

# LEGALFOXES LAW TIMES

## THE RISE AND FALL OF THE BASIC STRUCTURE DOCTRINE IN MALAYSIA

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### Introduction

The Basic Structure Doctrine, in essence, advocates that "there are certain features [in the Federal Constitution] that constitute its basic fabric."<sup>1</sup>

The Basic Structure Doctrine featured in Malaysian jurisprudence as a result of the decision of the Supreme Court of India in *Kesavananda v The State of Kerala* [1973] SCR Supp 1 which was later "reviewed and affirmed by the Supreme Court in *Indira Nehru Gandhi v Shri Raj Narain & Anr* AIR 1975 SC 2299."<sup>2</sup>

The majority in *Kesavananda* (supra) held *inter alia* that, "The power to amend does not include the power to alter the basic structure or frame-work of the Constitution so as to change its identity"<sup>3</sup>

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<sup>1</sup>*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507, at paragraph 8

<sup>2</sup>*Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, at p. 593

<sup>3</sup>*Kesavananda v The State of Kerala* [1973] SCR Supp 1, at p. 4

*Kesavananda* (supra) was cited and considered by the Federal Court of Malaysia in the frequently discussed decision of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.<sup>4</sup>

The Basic Structure Doctrine brings with it serious implications as any written law which offends the basic structure, including constitutional amendments, can be struck down for being unconstitutional.

### **The Rise**

Early mentions of the Basic Structure Doctrine in Malaysia include *Public Prosecutor v Datuk Harun Idris & Ors* [1976] 2 MLJ 116 whereby Eusoffe Abdoolcader J (later Supreme Court Judge) held that “... theequality provision in Article 8(1) is part of the basic structure of the Constitution and a basic feature thereof.”<sup>5</sup>

Another example is *Public Prosecutor v Phung Chin Hock* [1977] 2 MLJ 261 whereby Abdul Hamid J (later Federal Court Judge) was presented with an argument revolving around the Basic Structure Doctrine and referred to the Basic Structure Doctrine as if it were applicable in Malaysia<sup>6</sup> although ultimately His Lordship was of the view that the impugned constitutional

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<sup>4</sup>*Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, at pp. 192-193

<sup>5</sup>*Public Prosecutor v Datuk Harun Idris & Ors* [1976] 2 MLJ 116, at p. 120

<sup>6</sup>*Public Prosecutor v Phung Chin Hock* [1977] 2 MLJ 261, at p. 262: “As for the contention that even if Article 4 does not apply to the amendments they are still void in that they destroy the basic structure of the Federal Constitution I have, after careful perusal of the submission put forward before this court, formed the view that there is no substance in the argument. There are absolutely no grounds for suggesting that the amendments would destroy the basic structure of the Federal Constitution having regard to the fact that these amendments were properly made pursuant to and in accordance with the provisions of the Constitution.”

amendments “were properly made pursuant to and in accordance with the provisions of the Constitution.”<sup>7</sup>

On appeal, the Federal Court in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 appeared to accept that the Basic Structure Doctrine was part of Malaysian jurisprudence but concluded that the impugned Act of Parliament did not destroy the basic structure of the Constitution:

“... our answers to the three issues raised are: first, 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.**”<sup>8</sup> (emphasis mine)

A few years later, the Federal Court in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 also appeared to accept the existence and application of the Basic Structure Doctrine but just like its predecessors reckoned that “... the amendments complained of did not affect the basic structure of the constitution.”<sup>9</sup>

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<sup>7</sup>Ibid.

<sup>8</sup>*Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, at p. 75

<sup>9</sup>*Mark Koding v Public Prosecutor* [1982] 2 MLJ 120, at p. 123

However, the majority of the Federal Court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 (“**Kok Wah Kuan**”) appeared to veer away from the applicability of the Basic Structure Doctrine when it held:

“[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 F.J. (as His Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) said: "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it."<sup>10</sup> (emphasis mine)

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<sup>10</sup>Public Prosecutor v Kok Wah Kuan [2008] 1 MLJ 1, at pp. 16-17

It was only in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 (“**Sivarasa Rasiah**”) that the Federal Court expressly recognised the Basic Structure Doctrine. The Federal Court held the following:

“... 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. See *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461.”<sup>11</sup> (emphasis mine)

The Federal Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (“**Indira Gandhi**”) went further to hold that “the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution. It cannot be abrogated or altered by Parliament by way of a constitutional amendment.”<sup>12</sup>

In *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 (“**Alma Nuno Atenza**”), the Federal Court explicitly held that, “In fact **courts can prevent Parliament from destroying the ‘basic structure’ of the FC** (see *Sivarasa Rasiah* at para 20). 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**

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<sup>11</sup>*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, at p. 342

<sup>12</sup>*Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, at paragraph 48

**also for violation of the doctrines or principles that constitute the constitutional foundation.”<sup>13</sup> (emphasis mine)**

At its peak, there were Federal Court decisions for a few years in a row affirming previous Federal Court decision(s) on the Basic Structure Doctrine thereby further retrenching the same in Malaysian jurisprudence.

As a result of this widespread acceptance of the Basic Structure Doctrine, over the years, a number of legal provisions have been struck down as a result of (or premised upon) the Basic Structure Doctrine.

This includes Section 13 of the Security Offences (Special Measures) Act 2012,<sup>14</sup> and Regulation 12 of the Housing Development (Control and Licensing) Regulations 1989.<sup>15</sup>

### **The Fall**



In the recent legal challenge by Maria Chin Abdullah, the Member of Parliament for Petaling Jaya, against a travel ban imposed by the Director General of Immigration pursuant to Section 3(2) of the Immigration Acts 1959/63,<sup>16</sup> the Basic Structure Doctrine was the subject of much consideration.

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<sup>13</sup>*Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1, at p. 26

<sup>14</sup>*Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681, at p. 710

<sup>15</sup>*Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications* [2020] 10 MLJ 689, at p. 701

<sup>16</sup>*Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [Federal Court Civil Appeal No. 01(f)-5-03/2019(W)]

The leave questions in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [Federal Court Civil Appeal No. 01(f)-5-03/2019(W)] were as follows:

"Question 1

Whether section 3(2) of the Immigration Act empowers the Director General the unfettered discretion to impose a travel ban. In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticizing the government?

Question 2

Whether section 59 of the Immigration Act is valid and constitutional?



Question 3

"OUR MISSION YOUR SUCCESS"

Whether section 59A of the Immigration Act is valid and constitutional in the light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545?"<sup>17</sup>

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<sup>17</sup>*Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [Federal Court Civil Appeal No. 01(f)-5-03/2019(W)], at paragraph 10

Question 3 relates to the validity and constitutionality of a specific legal provision in light of the Basic Structure Doctrine, which at the time (and as seen above) appeared to be settled law.

Abdul Rahman Sebli FCJ, after considering the constitutional amendment in 1963 which brought about the new Borneo High Court and the vesting of judicial power in it, delivered the majority (4-3) decision that "a basic structure of the Federal Constitution per se is not inviolable. The legislature may still by law or constitutional amendment alter a "basic structure" of the Federal Constitution."<sup>18</sup>

It is submitted that the removal of judicial power and the vesting of judicial power in three High Courts of co-ordinate jurisdiction and status (then Malaya, Borneo, and Singapore), both of which were introduced by virtue of the Malaysia Act (No. 26 of 1963), cannot be treated in the same manner.

The former would "... place the Judiciary in a position subordinate to that of Parliament, which is untenable and simply wrong, in a democracy that is based on a written Constitution which declares constitutional supremacy"<sup>19</sup> while the latter has no detrimental effect on judicial power .

In a similar vein, constitutional amendments which seek to erode fundamental liberties cannot be treated in the same manner as constitutional amendments which seek to expand/improve fundamental liberties. The Basic Structure Doctrine will not stand in the way of the latter.

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<sup>18</sup>*Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [Federal Court Civil Appeal No. 01(f)-5-03/2019(W)], at paragraph 107

<sup>19</sup>*Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] MLJU 13, per Nallini Pathmanathan FCJ (dissenting), at paragraph 16



More importantly, Abdul Rahman Sebli FCJ held that "Article 121(1) of the Federal Constitution cannot be suborned to any doctrine of law, including the Indian doctrine of basic structure and the common law doctrine of separation of powers."<sup>20</sup>

In spite of the previous Federal Court decisions which affirmed and accepted the Basic Structure Doctrine in Malaysia, for example in *Sivarasa Rasiyah*, *Indira Gandhi*, and *Alma Nuno Atenza*, the majority in *Maria Chin Abdullah* appears to have favoured the approach in *Kok Wah Kuan* above.

The majority in *Maria Chin Abdullah* (supra) also held that "the better way of resolving constitutional conflicts arising from the enactment of post-Merdeka laws by Parliament is to stick to the dispute resolution process inherent in Article 4(1) of the Federal Constitution rather than to factor in the basic structure doctrine."<sup>21</sup>

The decision of the majority in *Maria Chin Abdullah* (supra) will undoubtedly be the subject of much discussion and scrutiny in the years to come.



The viability of the proposed simplistic Inconsistent-With-Article 4(1) approach will undoubtedly be tested in the years ahead and its effectiveness will no doubt have to be compared and contrasted with the Basic Structure Doctrine approach.

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<sup>20</sup>*Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [Federal Court Civil Appeal No. 01(f)-5-03/2019(W)], at paragraph 122

<sup>21</sup>*Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [Federal Court Civil Appeal No. 01(f)-5-03/2019(W)], at paragraph 255

One apparent weakness of the former is that the former will not protect erosions of fundamental liberties which are introduced by way of constitutional amendments. So long as procedurally the amendments to erode fundamental liberties comply with Article 159 of the Federal Constitution (on Amendment of the Constitution), such amendments will not be inconsistent with Article 4(1) of the Federal Constitution.

The Basic Structure Doctrine, on the other hand, would empower the Courts to strike down such constitutional amendments for violating the basic structure of the Federal Constitution which encompasses the rights guaranteed under Part II of the Federal Constitution (on Fundamental Liberties) as espoused in *Sivarasa Rasiah*.

### Conclusion

The majority of the Federal Court in *Maria Chin Abdullah* (supra) has, at best, diluted the application of the Basic Structure Doctrine in Malaysia. At worst, the Basic Structure Doctrine has withered away.



What is clear is that the doctrine, despite its history acceptance in the superior courts in Malaysia, is no longer a settled doctrine in Malaysian jurisprudence.

The full effect of the decision of the Federal Court in *Maria Chin Abdullah* (supra) will only be felt in the coming years as constitutional challenges, particularly those involving separation of powers and/or judicial power, come before the Federal Court for its determination.