting the institutionalisation of weaker governmental pillars.<sup>443</sup> In the context of the 1988 constitutional crisis, the deletion of the term 'judicial power of the Federation' in Article 121(1) was clearly a *coup de grace* at the co-equal stature of the judiciary<sup>444</sup> and the original jurisdiction of the courts.<sup>445</sup> Due to the Privy Council abolishment,<sup>446</sup> the courts became stricter in declaring the unconstitutionality of executive action as seen in *Berthelsen*<sup>447</sup> and *Dato' Yap Peng*,<sup>448</sup> where matters usually exempted from review such as national security and the Attorney General's discretion were submitted.<sup>449</sup> In fear of substantial judicial activism,<sup>450</sup> this led to the amendment by Parliament and for years, it enjoyed the unchecked power amending the supreme law while courts were confined to federal law.<sup>451</sup> The judiciary's independence, being a key feature of the Constitution's basic structure, as seen in *Semenyih Jaya*, helped reinstate the stature of separation of powers by guaranteeing the independence of the judiciary and reigniting judicial power.<sup>452</sup> Therefore, it is evident based on the constitutional crisis, that limiting Parliament's amendment power helps avert the unconstitutionality of the over-concentration of powers.

Despite the two-third majority criterion before a constitutional amendment can be passed, the majoritarian rule could still lead to dire outcomes.<sup>453</sup> This is because, with majority-governance in Parliament, this could lead to the deprivation of minority rights<sup>454</sup> and amendments made suited to the majority's ideals.<sup>455</sup> Furthermore, amendment power could also be vested in one-party majorities which could advance certain political interests that may not be beneficial to the nation as whole<sup>456</sup> and substantially reduces the effectiveness of the

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<sup>442</sup> Mehmet Kabasakal, 'Measuring the Decline of Parliaments: New Indicators and Turkey as An Illustrative Case' [2019] 73(1) CILT 269, 273.

<sup>443</sup> G. Bingham Powell, *Contemporary Democracies: Participation, Stability and Violence* (HUP 1984) 238.

<sup>444</sup> A.J. Harding, 'The 1988 Constitutional Crisis in Malaysia' [1990] 39(1) Int Comp Law Q 57, 69.

<sup>445</sup> Torsten Persson, Guido Tabellini and Gerard Roland, 'Separation of Power and Political Accountability' [1997] 112(4) Q J Econ 1163, 1199.

<sup>446</sup> On 1 January 1978, appeals to the Privy Council in criminal and constitutional matters were abolished, while appeals in civil matters were abolished on 1 January 1985.

<sup>447</sup> *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134, 138 (Supreme Court).

<sup>448</sup> *Public Prosecutor v Dato Yap Peng* [1987] 2 MLJ 311 (Supreme Court).

<sup>449</sup> H.P. Lee (n 432).

<sup>450</sup> Dato' Mohd Hishamudin Yunus, 'Judicial Activism: The Way To Go?' [2012] 6 MLJ 17, 21.

<sup>451</sup> Antonio Lamer, *The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change* (New Brunswick Law Press 1996) 54.

<sup>452</sup> *Hinds v The Queen* [1976] 1 All ER 353, 359 (Privy Council).

<sup>453</sup> Rio Hoe, 'Pros and Cons of Majority-Rule Explained' (*Singapore Consensus Examined*, 6 June 2017) <<https://consensusg.com/2017/06/06/pros-and-cons-of-majority-rule-explained-in-5-minutes/>> accessed 21 October 2020.

<sup>454</sup> Peter Emerson, 'Majority Rule: The Right May Be Wrong. In: From Majority Rule to Inclusive Politics' [2016] 319 PolSciQ 2, 13.

<sup>455</sup> Richard Albert, 'The Structure of Constitutional Amendment Rules' [2014] 49 Wake Forest L. Rev 919, 933.

<sup>456</sup> K. Pakaran, 'Disturbing Trend of The Bad and Ugly Emerging in New Malaysia' *The Star* (Kuala Lumpur, 14 July 2019) <<https://www.thestar.com.my/opinion/columnists/heart-talk/2019/07/14/disturbing-trend-of-the-bad-and-ugly-emerging-in-new-malaysia>> accessed 23 October 2020.



procedural limitation.<sup>457</sup> The whip system in place further inclines members of the same party to vote based on party lines as seen up to 2008 where a one-party majority occupied Parliament.<sup>458</sup> This issue was prominently seen in the 1983 amendment process, where despite intra-divisions in the governing party regarding limiting the Yang Di-Pertuan Agong's role, the bill successfully passed, proving exertion of party-influence in the constitutional process.<sup>459</sup> It can be argued that the framers were unable to predict the exertion of political influence and majoritarian rule<sup>460</sup> when drafting the constitution and thus, proves the necessity to limit Parliament's amendment authority.

The constitutionalist Emmanuel Sieyès<sup>461</sup> articulates that the constitution itself is an exercise of constituent power, establishing the law of the nation and Parliament operates in the constituted power of the constitution.<sup>462</sup> Therefore, an unlimited amending power could jeopardise the integrity of the constitution. Constitutional integrity is the congruence of practises operating in the confines of the constitutional framework<sup>463</sup> and the embodiment of its ideals.<sup>464</sup> This adherence to protecting the essence of the constitution ensures that the acts of the relevant institutions are in line with it<sup>465</sup> where an unbounded power could result in a deficit of constitutional legitimacy.<sup>466</sup> For instance, individuals would be more willing to be bound to constitutional provisions that guarantee fundamental liberties that remain unaltered by Parliament, as it legitimises their belief in constitutional protection.<sup>467</sup> Hence, limiting Parliament's authority to amend and not destroy the constitution safeguards the constituted power by upholding constitutional integrity.

Another argument against Parliament's freedom to amend the constitution can be seen in the effects of the 1988 judicial crisis, where the Constitution is powerless in protecting itself. The effect was not only a decrease in judicial power, but also a state of confusion with the law in years to come. Further, although politicians are elected through a democratic process, we can see that legislation could be used as a weapon by politicians. After the 2013 elections, the past government enacted contentious security laws. Moreover, although fundamental

<sup>457</sup> Vibhanshu Shekhar, 'Malay Majoritarianism and Marginalised Indians' [2008] 43(8) EPW 22, 24.

<sup>458</sup> Thomas B Pepinsky, *The 2008 Malaysian Elections: An End to Ethnic Politics?* (CUP 2016) 544.

<sup>459</sup> Cindy Tham, 'Major Changes to the Constitution' (*Badan Peguam Malaysia*, 17 July 2007) <<https://www.malaysianbar.org.my/article/news/legal-and-general-news/general-news/major-changes-to-the-constitution>> accessed 19 October 2020.

<sup>460</sup> Joseph Fernando and Shanthiah Rajagopal, 'Fundamental Liberties in The Malayan Constitution And The Search For A Balance, 1956–1957' [2017] 13(1) IJAPS 1, 17.

<sup>461</sup> Emmanuel-Joseph Sieyès was a constitutional theorist who drafted the concept of popular sovereignty during the French Revolution.

<sup>462</sup> Frank Maloy, *The Constitutions and Other Select Documents Illustrative of The History of France 1789-1901* (Wilson Publishing 1904) 201.

<sup>463</sup> Theodore Vestal, 'An Analysis of the New Constitution of Ethiopia and The Process of Its Adoption' [1996] 3(2) MichLRev 21, 33.

<sup>464</sup> Susan J Brison, *Contemporary Perspectives on Constitutional Interpretation* (Routledge 1993) 142.

<sup>465</sup> Gedion T Hessebon, 'The Precarious Future of the Ethiopian Constitution' [2013] 57(2) J. Afr. Law 215, 224.

<sup>466</sup> H.P. Lee, *Constitutional Conflicts in Contemporary Malaysia* (2ed, OUP 2017) 333.

<sup>467</sup> Jeffrey Tulis and Stephen Macedo, *The Limits of Constitutional Democracy* (PUP 2010) 121.

liberties are protected under Part II of the Constitution, there must be a guarantee that these liberties are untouched by the Parliament. The judiciary on their part has sought to interpret these liberties generously,<sup>468</sup> and therefore equal protection should be given by other branches of government.

The cases of *Loh Kooi Choon*<sup>469</sup> and *Phang Chin Hock*<sup>470</sup> are landmark decisions in proving that the doctrine of basic structure would be inapplicable in Malaysia. However, Justice Gopal Sri Ram submits that both judgments could be faltered due to confusion in regards to the provisions of Articles 4(1) and 159(1), where the term 'this Constitution' and the 'provisions of this Constitution' were used respectively<sup>471</sup> implying that there is a more substantive limitation to Parliament's authority. This distinction cannot be dismissed as the former could imply consideration must be given to the entire framework and structure of the constitution<sup>472</sup> as seen in Chief Justice Zakaria's judgement in *Mohammad Nizar's case*.<sup>473</sup> Thus, applying the pith and substance canon of interpretation as well as the prismatic approach, the courts could have proposed that Parliament could retain its amendment jurisdiction as long as violations to the basic structure does not occur which would have been a more practical way to read Articles 4(1) and 159 harmoniously.<sup>474</sup> This is also in line with *Alma Nudo Atenza v Public Prosecutor*,<sup>475</sup> where it could be inferred that the basic structure doctrine should be read harmoniously in accordance with Part II of the Constitution, as they are 'parts of a majestic, interconnected whole'. This contrasts the actual approach taken which held only regular legislation needed to be in line with Article 4(1). Thus, if a more prismatic approach were to be taken, both cases would have allowed courts early on to limit the amendment powers of Parliament and contend that even expressly the Constitution implies the necessity for limitations to be placed.

## 7. Potential Setbacks of the Basic Structure Doctrine and Limiting Parliament's Amending Power

Limiting Parliament's power could severely affect the vitality of the constitution due to hindrances on its capacity to develop. In the *Lembaga Tatatertib case*,<sup>476</sup> constitutional

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<sup>468</sup> Iqbal Harith Liang, 'The Chronicles of the Basic Structure Doctrine' (*UMLR / University of Malaya Law Review*, 2020) <<https://www.umlreview.com/lex-in-breve/the-chronicles-of-the-basic-structure-doctrine>> accessed 28 October 2020.

<sup>469</sup> *Loh Kooi Choon* (n 397).

<sup>470</sup> *Phang Chin Hock* (n 400).

<sup>471</sup> Datuk Seri Gopal Sri Ram, 'The Dynamics of Constitutional Interpretation' [2017] 4 MLJ 1, 7.

<sup>472</sup> *Ibid*, 11.

<sup>473</sup> *Dato' Seri IrHj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285, 307 (Federal Court).

<sup>474</sup> Andrew James Harding and James Chin, *50 Years of Malaysia: Federalism Revisited* (Marshall Cavendish 2014) 139.

<sup>475</sup> [2017] MLJU 884.

<sup>476</sup> *Lembaga TatatertibPerkhidmatanAwam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2000] MLJU 837 (Court of Appeal).

vitality was held as the perennialism of the Constitution, preventing it from being atrophied and rigid.<sup>477</sup> Despite how broad and exhaustive any provisions are, it is undeniable that the adopted text would be able to address all peculiar controversies<sup>478</sup> which stresses the importance in providing a system that allows to amend and revise outdated provisions, reflecting the contemporary norms of the nation.<sup>479</sup> This can be seen in the 1963 constitutional amendment,<sup>480</sup> where Parliament was able to update and include provisions safeguarding the rights and position for Sabah and Sarawak upon the conclusion of the Malaysia Agreement.<sup>481</sup> Moreover, a great indicator for vitality would be the potential for the constitution to respond to its surrounding circumstances<sup>482</sup> in which amendments should reflect. The Sensitive Matters Amendment<sup>483</sup> shows Parliament using its amendment authority to uphold the peace at the time after the 1969 racial riots.<sup>484</sup> Thus, Parliament's amendment power upholds vitality as this institution responds to contemporary issues, ensuring the continuous relevance of the constitution.

The dependence on Parliament for amending constitutional provisions could be said to provide some form of consistency as declarations of unconstitutionality by the courts can be reversed.<sup>485</sup> It is completely possible that declaration of amendments to be unconstitutional can be overturned by which this prevents the constitution from having a sense of consistency which should be expected specially to ensure the rule of law is upheld.<sup>486</sup> The less formalistic approach to constitutional interpretation further creates a vacuum of uncertainty.<sup>487</sup> This was seen in *Yuneswaran*,<sup>488</sup> where the Court of Appeal overruled the decision in *Nik Nazmi's case*,<sup>489</sup> resurrecting the previously unconstitutional act. This indirectly implies that the courts were meant to be no more but the *bouche de la loi*, the mouth of law,<sup>490</sup> as it has to remain

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<sup>477</sup> *Weems v US* [1910] 54 L Fd 793, 801 (U.S Supreme Court).

<sup>478</sup> Lech Garlicki, 'Constitutional Courts versus Supreme Courts' [2007] 5(1) Int. J. Const. Law 44, 57.

<sup>479</sup> Micheal Burgess and Alan Tarr, *Constitutional Dynamics in Federal Systems: Sub-national Perspectives* (McGill-Queen's University Press 2012) 420.

<sup>480</sup> Malaysia Act 1963; n/a, 'My Constitution: About Sabah and Sarawak' (*Badan Peguam Malaysia*, 10 January 2011) <<https://www.malaysianbar.org.my/article/about-us/committees/constitutional-law-committee/my-constitution-about-sabah-and-sarawak>> accessed 25 October 2020.

<sup>481</sup> Agreement relating to Malaysia (with annexes, including the Constitutions of the States of Sabah, Sarawak and Singapore, the Malaysia Immigration Bill and the Agreement between the Governments of the Federation of Malaya and Singapore on common market and financial arrangements) (Malaysia Agreement) (adopted on 9 July 1963) 750 UNTS 10760.

<sup>482</sup> H.P. Lee (n 466), 299.

<sup>483</sup> Constitution (Amendment) Act 1971.

<sup>484</sup> *Penyata Rasmi Dewan Rakyat*, 23 February 1971, volume 1.

<sup>485</sup> Robert Martin, *Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (McGill-Queen's University Press 2003) 601.

<sup>486</sup> Wilson Tze Vern Tay, 'Basic Structure Revisited: The Case of Semeniyh Jaya and the Defence of Fundamental Constitutional Principles in Malaysia' [2019] 14 AsJCL 113, 137.

<sup>487</sup> *Ibid*, 138.

<sup>488</sup> *Yuneswaran* (n 421).

<sup>489</sup> *Nik Nazmi* (n 420).

<sup>490</sup> K.M. Schonfeld, 'Rec, Lex Judex: Montesquieu and La Bouche De La Loi Revisited' [2008] 4 ECR 274, 300.

flexible and to a certain extent be inconsistent<sup>491</sup> and have Parliament be the main power in amending the constitution to provide structure to the process as a whole.

The prominence of the judiciary in the declaration of unconstitutional amendments could also result in a counter-majoritarian difficulty.<sup>492</sup> This would be avoided if substantial amending power remained vested in Parliament. The theory proposes that the issue of judicial control on constitutionality lies not in the power vested but the legitimacy of it.<sup>493</sup> This raises the query of accountability where it would infringe democracy to entrust the constitutionality of amendments to the supreme law in an institution that is unelected by the popular vote. In Malaysia, the appointment of judges by the Judicial Appointment Commission<sup>494</sup> upholds independence yet lacks the crucial principle of representative government that binds Parliament, making it better suited to alter constitutional provisions.<sup>495</sup> However, the undemocratic assumption of the judiciary can be countered as it defends democracy<sup>496</sup> as a whole by ensuring the amendments made are in line with the essence of the constitution and is able to do this objectively free from social milieu and political biases.<sup>497</sup>

Another reason why this particular limit may not be appropriate is because the tenets of doctrine are not found on a historical basis. The constitution domain should be portrayed as inspired by political and social happenings of a country,<sup>498</sup> and that to justify such an amendment should be done contextually.<sup>499</sup> Further, to ascertain a constitutional identity, we ought not to accept a set of characteristics that are regularly connected with liberal democratic constitutionalism without the comprehension of the political, social and economic conditions that lays behind the constitution.<sup>500</sup> It could be argued that a support of this ideology can be seen in the rejection of the basic structure doctrine in *Phang Chin Hock*, whereby to substantiate why the doctrine in the Indian constitution is because the Constituent Assembly's preamble and Directive Principles contains ideas and philosophies

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<sup>491</sup> Tarunabh Kaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism' [2019] 82(4) MLR 603, 605.

<sup>492</sup> *Halsbury's Laws of Malaysia*, 'Salient Characteristics of the Federal Constitution' (3d edn, 2018) vol 3, para 100.

<sup>493</sup> Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (YUP 1962) 111.

<sup>494</sup> Judicial Appointments Commission Act 2009, section 21.

<sup>495</sup> Daniel Greenwood, 'Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World' [2001] 53 Hofstra Law Rev. 781, 812.

<sup>496</sup> Mauro Arturo Rivera, 'The Counter-Majoritarian Difficulty: Bickel and the Mexican Case' [2010] 3 N. M. Law Rev. 26, 31.

<sup>497</sup> Nehaluddin Ahmad, Hjh Hanan bt Pehin Dato Hj Abdul Aziz, Hjh Masnoorani bt Hj Mohidin, 'Rights of Minorities in the Framework of International Legal Regime: A Comparative Study of the Indian Context' [2020] 5 MLJ 97, 104.

<sup>498</sup> R. Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) 11 International Journal of Constitutional Law 1.

<sup>499</sup> Adrienne Stone, 'Unconstitutional Constitutional Amendments: Between Contradiction and Necessity' [2018] SSRN Electronic Journal 1.

<sup>500</sup> Jaclyn L. Neo, 'A Contextual Approach To Unconstitutional Constitutional Amendments: Judicial Power And The Basic Structure Doctrine In Malaysia' (2020) 15 Asian Journal of Comparative Law 74.

that inspires their Constitution, which is not the case for our Federal Constitution. Hence, in interpreting the Malaysian Constitution, judges may opt for the four-walls doctrine, where comparative jurisdictions or international law principles may be irrelevant in interpreting Malaysia's constitution.<sup>501</sup>

## 8. Conclusion

Despite the issues aforementioned, it can be submitted that limiting Parliament's amendment power through judicial control presents more benefits as a whole. The counter-majoritarian difficulty can be considered a necessary sacrifice as it is a corollary to prevent abuse of powers<sup>502</sup> whereas the lack of consistency can be overcome by allowing the further development<sup>503</sup> of this area over time. In the Malaysian context, the basic structure doctrine clearly has been applied in a moderate manner<sup>504</sup> as even the amendment striking the judicial power of the courts still remains valid. It can be assumed that the courts recognise the legitimacy of the democratic procedure applied, yet at the same time have exercised their duty to reinstate their power as guardians of the constitution.<sup>505</sup>

"Our constitution is not a mere political document. It is essentially a social document ... based on a social philosophy."<sup>506</sup> These words show how the Constitution is the most important document in a country, that not only has repercussions on the people but also on the future. Therefore, the Constitution should firstly be adequate enough to protect certain rights that should be indispensable towards fellow Malaysians. Further, the Constitution should also not lose the basic essence of what makes it unique to Malaysia by ensuring that its foundation complies with the intentions of those who have formed our Constitution.

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<sup>501</sup> Tew (n 146), 681.

<sup>502</sup> Hon-Wah Ng, *Counter-Majoritarian Difficulty: Constitutional Review: Singapore and Hong Kong Compared* (Biblio Bazaar 2017) 262.

<sup>503</sup> Virendra Kumar, 'Statement of Indian Law-Supreme Court Of India through Constitution Bench Decisions Since 1950. A Juristic Review of Its Intrinsic Value and Juxtaposition' [2016] 58(2) Journal of the Indian Law Institute 189, 222.

<sup>504</sup> Tay (n 486), 142.

<sup>505</sup> The Malaysian Judiciary, *Yearbook 2012* (Percetakan Nasional Malaysia 2012) 375.

<sup>506</sup> Gabriella Negretto, 'Constitution-making and Liberal Democracy: The Role of Citizens and Representative Elites' [2020] 18(1) Int. J. Const. Law 206, 219.

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