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The Law and Politics of Unconstitutional Constitutional Amendments in Asia

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5 The law and politics of unconstitutional constitutional amendments in Malaysia

HP Lee and Yvonne Tew

5.1 Introduction

The judicial review of constitutional amendments is more than a matter of law, it is inescapably also a matter of constitutional politics. The question of whether a constitution possesses a foundational core immune from legislative alteration lies at the heart of how a particular polity conceives of its vision of constitutionalism.

The Malaysian experience with the notion of a constitutional basic structure over the last half century reveals a story about judicial power and constitutional politics. It is a story that cannot fully be told without understanding the courts' interaction with the political branches of government.[1]

Courts in Malaysia have long had – and continue – to navigate fraught political dynamics. For decades considered a dominant party regime, Malaysia had been governed by a single political coalition – Barisan Nasional – since its independence in 1957. In 2018, the Barisan Nasional government was voted out for the first time in the country's history. That unprecedented democratic regime change was followed by the Pakatan Harapan government's collapse in 2020, and a newly assembled Perikatan National coalition taking power, before itself succumbing to internal power struggles resulting in yet another change in leadership in 2021. Malaysia today is no longer, as it once was, characterized by a dominant political coalition that has never been ousted from power; it is, more than ever before, deeply fragile.

This chapter explores the rising trajectory of the unconstitutional constitutional amendments doctrine in Malaysia's constitutional landscape. The course of the doctrine's journey never did run smooth; it has been one of fits and starts. It traces the evolution of the Malaysian judiciary's engagement with the basic structure doctrine: from initial judicial resistance to the apex court's contemporary jurisprudence that established the judicial review of unconstitutional constitutional amendments in Malaysia's constitutional landscape. This chapter argues that although judicial approaches toward the basic structure doctrine still demonstrate some unevenness, the seeds of the doctrine of unconstitutional constitutional amendments have taken root, and begun to thrive, in Malaysia's constitutional soil.

1 See Yvonne Tew, *Constitutional Statecraft in Asian Courts* (OUP 2020) 57–65.

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Section 5.2 begins with the birth and growth of the Malaysian nation from its independence in 1957 and outlines the key institutions of constitutional governance of the Malaysian state. It sets out the constitutional amendment procedures laid out in the Malaysian Federal Constitution and situates the ease of constitutional change within a broader context dominated by consolidated political power. Section 5.3 looks at early judicial dicta in the 1970s and 1980s expressing skepticism toward the idea of implied limitations on constitutional amendments. Of significance is the constitutional amendment passed in 1988 altering Article 121(1) of the Federal Constitution to remove the textual provision vesting judicial power in the courts, and the Malaysian judiciary's anemic response to that legislative intrusion on judicial power. [2]

Section 5.4 examines the judicial renaissance in developing a doctrine protecting unamendable constitutional features in Malaysia. It focuses on three principal cases that demonstrate the rise of the basic structure doctrine in Malaysian constitutional jurisprudence: *Semenyih Jaya*,[3] *Indira Gandhi*,[4] and *Alma Nudo*.[5] In this trilogy of cases, the Malaysian apex court affirmed and entrenched the basic structure doctrine to Malaysia's constitutional order. While there is still some judicial reluctance to recognize that the doctrine fully applies to the Malaysian context,[6] what seems undeniable is that the notion of judicial review of constitutional amendments now occupies a central part in judicial reasoning and constitutional practice in Malaysia. The final part of this chapter considers how the basic structure doctrine might apply to specific constitutional amendments excluding judicial review over an emergency proclamation and removing the requirement of royal assent to legislation. We conclude with reflections on the contemporary state of Malaysian constitutional adjudication and politics, and the judicial path forward.

5.2 The Malaysian constitutional system

5.2.1 The emergence of the Malaysian polity

Situated between the Indian Ocean and the South China Sea, the Malay Peninsula sits at the center of Southeast Asia, a location that made its port cities the nucleus of trade routes between the East and the West. Changing colonial hands from the Portuguese to the Dutch and then to the British, the Federation of Malaya eventually achieved independence in 1957, following negotiations between local representatives from Malaya and the British government.

An independent commission headed by Lord Reid was appointed to create the new federation's constitution; it was tasked with making recommendations "for a

2 *Public Prosecutor v Kok Wah Kuan* [2008] 1 Malayan LJ 1.
3 *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 Malayan LJ 561.
4 *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak and Others* [2018] 1 Malayan LJ 545.
5 *Alma Nudo Atenza v Public Prosecutor* [2019] 4 Malayan LJ 1.
6 *Maria Chin Abdullah v Director-General of Immigration* [2021] 2 Current LJ 579.

federal form of constitution for the whole country as a single self-governing unit within the Commonwealth based on parliamentary democracy with a bicameral legislature."[7] The Reid Commission, constituted by five Commonwealth legal experts, gathered evidence from local groups and individuals before publishing a draft constitution, which was later modified after input by Malaya's Alliance coalition.

On August 31, 1957, the Federation of Malaya became a fully independent state, with the Independence Constitution coming into force. In 1963, the Federation of Malaysia was created when the polity expanded to include Singapore and the Borneo states of Sabah and Sarawak.

The Federal Constitution of Malaysia established a federal system of government, with a legislative, executive, and judicial branch, and a constitutional monarch.[8] Malaysia's constitutional framework is modelled after Westminster, with a bicameral Parliament and a Prime Minister and Cabinet as part of the executive. Significantly, Article 4(1) expressly declares that the Constitution is the supreme law of the land.[9] Courts are acknowledged to have the power to invalidate unconstitutional legislation and executive actions, and the Constitution also contains a chapter guaranteeing fundamental liberties.[10]

Malaysia's Constitution has often been said to embody a "social contract," reflecting the inter-communal compromise among the various racial and religious groups reached at the founding.[11] The elements of the constitutional framework include the establishment of a strong central government with the states and settlements enjoying a measure of autonomy, the safeguarding of the position and prestige of the Malay rulers, a constitutional head of state chosen from among the Malay rulers, a common nationality, and the safeguarding of the special position of the Malays and the legitimate interest of other communities.

5.2.2 The constitutional amendment process in Malaysia

Amendment rules are contained in Article 159 of Malaysia's Constitution. In general, amendments require an Act of Parliament that has been passed by a two-thirds majority of the total number of members of each House of Parliament.[12]

There are three categories of exceptions to this general requirement. First, the consent of the Conference of Rulers is additionally required for amending provisions dealing with citizenship, the Conference of Rulers, the Malay

7 Federation of Malay Constitutional Commission, Report of 1956–57 § Colonial No. 330.
8 Federal Constitution of Malaysia, ptVI, ch 1; pt IV, chs 3, 4; pt IX.
9 ibid art 4(1).
10 ibid arts 5–13.
11 See, for example, Tommy Thomas, 'The Social Contract: Malaysia's Constitutional Covenant' (2008) 1 Malayan LJ cxxxii.
12 Federal Constitution of Malaysia, art 159(3).

national language, the special position of the Malays, and the natives of Sabah and Sarawak.[13] A second category involves amendments affecting the constitutional position of Sabah and Sarawak, which requires the heads of these states to concur.[14] Third, for certain amendments – like those concerning supplementary citizenship provisions and the admission of a new state into the federation – a simple majority vote is all that is required.[15]

Formal amendment rules are one thing, amending the constitution in practice is another. The two-thirds legislative majority to amend most constitutional provisions has rarely posed a constraint for much of Malaysia's history. Since its enactment in 1957, the Malaysian Constitution has been amended extensively; estimates put the number at 51 amendment acts, or about 700 individual textual amendments.[16]

From the country's independence in 1957 to 2018, the Barisan Nasional ruling coalition typically controlled more than a two-thirds majority in parliamentary. As a result, constitutional amendments "had been apparently regarded by the government as a mechanism which could be exploited, as required, to enable the government and the ruling party to maintain and increase its grip on power."[17]

Things look somewhat different now. In the 2008 general elections, the Barisan Nasional lost its legislative supermajority for the first time in decades, and in 2018 was ousted from government. None of the governing coalitions that have come into power since 2018 have managed to control close to two-thirds of the parliamentary seats; indeed, the incumbent government appears to barely command a threadbare majority in Parliament. Still, it is relevant for our discussion on the basic structure that concerns about democratic legitimacy in Malaysia have historically not been focused on the difficulty of formal constitutional change, but on the ability of powerful political branches to amend the constitution at will.

13 ibid art 159(5). The Conference of Rulers is comprised of the Malay rulers and governors of individual states in Malaysia.

14 ibid art 161E(2).

15 HP Lee, 'The Process of Constitutional Change in Malaysia' in Tun Mohamed Suffian, HP Lee and FA Trindade (eds), *The Constitution of Malaysia – Its Development: 1957–1977* (OUP 1978), 369, 370–2.

16 Cindy Tham, 'Major Changes to the Constitution' (*The Sun*, 17 July 2007) https://perma.cc/5LU7-LRQ9, https://www.malaysianbar.org.my/article/news/legal-and-general-news/general-news/major-changes-to-the-constitution.

17 HP Lee, Richard Foo and Amber Tan, 'Constitutional Change in Malaysia' (2019) 14(1) Journal of Comparative Law 119, 138.

5.3 Judicial power, constitutional amendments, and constitutional politics

5.3.1 Early judicial resistance to implied limitations on the Constitution

An early glimmer of a notion of implied restrictions on the amendment power appeared in the 1963 case of *The Government of the State of Kelantan v The Government of Malaya and Tunku Abdul Rahman Putra Al-Haj*.[18] The case involved a challenge to the validity of the Malaysia Act 1963, which sought to amend the Federal Constitution to facilitate the enlargement of the Federation of Malaya by admitting three new states. Dismissing the challenge, Chief Justice Thomson wrote that the Federal Parliament had not done anything "so fundamentally revolutionary" as to require consultation with the state of Kelantan or any other state such that the amendment was unconstitutional.[19] That said, it seems highly likely that the Chief Justice's caveat was specifically tied to a narrow implied limitations notion confined to a requirement for consultation with the states in the event of a fundamental reconfiguration of the Malaysian federal scheme.[20]

In subsequent decisions in the 1970s and early 1980s, the Malaysian Federal Court gave short shrift to arguments that invoked the basic structure doctrine. In *Loh Kooi Choon v Government of Malaysia*,[21] Justice Raja Azlan Shah called the doctrine a "fallacy," observing that "it concedes to the courts a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power."[22]

A formalist approach was also taken in *Phang Chin Hock v Public Prosecutor*,[23] in which Lord President Tun Suffian stated that "Parliament may amend the Constitution in any way they think fit" as long it complied with the constitutionally prescribed amendment process.[24] But it's worth noting the Federal Court found that "none of the amendments" in the case actually "destroyed the basic structure of the Constitution," and so held it "unnecessary to express our view on

18 [1963] 1 Malayan LJ 355. See Johan Shamsuddin Sabaruddin, 'The Kelantan Challenge' in Andrew Harding and HP Lee (eds), *Constitutional Landmarks in Malaysia: The First 50 Years 1957–2007* (LexisNexis 2007) 47, 51.

19 [1963] Malayan LJ 355, 359. For criticisms of this implied restriction, see: S Jayakumar, 'Admission of New States' (1964) Malaya Law Review 181, 188; LA Sheridan and HE Groves, *The Constitution of Malaysia* (NY: Oceana Publications, 1967) 4.

20 The *Kelantan* case pre-dated the enunciation of the Indian basic structure doctrine in the 1973 case of *Kesavananda v. State of Kerala* AIR 1973 SC 1461 (India).

21 [1977] 2 Malayan LJ 187.

22 ibid 189. Justice Wan Suleiman FJ did not feel that the issue before the court would require him to determine whether there were "inherent or implied limitations to the power of amendment under Article 159." ibid 193.

23 [1980] 1 Malayan LJ 70.

24 ibid 73.

the question whether or not Parliament has power so to amend the Constitution as to destroy its basic structure."[25] Thus, in these early decisions, the Court left open the question as to whether the basic structure doctrine could be invoked in a future context.[26]

5.3.2 The 1988 constitutional amendment and judicial self-emasculation

Central to any discussion about the development of the basic structure doctrine in Malaysia is the constitutional amendment passed in 1988 to alter Article 121(1) of the Federal Constitution. In the decades following the founding of the Constitution, the Malaysian judiciary operated within a context of dominant political power; the courts tended to extensively defer to the political branches, adopting a strictly literal and legalistic approach to constitutional interpretation.[27] Article 121(1) as originally framed in the 1957 Independence Constitution expressly declared: "The judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law."

A main impetus behind this constitutional amendment was the Supreme Court's decision in the 1987 case of *Public Prosecutor v Dato' Yap Peng*.[28] The Court invalidated a legislative provision that empowered the Public Prosecutor to order an inferior court to transfer a case pending before it to the High Court, declaring that the provision encroached on the judicial power of the federation, vested by Article 121(1) in the courts. The Supreme Court declared that the provision amounted to "both a legislative and executive intromission into the judicial power of the Federation,"[29] holding that the power to transfer cases from a subordinate court at any stage of the proceedings could not be conferred on any organ of government other than the judiciary.

Soon after, the Malaysian Parliament, under Prime Minister Mahathir Mohamad's administration, passed an amendment to Article 121(1). The amended Article 121(1) now provides that "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law." Conspicuously absent from the amended Article 121(1) were the words "The judicial power of the Federation shall be vested" from the text of the constitutional provision.[30]

25 ibid 74.

26 See Jaclyn Neo, 'A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia' (2020) 15 Asian Journal of Comparative Law 69, 84.

27 Tew (n 1) 46–53.

28 [1987] 2 Malayan LJ 311 (SC).

29 ibid 318 (SC).

30 Still, the phrase "Judicial power of the Federation" remains as a shoulder note to the current Article 121(1) provision.

The occasion for the judiciary to determine the meaning of the amended Article 121(1) provision arose in the 2007 case of *Public Prosecutor v. Kok Wah Kuan*.[31] At issue was a statutory provision for the detention of a juvenile offender convicted of murder at the pleasure of the King. The Federal Court ruled that the provision was constitutional and that it did not impinge on judicial power.

Taking a rigidly literalist view of Article 121(1), the majority in the Federal Court held that the amended provision meant that the courts' powers and jurisdictions must now depend on federal law.[32] Justice Abdul Hamid's majority opinion exhibits a stunningly narrow conception of judicial power:

> After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that "judicial power of the Federation" as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law … But, to what extent such "judicial powers" are vested in the two High Courts depend on what federal law provides, not on the interpretation the term "judicial power" [has] prior to the amendment. That is the difference and that is the effect of the amendment.[33]

The position taken by the *Kok Wah Kuan* majority was nothing short of judicial self-emasculation. As the entity tasked as the final arbiter of constitutional meaning, it bears mentioning that it was open to the Federal Court to interpret the amended article narrowly, in a manner that would have avoided undermining its own position in the constitutional system. Instead, the majority placed a construction on the amended Article 121(1) that in effect converted the courts into little more than entities with begging bowls into which Parliament might, as it pleased, pour jurisdictional crumbs.

Justice Richard Malanjum forcefully dissented in *Kok Wah Kuan*. Declaring that he was "unable to accede to the proposition that as a consequence of the amendment of Article 121(1) … the courts in Malaysia can only function in accordance with what [has] been assigned to them by federal law,"[34] he wrote:

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

31 *Kok Wah Kuan* (n 2). See Richard SK Foo, 'Malaysia – Death of a Separate Constitutional Judicial Power' [2010] Singapore JL Studies 227.
32 *Kok Wah Kuan* (n 2) [11].
33 ibid.
34 ibid [37].

> 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.[35]

Justice Malanjum's vision of the separation of powers and judicial independence as basic features stands in stark contrast to the majority's approach in *Kok Wah Kuan*, according to which the very existence of the separation of powers hinges on the mercy of the legislature.[36] For years to come, the majority's position of *de facto* parliamentary supremacy – of reflexive deference to the political branches – would pervade much of the Malaysian courts' approach to constitutional review.

5.4 A judicial renaissance? The evolution of the unconstitutional constitutional amendments doctrine in Malaysia

5.4.1 The rise of the basic structure doctrine in Malaysia

5.4.1.1 Establishing the basic structure doctrine: Semenyih Jaya

The Malaysian Federal Court's unanimous decision in the 2017 case *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* represented a landmark assertion of judicial power in Malaysia.[37] On the surface, *Semenyih Jaya* involved a dispute over the adequate amount of compensation for a compulsory land acquisition.[38] But, shorn of its minutiae, the case engaged a broader question about judicial power.

The Land Acquisition Act of 1960 provided for two lay assessors to assist the presiding judge to determine the compensation of acquired land. In 1997, the Act was amended to provide that "the amount of compensation shall be the amount decided upon by the two assessors,"[39] and that any such decision would be "final and there shall be no further appeal to a higher Court on the matter."[40] The question was whether the Land Acquisition Act provisions infringed the Article 121(1) judicial power provision because it allowed lay assessors to conclusively determine the amount of compensation. That set the context for the Federal Court to address the scope of Article 121(1) in light of the 1988 amendment that had removed the provision vesting "the judicial power of the Federation" in the courts.

In a unanimous decision, the Federal Court held that "the judicial power of the court resides in the Judiciary and no other" under Article 121(1) of the

35 ibid [38].
36 ibid [22].
37 *Semenyih Jaya* (n 3)
38 Fed. Const. (Malay.), art. 13 ("(a) No person shall be deprived of property save in accordance with law; (b) No law shall provide for the compulsory acquisition or use of property without adequate compensation").
39 Land Acquisition Act 1960 §40D(1).
40 ibid §40D(3).

Constitution.[41] The Court struck down the challenged Land Acquisition provision for imposing on the judge a duty to adopt the determination of the lay assessors regarding the compensation amount.[42] This undermined the judicial power of the court enshrined under Article 121(1),[43] wrote Justice Zainun Ali, as it "effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it."[44]

It was the first time in two decades that the Malaysian Federal Court had invalidated a federal law. The *Semenyih Jaya* decision is significant for at least three reasons. First, it established that judicial power is vested in the courts and can only be exercised by a judicial body. Second, it signaled a clear departure from the self-emasculating position taken by the majority in the *Kok Wah Kuan*.[45] Third, it gave judicial endorsement to the migration of the basic structure doctrine into the Malaysian constitutional arena.[46]

The *Semenyih Jaya* Court departed from the narrow view of Article 121(1) taken by the *Kok Wah Kuan* majority, instead affirming Justice Richard Malanjum's dissenting opinion. The Court endorsed the view that the courts are "a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature," and that Article 121(1) "is not, and cannot be, the whole and sole repository of the judicial role in this country."[47] Courts are required "to ensure that there is a 'check and balance' in the system, including the crucial duty to dispense justice according to law for those who come before them."

It is worth noting the Federal Court's invocation of judicial authorities from comparative contexts. In discussing the meaning of "the judicial power of the Federation shall be vested," the Court observed that the phrase had been taken by the framers of the Malaysian Constitution from the Australian Constitution.[48] Australia's Constitution has no express recognition of the separation of power; yet, the neat compartmentalization of the three different organs of government is understood to reflect the separation of powers, and judicial power is recognized as vested in the constitutionally created courts.[49]

The Federal Court in *Semenyih Jaya* affirmed that judicial power can be vested only in the courts, notwithstanding the amendment to Article 121(1):

41 *Semenyih Jaya* (n 3) [86].
42 ibid [50].
43 ibid [95].
44 ibid [52].
45 *Kok Wah Kuan* (n 2). See Foo (n 31) 227.
46 On the migration of the basic structure doctrine globally, see Yaniv Roznai, 'Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea' (2013) 61 American Journal of Comparative Law 657.
47 *Semenyih Jaya* (n 3) [70].
48 ibid [64].
49 See *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254, 276 (observing that "for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed").

> [I]t is clear to us that the 1988 amendment had the effect of undermining the judicial power of the Judiciary and impinge on the following features of the Federal Constitution: (i) The doctrine of separation of powers; and (ii) The independence of the Judiciary.[50]

Denouncing the amendment for seeking to remove the judicial power from the judiciary, leaving the judicial institution "effectively suborned to Parliament, with the implication that Parliament became sovereign,"[51] the Court observed that "[t]his result was manifestly inconsistent with the supremacy of the Constitution enshrined in Article 4(1)."

In a ringing endorsement of the basic structure doctrine to the Malaysian Constitution, the Federal Court declared:

> It is worthwhile reiterating that Parliament does not have power to amend the Federal Constitution to the effect of undermining the features stated in (i) [the doctrine of separation of powers; and (ii) the independence of the judiciary].[52]

The Court bolstered its approach by referring to earlier decisions that had rejected parliamentary supremacy, citing the 2010 decision of *Siravasa Rasiah* for the proposition that "the fundamental rights guaranteed under Part II [of the Constitution] is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Act amending the Constitution) that violate the basic structure."[53] It also invoked *Kesavananda*, the famous authority for the Indian basic structure doctrine, to emphasize that "it is not permissible for the legislature to encroach upon the judicial sphere."[54]

At the heart of the vision of constitutionalism articulated by the Federal Court in *Semenyih Jaya* is a conception of judicial power as foundational to the separation of powers:

> 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 principle of the separation of powers. This is essentially the basis upon which rests the edifice of judicial power. The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.[55]

50 *Semenyih Jaya* (n 3) [74].
51 ibid [75].
52 ibid [76].
53 ibid [79].
54 ibid [87].
55 ibid [88]–[90].

5.4.1.2 Entrenching the basic structure doctrine: Indira Gandhi

Barely a year after *Semenyih Jaya*, the Malaysian apex court further entrenched the constitutional basic structure doctrine in *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak and Others*.[56] In another constitutional landmark, the Federal Court declared the power of judicial review as essential to the role of the courts and inherent to the Malaysian Constitution's basic structure. By contrast with *Semenyih Jaya*, which appeared pragmatically concerned with land acquisition compensation, the dispute in *this* case concerned a highly fraught issue: religion, and the relationship of the civil courts vis-à-vis the religious courts.

Indira Gandhi and her husband were both non-Muslims when they were married. Unbeknown to Indira Gandhi, her husband later converted to Islam, and then obtained certificates of conversion to Islam for their three children, before securing custody orders for the children from the Sharia court. Unable to access the religious courts as a non-Muslim, Indira Gandhi sought an order from the civil court to quash the certificates of conversion and custody orders unilaterally obtained by her ex-husband. She faced the argument that conversion to Islam was a strictly religious matter that was solely within the jurisdiction of the Sharia courts, not the civil courts. Indira Gandhi's case worked its way through the High Court and Court of Appeal, eventually arriving at the Federal Court after almost a decade.

In a unanimous decision, the Federal Court voided all the certificates of conversion, ruling that the constitutional right to equality requires the consent of both parents for the conversion of minor children. It held that civil courts have jurisdiction over all constitutional matters even when matters of Islamic law are involved,[57] departing from a pattern over the last two decades of civil courts extensively deferring jurisdiction to the Sharia courts.[58]

Of particular significance, the Federal Court declared that the power of judicial review is inherent in the basic structure of the Constitution. The Court's unanimous opinion underscores the role of the Court: "Inherent in these foundational principles is the role of the Judiciary as the ultimate arbiter of the lawfulness of state action. The power of the courts is a natural and necessary corollary of the rule of law."[59]

Justice Zainun Ali, writing for the Court as she had in *Semenyih Jaya*, referred to that earlier decision as having "put beyond a shadow of doubt that judicial power is vested exclusively in the High Courts by virtue of art 121(1)."[60] "Judicial independence and the separation of powers are recognized as features in the basic structure of the Constitution," she wrote. "The inherent judicial power of the

56 *Indira Gandhi* (n 4).
57 ibid [104].
58 See Yvonne Tew, 'Stealth Theocracy' [2018] 58 Virginia Journal of International Law 31.
59 ibid [33].
60 ibid [42].

civil courts under art 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism."[61]

Referencing the Indian basic structure doctrine in *Kesavananda* and *Minerva Mills*,[62] the Malaysian court declared that "the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution," and thus "cannot be abrogated or altered by Parliament by way of a constitutional amendment."[63]

It then turned to the Article 121(1A) provision, which provides that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Sharia courts." It's relevant to note that Article 121(1A) had been inserted when the Constitution was amended in 1988 to alter the Article 121(1) provision on judicial power. The *Indira Gandhi* Court made clear that the "vital role of the judicial review in the basic structure of the constitution" meant that "judicial power cannot be removed from the civil courts."[64]

Strikingly, the Federal Court, in effect, nullified Article 121(1A). It ruled that "the amendment inserting clause 1A into Article 121 does not oust the jurisdiction of the civil courts nor does it confer judicial power on the Sharia courts."[65] Civil courts are constitutionally created entities "invested with inherent judicial powers" whereas the Sharia courts are "creatures of state legislation."[66] "More importantly, Parliament does not have the power to make any constitutional amendment to give such an effect," wrote the Federal Court. "It would be invalid, if not downright repugnant, to the notion of judicial power inherent in the basic structure of the constitution."[67]

In a robust affirmation of judicial power, the Federal Court distilled the following principles in crystal-clear terms:

(a) under art 121(1) of the Federal 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

61 ibid [42].
62 ibid [48], [49].
63 ibid [48].
64 ibid [51].
65 ibid [92].
66 Ibid [80].
67 ibid [92].

(e) judicial power may not be conferred upon bodies other than the High Courts, unless such bodies comply with the safeguards provided in … the Constitution to ensure their independence.[68]

The apex court explicitly entrenched the basic structure doctrine in the Malaysian constitutional system:

> The powers of judicial review and of constitutional or statutory interpretation are pivotal constituents of the civil courts' judicial power under Article 121(1) .... As part of the basic structure of the constitution, it cannot be abrogated from the civil courts or conferred upon the Syariah Courts, whether by constitutional amendment, Act of Parliament or state legislation.[69]

Among the underlying principles on which the Malaysian Constitution is premised, the Court identified "the separation of powers, the rule of law and the protection of minorities."[70]

The Federal Court in *Indira Gandhi* affirmed the role of the civil courts as sole repositories of judicial power with the power of judicial review. *Indira Gandhi* not only reinforced the principles that were established in *Semenyih Jaya*, but also entrenched the doctrine of judicial review to protect the separation of powers and judicial power as part of the Constitution's basic structure.

5.4.1.3 Affirming the basic structure doctrine: Alma Nudo

In the 2019 case of *Alma Nudo Atenza v Public Prosecutor*, the Federal Court further affirmed the doctrine of a constitutional basic structure.[71] The Court struck down a statutory provision that allowed a double presumption against accused drug traffickers as disproportionate.

Delivering the judgment for a nine-member Court, Chief Justice Richard Malanjum observed that the "courts can prevent Parliament from destroying the 'basic structure' of the [Federal Constitution]."[72] Referring to the *Semenyih Jaya* and *Indira Gandhi*, the Chief Justice stated that:

> while the Federal Constitution 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 [Constitution] but also for violation of the doctrine or principles that constitute the constitutional foundations.[73]

68 ibid [58].
69 ibid [104].
70 ibid [90].
71 *Alma Nudo* (n 5).
72 ibid [73].
73 ibid.

In line with those earlier decisions, the Federal Court in *Alma Nudo* emphasized that the role of the judiciary is "intrinsic to the constitutional order."[74] "As the bulwark of the Federal Constitution and the rule of law," wrote the Chief Justice, "it is the duty of the Courts to protect the Federal Constitution from being undermined by the whittling away of the principles upon which it is based."[75]

5.4.2 An uneven judicial trajectory

5.4.2.1 Maria Chin Abdullah

In January 2021, in a sharply divided decision, the Federal Court revisited the relevance of the basic structure doctrine to Malaysia's constitutional system in *Maria Chin Abdullah v. Director-General of Immigration*.[76] The case involved a travel ban imposed by the immigration authorities on Maria Chin, a non-governmental organization leader, which prevented her from leaving Malaysia. A clause in the Immigration Act ousted judicial review of any decision made by the immigration authorities.[77] Maria Chin argued that the travel ban was beyond the power of the immigration authorities and, further, challenged the ouster clause as unconstitutional in light of the principles affirming judicial power and the separation of powers in *Semenyih Jaya* and *Indira Gandhi*.

The Federal Court ruled that the travel ban was unlawful on the grounds that the Immigration Director General does not have unfettered discretionary power to impose a travel ban on a citizen.[78] But the Court split 4–3 on the constitutionality of the Immigration Act clause preventing judicial review, an issue that brought to the fore the Article 121(1) provision on judicial power. Two opinions were delivered for the majority and two for the dissent.

Justice Abdul Rahman Sebli, writing one of the majority opinions, held that the ouster clause was consistent with Article 121(1), which provides that courts "shall have such jurisdictions and powers as may be conferred by federal law." Taking a "literal interpretation" of Article 121(1), Justice Abdul Rahman Sebli found the provision "irresistibly clear and unambiguous."[79] Since Parliament had determined through the Immigration Act that the courts' jurisdiction and powers are limited on immigration matters, the courts could not ignore the limitation imposed by the ouster clause.[80] The justice reasoned that the constitutional framers had not viewed that Article 121(1) set up conferral of the court's jurisdiction and powers by federal law as contrary to the separation of powers.[81]

74 ibid [74].
75 ibid [91]
76 *Maria Chin* (n 6).
77 Immigration Act 1959/63, §59A.
78 *Maria Chin* (n 6) [255] (Abdul Rahman Sebli FCJ).
79 ibid [85].
80 ibid [88]–[89].
81 ibid [98].

This majority opinion contains an excursus on the basic structure doctrine that is openly skeptical about the doctrine's applicability to the Malaysian context: "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."[82] "What poses a problem in the context of a written constitution is the application of the so-called 'doctrine' of basic structure,"[83] wrote Justice Abdul Rahman Sebli, "This leads to a situation where a law that is duly passed by Parliament is rendered void for offending the doctrine of separation of powers even where it is not inconsistent with the express terms of the Federal Constitution."[84] He dismissed the cases of *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo* as inapplicable to the present case,[85] observing that the articulation of the basic structure doctrine in those cases was "at best *obiter dicta*."[86] In his view, "*Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo* cannot be read … as deciding that Parliament has no power to amend the Federal Constitution."[87]

Justice Mary Lim wrote a concurring opinion, which was also joined by the other two of the majority justices.[88] In her view, it was unnecessary to determine the constitutionality of the ouster clause in light of *Semenyih Jaya* and *Indira Gandhi*; that question was unnecessary – in her words, "an overkill" – for determining the case.[89] Notably, though, Justice Mary Lim's opinion expressly acknowledges the basic structure doctrine in *Semenyih Jaya*:

> Where the jurisdiction and power of the court is interfered with in absolute terms as was the case in *Semenyih Jaya* … the court has no hesitation in striking down such provision as offending the doctrine of basic structure as enshrined within art. 4.[90]

Two opinions were delivered for the three judges in dissent. In her dissent, Chief Justice Tengku Maimun defended the Federal Court's earlier decisions on judicial power as part of the basic structure:

> The principles set forth in *Semenyih Jaya* and *Indira Gandhi* are irrefutably clear … no matter how art. 121(1) was or may have been amended, it being a basic feature of the [Federal Constitution], remains to be read as it was prior to the 1988 amendment.

82 ibid [122].
83 ibid [130].
84 ibid [131].
85 ibid [163]–[164].
86 ibid [165].
87 ibid [167].
88 ibid [257]–[377] (Mary Lim FCJ).
89 ibid [354]–[357].
90 ibid [282]. See also [272]–[273].

The 1988 amendment had "no effect whatsoever of diminishing or subordinating judicial power to Parliament or declaring Parliament supreme in any way."[91]

Where does this leave the current state of the basic structure doctrine in Malaysia's constitutional jurisprudence? For some commentators, the *Maria Chin* majority opinion heralded the demise of the basic structure doctrine in Malaysia.[92]

Rumors of the doctrine's death, we think, have been greatly exaggerated.[93] To be sure, there is much in Justice Abdul Rahman Sebli's opinion that stands at odds with the Federal Court's holdings in *Semenyih Jaya* and *Indira Gandhi* on the Article 121(1) judicial power provision and the constitutional basic structure. On careful inspection, though, the *Maria Chin* decision does not negate the basic structure doctrine established by the Malaysian Federal Court in *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo*.

First, Justice Abdul Rahman Sebli's opinion was not the only majority judgment in *Maria Chin*, and his critique of the basic structure doctrine is not shared by most of the judges in the case. As noted earlier, Justice Mary Lim is clear that the Court would have "no hesitation in striking down" a provision that prohibits judicial scrutiny "as offending the doctrine of basic structure,"[94] and she specifically held that the question about the basic structure was not relevant for determining the *Maria Chin* decision. All four judges in the majority concurred with the opinion of Justice Mary Lim, in addition to that of Justice Abdul Rahman Sebli.[95] All of which is to say, the only common holding shared by the two majority judgments relates solely to the validity of the Immigration Act's ouster clause, not the basic structure doctrine. And, of course, all three dissenting justices repudiated Justice Abdul Rahman Sebli's criticisms of the basic structure doctrine. All told: "This leaves Abdul Rahman Sebli FCJ's judgment alone in its attack on *Semenyih Jaya* and the basic structure doctrine."[96]

Second, Justice Abdul Rahman Sebli acknowledges that the precedents of *Semenyih Jaya* and *Indira Gandhi* do not apply to *Maria Chin*; on his own account, then, his opinion's discussion of the basic structure doctrine is merely obiter. Justice Abdul Rahman Sebli observed that "not only are the facts in *Semenyih Jaya* and *Indira Gandhi* different" to the Immigration Act context in *Maria Chin*, "but the constitutional and/or legal issues raised were also different."[97]

91 ibid [453]–[454] (Tengku Maimun FCJ).

92 See, e.g., Iqbal Harith Liang, 'Maria Chin v Director General of Immigration: The Basic Structure Doctrine's Demise?' (*Malaysian Public Law*, 9 January 2021) https://malaysianpubliclaw.com/maria-chin-v-director-general-of-immigration-the-basic-structure-doctrines-demise/.

93 To paraphrase the quote popularly attributed to Mark Twain, https://www.oxfordreference.com/view/10.1093/acref/9780199990009.001.0001/acref-9780199990009-e-9198.

94 *Maria Chin* (n 6) [282] (Mary Lim FCJ).

95 ibid [377].

96 Tan Kian Leong and Shukri Shahizam, 'O Bitter Pill to Swallow: Separating Ratio from Dicta in Maria Chin Abdullah' [2021] 1 Malayan LJ ccccii.

97 *Maria Chin* (n 6) [70] (Abdul Rahman Sebli FCJ).

Since *Semenyih Jaya* and *Indira Gandhi* were both dismissed as inapplicable to the *Maria Chin* context, Justice Abdul Rahman Sebli's views on the constitution's basic structure appear to be no more than dicta.

More broadly, *Maria Chin* does not affect the central holdings in *Semenyih Jaya* and *Indira Gandhi* establishing that the judicial power of the courts is fundamental to the constitution's basic structure. The Federal Court held in *Semenyih Jaya* that the 1988 amendment to Article 121(1) could not remove the courts' judicial power, which constitutes a fundamental feature of the basic structure. According to Justice Abdul Rahman Sebli, "on the facts of the present case, [there is] no removal of judicial power or conferral of judicial power to a non-judicial branch;"[98] and so, "where no amendment is made to the Constitution, the doctrine has no application and is irrelevant."[99] His majority opinion itself acknowledges that *Maria Chin* does not directly involve any constitutional amendment nor the removal of judicial power from the courts. Indeed, Justice Abdul Rahman Sebli's opinion expressly accepts that "*Semenyih Jaya* is authority for the proposition that a non-judicial body cannot bind the superior courts," and "*Indira Gandhi* for the proposition that Syariah Courts are not of equal status to the superior civil courts."[100] It follows, then, that none of the opinions in *Maria Chin* undermine the central holdings concerning judicial power and the constitution's basic structure established in *Semenyih Jaya* and *Indira Gandhi*.

Viewed against the broader arc of the evolution of the basic structure doctrine in Malaysian constitutional law, *Maria Chin* might represent a speedbump, but it is hardly an impenetrable roadblock.

5.4.3 The separation of powers, judicial power, and the basic structure doctrine

With the trilogy of decisions in *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo*, the Malaysian Federal Court carved out a role for the courts to protect a constitutional core of fundamental features as beyond the legislative intrusion. A striking aspect about the evolution of the basic structure doctrine in Malaysia is the judicial statecraft exhibited by the Malaysian Federal Court in developing the doctrine through bold, but also prudent, jurisprudence.[101]

The Federal Court developed its assertion of judicial power in careful stages, beginning with its 2017 decision in *Semenyih Jaya*, in which a unanimous Court established the foundation for the judicial review of constitutional amendments by identifying certain features as fundamental to the constitution and observing that these principles were beyond Parliament's amendment power.[102] Yet the

98 ibid [103].
99 ibid [141].
100 ibid [164]
101 Tew (n 1) 133–40.
102 *Semenyih Jaya* (n 3) [76].

Court did not expressly invalidate the constitutional amendment in *Semenyih Jaya*; instead, it read down the 1988 constitutional amendment, in effect nullifying the amendment by interpreting Article 121(1) to mean that judicial power continues to reside in the courts.[103] By refraining from striking down the amendment outright, the Court avoided provoking immediate political backlash while laying down the seeds for a doctrine of an immutable constitutional core.

Then, the following year, the Federal Court in *Indira Gandhi* powerfully entrenched and enforced the basic structure doctrine, declaring that "the power of judicial review is essential to the constitutional role of the courts and inherent in the basic structure of the Constitution," which "cannot be abrogated or altered by Parliament by way of a constitutional amendment."[104] In this unanimous judgment, the Court nullified the Article 121(1A) constitutional amendment and declared the principles foundational to the Constitution as "the separation of powers, the rule of law, and the protection of minorities."[105]

Later, in the 2019 case of *Alma Nudo*, a full bench of nine Federal Court justices reaffirmed the basic structure principles laid down in *Semenyih Jaya* and *Indira Gandhi*. The Court referred to both those decisions to reiterate that:

> This court has, on several occasions, recognised that the principle of separation of powers, and the power of the ordinary courts to review the legality of State action, are sacrosanct and form part of the basic structure of the [Federal Constitution].

More recently, some judgments reveal divisions on the Federal Court regarding the salience of the basic structure doctrine in the Malaysian constitutional order.[106] Like the *Maria Chin* majority decision by Justice Abdul Rahman Sebli, these cases show some backtracking about the doctrine's applicability

103 See Wilson Tay, 'Basic Structure Revisited: The Case of *Semenyih Jaya* and the Defence of Fundamental Constitutional Principles in Malaysia' (2019) 14 Asian Journal of Comparative Law 113.

104 *Indira Gandhi* (n 4) [48].

105 ibid [90].

106 See *Maria Chin* (n 6). See also *Rovin Joty A/L Kodeswaran v Lembaga Pencegahan Jenayah* [2021] 2 Malayan L J 822 (majority stating that the basic structure doctrine "should not be pressed into use in aid of interpretation" of the Federal Constitution, but acknowledging that the doctrine was not applicable for construing the constitutionality of the Prevention of Crimes Act in that case); *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan* [2021] 3 Malayan L J 759 (the majority upholding a provision of the Prevention of Crimes Act, relying on *Maria Chin* and *Rovin Joty* to state that the basic structure doctrine had no place in Malaysia, with the Chief Justice joined by another justice dissenting). However, *Rovin Joty* has been vacated on successful application for review by the Federal Court, to be heard de novo. The Chief Justice, writing for the Court, noted that the majority in *Rovin Joty* "did not allude to any suggestion by the respondents that basic structure doctrine is doctrinally wrong or most fundamentally, that it does not exist. *See Nivesh Nair v Abdul Razak Musa*, at [26] (Cr. Appl. No: 05(RJ)-2-03/2021(W)).

to Malaysia's Constitution. Even so, such judgments have far from definitively eroded the foundations of the basic structure doctrine established by the Federal Court's unanimous decisions in *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo*. Those three unanimous decisions – joined by a total of 19 justices – laid down the groundwork for protecting foundational principles of separation of powers and judicial power, which Malaysian courts can build on to shape future constitutional adjudication.

5.5 The potential reach of the basic structure doctrine

5.5.1 Emergency powers and constitutional ouster clauses

What is the potential scope of the basic structure doctrine in Malaysia? This section speculates on the implications of the doctrine by examining constitutional amendment challenges that have already emerged on the horizon.

One challenge involves the constitutional amendment passed in 1981 to the Malaysian Constitution's Article 150 emergency powers provisions. In 1981, Article 150 was amended with the insertion of a clause that deprived the courts of jurisdiction to determine the validity of a proclamation of emergency and orders of preventive detention. Article 150(8) now provides that the King's satisfaction that a grave emergency exists "shall be final and conclusive and shall not be challenged or called in question in any court on any ground."[107] Moreover, "no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground," regarding the validity of a proclamation of emergency or the continued operation of an emergency ordinance. As one of us has argued previously, the width of this constitutionally entrenched ouster clause amounts to an abrogation of the judicial power of the courts: "[T]he new clause (8) has undermined the basic structure of the Constitution as all questions concerning emergency powers are left to the absolute discretion of the Government of the day."[108]

In January 2021, the King issued a proclamation of emergency, pursuant to Cabinet advice, purportedly to combat the COVID-19 pandemic.[109] The state of emergency was slated to last till August 1, 2021. During this time, an emergency ordinance promulgated under the proclamation suspended the sitting of Parliament and the legislative assemblies of the States.

All of this occurred in the aftermath of the Perikatan Nasional coalition taking over governance in March 2020 after the breakdown of the Pakatan Harapan coalition. After taking power without an electoral mandate, Prime Minister

107 Article 150(8)(a).

108 HP Lee, 'Emergency Powers in Malaysia' in FA Trindade and HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments* (OUP 1986) 135, 151.

109 Muhyiddin Yassin, at the time the prime minister and head of the Perikatan Nasional government, had attempted to convince the King to proclaim a state of emergency in October 2020, but the King rejected the Prime Minister's plan.

Muhyiddin Yasin faced persistent calls to prove that he commanded the support of the majority in Parliament. Critics viewed the suspension of Parliament during this state of emergency as a move to prevent the Prime Minister's support from being tested on the floor of Parliament.

The emergency proclamation has led to two challenges before the High Court. In response to the first challenge, brought in March 2021 by three elected representatives, the High Court ruled that Article 150(8) precluded judicial review of the King's emergency proclamation and the enacted ordinances.[110] The second lawsuit brought by opposition leader Anwar Ibrahim challenged the constitutionality of the Prime Minister's advice to the King to suspend Parliament during the emergency.[111] In April 2021, the High Court rejected Anwar Ibrahim's application for judicial review, also on the grounds that Article 150(8) effectively precluded judicial review of matters relating to the proclamation of an emergency.[112] Should the Federal Court decide to hear these cases on appeal, the basic structure doctrine will likely be at the forefront of challenges to the validity of the Article 150(8) constitutionally entrenched ouster clauses.

5.5.2 Royal assent as a feature of the Constitution's basic structure?

That's not all. Another lawsuit brought by Anwar Ibrahim seeks to invalidate the National Security Council Act 2016 as well as the constitutional amendments involving the royal assent to legislation.[113] The National Security Council Act passed in 2016 empowers the Prime Minister, on advice of a national security council, to declare a security area, over which the Prime Minister has the power to deploy security forces. The Malaysian Bar Council has denounced the security law for enabling "the Prime Minister, either unilaterally or through the NSC, to exercise authoritarian executive powers," adding that "[t]hese powers are in

110 Bernama, 'Emergency proclamation cannot be challenged: High Court' (*The Malaysian Reserve*, 11 March 2021) <https://themalaysianreserve.com/2021/03/11/emergency-proclamation-cannot-be-challenged-high-court/> accessed 28 May 2021.

111 Ida Lim, 'Anwar sues PM over Parliament suspension in Emergency, seeks court order to declare Muhyiddin's advice to Agong illegal, unconstitutional' (*Malay Mail*, 26 January 2021) <https://www.malaymail.com/news/malaysia/2021/01/26/anwar-sues-pm-over-parliament-suspension-in-emergency-seeks-court-order-to/1944059 > accessed 28 May 2021.

112 'Court throws out Anwar's bid to challenge emergency proclamation' (*Free Malaysia Today*, 22 April 2021) https://www.freemalaysiatoday.com/category/nation/2021/04/22/court-throws-out-anwars-bid-to-challenge-emergency-proclamation/? accessed 28 May 2021.

113 *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 Malayan LJ 133. The basic structure issue was one of the questions posed to the Federal Court of Malaysia following a referral to the apex court by the High Court regarding questions raised in Anwar Ibrahim's application.

effect emergency powers, but without the need for a proclamation of an emergency under Article 150 of the Federal Constitution."[114]

One of the grounds on which the National Security Act was challenged is that it was passed without the assent of the King following what are argued to be unconstitutional constitutional amendments.[115] When the Barisan Nasional government tried to pass the National Security Council Bill in 2016, the King did not give his assent to the contentious security bill. Nonetheless, the national security law came into force because of the legislative procedure put in place by constitutional amendments that dispensed with the requirement for royal assent. As a result of these constitutional amendments, passed in 1983, 1984, and 1994, the Constitution now provides that after the Bill has been submitted to the King and 30 days have elapsed, the bill shall become law "in the like manner as if [the King] had assented thereto."[116]

Thus, the question was whether the National Security Council Act was unconstitutional because it had "become law pursuant to unconstitutional amendments," on the ground that those amendments violated the basic structure of the Constitution. In other words, the royal assent was argued to constitute a basic feature of the Constitution that cannot be removed by complying with the constitutional amendment process.

In a 5–2 decision delivered in February 2020, the Federal Court declined to answer the question on the constitutionality of the National Security Council Act and the constitutional amendments.[117] The majority ordered the case to be struck out, holding that the questions posed – on the constitutionality of the statute and the constitutional amendment – were abstract and purely academic. The dissenting justices were clear that they would have been prepared to find the statute unconstitutional for violating the Constitution's Article 149 anti-subversion provisions as well as being a disproportionate restriction on the constitutional right to freedom of movement. But on the basic structure point, Justice David Wong reasoned that the royal assent remains a part of the legislative process as a matter of construction, hence "the question as to the violation of the basic structure of the Constitution does not arise."[118]

114 Steven Thiru, 'Bar: Hallmarks of authoritarianism in government's NSC Act move' (*Malaysiakini*, 15 June 2016) <https://www.malaysiakini.com/news/345378> accessed 28 May 2021.

115 Shad Saleem Faruqi, 'A precedent but no blanket pass' (*The Star*, 23 June 2016) <http://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2016/06/23/a-precedent-but-no-blanket-pass-article-66-4a-permits-the-king-to-be-bypassed-but-cannot-apply-to-ot/> Steven Thiru, 'Bar: Hallmarks of authoritarianism in government's NSC Act move' (*Malaysiakini*, 15 June 2016) <https://www.malaysiakini.com/news/345378> accessed 28 May 2021.

116 Fed. Const. (Malay.), Section 66(4A).

117 *Anwar Ibrahim* (n 113).

118 ibid [146].

The majority and the dissenting justices in this 2020 decision avoided the question about the validity of the constitutional amendments, thus allowing the Federal Court to navigate out of having to determine whether the royal assent falls within the constitutional basic structure, a minimalist move that appeared prudent.[119] The invocation of the basic structure doctrine with regard to the royal assent is a double-edged sword when appreciated against the backdrop of Malaysian *realpolitik*. The constitutional amendments in 1993, 1984, and 1994 arose at a time when then-Prime Minister Mahathir Mohamad was engaged in a convulsive constitutional battle with the Malay rulers after the conduct of some of the Rulers had given rise to concerns that they were exceeding their role as *constitutional* monarchs;[120] these included reported instances of some Rulers withholding their assent to state legislation because they could not get their way with their state government. Writing in support of applying the basic structure doctrine to the Malaysian constitutional arena, Andrew Harding once remarked that "decisions must be guided by instinct."[121] Judicial instinct is needed to determine not just when to invoke the doctrine, but also when to avoid doing so.

More generally, although it remains to be seen how far the Malaysian apex court will extend the basic structure doctrine in cases to come, it seems apparent that the doctrine will increasingly play a role in future constitutional challenges.

5.6 Conclusion

Constitutional adjudication is bound up in constitutional politics. Courts in Malaysia, as in many other fragile democracies in Asia, face the sensitive task of navigating powerful political actors in seeking to enhance the judiciary's position as a constitutional stakeholder. That endeavor is ever more challenging – and ever more crucial – amidst a political landscape in flux.

For decades, Malaysia operated under a dominant ruling coalition, the Barisan Nasional alliance, which had held power since before the country's independence in 1957. That ended in 2018, when Barisan Nasional was voted out in an

119 Anwar Ibrahim subsequently filed an application to review the Federal Court's February 2020 decision. In January 2021, the Federal Court, after rehearing the case, reserved decision on the question regarding whether the National Security Act was unconstitutional because it did not receive the royal assent. At the time of going to print, it was reported that the Federal Court had delivered a decision in August 2021 in which it has rejected the challenge to the constitutionality of the National Security Council Act 2016, with the Court holding that the constitutional amendments to royal assent of legislation did not engage the basic structure doctrine. See *Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia* (Civ. Appl. No. 06(RS)-1-03/2019(W)).

120 For an account of the constitutional battle over the royal assent, see HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (2nd edn, OUP 2017) chapter 2. See also Raja Tun Azlan Shah, 'The Role of Constitutional Rulers in Malaysia' in FA Trindade and HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments* (OUP) chapter 5.

121 AJ Harding, 'The Death of a Doctrine? *Phang Chin Hock v Public Prosecutor*' [1979] 21 Malaya Law Review 365, 373.

unprecedented election outcome, resulting in the transfer of government power to the Pakatan Harapan coalition – the Alliance of Hope – in the country's first ever democratic transition.

And then came 2020. A domestic government crisis, and a global pandemic. In March 2020, the Pakatan Harapan government collapsed, following political defections and a leadership battle between political rivals. Prime Minister Muhyiddin Yassin was appointed premier by the King, at the helm of Perikatan Nasional, a hastily assembled coalition that returned many members of the Barisan Nasional government to power. Citing the coronavirus pandemic, in January 2021, a nationwide state of emergency was declared, followed by the government announcing the suspension of Parliament; by August 2021 however, internal power struggles within the Perikatan Nasional government saw Prime Minister Muhyiddin Yassin replaced by Ismail Sabri Yaakob, the country's third premier in three years.[122]

It is against this background of constitutional politics – of a long history of dominance by a single political alliance, and of deeply fragile political dynamics in transition – that the evolution of judicial power and the unconstitutional constitutional amendments doctrine in Malaysia must be understood. Faced with consolidated political power for much of the nation's post-independence history, the Malaysian judiciary's path toward becoming an effective constraint on the governing powers has been described as Sisyphean.[123]

Yet, in recent times, the Malaysian courts have shown signs of judicial willingness to reassert power, through the careful, but unmistakable, development of the basic structure doctrine. With strategic maneuvering, the Malaysian Federal Court set the groundwork for safeguarding foundational constitutional elements from being altered by the legislature in its 2017 decision in *Semenyih Jaya*.[124] A year later, in another display of judicial statecraft in *Indira Gandhi*, the apex court explicitly endorsed the constitutional basic structure doctrine, invoking the power to nullify a constitutional amendment that curtailed the civil courts' power of judicial review.[125] And in subsequent cases in 2019 and 2020, the Federal Court affirmed that the doctrine that "courts can prevent Parliament from destroying the basic structure of the Constitution" is now part of Malaysian constitutional jurisprudence.[126]

122 'Malaysia gets a new prime minister — the country's third in 3 years' (CNBC, 20 August 2021) <https://www.cnbc.com/2021/08/20/malaysia-king-appoints-ismail-sabri-yaakob-as-new-prime-minister.html> accessed 14 September 2021.

123 HP Lee and Richard Foo, 'The Malaysian Judiciary: A Sisyphean Quest for Redemption?' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (CUP 2018) chapter 11.

124 *Semenyih Jaya* (n 3).

125 *Indira Gandhi* (n 4).

126 *Alma Nudo* (n 5) [73]. See also *JRI Resources Sdn Bhd v. Kuwait Finance House* [2019] 3 Malayan LJ 561 [240] (Chief Justice Richard Malanjum observing that "the basic structure doctrine is very much part of this country's judicial landscape"); *Anwar Ibrahim* (n 113)

Judicial embrace of the basic structure doctrine in Malaysia has not been ubiquitous, however. Recent Federal Court judgments, like the Maria Chin judgment and other decisions delivered in 2021, underscore that some judges reject the basic structure doctrine's relevance in Malaysia's constitutional context.[127] That not all judicial quarters have embraced the notion that there can be implied limits on constitutional amendments is unsurprising, especially for judges navigating a fraught political context. But it does not decisively undermine the basic structure doctrine established by the apex court's contemporary jurisprudence.

Of course, the precise contours of the doctrine's operation in Malaysia remain to be worked out. What seems undeniable, though, is that the notion of an implied domain of unamendable features has begun to alter the landscape of Malaysia's constitutional order and that doctrine will increasingly be invoked in future constitutional litigation, as recent constitutional challenges only confirm.[128]

The trajectory of judicial power in a fragile democracy rarely moves in a straight line; it zigs and zags. With its unanimous decisions in *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo* establishing judicial review over constitutional amendments, the Malaysian Federal Court put in place a firm foundation for a potent judicial mechanism that empowers courts to protect basic principles of separation of powers and judicial review as part of the constitution's foundational core. Even so, ultimately, the doctrine's effectiveness rests on judicial willingness to wield this powerful tool.

Dayung sudah di tangan, perahu sudah di air, as a Malay proverb goes, "The paddle is already in hand, the canoe is already in the water." While the exact shape of the Malaysian courts' path may yet be uncertain, the way forward has been clearly lit.

[110] (Justice David Wong observing "[w]hat remains clear at this juncture is that the assertion that there is no such thing as basic structure doctrine, may no longer be made").

127 *Maria Chin* (n 6) (majority opinion of Justice Abdul Rahman Sebli).

128 See, for example, *Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia* (Civ. Appl. No. 06(RS)-1-03/2019(W); *Nivesh Nair v Abdul Razak Musa*, at [26] (Cr. Appl. No: 05(RJ)-2-03/2021(W)). See also recent cases revealing the Federal Court's divide on the basic structure doctrine (n 106).