THE DOCTRINE OF BASIC STRUCTURE IN MALAYSIA: BETWEEN THE PROTECTION OF FUNDAMENTAL LIBERTIES, NATIONAL IDENTITY, AND ISLAM

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ABSTRACT

Part II of the Federal Constitution represents Malaysia's political and civil rights constitutional safeguards. These safeguards, however, has been amended through time since its inception in 1957. The amendments that have been done to Article 5 to13 and other related provisions such as Article 149, 150 and 159 have brought a mixture of reactions among the masses, where some viewed that such amendments have to be done as the country is growing. In contrast, others regarded it as a threat against preserving the national and constitutional identity. In addition to that, these constitutional amendments often resulted in these safeguards to their detriment. Concerning this, preservation of security, public order, and national identity has frequently been used to justify its alteration. Hence, the doctrine of basic structure has been raised to protect constitutional integrity; even its reception is generally divided and equally contested. The main objective of this paper is to examine the concept of basic structure and its relationship to the protection of fundamental liberties in Malaysia. Furthermore, this paper also explores the dilemma surrounding the country in finding its constitutional identity, which often centres on the conflict between Islam, local demographics, common law heritage, and cultural values. This paper adopts qualitative methodology, where a doctrinal approach is adopted.

Keywords: *Basic Structure, Fundamental Liberties, Islam, Federal Constitution, Malaysia*

INTRODUCTION

The Malaysian Federal Constitution furnishes in Article 4(1) that reads: "This Constitution is the supreme law of the Federation and any law passed after the Merdeka Day, which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". The supremacy of the Federal Constitution is further emphasised by the then Lord Precedent, Tun Suffian in *Ah Thian v. Government of Malaysia*;

> "The doctrine of Parliamentary sovereignty does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislature in Malaysia is limited by the Constitution, and they cannot make any new law they please."[1]

Despite the guarantee given under the Federal Constitution that affirms its supremacy; however, the same constitution also empowered the Parliament to amend its provisions subjected to several constitutional requirements. As the Federal Constitution does not put any substantive limitation to the legislative to the constitutional amendment, thus the worries over the excessive alteration of the essential characteristics of the Constitution may be well-founded, as such amendments may

[1] *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 113

negatively affect the guarantees over the protection of human rights, and as well other core features as mention in the Federal Constitution. In this respect, the notion of unconstitutional constitutional amendments has been raised under the banner to protect the integrity and the basic principles as guaranteed initially under the Federal Constitution. The proponents of this notion firmly believe that the judiciary should exercise its role as the guardian of the Constitution against the possible legislative abuse that might destroy the objects and the fabric of the said document. In the absence of express substantive limitation to the constitutional amendment, the Malaysian judiciary, in many cases, had employed the doctrine of basic structure, where it allows the court to strike down any constitutional amendments that are done against provisions that are regarded as part of the basic structure to the Constitution. However, there is a clear split even among the judicial members regarding the acceptance of the basic structure doctrine approach.

On the other hand, there is also a concern where there might be an ever-present danger to solely leave to the Court's interpretation of what may construe as part of the basic structure to the Constitution and what is not. Some may even say that it may be amounting to the abuse of the doctrine of separation of powers as the judiciary is not expressly authorised by the Federal Constitution to 'rewrite' the Constitution.[1] In the meantime, there is also a fear of misconstruing by the court on several related core issues under the Federal Constitution, particularly on the subject of Islam, and national or constitutional identities that be shaped through historical, cultural and traditional elements. These are never-ending competing interests among Malaysians, which build based diversity of creed, race and cultures, if not handled carefully, might upset its standing social balance and harmony that has been in practice since the independence.

Therefore, this paper will navigate its readers to understand the amendment process as provided under the Federal Constitution, which when it can be held as unconstitutional. In the next part, the author will explain what it means by the doctrine of basic structure and its origins before discussing the application of the principle in Malaysia in light of the protection of fundamental liberties. Approaching the end of this paper, the author will address several vital dilemmas encircling the issue; as to balance the doctrine of basic structure, fundamental liberties, national identity, and Islam. This paper will end with a conclusion to its discussion.

AMENDMENT PROCEDURES UNDER THE FEDERAL CONSTITUTION

According to Low Hong Ping, constitutional amendment generally refers to 'a formal amendment of a written constitution through the textual amendment procedure furnished as in the constitution'.[2] The main objective of constitutional amendment rules is to improve, correct or repair the constitutions.[3] However, 'Constitutional amendment' should not be confused with 'constitutional dismemberment'. Richard Albert propounded that while the amendment is done within the existing government setting, constitutional dismemberment refers to the fundamental alteration of a constitution that may reshape its very framework and depart from its presuppositions.[4] Jaclyn has cautioned that dismemberment of a constitution may be amounting

[1] Abdul Hamid Mohamad, "Not For Judges To Rewrite The Constitution" in *No Judge Is a Parliament : Collection of Speeches & Articles*, "Not For Judges To Rewrite The Constitution" (Kajang: CLJ Publication, 2021).
[2] Low Hong Ping, "The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of our Constitutional Identity", *Journal Malaysian and Comparative Law*, vol. 45, no. 2 (2018): 54.
[3] Rosalind Dixon, "Constitutional amendment rules: A comparative perspective", *Comparative Constitutional Law*, no. 347 (2011): 96–111.
[4] Richard Albert, "Formal Amendment Rules" in *Routledge Handbook of Comparative Constitutional Change*, "Formal Amendment Rules" (Texas: Routledge, 2020).

to 'unmake the constitution',[1] as dismemberment may deliberately dissemble 'one or more of the constitution's constituents parts', which may alter the identity of the constitution.[2] This is where scholars, including Jaclyn, exercise caution that there must be a restraint on amendment powers of the legislative against the constitution should be imposed to protect the polity's constitutional identity.[3]

In the context of the Malaysian Federal Constitution, despite Article 4(1) explicitly stressed on constitutional supremacy; however, the constitution generally rejects the notion of substantive limitation upon the legislative with regards to the constitutional amendment.[4] The Parliament is empowered to amend the Federal Constitution subjected to procedural requirements set out under Article 159 and 161E. According to both of the provisions mentioned, 'amendment' includes repeal and addition. The inclusion of the term 'repeal' might open up to an assumption that 'amendment' under the constitution might consist of 'dismemberment' as coined out by Richard Albert earlier.[5] In this respect, Low How Ping submitted that the Constitution does not recognise or intend 'repealing' or 'amendment' to result from consequences of dismemberment since there is no separate procedure for repealing has been set out under the Constitution.[6] According to him, the 'dismemberment' of a constitution should be judged based on the outcome of the amendment rather than from the textual context per se, as Richard Albert outlines dismemberment as 'thoroughly transformative'.[7]

In general, there is a tiered scheme of procedures to amend the Federal Constitution, which is designed to allow growth and flexibility. It can be said there are four groups of provisions that are subjected to different procedural amendment requirements.[8] The first requirement, which is the most omnipresent, is stipulated under Article 159 of the Federal Constitution, which requires a special two-third majority of both houses of the Parliament. Notably, this is a general requirement unless other provisions in the Constitution expressly exclude it. The second requirement imposes an additional requirement of the first method, where the consent of the Conference of Rulers is required to amend several provisions as mentioned explicitly under the Federal Constitution.[9] This includes, but is not limited to, limitation to freedom of speech and expression,[10] national language,[11] matters relating to Malay Rulers,[12] Citizenship,[13] limitation to parliamentary privilege[14] and

[1] Jaclyn L. Neo, "A contextual approach to unconstitutional constitutional amendments: Judicial power and the basic structure doctrine in Malaysia", *Asian Journal of Comparative Law*, vol. 15, no. 1 (2020): 69–94.
[2] Richard Albert, "Constitutional Amendment and Dismemberment", *The Yale Journal of International Law*, vol. 43, no. 1 (2018). Page 4
[3] Neo, A contextual approach to unconstitutional constitutional amendments: Judicial power and the basic structure doctrine in Malaysia. Page 72
[4] Muhammad Hassan and Johan Shamsuddin Bin Sabaruddin, "An Induction of Basic Structure Doctrine in Malaysian Jurisprudence and Federal Constitution: An Overview", *Jurnal Undang-undang dan Masyarakat*, vol. 26, no. 2020 (2020): 3–14.
[5] Ping, The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of our Constitutional Identity. Page 61
[6] Ibid.
[7] Ibid.
[8] Neo, A contextual approach to unconstitutional constitutional amendments: Judicial power and the basic structure doctrine in Malaysia.Page 75
[9] Article 159(5) of the Federal Constitution
[10] Article 10(4) of the Federal Constitution
[11] Article 152 of the Federal Constitution
[12] Article 181, Article 70, Article 71(1), Article 38 of the Federal Constitution
[13] Part III of the Federal Constitution
[14] Article 63(4) of the Federal Constitution

reservation of quotas for Malays and natives of Sabah and Sarawak.[1] Next, the consent of the head of state of Sabah and Sarawak are also required to amend relevant provisions affecting the constitutional positions of both East Malaysian states.[2] These comprise provisions related to citizenship, the appointment and removal of the High Court judges in Sabah and Sarawak, legislative powers, religion in the state, and allocation of members of Parliament in the House of Representative from both states.[3] Finally, amendments relating to matters as laid down under Article 159(4) of the Federal Constitution can be amended to exclude the two-thirds majority prerequisite. It has been suggested that these provisions can be amended through a simple majority as any ordinary federal law,[4] which is consistent with the expression under Article 159(1) of the Constitution.[5] In this regard, Jaclyn observes that since some provisions are allowed to be amended through a simple majority, thus it blurs the distinction between ordinary law and the higher law, such as constitutional law.[6] This is because, by inference, a higher law should be more difficult to amend than the ordinary law.[7]

It can be argued that a tiered amendment procedure scheme may have an expressive persistence, 'as it may reflect the most fundamental values polity'.[8] Nevertheless, despite the procedural limitations to the amendments prescribed by the Federal Constitution, the Constitution has been amended no less than fifty-seven times in the last sixty years.[9] These amendments, of course, directly or indirectly affect the protection of fundamental liberties, or at least the role and the independence of the judiciary that is supposed to be its guardian. This may be why the judiciary, through its judicial power, embraces the philosophy of unconstitutional constitutional amendments, particularly the doctrine of basic structure. Hence, the next part will discuss the general concept of the doctrine and its history to provide us with a better context to understand it.

THE CONCEPT OF BASIC STRUCTURE DOCTRINE AND ITS GENESIS

Although the doctrine of basic structure is much attributed to the ground-breaking decision in the Indian case of *Kesavananda Bharati v. Kerala*,[10] however, some argue that the idea has much been influenced by the works of Dietrich Conrad, a German scholar,[11] as which expressly embraced by one of the Judges in the case, Judge Khanna.[12] However, it is interesting to note that the doctrine

[1] Article 153 of the Federal Constitution
[2] Please refer to Article 161E of Federal Constitution
[3] Please refer to Article 161E (2) of the Federal Constitution
[4] *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (Federal Court)
[5] Neo, A contextual approach to unconstitutional constitutional amendments: Judicial power and the basic structure doctrine in Malaysia. Page 76
[6] Ibid.A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (London: Macmillan, 8th edn., 1915). Page 39-40
[7] Neo, A contextual approach to unconstitutional constitutional amendments: Judicial power and the basic structure doctrine in Malaysia. Page 76
[8] Ibid.; Richard Albert, "The Expressive Function of Constitutional Amendment Rules", *McGill Law Journal*, vol. 225 (2013): 225–281.
[9] Hassan and Bin Sabaruddin, An Induction of Basic Structure Doctrine in Malaysian Jurisprudence and Federal Constitution: An Overview. Page 4
[10] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1561,1480
[11] For more, please read Monika Polzin, "The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting", *Indian Law Review*, vol. 5, no. 1 (2021): 45–61.
[12] *Kesavananda Bharati v. State of Kerala* (n1) [1485] [Khanna].

of implied limitation, in this context, the basic structure, should only be applied as a "doctrine of last resort".[1] In this respect, he argued that it should be used only limited to cases where abuse of power are apparent.[2]

Similarly, in Malaysia, there is no express mention of the term "Basic Structure" in the Indian Constitution. Instead, it can be suggested that the concept of basic structure in the Indian context is much derived from the existence of 'preamble' in the said constitution.[3] The basic idea of the doctrine is that amendments to a Constitution should be limited to the extent that it does not destroy or reduce the features and elements that are part of the basic structure.[4] This doctrine provides a more jurisdictional basis to the judiciary to determine the premises and provisions under a Constitution that should be deemed 'unamenable' by the legislative as it forms parts of a Constitution's basic structure.

The Indian basic structure doctrine was established in a very slim majority (7:6) by the Indian Supreme Court in the case of *Kesavananda Bharati v. Kerala*,[5] as mentioned earlier. In this case, through its majority decision, the Court recognised that provisions on Fundamental Liberties are beyond the Parliament's amending power. This judgment also marked that the Parliament may only amend the constitution but not rewrite it since the authority to amend is not the power to abolish.[6]

Nevertheless, the Indian jurisprudence first forwarded the doctrine in a much earlier case of *Sajjan Singh v. State of Rajasthan*,[7] where Mudhokar J, in his dissenting view, questioned the power of the legislative authority to abridged provisions on Fundamental Liberties under Part III of the Indian Constitution.[8] The position taken by Mudhokar J in the said case is totally in contrast with the precedent set in the case of *Shankari Prasad*,[9] where the Supreme Court acknowledged that the amending power granted by the Indian Constitution under Article 368 is as well extended to the authority to amend the Fundamental Rights as guaranteed under the said constitution.[10]

The doctrine further gained its foothold in the Indian jurisprudence through the subsequent decisions after *Kesavananda Bharati*, as such in the *Indira Nehru Gandhi*,[11] where the Supreme Court struck down the Clause(4) of Article 329-A, which was inserted through the 39th Amendment, through the application of the basic structure doctrine. The amendment itself was controversial as it put the election beyond judicial scrutiny. The doctrine further gained recognition in the *Minerva*

[1] Polzin, The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting. Page 56
[2] Ibid.
[3] *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70, Page 73
[4] Sharon K Chahil, "A critical evaluation of the constitutional protection of fundamental liberties : The basic structure doctrine and constitutional amendment in Malaysia", *Malayan Law Journal*, vol. 3, no. 1 (2002): 1–13; Hassan and Bin Sabaruddin, An Induction of Basic Structure Doctrine in Malaysian Jurisprudence and Federal Constitution: An Overview.
[5] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1561,1480
[6] The position taken in this case might be different in application to the Malaysian Federal Constitution, as the wordings under Article 159 also includes 'repeal', unlike its corresponding Indian position.
[7] *Sajjan Singh v. State of Rajasthan* 1965 AIR 845
[8] Ibid.
[9] *Shankari Prasad Singh Deo & Ors v. The Union of India & Ors* AIR 1951 SC 458
[10] It is worth mentioning that the court has reversed the stance in *Sajjan Singh* in the case of *Golak Nath & Ors v. State of Punjab & Ors* 1967 AIR 1643, before the doctrine gained its formal recognition in *Kesavananda* case.
[11] *Indira Nehru Gandhi v. Shri Raj Narain & Anr* 1975 AIR 2299

Mills case,[1] where the Supreme Court annulled two amendments to the Constitution made through the 42nd Amendment Act 1976.

Through the judicial decisions, the court has listed out several characteristics under the Indian Constitution that should be regarded as part of its basic structure. In *Kesavananda* alone, the court outlines that it comprises Constitutional supremacy, Republican and Democratic form of government, Federal and Secular character of the constitution, fundamental liberties, sovereignty and unity of India, and the doctrine of separation of powers.[2] Further characteristics such as Rule of Law[3] and limited amending power of the Parliament to amend the constitution,[4] among others, were added in the subsequent cases.

FUNDAMENTAL LIBERTIES AND THE DOCTRINE OF BASIC STRUCTURE IN MALAYSIA: A POTENTIAL ROLLERCOASTER RIDE?

Even though most of the discussions related to the doctrine of basic structure in Malaysia are mainly focusing on the aspect of the role of the judiciary in a constitutional democracy,[5] however, without a doubt, the application of the doctrine may inevitably affect the scope of protection of fundamental rights.[6] In this respect, Sharon raised a question on whether the Federal Constitution may be accurately amended so that it may contradict itself.[7] For instance, Article 149(2) of the Federal Constitution, which concerns the enactment of counter-subversion laws, was amended in 1960 that has paved the way to the indefinite existence of subversion laws, which may affect the protection of fundamental liberties. This is since legislation enacted under Article 149 may exempt some protection of human rights furnished under Part II of the Federal Constitution.[8] Through the said constitutional amendment, the newly inserted clause (2) of Article 149 has removed the requirement for any legislation passed under Article 149(1) of the Federal Constitution to expire 'one year from the date on which it comes into operation'.[9] The other example of a constitutional amendment in contest relates to the proclamation of emergency under Article 150, particularly clause (3). The original Article 150(3) comprises of the following features; 1) An emergency will cease to have effect after two months after its proclamation, and 2) An Emergency Ordinance will automatically cease to have effect after 15 days 'beginning with the date on which both houses are sitting'. According to Sharon, the original Article 150(3) churned out two consequences, where 1) would have brought an Emergency Proclamation to be ended early, and 2) An Ordinance would only last up to six months as the proclamation of emergency should be expired in two months.[10] This is in contrast to the current Article 150(3), where a new emergency can be proclaimed or ordinances can be enacted in consequence. Through emergency ordinances, various legislative

[1] *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* AIR 1980 SC 1789
[2] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1561,1480
[3] Added in the case of *Indra Sawhney & Others v. Union of India* AIR 1993 SC 477
[4] Added in the case of *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* AIR 1980 SC 1789
[5] For instance in Neo, A contextual approach to unconstitutional constitutional amendments: Judicial power and the basic structure doctrine in Malaysia.
[6] Yvonne Tew, "On the Uneven Journey to Constitutional Redemption : The Malaysian Judiciary and Constitutional Politics", *Washington International Law Journal Association*, vol. 673 (2016).
[7] Chahil, A critical evaluation of the constitutional protection of fundamental liberties : The basic structure doctrine and constitutional amendment in Malaysia. Page 2
[8] Which are Article 5, 9, 10 and 13 of the Federal Constitution.
[9] Please refer to Act 10/1960, Section 28(a) and (b), effective from 31 May 1960
[10] Chahil, A critical evaluation of the constitutional protection of fundamental liberties : The basic structure doctrine and constitutional amendment in Malaysia. Page 2

amendments have been made that put the protection of fundamental liberties to the detriment. For example, Ordinance No 45 of 1970 was used to amend Section 3(1) of the Sedition Act 1948, adding new elements of 'seditious tendency', further restricting freedom of speech. The provision in the ordinance that was introduced to amend the Sedition Act 1948 was later incorporated in the Constitution in the form of Article 10(4) of the Federal Constitution. In this respect, it added further authority to the Parliament to enact any laws on the matter restricted as encapsulated under Section 3(1) of the Sedition Act 1948.

Additionally, the same Ordinance has become the basis of the amendment of Article 63(4) to impose tighter restrictions on rights to freedom of speech in the Parliament, on the basis of sedition. Perhaps, the genuine worry over alteration over constitutional protection on fundamental liberties had become one of the basis to introduce unconstitutional constitution amendment doctrine, particularly the basic structure doctrine in Malaysia. According to Sharon, this needed to be done to ensure that the constitutional protection on fundamental liberties is truly guaranteed.[1]

The doctrine of basic structure reached the Malaysian shores as early as in 1963 through the case of *Government of Kelantan v. Government of Malaya*, where the state government of Kelantan petitioned a challenge to the Malaysia Act 1963, on the argument that the said state government and its Ruler was not consulted before its passing, on the basis of the should have been a party to the Malaysian agreement.[2] In this case, Thomson CJ ruled that:

> "In doing these circumstances, I cannot see that Parliament went in any way beyond its power or that it did anything so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe that is to say a condition to the effect that the State of Kelantan or any other State should be consulted. In bringing about these changes has done no more than exercising powers which were given to in the Constitution 1957 by the Constituent States including the State of Kelantan."[3]

In this regard, Shad Saleem Faruqi argued that the seed of basic structure doctrine was planted through the case. Despite Thomson CJ rejecting the contention of the plaintiff, but he stated that if the Parliament does anything 'fundamentally revolutionary', therefore it may require 'fulfilment of condition which the Constitution itself does not prescribe'.[4] The author opined that this also echoes the concept of 'dismemberment' as highlighted by Richard Albert in the earlier subtitle.[5]

The acceptance of the doctrine of basic structure is formally tested in the case of *Loh Kooi Choon*, where the issue is related to the question of the power of Parliament to amend constitutional provisions related to fundamental liberties under Part II of the Federal Constitution.[6] Among issues in the case is the challenge to the amendment of Article 5(4) of the Federal Constitution by the Parliament, of which contended by the defendant on the basis of fundamental rights provision is subjected to 'implied substantive limitation' as uttered by the Indian Supreme Court in *Kesavananda Bharati*. Nevertheless, the Federal Court rejected such contention stating that fundamental liberties provision may be amended if the constitutional procedures laid down under

[1] Ibid. Page 13
[2] *Government of State of Kelantan v. Government of the Federation of Malaya & Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLJ 355
[3] Ibid.
[4] Shad Saleem Faruqi, *Document of Destiny : the constitution of the federation of Malaysia*, (Petaling Jaya: Star Publications, 1st Editio edn., 2008).
[5] Albert, Constitutional Amendment and Dismemberment.
[6] *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187

Article 159 were properly observed.[1] It is also interesting that His Lordship Raja Azlan Shah FJ remarked in this case that the drafters of the Constitution would insert a clear stipulation on amenability of Part II of the Federal Constitution, should they intend it to be unamenable.[2] Nevertheless, Low How Ping argues that despite the rejection, Raja Azlan Shah FJ intentionally or otherwise had caused the inception of the doctrine in the country.[3] This is because, in his Lordship's introductory remarks did stipulate that the Constitution is embodied by three basic concepts, which are: 1) protection of fundamental rights, 2) Separation of Powers between the state and the Federation, and 3) Demarcation of powers between the three organs; executive, legislative and judiciary.[4]

Nonetheless, the application of the doctrine of basic structure once again has been rejected in the case of *Phang Chin Hock*, where the Supreme Court cited that "it is not enough for us merely to say that Parliament may amend the Constitution in the way they think fit, provided that comply with all the conditions precedent and subsequent regarding and form prescribed by the Constitution itself".[5] The decision in *Phang Chin Hock* reaffirms the precedent set in *Loh Kooi Choon*. In fact, the precedent set in both cases was followed by a Singaporean case, *Teo Soh Lung v. Minister for Home Affairs*,[6] and adopted the same reasoning as provided in *Phang Chin Hock* in rejecting the application of the doctrine in Singapore.

Loh Kooi Choon stood as the law of the land for 33 years until 2010, where the doctrine of basic structure gained its recognition in the Malaysian jurisprudence. In *Sivarasa Rasiah*,[7] the appellant contested the constitutionality of Sec 46 A (1) of the Legal Profession Act 1976, which denies his right to enter the election of the Bar Council, as he is also a Member of Parliament. In this respect, the appellant argued that as fundamental rights are guaranteed under the Federal Constitution, thus it 1) violates his right of equality as prescribed under Article 8(1), 2) violating his freedom of association as guaranteed under Article 10(1)(c), as well as 3) his right to personal liberty under Article 5(1) of the Federal Constitution.[8] Based on the argument above, he prayed to the Court to declare the contested Section 46 A (1) to be struck down as it is unconstitutional, in violation of the protection of fundamental liberties, which is part of the basic structure of the Federal Constitution. However, the Federal Court dismissed the appeal as it ruled that the provision in question is not a violation of fundamental rights as stipulated under the Constitution. However, in delivering the judgment, Gopal Sri Ram FCJ, in reference to *Kesavanda Bharati,* stated:

> "…. It is clear from the way in which the Federal Constitution is constructed that there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends basic structure may be struck down as unconstitutional. Whether a

[1] Ping, The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of our Constitutional Identity.
[2] Hassan and Bin Sabaruddin, An Induction of Basic Structure Doctrine in Malaysian Jurisprudence and Federal Constitution: An Overview.
[3] Ping, The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of our Constitutional Identity. Page 66
[4] *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 at Page 188
[5] *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70. Read as well Tew, On the Uneven Journey to Constitutional Redemption : The Malaysian Judiciary and Constitutional Politics.Page 690
[6] *Teo Soh Lung v. Minister for Home Affairs & ors* [1989] 2 MLJ 449
[7] *Sivarasa Rasiah v. Badan peguam Malaysia & Anor* [2010] 2 MLJ 333
[8] Hassan and Bin Sabaruddin, An Induction of Basic Structure Doctrine in Malaysian Jurisprudence and Federal Constitution: An Overview. Page 8

> particular feature is part of the basic structure must be worked out 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."

The effort of Gopal Sri Ram FCJ on re-introducing the doctrine of basic structure was met with criticisms, including one from the former Chief Justice of Malaysia, Abdul Hamid Mohamad. In his writing, he criticised the ground of the lordship of introducing the doctrine at all since the issue in question did not concern constitutional amendment of a provision but a mere issue of the constitutionality of Section 46A (1) of the Legal Profession Act 1976.[1] Thus, accordingly, the observations ending with the reliance on the *Kesavananda Bharati* case should be regarded as a mere *obiter*.[2]

Notwithstanding with the decision in *Sivarasa Rasiah*, the stance as affirmed in *Loh Kooi Choon* were continued to be cited at least in another two cases, namely in *Mohammad Nizar Jamaluddin v. Zambry Abdul Kadir*[3] and *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh*[4].[5] Nevertheless, the decision in *Sivarasa Rasiah,* which recognised fundamental liberties as part of the basic structure, are celebrated in much other subsequent cases. These include in the case of *Muhammad Hilman bin Idham v. Kerajaan Malaysia*[6] where the court recognised that provision on fundamental liberties as stipulated under Part II of the Federal Constitution form part of its basic structure.[7] In *Muhammad Hilman bin Idham*, the Court had relied on the decision in *Sivarasa* to invalidate Section 15(5) of the Universities and University Colleges Act 1971 as putting an excessive restriction on freedom of expression as guaranteed under Article 10(1) of the Federal Constitution. The precedent set in *Sivarasa Rasiah* was also closely referred to in *SIS Forum v. Dato Seri Syed Hamid b Syed Jaafar Albar,* where Mohamed Ariff J, affirmed that Part II of the Federal Constitution, in regards to the protection of fundamental liberties is part of the basic structure of the Constitution.[8] In this case, the order to ban a book entitled "Muslim Women and the Challenge of Islamic Extremism" by the Home Minister was challenged, and the applicant sought a Judicial Review. The High Court, in this case, found that the Minister concern was unable to justify that the publication of the book would implicate public order and affect the tranquillity and safety of the community.[9] The approach in *Sivarasa Rasiah* was also adopted in the case of *Nik Nazmi Nik Ahmad,* where the Court held that Section 9(1) and Section 9(5) of the Peaceful Assembly Act 2012 are unconstitutional, which are inconsistent with the limitation set on freedom of assembly as allowed under Article 10(2) of the Federal Constitution.[10]

In *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat* further reaffirms the acceptance of incorporation of the doctrine of basic structure.[11] In this case, Zainun Ali FCJ highlighted that the amendment to Article 121(1) of the Federal Constitution should not be read narrowly, to the extent that it may be inconsistent with the concept of supremacy of the constitution as manifested under

[1] Mohamad, Not For Judges To Rewrite The Constitution. Page 205-208
[2] Ibid.
[3] Dato' Seri Ir Hj *Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir, Attorney General,* (Intervener) [2010] 2 CLJ 925.
[4] *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor* [2013] 5 CLJ 447
[5] Mohamad, Not For Judges To Rewrite The Constitution. Page 209
[6] *Muhammad Hilman bin Idham v. Kerajaan Malaysia* [2011] 6 MLJ 507
[7] Iqbal Harith Liang, "The Chronicles of The Basic Structure Doctrine", *University of Malaya Law Review*, (2020).
[8] *Dato' Seri Hamid bun Syed Jaafar Albar (Menteri Dalam Negeri lawan SIS Forum (Malaysia)* [2012] 6 MLJ 340
[9] Ibid.
[10] *Nik Nazmi Bin Ahmad v. Public Prosecutor* [2014] 4 CLJ 944
[11] *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 5 CLJ 526

Article 4(1) of the Federal Constitution.[1] Her ladyship, in this case, also stressed that the independence of the judiciary and separation of powers formed part of the basic structure.[2] The decision in *Semenyih Jaya* was also followed in *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak*.[3] This highly controversial case saw a bench of 5 Federal Court judges unanimously annulled unilateral conversion of children to Islam by his father.[4] In this respect, the Court also held that the judicial power is inherited by the civil courts as vested under the Article 121(1) and is crucial in exercising their function as a check and balance mechanism towards other organs.[5] Therefore, Syariah Court are not supposed to be conferred with such power to review administrative actions, of which the power of judicial review vested upon the civil court is an essence under the doctrine of separation of powers, which is also part of the basic structure of the constitution. Further, her ladyship Zainun Ali FCJ also outlines several other characteristics that form part of the Constitution's basic fabric, including the rule of law and the protection of minorities.[6]

The doctrine further flourished in the case of *Alma Nudo Atenza v. Public Prosecutor,* where the central issue of the case was in regards to the constitutional validity of the impugned Section 37A of the Dangerous Drugs Act 1952, in reference to provisions under the Federal Constitution, particularly on Right to Life as vested under Article 5, equality; under Article 8, and the judicial power under Article 121. [7] In his judgment, Richard Malanjun CJ stressed that the rights vested under Article 5(1) are 'the foundational fundamental right upon which other fundamental rights enshrined in the Federal Constitution draw their support'. [8] Thus, according to Iqbal, as it is by then, it is well settled that fundamental liberties guaranteed under the Federal Constitution are part of the basic structure of the Constitution; therefore, this case strengthens the earlier position taken in the earlier cases. [9] Moreover, his Lordship also reiterated the acceptance of the basic structure doctrine in Malaysian jurisprudence, where he stated:

> 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 FC… In fact, courts can prevent Parliament from destroying the "basic structure" of the FC. (See: Sivarasa Rasiah (supra) 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 also for violation of the doctrines or principles that constitute the constitutional foundation.[10]

[1] Liang, The Chronicles of The Basic Structure Doctrine.
[2] Ashgar Ali Ali Mohamed, "Basic structure doctrine and its application in Malaysia: with reference to decided cases" in *Malaysian Legal System*, edited by Ashgar Ali Ali Mohamed (Ampang: CLJ Publication, 2020), 711–730.
[3] *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [2018] 3 CLJ 1455,FC
[4] Ali Mohamed, Basic structure doctrine and its application in Malaysia: with reference to decided cases.
[5] Hassan and Bin Sabaruddin, An Induction of Basic Structure Doctrine in Malaysian Jurisprudence and Federal Constitution: An Overview.
[6] Ping, The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of our Constitutional Identity.
[7] *Alma Nudo Atenza v. Public Prosecutor* [2019] 5 CLJ 780, FC
[8] Ibid. Para 98
[9] Liang, The Chronicles of The Basic Structure Doctrine.
[10] *Alma Nudo Atenza v. Public Prosecutor* [2019] 5 CLJ 780, FC, Para 72-73

The Federal Court's recent decision in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor*[1] had raised a crucial question to the protection of fundamental liberties under the Federal Constitution, but more importantly on the acceptance of the concept of basic structure doctrine in the country.[2] In this case, Maria Chin was denied by the immigration authorities from flying to South Korea to receive an award without any sufficient reason given by the said authorities. In response to this, the Plaintiff applied for judicial review in contest of the decision made by the Immigration department. Further, she also invoked that the respondents had violated Article 5(1), Article 8, and Article 10 of the Federal Constitution. The plaintiff also asserted that Section 59A of Immigration Act 1959 should be held unconstitutional as it expressly denies the avenue of judicial review of the aggrieved party. Through this, she substantiates that it is also a violation of the basic structure doctrine as recognised in any democratic constitutional document.[3] Ashghar Ali, however, described the verdict in Maria Chin as 'perplexing'.[4] One of the reasons is, despite the court held that the decision of the respondent to impose a travelling ban against the plaintiff is without sufficient authority; however, the Court held that Section 59A in contention is constitutional.[5]The Court also chose to ignore the essence of the basic structure of the Constitution, which is fundamental rights in this case, in disregarding the doctrine of *stare decisis* as decided in the earlier three cases; i.e. *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*. The rejection of the doctrine also on the argument that the decision in the 'three cases' as mentioned earlier that recognised the basic structure doctrine are mere *obiter dicta*, hence should not have any legal effect on the present case.[6] Concerning Article 121 (1) on the independence of the judiciary, the majority also held that the basic structure is an abstract doctrine, and the doctrine of separation of powers itself has never been expressly stipulated in the Federal Constitution.[7] The majority decision also added that it does not recognise that the doctrine is a 'homegrown' feature but created from the Indian constitutional framework.

Further, the absence of an equivalent provision to the Article 4(1) of the Federal Constitution in the Indian Constitution has also strengthened the ground of rejection to the doctrine. Hence, through *Maria Chin*, the position of the Malaysian jurisprudence in regards to the basic structure has been effectively restored to the earlier position taken in the *Loh Kooi Choon*. The trend of rejection to the doctrine of the basic structure that was recently begun in *Maria Chin* has further taken strong reception in the subsequent cases, which is in *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & 4 Ors*[8] and later in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan & Ors*[9].

From a different perspective, it is also valid to raise a concern that the flip-flopped ruling taken by the judiciary might upset the adherence to the doctrine of *stare decisis*. The doctrine dictates a Court other than the apex court to follow the decision of a higher court or the same equal level in the court structure subjected to limited exceptions.[10] Additionally, the rule of judicial precedent shall

[1] *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579
[2]Ashgar Ali Ali Mohamed, Chithra Latha Ramalingam, and Muhamad Hassan Ahmad, "The Eclipse of Basic Structure Doctrine : An Assessment of Clash Between Three Titans and Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750", *Malayan Law Journal*, vol. 1, no. 1 (2021).. Page 4
[3]Ibid.. Page 7
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and Other Appeals* [2021] 3 MLRA 260
[9] *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 2 MLJ 759*
[10]Ali Mohamed, Ramalingam, and Ahmad, The Eclipse of Basic Structure Doctrine : An Assessment of Clash Between Three Titans and Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750.. Page 12

apply if the relevant fact of the present case is similar to the earlier decided case. Concerning this, Ashgar posited that the observation of this doctrine is crucial in the interest of certainty and finality of the law. In relation to our discussion, even though it is acknowledged that when there are two apex court decisions are in conflict, therefore the subsequent decision ought to prevail; however, there is always a chance that the subsequent panel of the Federal Court may revert back to the earlier decision, in this respect re-admitting the doctrine of basic structure in Malaysian jurisprudence. Ashgar also asserted that if the apex court is allowed to offend the stare decisis doctrine, the doctrine itself will lose its crucial values, which could result in a 'chaotic situation'.[1] The flip-flopped stance by the court should be averted as well on the ground that it would also be a breach of the Rule of Law. This is consistent with Joseph Raz's guiding principle on Rule of Law, where among them 'the law should be stable and should not change too frequently', as if it is, therefore the people to find out what is the law of the moment is.[2] Lord Bingham also echoed the same sentiment where he also outlined that 'the law must be accessible, intelligible, clear, and predictable'. [3] Indeed, this possible flip-flopped stance is a rollercoaster ride to be avoided.

THE LOCAL DILEMMA: FUNDAMENTAL LIBERTIES, NATIONAL IDENTITY AND ISLAM

Under this subtitle, the author outlines several possible dilemmas surrounding the difficult relationship between the basic structure doctrine, fundamental liberties, national identity and Islam.

a. The Never-Ending Quest In Search of Constitutional Identity or National Identity?

> The constitution is a precious heritage; therefore you cannot destroy its identity[4]

'Constitutional identity' is a contested concept as there is no consensus on what it may entail or denote. It is as well noted that the concept of 'constitutional identity' and 'national identity' may be overlapping and frequently used interchangeably,[5] either intentionally or by mistake. However, this is not entirely accurate as 'national identity' can exist without a constitution, while 'constitutional identity' can exist without a nation and *vice versa*.[6] Thus, the quest should rather be in search of 'constitutional identity' rather than 'national identity'.

Aristotle insisted that the identity of the state does not depend on its physical characteristic but its constitution.[7] Rosenfeld argues that the spectrum of conceptions to constitutional identity may be ranging from focus on the actual features and provisions of a constitution to the relation between

[1] Ibid.

[2] Joseph Raz, *The Authority of Law*, (Oxford: Oxford University Press, *The Authority of Law: Essays on Law and Morality*, 1979). Page 214-215

[3] Lord Bingham, "Rule of Law", *The Cambridge Law Journal*, vol. 66, no. 1 (2007): 67–68.

[4] *Minerva Mills Ltd v. Union of India* AIR 1980 SC 1789,1798

[5] Elke Cloots, "National Identity, Constitutional Identity, and Sovereignty in the EU", *Netherlands Journal of Legal Philosophy*, vol. 45, no. 2 (2017): 82–98.

[6] Anna Śledzińska-Simon, "Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland", *International Journal of Constitutional Law*, vol. 13, no. 1 (2015): 124–155.

[7] Michel Rosenfeld and András Sajó, "Constitutional Identity" in *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012). Page 2

the identity of the constitution and other relevant identities (such as religious, national, ideological identity), and the relation between the culture and constitution of its jurisdiction.[1] In this respect, according to Rosenfeld, based on this, different meanings of constitutional identity emerge. Firstly, the identity derives from having a constitution, next from the distinctive elements and identity that derives from the content of a constitution. Finally, the context in which the said constitution operates plays a crucial role in determining its identity.[2]

Jacobsohn explains that the main objective of a 'constitutional identity' is to deal with 'constitutional disharmony'.[3] According to Jacobsohn, such 'disharmony may arise from within the constitution's text, or due to political contestation or the difference of context in interpreting historical change.[4] This is where Jacobsohn advocates dialogues to cope with the conflict and dissonance that may arise from the differences in interpreting the context of constitutional identity.[5] Despite in agreement with Jacobsohn, Rosenfeld describes that his approach is 'narrow'.[6] Rosenfeld argues that 'constitutional identity' should be moulded through the three principle questions, which are ; *To whom* the constitution to be addressed? *What* should the Constitution provide? And *How* the constitution to be justified?.[7]

While constitutional and national identity discourse in Europe is rooted much from the formal recognition of constitutional identity as a legal notion of EU law fates to the 1990s,[8] the debate over constitutional and national identity in Malaysia may have different motives and perspectives. Perhaps the direction provided by the Canadian Supreme Court in *Reference re Senate Reform (2014:25-26)* may shed light on how the basic elements, of which may shape a constitutional identity:

> "The constitution implements a structure of government and must be understood by reference to the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning…. The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts….. Generally, constitutional interpretation must be informed by the foundational principles of the constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law ….These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an 'internal architecture' , or 'basic constitutional structure' … The notion of architecture expresses the principles that the individual elements of the Constitutional are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole' … In other word, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement.

[1] Ibid.
[2] Ibid.
[3] Gary Jeffrey Jacobsohn, "Constitutional Identity", *Review of Politics*, vol. 68, no. 3 (2006): 361–397.
[4] Ibid.
[5] Ibid.
[6] Rosenfeld and Sajó, Constitutional Identity.
[7] Ibid.
[8] Federico Fabbrini and András Sajó, "The dangers of constitutional identity", *European Law Journal*, no. May (2019): 1–17.

> The assumptions that underlie the text and the manner in our interpretation understanding and application of the text"[1]

Sharing the same basis, this is perhaps the reason why most of the categorisation of what constitutes constitutional identity in Malaysia is much centralised on the 'traditional elements' which are inherent in the Federal Constitution. For instance, Abdul Aziz Bari identifies indigenous characters to the Constitution are Islam, Malay language, the special position of the Malays, and the Malay Sultanates.[2] Shad Faruqi also posited the same characteristic as mentioned by Aziz Bari, but with additional features such as fundamental rights, federalism, constitutional supremacy and electoral democracy.[3] It is also interesting that Wan Ahmad Fauzi stressed that the 'basic structure' of which, in this context, form a constitutional identity should be based on the Oath of the Yang Dipertuan Agong by taking the historical and traditional context into account.[4] It is also submitted by Faiza Tamby Chik that in referring to the same characteristics as pointed out by Aziz Bari earlier, that such features should be regarded as form the 'basic structure' (hence forming the constitutional identity), as they were part of 'terms of reference' of the Reid Commission in drafting the Federal Constitution for the Federation in 1957.[5] However, the approach taken by the scholars, as mentioned earlier, is not with criticisms. In criticising the approach taken, Nazim argues that even though by taking history into consideration may increase its legitimacy, however to overemphasis on traditions and traditional elements of a constitution should be subjected to a certain extent of limitations.[6] He further added that such analysis on over-reliance to historical elements does not give proper recognition to changes and transformations that take place in society and disregards the constitutive effect that law has on social reality. [7]

Perhaps we finally can reach a consensus by incorporating a more contemporary reinterpretation of national identity in the form of 'Rukun Negara', to be our 'constitutional identity' by inserting it as a preamble in our Federal Constitution?

b. *Rukun Negara* as the Preamble of the Federal Constitution? – A Solution Once for all?

Preambles are 'opening statements that express the aims and objects dreams and demands, values and ideal of a nation'.[8] Preamble can as well be define as 'a brief introductory statement about the fundamental purposes of the Constitution and the guiding principles'.[9] Durga Das Basu further define preamble as 'a Preamble is a declaration, a firm resolve, a pledge, an undertaking and… a dedication'.[10] Zakariah defines a preamble as 'an introductory and explanatory statement in a

[1] *Reference re Senate Reform (2014:25-26) ,* as seen in Wan Ahmad Fauzi Wan Husain, "Suatu Pengenalan Struktur Asas Perlembagaan Dari Perspektif Malaysia", *International Journal of Islamic and Humanities Research*, vol. 1, no. 1 (2021): 1–12.

[2] Abdul Aziz Bari and Farid Sufian Shuaib, *Constitution of Malaysia: Text and Commentary*, (Petaling Jaya: Pearson Prentice Hall, 3rd edn., 2009).

[3] Faruqi, Document of Destiny : the constitution of the federation of Malaysia. Page 114-117

[4] Wan Husain, Suatu Pengenalan Struktur Asas Perlembagaan Dari Perspektif Malaysia.

[5] Mohd Nazim Ganti Shaari, "Malaysia's Constitutional Identity: A Chimera?" in *Illusions of Democracy : Malaysian Politics and People*, edited by Sophie Lemière (Amsterdam: Amsterdam University Press, 2019), 43–58.

[6] Ibid.

[7] Ibid.

[8] Shad Saleem Faruqi, *Our Constitution*, (Subang Jaya: Thomson Reuters Asia, 2019). Page 305

[9] Mohamad, Not For Judges To Rewrite The Constitution.Page 255

[10] As seen in Faruqi, Our Constitution. Page 305

document that explains document's purpose and underlying philosophy'.[1] As of today, 180 Constitutions around the world possess Preamble, of which we are not.[2]

The existence of preamble, in general, is to serve as a guide in interpreting a Constitution. However, in respect of its application, it may differ from one jurisdiction to another. In some jurisdictions, a Preamble is given a limited role where it is only applicable to guide legal interpretation of the Constitution where 'the language is regarded to be ambiguous'.[3] In some other jurisdictions such as Canada, Ireland, and South Africa, the Preamble is used to guide constitutional review.[4] On the other hand, in India and Pakistan, the Preamble is regarded as equivalent to Directive Principles of State Policy.[5]This is contextually manifested in the case of *Kesavananda Bharati* that brought about the basis of the doctrine of basic structure.

The Rukun Negara was first introduced as the national philosophy by the Yang Dipertuan Agong during the Malaysian Independence day in 1970.[6] Drafted by the National Consultative Council (NCC) in 1970 as a result of the May 1969 racial riot, the Rukun Negara seeks to enhance the unity among the people, promoting the democratic way of life, establishing a just and equitable society, upholding a liberal approach in addressing diversity, and creating a progressive society through the use of science and technology.[7] Through these objectives, Rukun Negara underlines five of its core principles; 1) Belief in God, 2) Loyalty to the King and Country, 3) Supremacy of the Constitution, 4) Rule of Law, and 5) Courtesy and morality. Nevertheless, the main issue to ponder is to what extent Rukun Negara, if admitted as the Preamble of the Constitution, would influence the protection of fundamental liberties and the position of Islam and its consequences in shaping the constitutional and national identity?

The proponents of the idea argue that the Rukun Negara is compatible with the Federal Constitution, giving regards to its shared ground and distils the essence of the Constitution.[8] It first can be argued that the first stipulation of the Rukun Negara, 'Belief in God', corresponds with both provisions under the Federal Constitution, which are Article 3 that recognised the position of Islam as the religion of federation and other religions to be practised in peace and harmony, as well as Article 11, which stipulates guarantee of freedom of religion and its limitations. Critics of this idea raise their concern of which the word 'Islam' is absent in the Rukunegara, which it may undermine the exalted position of Islam as guaranteed under Article 3(1) of the Federal Constitution. The absence of any reference of any religion under the term "God" may as well be treated as a forwarded intention of Parliament to treat all religions equally.[9] In this regard, Abdul Hamid also cautioned that the insertion of such a term would give a window for those who are unhappy with the current standing provisions as a point of argument, which would be detrimental in effect to Malays/Muslims and Islam as compared to the others.[10] In this regard, Shad Faruqi contended that though Rukun Negara does not explicitly mention Islam, but its respect for God

[1] A. A. Zakariah, "Human rights and the United Nations charter: Transcendence of the international standards of human rights", *Pertanika Journal of Social Sciences and Humanities*, vol. 25, no. October (2017): 185–198.
[2] Faruqi, Our Constitution.Page 305
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Mohamed Azam Mohamed Adil, "Rukun Negara as The Preamble to The Federal Constitution", *ICR Journal*, vol. 10, no. 1 (2019): 118–120.
[7] Faruqi, Our Constitution; Mohamed Adil, Rukun Negara as The Preamble to The Federal Constitution.
[8] Faruqi, Our Constitution.
[9] Mohamad, Not For Judges To Rewrite The Constitution.
[10] Ibid.

is consistent with the said provision Article 3(1) on Islam, as well as its scheme of religious pluralism as mentioned under for it recognised 'other religions' under the same provision.[1] This, according to him, should be read together with Article 11 of which explicitly recognised the freedom of religion. By recognising such precepts in the Rukun Negara to be part of the Preamble of the Constitution, it may inexplicitly recognise the importance of solidarity of the community members towards their religious belief.[2]

The stipulation of "Loyalty to the King and Country" will further assert the position of Malay rulers as the crucial institution that is the core of the country's stability.[3] In this respect, it affirms the position of the Yang Dipertuan Agong (YDPA) as the supreme head of the federation as mentioned under Article 32(1) of the Constitution. Evidently, the YDPA is also the caretaker of the people of all backgrounds and races and a safeguard to the special position of Malays and natives of Sabah and Sarawak.[4] The position of Islam will be indirectly solidified in the context under the Constitution as the YDPA is solemnly, by oath is bound to perform his duties according to Malaysia's law and Constitution and to protect the religion of Islam.[5] In addition to that, the insertion of "Supremacy of Constitution" directly echoes the stipulation under Article 4(1) of the Federal Constitution. The insertion of "Rule of Law" as preamble is also compatible with several other corresponding Articles under the Federal Constitution. Under this context, it may imply the need for executive accountability, equality, a stable and clear law, and protection of human rights as mentioned under the Part II of the Constitution. Finally, the addition of the concept of "morality" is, according to Shad Faruqi, consistent with the already safeguard as able by empowering Parliament in Article 10 and 11 to legislate laws to safeguard morality. However, the author would like to assert that the issue of morality should be defined accordingly according to the precepts of morality in the local Malaysian context; that is, Muslim and Asian values should take precedence when there is a need for such.

Although some may argue that the incorporation of Rukun Negara may be redundant may create confusion, the author is optimistic about this prospect. In fact, the consideration to include Rukun Negara as the preamble in the Federal Constitution is timely and relevant more than ever before.[6] This is because the constitutional preamble only focuses on general values and will not disrupt the essence and indigenous elements that have already been embedded in the Federal Constitution. Therefore, in this respect, core provisions as of Article 3(1), or Article 153, will remain intact.[7] The provisions of the Federal Constitution should not be read in isolation; therefore, the capacity of a Preamble is only to be limited to as a guide, should the provisions in it be vague. However, if the provision is unambiguous and clear, a Preamble cannot be employed against it.[8]

[1] Faruqi, Our Constitution.
[2] Noor Ashikin Hamid, Hussain Yusri Zawawi, Mahamad Naser Disa, and Ahmad Zafry Mohamad Tahir, "Rukun negara as a preamble to malaysian constitution", *Pertanika Journal of Social Sciences and Humanities*, vol. 29, no. 2 (2021): 29–42.
[3] Ibid.
[4] As provides under Article 153 and 161E of the Federal Constitution
[5] Hamid, Zawawi, Disa, and Tahir, Rukun negara as a preamble to malaysian constitution.
[6] Mohamed Adil, Rukun Negara as The Preamble to The Federal Constitution.
[7] Ibid.
[8] Perhaps the approach under Article 3(4) of the Federal Constitution can be employed on the Preamble, where it is expressly stated that "Nothing in this Article derogates from any other provision of this Constitution."

c. Islam as Part of the Basic Structure in the Constitution?

In principle, Islam is a strong advocate in relation to the protection of human rights. Azam Adil and Nisar even argue that, among the first significant contribution of Islam is 'a paradigm shift towards human rights'.[1] The notion of the concept of human rights in Islam is much centralised in regards to *huquq Allah* and *huquq al-I'bad*, which can be translated as the rights of the Creator and the rights of the servant of Allah, which refers to human beings.[2] Additionally, Islam also stressed adhering to the concept of '*adl* or justice, which signifies moral rectitude and fairness'.[3] Further, *'adl* also refers to sincere adherence of human rights, as the Quran refers;

> "O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is [fully] aware of what you do"[4]

In addition to that, validation towards human welfare and the principles of good government are also recognised under Islamic Law which is consistent with the contemporary universal human rights ideals. This is stipulated under the overall purpose of Sharia' *(Maqasid al-Sharia')*[5] which consists of the right to life, right to intellect, right to preserve dignity, honour and lineage of humankind, right to ownership, and last but not least, right to 'religious' freedom, pluralism and tolerance. [6]

Article 3 of the Federal Constitution recognised Islam as the religion of federation while simultaneously upholding the concept of religious freedom among the multi-ethnic Malaysian society. Nevertheless, Azam Adil and Nisar argue that in reality, the status of Islam as furnished under the said provision does not necessarily reflect its influence in the legal dimension due to the limited recognition and application of Islamic Law as the law of the land.[7] This, of course, influenced the dynamic of the relationship between Islamic law and its tenets and the protection of fundamental liberties under the Federal Constitution. The discussion on the position of Islam under the Federal Constitution is crucial as it would determine whether Islam can be regarded as a basic fabric of the constitution, of which the basis is to be regarded as part of its basic structure. In this regard, commentators split into two arguments, as of which first would rely on the decision made in the case of *Che Omar bin Che Soh v. Public Prosecutor,* where the Supreme Court concluded that the application of Article 3(1) is only limited to the ceremonial and ritualistic role of Islam.[8] The proponents of this arguments would also rely upon the dicta in the case of *Indira Gandhi* where the Federal Court stated that:

> .. Whether that argument is hinged on Islam being the religion of the Federation or that Islamic law is the *grundnorm* or basic structure of the Constitution, it has no foundation and place in the interpretation of the relevant provisions of the Federal

[1] Mohamed Azam Mohamed Adil and Nisar Mohammad Ahmad, "Islamic Law and Human Rights in Malaysia", *Islam and Civilisational Renewal*, vol. 5, no. 1 (2014): 43–67.
[2] Ibid.
[3] Ibid.
[4] Al-Quran, Al-Maidah 5:8
[5] For better understanding, please read Multazimah Rafie, Che Wan Norazura Che Wan Nordin, and Shahrul Mizan Ismail, "The Universal Declaration of Human Rights and Maqasid Syariah : Gauging Resemblance & Aberration" in *International Conference on Shariah & Globalisation*, (Yogyakarta, 2017).
[6] Religious freedom have to be understood in respect that non-Muslim cannot be forced to accept Islam.
[7] Adil and Ahmad, Islamic Law and Human Rights in Malaysia.
[8] *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55

> Constitution [sic] and the federal laws and state enactments as has been held in a number of cases and supported by legislative and constitutional history'[1]

Additionally, the Court in *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray* also reaffirmed that the position of Islam in the Federal Constitution does not construct the supremacy of Islamic Law in the country.[2] Further, the term 'law' in the Article 160 Federal Constitution only confines to written law, common law, and custom that is in operation, which, unfortunately, expressly exclude the term 'Islamic law'. In addition, the jurisdiction of Islamic Law is only specifically provided under the Ninth Schedule, List II – State List. The jurisdiction to legislate Islamic Law is particularly limited to the respective state legislative assembly (except for the Federal territories), and of which the Islamic Law is only subjected to persons who profess the religion of Islam. The powers of Sharia' Courts are also not properly defined under the Federal Constitution, but for only its jurisdiction as prescribed under Article 121(1A) of the Constitution, which takes away the jurisdiction of the Civil Courts over it. In this respect, even the powers of the *Sharia'* Court was open to contention due to the acceptance of the basic structure doctrine in Malaysia. In relying on the decision in the case of *Indira Gandhi,* which declared that the power of judicial review is inherent to the Civil Courts and forms part of the basic structure under the Federal Constitution and thus cannot be removed by the Parliament by way of a constitutional amendment, Jaclyn Neo posited that thus by application, Article 121(1A) which inserted later by the Parliament, is also invalidated in effect by analogy.[3] Apart from that, Shad Faruqi also stressed that it is crucial to read Article 3(1) along with Article 3(4) of the Federal Constitution, where in effect, Islamic Law cannot be employed to invalidate or challenge any institution, principle or law established under the Constitution.[4]

On the other hand, some may argue that the landmark decision in the case of *Che Omar Che Soh* does not reflect the entire picture of the position of Islam as stated in the White Paper and the Reid Commission Report.[5] In light of the discussion in regards to the doctrine of basic structure, Farid Sufian argues that the fact that the Supreme Court in *Phang Chin Hock did* not reject the notion that Islam is the religion of the federation as stipulated under the Federal Constitution, whereas in the context of India, which where the doctrine was popularised it is expressly stressed on its secular character;[6] thus it cannot be replaced with it as such in Malaysia have its guarantees under the Article 3(1), therefore shows the tacit approval over embedded nature of Islam in the Constitution. The same sentiment on the exalted position of Islam is also echoed in several case laws in the country. For instance, in the case of *Meor Atiqurrahman*, the High Court observed that 'Islam is put on a higher pedestal under the Constitution'.[7] While in *Lina Joy v. Majlis Agama Islam Wilayah*, the High Court acknowledged the special status of Islam as the dominant and main religion in the Federation, where in effect, Article 3(1) also formed an obligation for the Federation

[1] As seen in Liang, The Chronicles of The Basic Structure Doctrine.
[2] *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray* [2008] 2 MLJ 147
[3] Neo, A contextual approach to unconstitutional constitutional amendments: Judicial power and the basic structure doctrine in Malaysia. Page 93
[4] Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia*, (Petaling Jaya: Star Publications (Malaysia) Bhd, 1st Editio edn., 2008). Page 126
[5] Adil and Ahmad, Islamic Law and Human Rights in Malaysia. Page 46
[6] Farid Sufian Shuaib and Murat Tumay, "Lessons From a Secular State : Essence of the Constitution and Its Implication on Judicial Interpretation of Human Rights Provisions In Turkey and Malaysia", *Al-Shajarah*, vol. 24, no. 2 (2019): 167–183. Page 180
[7] As seen in Ibid. Please read the case as well; *Meor Atiqulrahman Bin Ishak and others v Fatimah Bte Sihi and others* [2000] 5 MLJ 375.

to preserve, protect and promote Islam.[1] It is also interesting that Apandi Ali JCA at the Court of Appeal remarked in the case of *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* that the Article 3(1) of the Federal Constitution should be regarded as part of the basic structure in the Constitution, and in that respect should be read together with the guarantees stipulated under Part II of the Constitution. He stated that:

> "It is my judgment that the fundamental liberties of the respondent in this case, has to be read with art 3(1) of the Federal Constitution. Article 3(1) reads as follows….It is my observation that the words 'in peace and harmony' in art 3(1) has a historical background and dimension, to the effect that those words are not without significance. The article places the religion of Islam at par with the other basic structures of the Constitution, as it is the third in the order of precedence of the articles that were within the confines of Part I of the Constitution. It is pertinent to note that the fundamental liberties articles were grouped together subsequently under Part II of the Constitution."[2]

Based on the arguments above, it can be concluded that human rights and Islamic Law, despite both, are protected under the Federal Constitution, and Islam is the proponent of protection of Human Rights; however, the notion of 'human rights' as understood by western terminology might be different to what is understood by the Islamic law perspectives. Nevertheless, it shall also be submitted that despite Islam may not be the basic law of the land, therefore may not be able to qualify it as part of the basic structure of the constitution; however it should be put at a rightful exalted position as if Malaysia is not regarded as a theocratic or in a sense, a full-fledged Islamic state, it should not in any way to be regarded as a secular state either due to the existence of Article 3(1) and other corresponding provisions in the Federal Constitution,[3] that expressly mentioned the religion of Islam of which a secular constitution such as of the Indian or Turkish Constitution does not.[4] Thus, in the author's opinion, to recognise Islam as the basic structure and rights to be read together with part II on fundamental liberties would require an amendment to the Federal Constitution, albeit paradoxically to the subject of this paper.[5] Perhaps by inserting *Rukunegara* as the preamble in the Federal Constitution, it might further solidify the position of Islam as the religion of the Federation?

CONCLUSION

From the discussion above, we can conclude that the acceptance of the doctrine of basic structure in Malaysia is inconsistent, even among the judicial fraternities. It is feared that, to worse, it may have a significant negative effect on the Malaysian judicial system, including in regards to the protection of fundamental liberties. Even at the moment, the issues have been temporarily put to rest; however, it is almost certain that it may be raised again in the future, much depending on the contextual relationship between the judiciary and politics. In the meantime, a more tangible and

[1] *Lina Joy v Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119. The Court referred to Mohammad Imam, "Freedom of Religion under the Federal Constitution of Malaysia – A Reappraisal" [1994] 2 CLJ lvii.

[2] *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468 at para 31

[3] Such as Article 11(4), Nine Schedule List II, The Fourth Schedule, Article 12(2) of the Federal Constitution, among others. For a better context, read Mohamed Azam Mohamed Adil, "The Federal Constitution: Is Malaysia a Secular State?", *ICR Journal*, vol. 6, no. 1 (2015): 121–123.

[4] For more on comparison between Malaysian Constitution and the Turkish Constitution, please read Shuaib and Tumay, Lessons From a Secular State : Essence of the Constitution and Its Implication on Judicial Interpretation of Human Rights Provisions In Turkey and Malaysia.

[5] As also proposed by Azam Adil in Adil and Ahmad, Islamic Law and Human Rights in Malaysia.Page 59

holistic approach should be taken in construing the characters and basic structure of the Federal Constitution that forms its basic constitutional identity. In this respect, perhaps the initiative to constitutionalise Rukun Negara as the Preamble to the Federal Constitution may be a good move to put the conflict of determining what constitutes basic structure to the Constitution to rest. It should be asserted that those interpretations must be made by considering not just universal but also local cultural, historical, religious and legal norms.

Further, even Islam may not be a feature that forms a part of the basic structure; however, its exalted position under the Constitution should not be disputed. Perhaps by adopting Rukun Negara as preamble, it may solidify the position of Islam under the Constitution. Thus, the harmonious construction approach should take precedence. That is, the provisions under the Federal Constitution should not be read in isolation.

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