

CHAPTER 23

BASIC STRUCTURE DOCTRINE AND ITS APPLICATION IN MALAYSIA: WITH REFERENCE TO DECIDED CASES¹

23.1 INTRODUCTION

The separation of power doctrine propounded by the English philosopher, John Locke and the French writer, Baron de Montesquieu, provides that the legislative, executive and judicial functions of the Government should be discharged by independent institutions which is primarily aimed at avoiding the over-concentration of power in the hands of a few besides promoting transparency and accountability of the Government.² The judiciary is not only entrusted to interpret and enforce the laws enacted by the Legislature³ but also to ensure

- 1 This Chapter is contributed by Ashgar Ali Ali Mohamed. The contents of this chapter has been published as an article in Malaysian Court Practice Bulletin No. 1 of 2020 and is reproduced in this book with kind permission of LexisNexis (M) Sdn Bhd.
- 2 See *PP v. Kok Wah Kuan* [2007] 6 CLJ 341. In *Alma Nudo AtENZA v. PP & Another Appeal* [2019] 5 CLJ 780 Richard Malanjum CJ stated: ‘The separation of powers between the Legislature, the Executive, and the Judiciary is a hallmark of a modern democratic State [T]he separation of powers is not just a matter of administrative efficiency. At its core is the need for a check and balance mechanism to avoid the risk of abuse when power is concentrated in the same hands ... ’.
- 3 In *PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener)* [2019] 6 CLJ 1, Ramly Ali, Azahar Mohamed, Rohana Yusuf, Tengku Maimun Tuan Mat, Nallini Pathmanathan FCJJ delivering the judgment of the Federal Court stated: ‘The courts of justice are the bulwark of a nation. Alexander Hamilton famously recognised, in the doctrine of the separation of powers, that the Legislature controls money, the executive controls force and the judiciary controls nothing. It is on public confidence that the judiciary depends, for the general acceptance of its judicial decisions, by both citizens and the Government. The public conforms to the decisions of the judiciary, because they respect the concept of judicial power and the judges who exercise such power. Therefore, the trust and confidence of the people in the judicial system to deliver impartial justice comprises the very foundation of the judiciary’.

there is no encroachment or overstepping of power by the Legislature and the executive.⁴ The Judiciary is empowered to determine the constitutionality or legality of the executive decisions. Further, the constitutional amendments and legislation is also subject to judicial scrutiny and the courts are empowered to strike it down when it can be shown that the legislative action in enacting the legislation or the constitutional amendment was arbitrary and violated the constitutional framework.⁵

In delivering a keynote address at the Lawasia Constitutional and Rule of Law Conference 2019, Tan Sri Dato' Seri Utama Tengku Maimun bt Tuan Mat, Chief Justice of Malaysia stated: 'The key idea behind the doctrine of separation of powers is the aim to prevent absolutism or the concentration of powers in one arm. Now, because the executive and the legislative branches are to some extent fused, and that they determine governmental policy backed by electoral mandate, it becomes the function of the Judiciary to ensure that such powers are exercised in full conformity with the law. This is why an attempt to undermine the strict separation of powers is viewed as an affront to democracy specifically, and to constitutionalism generally.'⁶

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- 4 In *Country Garden Danga Bay Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor* [2019] 1 LNS 1693 Harmindar Singh Dhaliwal JCA stated: '[C]ases concerning judicial review and certiorari should be considered on a different footing as it is an important process to review executive and legislative actions. It provides the checks and balances which are imperative in the separation of powers.'
 - 5 In *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780 Richard Malanjum CJ, delivering the judgment of the court, stated: 'Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide.'
 - 6 Keynote address by Tan Sri Dato' Seri Utama Tengku Maimun bt Tuan Mat entitled: 'The Importance of Constitutionalism in Public Institutions' delivered at the Lawasia Constitutional & Rule of Law Conference 2019 held at One World Hotel on 5 October 2019. The full speech is available at [2019] 6 MLJ i.

Having said the above, this chapter discusses the application of the basic structure doctrine and with reference to decided cases. It is noteworthy that this doctrine was developed by the Indian Supreme Court in their landmark case of *Kesavananda Bharati v. State of Kerala*⁷ – a case heard and decided by a bench of 13 judges – which held *inter alia*, that the Constitution (Twenty-fourth Amendment) Act 1971 was unconstitutional and therefore void. The case of *Kesavananda Bharati* was subsequently followed in *Indira Nehru Gandhi v. Raj Narain*,⁸ and *Minerva Mills v. Union of India*,⁹ among others. The doctrine dictates that the Constitution has certain ‘basic features’ which are permanent which cannot be altered or destroyed through legislative amendments. The ‘basic features’ of the Constitution are not defined and it is therefore left for the courts to determine. In the context of the Malaysian Constitution, it would necessarily include *inter alia*, the position of Islam as the religion of the federation, supremacy of the Constitution, fundamental liberties, constitutional monarchy, federalism and separation of the powers of the three branches of Government.¹⁰

What is emphasised is that the judiciary is empowered to strike down an amendment to the Constitution or any enacted laws which conflicts with or seeks to alter the basic structure of the Constitution. As succinctly stated by Richard Malanjum CJ in *Alma Nudo Atenza v. PP & Another Appeal*:¹¹ ‘Courts can prevent Parliament from

7 [1973] AIR 1461, SC.

8 [1975] AIR 2299, SC.

9 [1980] AIR 1789, SC.

10 See *Phang Chin Hock v. Public Prosecutor* [1979] 1 LNS 67, FC. In *KCSB Konsortium Sdn Bhd v. Pentadbir Tanah Johor Babru & Anor And Another Case* [2019] 1 LNS 1116, it was stated that ‘A person’s right to property is a fundamental right imbedded in the Federal Constitution by the founding fathers of this nation. No law or institution can remove such right. Such right is part of our basic structure of the Federal Constitution.’

11 See footnote 5 above.

destroying the “basic structure” of the Federal Constitution [FC]... And while the FC does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that constitute the constitutional foundation. The role of the Judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide.’

23.2 BASIC STRUCTURE DOCTRINE IN MALAYSIA

Initially, the doctrine of basic structure was not approved by the Malaysian courts, mainly because of some glaring differences between the Malaysian and Indian Constitution. In *Phang Chin Hock v. Public Prosecutor*,¹² the Federal Court stated, “considering the differences in the making of the Indian and our Constitutions, in our judgment, it cannot 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.” In rejecting the application of this doctrine, Raja Azlan Shah FJ (as His Majesty then was) in *Loh Kooi Choon v. Government of Malaysia*,¹³ stated ‘the question whether the impugned Act is ‘harsh and unjust’ is a question of policy to be debated and decided by Parliament, and therefore, not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament.’ In *Loh Kooi Choon*, the plaintiff claimed damages against the defendant for wrongful imprisonment which arose pursuant to his detention under Restricted Residence Enactment in violation of art. 5(4) of the Federal Constitution which required him to be produced before a magistrate within 24 hours of his arrest. His Lordship further added:

‘It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament

12 [1979] 1 LNS 67, FC.

13 [1975] 1 LNS 90.

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.’

The views of Raja Azlan Shah in *Loh Kooi Choon* were affirmed by Suffian LP in *Phang Chin Hock v. Public Prosecutor*,¹⁴ when his Lordship stated: ‘[F]irst, Parliament have power to make constitutional amendments that are inconsistent with the Constitution. Secondly, Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself and it is unnecessary for us to say whether or not Parliament’s power of constitutional amendment extends to destroying the basic structure of the Constitution. Thirdly, Act 216 is constitutional. Whatever may be the features of the basic structure of the Constitution, none of the constitutional amendments complained of and none of the impugned provisions of Act 216 have destroyed the basic structure of the Constitution.’¹⁵ Again, in *Mark Koding v. PP*,¹⁶ the Federal Court stated: “As regards to the argument that the amendments complained of affected the basic structure of the Constitution and are therefore unconstitutional, with great respect to Mr Heald, we have no difficulty in holding that they do not; and it was therefore unnecessary for us to consider the question whether or not Parliament has power to so amend the Constitution as to alter its basic structure whatever that may be.”

14 [1979] 1 LNS 67.

15 Act 216 refers to the Emergency (Essential Powers) Act 1979 which Act had ceased to have effect since 21 June 2012 by virtue of cl. (7) of art. 150 of the Federal Constitution.

16 [1982] 2 MLJ 120 (FC).

In *Public Prosecutor v. Kok Wah Kuan*,¹⁷ the majority Federal Court judges rejected the application of the basic structure doctrine in regards to the encroachment into judicial power by s. 97(2) of the Child Act 2001. Earlier, the Court of Appeal held, *inter alia*, that the above section clearly contravened the doctrine of separation of powers housed in the Constitution by consigning to the executive the judicial power to determine the measure of the sentence. In allowing the appeal, setting aside the order of the Court of Appeal and reinstating the order of the High Court, Abdul Hamid Mohamad PCA, delivering a 4-1 majority judgment of the Federal Court,¹⁸ stated:

‘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.’

However, the dissenting judgment by Richard Malanjum FCJ held, *inter alia*, that the doctrines of separation of powers and the independence of the judiciary are basic features of our Constitution and that the jurisdiction and powers of the courts cannot be confined to federal law. In particular, his Lordship stated:

“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

17 [2007] 6 CLJ 341.

18 Majority decision comprising of Ahmad Fairuz CJ, Abdul Hamid Mohamad PCA, Alauddin Mohd Sheriff CJ (Malaya) and Zaki Tun Azmi FCJ. The dissenting judgment was by Richard Malanjum CJ (Sabah & Sarawak).

been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of the Government wherein the courts form the third branch of the Government and they function to ensure that there is ‘check and balance’ in the system including the crucial duty to dispense justice according to the law for those who come before them.

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

The recent decisions of the Federal Court in *Sivarasa Rasiah v. Badan Peguam Malaysia*,¹⁹ *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and another case*,²⁰ *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals*²¹ and *Alma Nudo Atenza v. PP & Another Appeal*²² however have approved the basic structure doctrine in Malaysia. In *Sivarasa Rasiah*’s case, Gopal Sri Ram FCJ, delivering the unanimous decision of the Federal Court,²³ stated: “it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution.”

19 [2010] 3 CLJ 507.

20 [2017] 5 CLJ 526.

21 [2018] 3 CLJ 145, FC.

22 [2019] 5 CLJ 780, FC.

23 The Federal Court comprising of Richard Malanjum CJ (Sabah & Sarawak), Zulkefli Makinudin FCJ and Gopal Sri Ram FCJ.

In *Semenyih Jaya*'s case, the Federal Court declared that s. 40D of the Land Acquisition Act 1960, which had removed the power of the judge to determine the value of the land and vested the same with two professional land valuers, as unconstitutional because it violated art. 121(1) of the Constitution. It was stated, *inter alia*, that 'the power to award compensation in land reference proceedings is a judicial power that is vested in the High Court Judge sitting in the Land Reference Court.' Delivering the unanimous decision of the Federal Court, Zainun Ali FCJ stated: 'the Judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.'²⁴

The *Semenyih Jaya*'s case was followed in *Indira Gandhi*'s case, where a bench of five Federal Court judges²⁵ unanimously nullified the unilateral conversion of three children to Islam by the father. The crux of the contentious issue in this case was whether the consent of only one parent is required to make minor children Muslim.²⁶ Zainun Ali FCJ, once again delivering the judgment of the Federal Court, stated *inter alia*, that the vesting of judicial power of the Federation in the civil

24 The Federal Court comprises of Zulkefli Ahmad Makinudin CJ (Malaya), Hasan Lah FCJ, Zainun Ali FCJ, Abu Samah Nordin FCJ and Zaharah Ibrahim FCJ.

25 The Federal Court comprising of Zulkefli Ahmad Makinudin PCA, Richard Malanjum CJ (Sabah and Sarawak), Zainun Ali FCJ, Abu Samah Nordin FCJ and Ramly Ali FCJ.

26 However, pursuant to s. 4 of the Law Reform (Marriage and Divorce) Amendment Act 2017 which came into effect on 15 December 2018, any application for divorce for marriage solemnised in a civil registry must be resolved in the civil court even if one of the spouse has converted to Islam. The newly inserted sub-s. (1) of s. 51 the Law Reform (Marriage and Divorce) Act 1976 allow either party, or both parties, to a marriage to petition for a divorce where one of them has converted to Islam. Prior to this amendment, only the non-converting spouse could petition for a divorce. Further, a new s. 51A to the Principal Act provides that where the converted spouse dies before the non-Muslim marriage is dissolved, the surviving spouse, the surviving children of a marriage and the parents of the deceased converted spouse will be entitled to participate in the distribution of the matrimonial assets of the deceased.

courts formed part of the basic structure of the Constitution and could not be removed, even by constitutional amendment. In particular, her Ladyship stated:

‘It would be instructive to now distil the principles as have been illustrated above: (a) under art. 121(1) [Constitution], judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts cannot be confined to federal law. The courts will continually and inevitably be engaged in the interpretation and enforcement of all laws that operate in this country and any other source of law recognised by our legal system; (b) judicial power in particular the power of judicial review, is an essential feature of the basic structure of the Constitution; (c) features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment; (d) judicial power may not be removed from the High Courts; and (e) judicial power may not be conferred upon bodies other than the High Courts, unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence.’

And more recently, in *Alma Nudo Atenza v. PP & Another Appeal*,²⁷ a nine-member bench led by Richard Malanjum CJ²⁸ unequivocally approved the basic structure doctrine. In delivering the unanimous decision of the court, his Lordship stated:

‘This court had, on several occasions, recognised that the principle of separation of powers and the power of the ordinary courts to review the legality of a State action, are sacrosanct and form part of the basic structure of the FC. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide.’ It was further stated that the courts can prevent Parliament from

27 [2019] 5 CLJ 780, FC.

28 This case was heard by a panel of nine Federal Court judges as follows: Richard Malanjum CJ, David Wong Dak Wah CJ (Sabah and Sarawak), Ramly Ali FCJ, Balia Yusof Wahi FCJ, Alizatul Khair Osman FCJ, Rohana Yusuf FCJ, Tengku Maimun Tuan Mat FCJ, Abang Iskandar FCJ and Nallini Pathmanathan FCJ.

destroying the 'basic structure' of the Federal Constitution. 'And while the FC does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that constitute the constitutional foundation. The role of the Judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide.'

From the above, it is thus apparent that the doctrine of basic structure has now form part of the law of Malaysia and with it the judiciary is empowered to nullify any legislation including any amendment to the Constitution when it conflicts with or seeks to alter the basic structure of the Constitution. In light of the acceptance of the basic structure doctrine in Malaysia, Mohd Hishamudin Yunus, the former Court of Appeal judge, stated: 'only by restoring judicial powers can the judiciary act as an effective check and balance on Parliament and on the executive, and the independence of the judiciary restored. With the basic structure doctrine, our constitutional framework and its essential features may be maintained and the three branches of Government, i.e. the Executive, the Judiciary and Parliament, kept within their constitutional limits.'²⁹

29 See Mohd Hishamudin Yunus, 'The Malaysian Constitution and the Basic Structure Doctrine' in Legal Herald November 2018 at <https://www.lh-ag.com/wp-content/uploads/2018/12/1-The-Malaysian-Constitution-and-the-Basic-Structure-Doctrine.pdf>

23.3 APPLICATION OF BASIC STRUCTURE DOCTRINE: WITH REFERENCE TO DECIDED CASES

The application of the basic structure doctrine may be further illustrated with reference to the decided cases shown in the table below.

<p><i>Bank Kerjasama Rakyat Malaysia Bhd v. Koperasi Amanah Pelaburan Bhd</i>³⁰</p>	<p>It was held, <i>inter alia</i>, that s. 82(1)(d), (3)(c), (5) and (7) of the Co-operative Societies Act 1948 which has the effect that the civil court can only have jurisdiction to hear the action when the Malaysia Co-operative Societies Commission requires the plaintiff and defendant to refer the case to the court, had altered the basic structure of the Constitution regarding the court's exclusive judicial power to decide disputes under art. 121(1) of the Federal Constitution and thus, by virtue of art. 4(1) of the Constitution the above provisions were void to the extent of the encroachment.</p>
<p><i>Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal</i>³¹</p>	<p>The Federal Court was faced with the issue whether the power of the Attorney General under s. 9(1) of the Government Proceedings Act 1956 to grant or refuse consent was amenable to judicial review. Mohd Zawawi Salleh FCJ delivering the judgment of the court reiterated the important pronouncement in <i>Semenyih Jaya</i>'s case namely, "that the power of judicial review 'cannot be changed or altered by Parliament by way of a constitutional amendment.' The court further stated, 'the power of judicial review is essential to the constitutional role of the courts, and inherent in basic structure of the constitution.' The Federal Court's reassertion of constitutional judicial power and its status as superior court meant that the power of the AG to grant or refuse consent under s. 9(1) of Act 359 is amenable to judicial review."</p>

30 [2019] 1 LNS 1099.

31 [2019] 4 CLJ 561, FC.

<p><i>Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia & Anor</i>³²</p>	<p>The appellant sought to challenge the constitutionality of the National Security Council Act 2016 (NSCA) which became law by virtue of art. 66(4A) of the Federal Constitution. The appellant contended that art. 66(4A) which provides that a Bill which is not assented to by the Yang di-Pertuan Agong within the time specified under art. 66(4) i.e., 30 days, shall become law as if it had been assented to, is unconstitutional because the amendment offended the basic structure of the Constitution. Accordingly, the NSCA which was enacted in accordance with art. 149, which became law pursuant to art. 66(4A), was unconstitutional, null and void. In dismissing the above application, Rohana Yusuf JCA delivering the judgment of the court stated: 'All these can only mean that the challenge posed by the appellant is questioning the power of the Parliament to legislate the impugned laws which fall squarely under art. 4 read with art. 128 and is therefore within the exclusive jurisdiction of the Federal Court.'</p>
<p><i>Mohamad Raimi Ab Rahim & Ors v. Dato' Seri Mohd Najib Tun Haji Abdul Razak & Ors</i>³³</p>	<p>The applicant submitted that the Trans-Pacific Partnership Agreement (TPPA), if signed by the respondents, will be <i>ultra vires</i> the Constitution, and damaging the basic structure of the Constitution. In dismissing the above application, it was held <i>inter alia</i>, that the signing of the TPPA involves a policy consideration by the Federal Government and is not for the Court to question the merits or demerits of the Government decision to sign the TPPA.</p>
<p><i>Teh Swee Chin & Ors v. PP</i>³⁴</p>	<p>The applicants contended that the Parliament has no power to make laws which are inconsistent with the Federal Constitution or introduce any law such as the Security Offences (Special Measures) Act 2012 (SOSMA) which undermine the doctrine of separation of powers and independence of the judiciary which formed part of the basic structure of the Federal Constitution. In rejecting the above contention,</p>

32 [2019] 1 CLJ 445, CA.

33 [2016] 1 LNS 575.

34 [2018] 1 LNS 891.

	<p>Ahmad Shahrir Mohd Salleh JC, stated: ‘Parliament has deemed it necessary to pass the Security Offences (Special Measures) (Amendment) Act 2014 to include the offence of being a member of an organized criminal group under s. 130V(1) of the Penal Code as a security offence under the First Schedule of SOSMA ... [T]he offence under s. 130V(1) of the Penal Code falls squarely within the categories of actions envisaged by art. 149(1)(a) of the Federal Constitution. Its addition to the First Schedule of SOSMA by Security Offences (Special Measures) (Amendment) Act 2014 is entirely defensible in the circumstances and I do not find it being <i>ultra vires</i>, either of art. 5(1) or art. 8(1).’</p>
<p>Christin Nirmal v PP³⁵</p>	<p>The appellant was charged and convicted for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (‘DDA’) and was sentenced to mandatory death pursuant to s. 39B(2) of the DDA. Subsequently, the appellant challenged the validity of s. 39B(1)(a) of the DDA contending <i>inter alia</i>, that the mandatory death penalty for trafficking in dangerous drug was inconsistent with art. 5(1) of the Federal Constitution. In delivering the judgment of the court, Yeoh Wee Siam JCA stated: ‘We are of the firm opinion that the function of the courts is to interpret the law, and not to declare the mandatory death penalty under the impugned provisions of the DDA as unconstitutional. It is the Legislature, being the policy-maker, which has to amend the DDA and abolish the mandatory death sentence if it thinks that it is cruel and harsh, and a draconian law which is not in keeping with international trends, and “is inconsistent with the Federal Constitution for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances.”’</p>

*JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President of Association of Islamic Banking Institutions Malaysia & Anor (Interveners)*³⁶

The Federal Court had considered the constitutionality of ss. 56 and 57 of the Central Bank of Malaysia Act 2009 (CBMA).³⁷ The majority decision³⁸ held that the vesting of power with the Shariah Advisory Council (SAC) in Shariah matter arising in the Islamic financing facility did not breach the Federal Constitution because SAC's ruling does not in any way usurp the judicial power of the civil courts. It was stated that SAC merely ascertains the Islamic financing issues while the final determination of the dispute between parties is still within the jurisdiction of the civil courts. The reasoning of the court is summarised below.

- (i) that s. 57 of the CBMA does not conclude or settle the Islamic financing dispute between the parties as the determination of a borrower's liability is decided by the presiding judge. 'Hence, an 'ascertainment' exercise which results in a 'ruling' must not be confused with an act of 'determination' which results in a final decision.'

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36 [2019] 5 CLJ 569, FC. This case was heard by a panel of nine- Federal Court judges as follows; Richard Malanjum CJ, Ahmad Maarop PCA, Zaharah Ibrahim CJ (Malaya), David Wong Dak Wah CJ (Sabah and Sarawak), Ramly Ali FCJ, Azahar Mohamed FCJ, Alizatul Khair Osman FCJ, Mohd Zawawi Salleh FCJ, Idrus Harun FCJ.

37 Section 56(1) provides 'Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall – (a) take into consideration any published rulings of the Shariah Advisory Council; or (b) refer such question to the Shariah Advisory Council for its ruling. (2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.' Further, s. 57 provides 'Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under s. 55 and the court or arbitrator making a reference under s. 56.'

38 The majority decision was delivered by Mohd Zawawi Salleh FCJ with Ahmad Maarop PCA, Ramly Ali, Azahar Mohamed, Alizatul Khair Osman FCJ] concurring.

- (ii) that SAC's ruling was solely confined to the Shariah issues and it is the presiding judge who made reference to the SAC would exercise his judicial power and decide the case based on the evidence submitted before the court. Hence, 'the SAC did not usurp the judicial power of the court.'
- (iii) that s. 56(1) gives option to the court or arbitrator whether to take into consideration the published ruling of the SAC or refer the Shariah issue to the SAC for ruling. "The word 'or' in s. 56(1) signifies that such option is provided to the court or arbitrator and the phrase 'take into consideration' implies that only the court or arbitrator has the exclusive judicial power to decide on the case by applying the ruling of the SAC to the facts of the case before them.
- (iv) that the binding nature of the SAC's ruling is justified as the civil courts are not sufficiently equipped to make findings on Islamic financial matters unlike the SAC which comprises of scholars experts on Islamic finance and hence, the SAC ruling 'conserves and protects the public interest.'
- (v) that the use of expert evidence on Islamic financial matters would not be helpful to a civil court judge as, ultimately, the judge would have to decide which expert opinion to rely on and this could be further complicated if each expert based his/her opinion on different schools of Islamic jurisprudence.

However, David Wong Dak Wah CJ (Sabah & Sarawak) and Richard Malanjum CJ penned the dissenting judgment in *Kuwait Finance House*. In his judgment, David Wong Dak Wah CJ (Sabah & Sarawak) stated that the 'SAC had by its role of providing a binding ruling on the courts, had in no uncertain terms stepped into the sphere of judicial function which under the FC

	<p>is solely reserved to the civil courts.' Sections 56 and 57 which had clothed SAC, a non-judicial body under the FC, with judicial power have in fact violated the doctrine of separation of powers.</p> <p>Likewise, Richard Malanjum CJ in his separate dissenting judgment stated that the following functions of the SAC fell clearly within the core area of judicial power namely, that SAC exercised an adjudicative function; finally resolved the dispute on the issue of Shariah law; and gave a decision which was immediately enforceable and binding on the High Court. His Lordship stated: 'In the circumstances, s. 57 of the CBMA contravenes art. 121 of the FC in so far as it provides that any ruling made by the SAC pursuant to a reference is binding on the High Court making the reference. The effect of the section is to vest judicial power in the SAC to the exclusion of the High Court on Shariah matters. The section must be struck down as unconstitutional and void.'</p>
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23.4 CRITICISM AGAINST BASIC STRUCTURE DOCTRINE

Despite the approval of the basic structure principle in Malaysia, Tun Abdul Hamid Mohamad, the former Chief Justice of Malaysia, had vehemently opposed the adoption of this doctrine. According to him, the Constitution has vested power with the Parliament to amend any part of the Constitution in any way they think fit, provided that all the conditions precedent prescribed by the Constitution itself are followed. The above is in fact fortifying the views of Suffian LP in *Phang Chin Hock v. Public Prosecutor*,³⁹ where his Lordship stated: '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, art. 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

39 [1979] 1 LNS 67, FC.

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 art. 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) polity, a living document that is reviewable from time to time in the light of experience and, if need be, amended.³

It is noteworthy that since its adoption in 1957, the Federal Constitution had been amended more than 57 times⁴⁰ and the recent one being the Constitution (Amendment) Bill 2019 which is aimed at amending arts. 47 and 119 of the Constitution so as to lower the voting age from 21 to 18.⁴¹ Basically, there are four methods of Constitution amendment as highlighted by Raja Azlan Shah, FJ (as his late Highness then was) in *Loh Kooi Choon v. Government of Malaysia*⁴² namely: '(1) Some parts of the Constitution can be amended by a simple majority in both Houses of Parliament such as that required for the passing of any ordinary law. They are enumerated in cl. (4) of art. 159 and are specifically excluded from the purview of art. 159; (2) The amending cl. (5) of art. 159 which requires a two-thirds majority in both Houses of Parliament and

40 See https://en.wikipedia.org/wiki/List_of_amendments_to_the_Constitution_of_Malaysia. Recently, there was an attempt to amend art. 1(2) of the Federal Constitution making Sabah and Sarawak equal partners with peninsular Malaysia in the Federation of Malaysia. Unfortunately, the Government failed to obtain the two-third Parliament majority needed to amend: see 'Govt fails to get two-thirds Parliament majority to amend Constitution at <https://www.thestar.com.my/news/nation/2019/04/09/constitutional-amendment-fails-in-dewan-rakyat#e2xhOgKyayeqzFYR.99>

41 See 'Dewan Rakyat passes Bill to amend Federal Constitution to lower voting age to 18' at <https://www.thestar.com.my/news/nation/2019/07/16/federal-constitution-amended-to-lower-voting-age-to-18#KixgQxxKoKt1pu0I.99>

42 [1975] 1 LNS 90.

the consent of the Conference of Rulers; (3) The amending cl. (2) of art. 161E which is of special interest to East Malaysia and which requires a two-thirds majority in both Houses of Parliament and the consent of the Governor of the East Malaysian State in question; (4) The amending cl. (3) of art. 159 which requires a majority of two-thirds in both Houses of Parliament.' The procedure to amend the Constitution as contained in art. 159 is reproduced below.

- (1) Subject to the following provisions of this Article and to Article 161E, the provisions of this Constitution may be amended by federal law.
- (2) (Repealed).
- (3) A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 shall not be passed in either House of Parliament unless it has been supported on Second and third Readings by the votes of not less than two-thirds of the total number of members of that House.
- (4) The following amendments are excepted from the provisions of Clause (3), that is to say:
 - (a) any amendment to Part III of the Second or to the Sixth or Seventh Schedule;
 - (b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76;
 - (bb) subject to Article 161E any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to the application of this Constitution to a State previously so admitted or associated;
 - (c) any amendment consequential on an amendment made under paragraph (a).

- (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.
- (6) In this Article “amendment” includes addition and repeal; and in this Article and in paragraph (a) of Article 2 “State” includes any territory.

Apart from the above, Tun Abdul Hamid Mohamad also contended that with the adoption of the basic structure doctrine, the ‘judges are giving themselves the power to amend or rewrite the Constitution.’ In his article entitled ‘No Judge is a Parliament’, he stated:

“I must emphasise that I am objecting to the introduction of the basic structure principle invented by the Indian Judges on ground of principle and nothing else. We cherish the doctrines of independence of the judiciary, separation of powers, rule of law, Parliamentary democracy and supremacy of the Constitution. Now Judges are giving themselves the power to amend or rewrite the Constitution. I stand by what I had said in my judgments: No Judge is a Parliament. If the doctrine of separation of powers were to have any meaning, all the three branches of the Government i.e. Legislature, Executive and Judiciary must respect each other’s jurisdiction. I hope our members of Parliament are aware of what is happening. What recourse do they have? The answer is to revert to the Constitution. The power to amend the Constitution is vested in the Parliament. In the name of parliamentary democracy and separation of powers, all members of Parliament, whether they are from the Government or the opposition, should come together and move a bill to amend the Constitution to the effect that Parliament may amend any part of the Constitution provided that the procedure laid down by the Constitution is followed. The original position should be restored.”⁴³

43 Tun Abdul Hamid Mohamad, ‘No Judge is a Parliament’ delivered at the International Islamic University Malaysia symposium entitled “Constitutional Oath, Rule of Law and Supreme Policing Role of the Judiciary” on 30 March 2018: see <https://tunabdulhamid.me/2018/03/no-judge-is-a-parliament/>

23.5 CONCLUSION

The doctrine of basic structure provides that the Constitution has certain basic features that cannot be altered or destroyed through legislative amendment and the judiciary is empowered to strike down an amendment to the constitution or any other enacted laws which conflict with or seek to alter this basic structure doctrine. Initially, this doctrine was disapproved in Malaysia in *Loh Kooi Choon, Phang Chin Hock* and *Kok Wah Kuan*. However, in *Sivarasa Rasiah, Semenyih Jaya, Indira Gandhi* and *Alma Nudo Atenza* this doctrine has been accepted and it now form part of the law of Malaysia. It is noteworthy that by virtue of the conflicting apex court's decisions as above, the doctrine of *stare decisis* dictates that the legal principle embodied in the recent apex court's decision has to be followed by subsequent cases.⁴⁴ Hence, any constitutionality or legality of the executive action is questionable in the High Court by way of judicial review.⁴⁵ The judiciary is also empowered to review the legislation and any constitutional amendments which violates the basic structure of the constitution. For example, the constitutionality of ss. 56 and 57 of the Central Bank of Malaysia Act 2009 which in effect vested the 'judicial power' in the Shariah Advisory Council on matters relating to Islamic finance business was recently decided by the Federal Court in *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President of Association of Islamic Banking Institutions Malaysia & Anor (Interveners)*.⁴⁶ Further, art. 128(1)(a) of the Federal Constitution empowers the Federal Court to decide on the validity of a law enacted by Parliament or by the Legislature of a State.⁴⁷ In short, the judiciary is empowered to 'prevent Parliament from destroying the "basic structure" of the Federal Constitution'.⁴⁸

44 See *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645, FC.

45 *Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal* [2019] 9 CLJ 153, FC.

46 See *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President of Association of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 5 CLJ 569, FC.

47 Article 128 (1)(a) of the Federal Constitution provides 'the Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction—(a) any question whether a law made by parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which parliament or, as the case may be, the Legislature of the State has no power to make laws'.

48 Per Richard Malanjum CJ *Alma Nudo Atenza v PP & Another Appeal* [2019] 5 CLJ 780, FC.