

The Doctrine of Basic Structure of the Malaysian Constitution: A Study of Framework

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ABSTRACT

The Federal Constitution of Malaysia (the Constitution) is a living and vibrant document that may have to be amended in order to keep up with contemporary social, economic and political needs of the country. This proposed amendment may destroy its basic structure. The paper seeks to evaluate the doctrine of basic structure which has originally been developed by courts in India. The study is based on doctrinal research and a comparative analysis on the development of the doctrine of basic structure in Indian jurisprudence. It was found that in Malaysia since the Executive controls two thirds or more of the seats in the Dewan Rakyat any part of the Constitution can be amended even if destroys the basic structure of the Constitution.

Keywords: Basic structure, constitutional amendment, India, Malaysian Constitution

INTRODUCTION

As of September 2015, there have been 57 amendments to the Constitution of Malaysia since its enactment in 1957. Hamzah (2009) observed that certain provisions in the constitution may not be practical or

relevant due to changes in social, political and economic conditions, hence there are need for amendment to certain provisions by the legislative. The Reid Commission framed it in such a way that an amendment would not be too difficult to the extent of frustrating the need for amendment, but at the same time, not too easy that it would end up weakening our constitutional safeguards. However, Lee (1978) observed that a constitution which is extremely easy to amend may turn out to be worse than having no constitution at all. He observed that some of the more fundamental amendments to the Malaysian Constitution had led to “a

ARTICLE INFO

Article history:

Received: 5 January 2017

Accepted: 26 September 2017

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truncation of safeguards which had been considered by the Reid Commission as vital for the growth of a viable democratic nation” (Lee, 1978, p. 369). The provision to amend the Constitution falls under Article 159. In Malaysia by virtue of Article 159 and Article 161E (for East Malaysia) Parliament is empowered to amend the Constitution. These Articles set out the formal or procedural requirements for amendment. Certain parts can be amended by a simple majority while others – for example, in the case of East Malaysia – require a two-thirds majority.

The Doctrine of Basic Structure

India. On the premise of *Kesavananda Bharati v. State of Kerala* (1973) the Supreme Court of India outlined the basic structure doctrine of the Indian Constitution. It ruled that all provisions of the constitution, including fundamental rights can be amended. However, Parliament cannot alter the basic structure of the constitution like secularism, democracy, federalism, separation of powers. Often called the “Basic Structure Doctrine”, this decision is widely regarded as an important part of Indian history. Later, the Supreme Court in *Maneka Gandhi v. Union of India* (1978) extended the doctrine’s importance as superior as to any parliamentary legislation. According to the verdict, no Act of parliament can be considered a law if it violated the basic structure of the constitution. This landmark guarantee of fundamental rights was regarded as a unique example of judicial independence in preserving the sanctity of

fundamental rights. The fundamental rights can only be altered by a constitutional amendment; hence their inclusion is as a check not only on the executive branch, but also on the Parliament and state legislatures. The imposition of a state of emergency may lead to a temporary suspension of the rights conferred by Article 19 (including freedoms of speech, assembly and movement, etc.) to preserve national security and public order. The President can, by order, suspend the right to constitutional remedies as well.

As a whole, the court recognised that that basic structure includes supremacy of the Constitution, rule of law, judicial review, effective access to justice, democracy, federalism, and secularism. While in *State of Bihar v. Bal Mukund Sah and Ors.* (2000), the Supreme Court observed that the concepts of “separation of powers between the legislature, executive and judiciary” as well as “the fundamental concept of independent judiciary have been now elevated to the level of basic structure of the Constitution and are the very heart of the Constitutional scheme”. It also includes free, fair and periodic elections (*Kihoto Hollohan v. Zachilhu*, 1993). The doctrine of basic structure is vague in the sense that there is no clear-cut list given by the judiciary that such provisions of the constitution form the basic structure, rather, it has been left open before the judiciary to decide the same on the case to case basis. In India, Seervai (2008) has lamented that a precise formulation of the basic features would be a task of greatest difficulty and would add to the uncertainty of interpreting

Table 1
Features of Basic Structure according to judges in India

Judge	Features of Basic structure
Chief Justice Sikri <i>Kesavananda Bharati v. State of Kerala,</i> 1973	<ul style="list-style-type: none"> • supremacy of the constitution • republican and democratic form of government • secular character of the constitution • separation of powers between the legislature executive and the judiciary • federal character of the constitution
Justice Shelat and Justice Grover	<ul style="list-style-type: none"> • mandate to build a welfare state contained in the Directive Principles of State Policy • unity and integrity of the nation • the sovereignty of the country
Justice Hegde and Justice Mukherjee	<ul style="list-style-type: none"> • sovereignty of India • democratic character of the polity • unity of the country • essential features of the individual freedoms secured to the citizens • mandate to build a welfare state
Justice Reddy	<ul style="list-style-type: none"> • sovereign democratic republic • parliamentary democracy • three organs of the State
Justice Thomas Justice Chandrachud	<ul style="list-style-type: none"> • power of judicial review • unamendable sovereign democratic republic status • equality of status and opportunity of an individual • secularism and freedom of conscience and religion • government of laws and not of men i.e. the rule of law
Chief Justice Ray	<ul style="list-style-type: none"> • the constituent power of Parliament was above the constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections
Justice Mathew	<ul style="list-style-type: none"> • that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary
Justice Beg	<ul style="list-style-type: none"> • that supremacy of the constitution • separation of powers
Justice Sharma, Justice Venkatachalliah, Justice Verma, Justice Reddy, Justice Jayachandra and Justice Agrawal	<ul style="list-style-type: none"> • free, fair and periodic election

the scope of Article 368. In the case of *M. Nagraj v. Union of India* (2006) the Court has tried to formulate a general test to decide if an amendment is against the basic structure of the constitution.

The Court held that in order to apply the principle of basic structure, twin tests have to be satisfied, namely, the 'width test' and the 'test of identity'. The Court referred to the judgment in *Kesavananda Bharati*

v. State of Kerala (1973) which clarified that not an amendment of a particular Article but an amendment that adversely affects or destroys the wider principles of the Constitution such as democracy, secularism, equality or republicanism or one that changes the identity of the Constitution is impermissible. Again, in the case of *R. Coelho v. State of Tamil Nadu* (2007), the Court held in respect of the amendments of the fundamental rights not a change in the particular Article but the change in the essence of the right must be the test for the change in the identity. It was further held by the Court that if the triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the “essence of right test” but also the “rights test” has to apply. The Court also observed that ‘rights test’ and the ‘essence of right’ test both forms part of the application of the doctrine of basic structure. Finally, the “impact test” can be used to determine whether any law destroys the basic structure. If the impact of such a law has an effect on any of the rights guaranteed under Part III of the Indian Constitution, then by applying this test, the answer will be in affirmative that such law is in violation of the basic structure.

Malaysia. The question then arises whether any part of the Constitution may be amended as provided by Article 159. The Federal Court held that Parliament may, completely remove the whole of Part II of the Constitution (the fundamental rights guarantees) provided it meets the procedural requirements set out in Article 159 (*Loh Kooi*

Choon v. Government of Malaysia, 1977 and *Phang Chin Hock v. Public Prosecutor*, 1980). In short, the Article allows the Executive which controls two thirds or more of the seats in the Dewan Rakyat to amend any part of the Constitution even if the amendment cuts across or even destroys the basic structure of the Constitution (Sri Ram, 2010). It seems that both decisions failed to protect and preserve the integrity of the Constitution. However, an opposing view which says that not only must an Act amending the Constitution comply with the procedure prescribed by Article 159, it also must not violate the fundamental rights provisions in Part II (Sri Ram, 2010). Accordingly, there are certain features of the Constitution that form part of its basic structure such that an Act amending the Constitution is invalid if it is inconsistent with the basic structure. Article 4(1) which declares the Constitution to be the supreme law and states that any law passed after Merdeka Day which is “inconsistent with this Constitution” shall be void to the extent of the inconsistency. They argued that the phrase “this Constitution” must include its basic structure. The fundamental rights provisions form part of the basic structure of the Constitution as does the concept of a Constitutional Monarchy (Sri Ram, 2010).

The Federal Court in the case of *Sivarasa Rasiah v. Badan Peguam Malaysia* (2010) departed from the earlier cases and held that the basic structure doctrine is part of our law and that the fundamental rights provisions form part of the basic structure. Further, that even if an Act amending the Constitution

complies with the procedural requirements of Article 159, it may nevertheless be struck down if it violates the basic structure. What forms part of the basic structure is something that must be decided on a case by case basis. It was suggested by the counsel in *Phang Chin Hock v. PP* (1980) that the basic structures of the Malaysian Constitution would consist of: (a) supremacy of the Constitution; (b) constitutional monarchy; (c) that the religion of the Federation shall be Islam and that other religions may be practised in harmony; (d) separation of the powers of the three branches of Government; and (e) the federal character of the Constitution. However, the Federal Court highlighted a distinction between the Malaysian Constitution and Indian Constitution whereby the former does not have a Preamble, a Directive Principles and was not made by a constituent assembly. The court declined to make a conclusion whether there is an implied limitation on the power of Parliament in not destroying the basic structure of the Constitution amendments (p. 73).

FINDING

The writers are of the view that the doctrine of separation of powers, the rule of law and an independent judiciary must form a part of the basic structure of the constitution. The question is whether this has been recognised by the country's courts as part and parcel of our Constitution.

The Federal Court in *PP v. Kok Wah Kuan* (2007) said that Malaysia 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. The extent of the applicability of the doctrine depends on the provisions of the Constitution. The Federal Court pointed out that:

A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. At the same time, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, although it may be inconsistent with the doctrine. The doctrine of the separation of powers is not a provision of the Malaysian Constitution, even; it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. It does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore null. (p. 355)

Thus, the doctrine of strict separation of powers as propounded by the French philosopher Montesquieu has no application in Malaysia. However, it can be argued that the foundation of the entire constitutional structure of Malaysia resides in the separation of powers set out in Articles 39, 44 and 121 of the Federal Constitution of Malaysia. These Articles deal with

executive, legislative and judicial powers respectively. Although the existing provision on judicial power has been amended to make it less certain, one can safely say that the Constitution still subscribes to the idea of separation of powers and hence, the judicial power to review legislative and executive actions. In our opinion, the doctrine of separation of power is definite and absolute. Judicial review is another proof that there is actually separation of powers in a Westminster democracy like ours. It lays within judicial review, although it does not subscribe to a “pure” separation of powers, a Westminster-model constitution can and does in fact incorporate the separation of power (see *New South Wales v. Commonwealth*, 1915; *AG for Australia v. the Queen*, 1957; *Liyanage v. the Queen*, 1967; *Hinds v. the Queen*, 1977).

Meanwhile, the rule of law, in its most basic form, is the principle that no one is above the law. It should be noted that the doctrine is derived from Article 4(1) of the Federal Constitution which obviously establishing the Constitution as a basis of the rule of law. Further, Article 128 confers power on the Federal Court to determine the constitutionality of federal and state laws. And Article 162(6) lays down that any court or tribunal applying the provisions of any existing law may apply it with such modification as may be necessary to bring into accord with the provisions of the Constitution. The implication of these Articles is that in Malaysia all persons and authorities including the Parliament are subject to the provisions of the Constitution,

in so far as their powers are to be found in the Constitution. In this context Harding (1996) observes that the Malaysian Constitution clearly embodies, expressly in many of its provisions, the principles outlined by Dicey. While, the equality provision is found in Article 8(1) which states that all persons are equal before the law and entitled to the equal protection of the law. The legal meaning of Article 8 is that no one is above the law, thus everyone is equal in the eyes of the law. In short, Article 8(1) is a codification of Dicey’s rule of law. Article 8(1) emphasises that this is a country where government is according to the rule of law. In other words, there must be fairness of State action of any sort, legislative, executive or judicial. Therefore, the doctrine of rule of law, which forms part of the common law, demands minimum standards of substantive and procedural fairness (*Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd*, (2003).

With regards to judicial independence, Harding (2012) contended that the Constitution secure judicial independence in several ways through express provisions of the appointment, security of tenure, and removal of judges. Abusing or insulting a judge may amount to contempt. This is reflected in Article 126 of the Constitution. Judicial immunity is a part of judicial independence. The purpose of judicial immunity is to enable judges, counsel and witnesses to speak and act fearlessly in the interest of justice and to condemn inequity in appropriate language without fear of being sued or prosecuted. In the performance of their judicial functions all judges are

immune from the law of torts and crime. Every judge of the superior and inferior courts is entitled to protection from liability for anything said or done while acting judicially. The law on judicial immunity can be seen in the following instances: firstly the conduct of a judge cannot be discussed in Parliament and State Legislative Assembly as stated in Article 127. Secondly, there is passing reference to immunities in Article 122AB(1) for Judicial Commissioners but no explicit protection for other judges; a number of other laws confer absolute privilege on judicial proceedings such as the ones under English common law which is applicable in Malaysia; the Defamation Act 1957 in section 11(1) confers absolute privilege on reports of judicial proceedings including pleadings, judgments, sentences or findings. This is so if the reports are fair, accurate and contemporaneous and the proceedings were publicly heard before a lawful court. All comments on judicial proceedings are privileged if fair and in good faith; and lastly, under section 6(3) of the Government Proceedings Act 1956 there is absolute immunity in torts for all acts performed in a judicial capacity (Ab Rahman, 2016). There is no exhaustive or exclusive definition of basic structure given by the judiciary. Judicial approach has been on case by case basis to define what is included in the doctrine of basic structure in Malaysia. Malaysian courts have yet to develop the basic structure test like their Indian counterparts.

CONCLUSION

The applicability of the basic structure doctrine is contentious both in terms of its adaptability and enforcement in jurisdictions outside India. This doctrine due to its undefined nature continues to be unclear in its perception and application. Factors such as differences in political and constitutional history pose a hindrance towards the doctrine becoming a universal watchdog of the legislature. The Indian basic structure doctrine was presented in Malaysia in several cases, and at an early stage the Malaysian Federal Court rejected the Indian basic structure doctrine, granting Parliament an unlimited power to amend the Constitution. In *Loh Kooi Choon v. Government of Malaysia* (1977), Justice Raja Azlan contended, with direct reference to *Kesavananda Bharati v. State of Kerala* (1973), that, in contrast with Indian jurisprudence, any provisions of the Malaysian Constitution could be amended. In *Phang Chin Hock v PP* (1980), again with direct reference to *Kesavananda Bharati v. State of Kerala* (1973), the Federal Court held that the basic structure doctrine does not apply in Malaysia due to differences between the Indian and Malaysian Constitutions – mainly historical differences and the fact that in contrast with the Indian Constitution, the Malaysian Constitution of 1957 has no preamble. However, based on *Sivarasa Rasiah v. Badan Peguam Malaysia* (2010) it was concluded that the doctrine of basic structure of the constitution is no longer rejected and treated as an unfamiliar concept in our constitutional law. As briefly pointed

out by Justice Hishamudin in *Sivarasa Rasiah v. Badan Peguam Malaysia* (2010) the fundamental liberties as enshrined in Part II of the Federal Constitution ranging from Article 5 to Article 13 of the Federal Constitution are now being recognised as a part of the basic structure of the Federal Constitution.

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