The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of our Constitutional Identity

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I. INTRODUCTION

This short note explores the doctrine of unconstitutional constitutional amendments in Malaysia. The author argues that substantively, there are explicit and implicit limitations on the power of Parliament to amend the Federal Constitution (Constitution). The explicit limits are found in the provisions of the Constitution. The implicit limits are anchored by the basic structure doctrine. For the latter, the author will demonstrate that the structure of the amendment rules in the Constitution, the process by which the Constitution is amended, partially informs on what is the basic structure of the Constitution. Nonetheless, the Malaysian jurisprudence on the basic structure doctrine still lacks a 'soul' – the constitutional identity of Malaysia.

Part II explains the meaning of constitutional amendments, the functions of formal constitutional amendment rules and the structure of formal constitutional amendment rules. Part III examines the doctrine of unconstitutional constitutional amendments by looking into explicit and implicit substantive constitutional unamendability. Part IV discusses the constitutional amendments in Malaysia, drawing from the literature discussed in Parts II and III to dissect pertinent provisions of the Constitution and to delve into a few landmark constitutional amendment cases. Part V concludes.

II. FORMAL CONSTITUTIONAL AMENDMENT RULES

In this short note, constitutional amendment refers to formal amendment of a written constitution through the textual amendment procedure provided in the constitution. Rosalind Dixon notes that for most commentators, formal constitutional amendment rules serve to correct, repair or improve the constitutions.[1] Formal constitutional amendment rules lay out the procedures to amend written constitutions,[2] at times specifying what is subject to or immune from formal amendment.[3] As discussed below, 'amendment' in this

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1 Rosalind Dixon, Constitutional Amendment Rules: A Comparative Perspective in Tom Ginsburg and Rosalind Dixon, eds., Comparative Constitutional Law, Edward Elgar Publishing, 2011, p. 96.

2 Rosalind Dixon and Richard Holden, Constitutional Amendment Rules: The Denominator Problem in Tom Ginsburg, ed., Comparative Constitutional Design, Cambridge University Press, 2012, p. 195.

3 Jon Elster, "Constitutionalism in Eastern Europe: An Introduction" University of Chicago Law Review, 1991, Vol. 58, p. 447 at p. 471.

note does not refer to constitutional changes which completely transform the existing constitutional order.

In addition to the general function of amending, the rules also express constitutional values,[4] direct popular will into institutional dialogue,[5] promote deliberation on constitutional meaning[6] by generating new interpretations of the constitution or trumping existing judicial interpretations[7] and allow the alteration of specific constitutional procedure or structure.[8] Underlying formal amendment rules are faith and distrust in political actors; they authorise political actors to change the constitution but at the same time limit how and when political actors may do so.[9] Finally, while constitutional rules generally set the 'rules of the game in a society,' amendment rules establish the 'rules for changing the rules.'[10]

Richard Albert groups the structures or processes of formal amendment rules into three tiers – the foundations, frameworks and specifications of formal amendment rules, with options within each of these tiers: one of two fundamental foundations, one of six operational frameworks and a combination of supplementary specifications.[11] A brief description of each tier is as follows.

In the foundations of formal rules, there are two types of rules – amendment and dismemberment.[12] Amendment alters a constitution within the existing system of government while dismemberment is a fundamental alteration, departing from the presuppositions of a constitution or even reshaping its framework.[13] In short, dismemberment is thoroughly transformative.[14] If the distinction is not addressed in a constitution, the courts may enforce the distinction via the basic structure doctrine or its equivalent to prevent a purported amendment to essentially result in dismemberment.[15]

For example, the Constitution of Costa Rica embraces the distinction between amendment and dismemberment in the foundation of its formal amendment rules. Article 195 of the Costa Rican Constitution provides that "The Legislative Assembly may *partially* amend this Constitution complying strictly with the following provisions…"

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4 Richard Albert, "The Expressive Function of Constitutional Amendment Rules" McGill Law Journal, 2013, Vol. 59, p. 225 at p. 236.

5 Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process" Harvard Law Review, 1983, Vol. 97, p. 386 at p. 431.

6 Raymond Ku, "Consensus of the Governed: The Legitimacy of Constitutional Change" Fordham Law Review, 1995, Vol. 64, p. 535 at p. 571.

7 *Supra* at n. 1 p. 98.

8 *Supra*. at n 1 p. 97.

9 Bjørn Erik Rasch and Roger D Congleton, Amendment Procedures and Constitutional Stability in Roger D Congleton & Birgitta Swedenborg, (Eds.), Democratic Constitutional Design and Public Policy, MIT Press, 2006, p. 325.

10 Bjørn Erik Rasch and Roger D Congleton, *Supra* n 9, pp. 319 & 321.

11 Richard Albert, Formal Amendment Rules: Functions and Design in Xenophon Contiades and Alkmene Fotiadou, eds., Routledge Handbook on Comparative Constitutional Change (forthcoming) p. 24.

12 *Ibid.* pp. 24-25.

13 *Ibid.*

14 Richard Albert, "Constitutional Amendment and Dismemberment" The Yale Journal of International Law, 2018, Vol. 43, No. 1, p. 1 at pp. 2-3.

15 Richard Albert, Formal Amendment Rules, n 11, p. 26.

(Italics added) The provision then lists the requirements for 'partial' amendment.[16] For 'dismembering' the Costa Rican Constitution, the next article provides as follows:

> A general amendment of this Constitution can only be made by a Constituent Assembly called for the purpose. A law calling such Assembly shall be passed by a vote of no less than two thirds of the total membership of the Legislative Assembly and does not require the approval of the Executive Branch.[17]

Most constitutions do not embody the distinction between amendment and dismemberment, including, as argued below, the Federal Constitution of Malaysia.

Generally, constitutions embed one of six frameworks into the formal amendment foundations. The frameworks differ by the number of procedures available to amend a constitution and the range of constitutional provisions open to formal amendment by these procedures.[18] There are six possible combinations:

	Single-track	Multi-track
Comprehensive	Comprehensive single-track	Comprehensive multi-track
Restricted	Restricted single-track	Restricted multi-track
Exceptional	Exceptional single-track	Exceptional multi-track

The amendment frameworks for the six combinations are as follows:

1. Comprehensive single-track: There is only one amendment procedure and it applies to all amendable provisions. This framework has the virtue of clarity.[19] The Constitution of Japan adopts this framework.[20]
2. Comprehensive multi-track: Political actors may deploy any of the available amendment procedures to amend any amendable provision.[21] This framework is adopted by South Korea.[22]
3. Restricted single-track: There are different amendment procedures and the provisions to which each amendment procedure applies are specifically stated. It is single-track insofar as it provides a single procedure to amend specifically enumerated provisions.[23] The South African Constitution adopts this framework.[24]

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16 Art 195, Constitution of Costa Rica.

17 Art 196, Constitution of Costa Rica.

18 Richard Albert, Formal Amendment Rules, n 11, pp. 26-27.

19 Richard Albert, "The Structure of Constitutional Amendment Rules" Wake Forest Law Review, 2014, Vol. 49, p. 913 at 939.

20 Art 96, Constitution of Japan.

21 Richard Albert, *Supra* n 19, p. 940.

22 Art 128(1), Constitution of South Korea.

23 Richard Albert, *Supra* n 19, p. 942.

24 Ss. 74(1), (2) and (3), Constitution of South Africa.

4. Restricted multi-track: There is more than one amendment procedure to amend specifically enumerated provisions.[25] This framework is practised by Canada.[26]
5. Exceptional single-track: There are only two amendment procedures in exceptional single-track – one for all amendable provisions and another applying exclusively to one provision or a set of related provisions. The special amendment procedure incorporates the general one, in that amending the special provision or set of related provisions requires the adherence first to the general amendment procedure and then to the special procedure.[27] Australia adopts this framework.[28]
6. Exceptional multi-track: There is more than one general amendment procedure applicable to all provisions, except one provision or a set of related provisions, which, in addition to requiring completion of one of the available general procedures, also requires the adherence to a special procedure.[29] The Constitution of the United States of America practices this framework.[30]

The third tier in constitutional amendment processes according to Albert is specifications. Specifications act as operational restrictions which political actors must navigate to alter a constitution. There are five types of specifications,[31] two of which are relevant for this part:

1. The restrictions on subject matter from amendments.
2. The disabling of the formal amendment process during emergency.

The significance of the tripartite classification is noteworthy. Through the design of the formal amendment rules, constitutional authors convey what matters more or most in a constitution. When they prioritise provisions by the ease or difficulty of amending those provisions, the hierarchy reflects constitutional values embodied in the constitutional text.[32] When there are subject matter restrictions, the restrictions also reflect the constitutional values cherished by the constitutional drafters.[33]

III. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

To recap, constitutional amendment refers to formal amendment of a written constitution through the textual amendment procedure provided in the constitution. However, Yaniv Roznai has questioned whether a constitutional amendment can be unconstitutional.[34] Are

25 Richard Albert, *Supra* n 19, p. 944.

26 Part V, Constitution Act 1982, Canada.

27 Richard Albert, *Supra* n 19, p. 946.

28 S. 128, Constitution of Australia.

29 Richard Albert, *Supra* n 19, p. 948.

30 Art V, Constitution of the United States of America.

31 Richard Albert, *Supra* n 11, pp. 28-31.

32 Richard Albert, *Supra* n 19, p. 962.

33 Richard Albert, *Supra* n 19, p. 963.

34 Yaniv Roznai, "The Theory and Practice of Supra-Constitutional Limits on Constitutional Amendments" International and Comparative Law Quarterly, 2013, Vol. 62, p. 557.

there any substantive limitations on the power of the Parliament to amend a constitution[35] and "to constitute and de-constitute the fundamental provisions of the basic law"[36]? Does the constitution amendment power allow constitutional amendments which violate fundamental rights and principles[37] and destroy the basic structure of the constitution[38]?

To answer those questions, it is imperative to understand the nature of the constitution amendment power. Roznai has argued that the amendment power is a *sui generis* power, weaker than the constituent power but greater than the ordinary legislative power.[39] In this sense, the power of Parliament to amend the constitution is a power delegated by the constitution to Parliament. Since it is a delegated power, Parliament acts as a trustee to the people, who possess primary constituent power. Having delegated power, Parliament is in a fiduciary relationship to the people and possess only secondary constituent power. By the very nature of the fiduciary relationship, the delegated power of Parliament to amend the constitution is limited. There exists a vertical separation of powers between the people having primary constituent power and Parliament having secondary constituent power.[40] How then is the power of the Parliament to amend the constitution limited?

The explicit limits on constitutional amendments may be found in the text of the constitution prescribing that certain provisions are unamendable. The implicit limits arise from the interpretations of the courts, declaring that certain constitutional provisions or principles are implicitly unamendable despite the absence of explicit limits on the amendment of those provisions or principles.[41] If the court makes such a declaration, it would mean that the amendment is unconstitutional.

The doctrine of unconstitutional constitutional amendments is however not without problems. It is the "most extreme of counter-majoritarian acts."[42] The use of the doctrine allows the courts to cut off any avenue for the people in shaping the constitution, unless there are major changes to the particular amendment, to the composition or approach of the courts or to a wholesale replacement of the constitution.[43] Nonetheless, the doctrine is useful to preserve fragile democracies against democratic erosion.[44] In this vein, David Landau has shown how the doctrine may be used to curb abusive constitutionalism where

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35 Yaniv Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers, PhD Thesis, The London School of Economics and Political Science, 2014, p. 13.

36 Shad Saleem Faruqi, Document of Destiny: The Constitution of the Federation of Malaysia, Star Publications (Malaysia) Berhad, 2008, p. 563.

37 Yaniv Roznai, "Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea" The American Journal of Comparative Law, 2013, Vol. 61, No. 3, p. 657 at p. 659.

38 Shad Saleem Faruqi, *Supra* n 36, p. 563.

39 Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers, Oxford University Press, 2017, pp. 110-113.

40 Yaniv Roznai, *Supra* n 39, pp. 133-134.

41 *Ibid.* at p. 6.

42 Gary Jeffrey Jacobsohn, "The Permeability of Constitutional Borders" Texas Law Review, 2004, Vol. 82, p. 1763 at p. 1799.

43 Rosalind Dixon and David Landau, "Transnational Constitutionalism and A Limited Doctrine of Unconstitutional Constitutional Amendment" International Journal of Constitutional Law, 2015, Vol. 13, No. 3, p. 606 at p. 610.

44 Samuel Issacharoff, "Constitutional Courts and Democratic Hedging" Georgetown Law .Journal, 2011, Vol. 99, p. 961 at pp. 999–1001.

would-be authoritarian leaders use the tools of constitutional change to undermine the democratic order.[45]

For example, the Constitutional Court of Colombia struck down the amendment to the Colombian Constitution which would have allowed President Alvaro Uribe a third term in office. The Constitutional Court found that the third term would have enabled Uribe to influence the selection of almost all officials who were supposed to 'check' him. Moreover, the advantages of incumbency would grow over time, making it more difficult to dislodge him, and the stronger presidency would weaken democratic institutions.[46]

A. *Explicit Substantive Limits on Constitutional Amendments*

'Formal constitutional unamendability' refers to the limitations imposed on the amendments of constitutional subjects through the formal amendment procedure provided explicitly in the constitution.[47] Monika Polzin observes that there is an increasing international tendency to distinguish between fundamental constitutional provisions which are regarded as unamendable and other amendable constitutional provisions.[48] The provisions which provide that certain constitutional provisions, principles or subjects are immune from amendments are known as unamendable provisions.

For example, the Constitution of Bangladesh was amended in 2011 by inserting an unamendable provision in the form of Article 7B. As will be noticed below, Article 7B interestingly mentions that Articles relating to the basic structures of the Constitution are unamendable:

> Notwithstanding anything contained in Article 142 of the Constitution, the preamble, all articles of Part I (the Republic), all Articles of Part II (Fundamental Principles of State Policy), subject to the provisions of Part IXA (Emergency Provisions), all articles of Part III (Fundamental Rights), and the provisions of articles relating to the basic structures of the Constitution, including Article 150 of Part XI (Transitional and Temporary Provisions), shall not be amendable by way of insertion, modification, substitution, repeal, or by any other means.

As aforementioned, vertical separation of powers exists between the primary and secondary constituent powers. Consequently, the primary constituent power may place explicit limits on the secondary constituent power. Constitution amendment power, which is established by the constitution and deriving from it, must be exercised in accordance with the prohibitions set out by the constitution.[49]

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45 David Landau, "Abusive Constitutionalism" University of California, Davis, Law Review, 2013, Vol. 47, p. 189 at pp. 231-239.

46 David Landau, Abusive Constitutionalism, n 46, pp. 202-203.

47 Yaniv Roznai, Unconstitutional Constitutional Amendments, n 39, p. 6.

48 Monika Polzin, "Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law" International Journal of Constitutional Law, 2016, Vol. 14, No. 2, p. 411 at p. 412.

49 Yaniv Roznai, PhD Thesis, n 35, pp. 110-111.

Another example of such prohibitions is Article 97 of the Constitution of Japan. It provides as follows:

> The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for *all time inviolate*. (Emphasis added)

B. *Implicit Substantive Limits on Constitutional Amendments*

Regardless of the presence or absence of explicit substantive limits on the amendment power, are there any implicit limits on the same? Roznai has argued that the constitution amending power cannot be legitimately used to negate the fundamental commitments of the constitution's core,[50] the basic structure of the constitution.[51]

However, Yap Po Jen has asked why derivative constitutional amendment power does not include the right to change the fundamental features. He has noted that it is not self-evident why the original constituent assembly has not divested all of its amending powers to future amenders.[52] On this point, Roznai has theorised that there is a spectrum of constitutional amendment powers: "The more an amendment process contains inclusive and deliberative democratic mechanisms, the more closely it resembles 'the people's' primary constituent power."[53] As such, whether the original constituent assembly has divested all of its amending powers can only be inferred from the amendment procedure in the constitution. The participative mechanisms would include popular referendums and election of special constituent assemblies.

Gary Jacobsohn comments that the comprehensiveness of the Indian discussion on constitutional change and maintenance is unrivalled in world jurisprudence.[54] It was in India where the basic structure doctrine was conceived. According to the basic structure doctrine, the amendment power does not "include the power to abrogate or change the identity of the Constitution or its basic features."[55]

As the history of the basic structure doctrine has been extensively expounded elsewhere, this short note will only mention two relevant cases in support of the author's argument that the basic structure doctrine in Malaysia needs an identity. The 24th Amendment passed by the Indian Parliament allowed the Parliament in the exercise of its constituent power to amend the constitution by way of addition, variation or repeal, including the provisions on fundamental rights. The validity of this amendment was

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50 Joel Colón-Ríos, "Introduction: The Forms and Limits of Constitutional Amendments" International Journal of Constitutional Law, 2015, Vol. 13, No. 1, p. 567.

51 Yaniv Roznai, Unconstitutional Constitutional Amendments, n 39, pp. 42-47.

52 Yap Po Jen, "The Conundrum of Unconstitutional Constitutional Amendments" Global Constitutionalism, 2015, Vol. 4, No. 1, p. 114 at p. 118.

53 Yaniv Roznai, Unconstitutional Constitutional Amendments, n 39, p. 175.

54 Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution – A Comparative Perspective" International Journal of Constitutional Law, 2006, Vol. 4, p. 460 at p. 462.

55 *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461.

challenged and the Supreme Court in *Kesavananda Bharati v State of Kerala*[56] held that "the power to amend the constitution does not include the power to alter the basic structure, or framework of the constitution *so as to change its identity*."[57]

In *Minerva Mills, Ltd. v Union of India*,[58] the Supreme Court adjudicated upon the 42nd Amendment which it was provocatively declared that "no amendment… shall be called into question in any court on any ground." Justice Chandrachud sang what he called "the theme song of *Kesavananda*," for which Jacobsohn has observed that Justice Chandrachud was now fully prepared to become a part of the chorus: "Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you *cannot destroy its identity*."[59]

As can be seen from the often quoted excerpts of the judgements above, Jacobsohn argues that the main reason emerging from the Indian jurisprudence on unconstitutional amendment is the need to preserve the constitution's identity. Why should a constitution not be amended so as to destroy its basic structure? It is to preserve the identity of the constitution. What then is constitutional identity? Bui Ngoc Son refers constitutional identity to constitutional ideas and principles fundamental to a polity, shaping the formulation of constitutional institutions and their practices.[60]

How then can one identify constitutional identity? Jacobsohn has proposed as follows:

> …a constitution acquires an identity through experience… Identity emerges dialogically and represents a mix of political aspirations and commitments that is expressive of a nation's past, as well as the determination of those within the society who seek, in some ways, to transcend that past…[61]

IV. CONSTITUTIONAL AMENDMENTS IN MALAYSIA

A. *The Formal Constitutional Amendment Rules in the Federal Constitution*

The author opines that the formal amendment rules in the Constitution are not merely found in Articles 159 and 161E; the requirement of Article 38(4) is also part of the procedures for reasons explained below. Secondly, the author argues that there are two general procedures and two special procedures. Since the two special procedures are activated only when one of the general procedures is adhered to, the procedures cannot be regarded as separate.

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56 *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461.

57 *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461, 1510, 1603, 1624-25 (Italics added).

58 *Minerva Mills, Ltd. v Union of India*, AIR 1980 SC 1789. (Italics added)

59 *Minerva Mills, Ltd. v Union of India*, AIR 1980 SC 1789, 1798 (Italics added).

60 Bui Ngoc Son, "Globalization of Constitutional Identity" Washington International Law Journal, 2017, Vol. 26, No. 3, p. 463 at p. 464.

61 Gary Jeffrey Jacobsohn, "Constitutional Identity" The Review of Politics, 2006, Vol. 68, p. 361 at p. 363.

(i) The Foundation

Albert has posited that there are two foundations underlying formal amendment rules: amendment and dismemberment. In both Articles 159 and 161E, 'amendment' includes addition and repeal.[62] By including 'repeal,' 'amendment' in the Constitution seems to include dismemberment as conceived by Albert. In addition, Yap Po Jen has argued that the textual argument that amendment does not mean abrogation is compelling only in instances when the constitution does not expressly define the meaning of the word 'amend'.[63]

However, the author is of the view that since there is no separate procedure for 'repealing', the constitutional authors of the Constitution did not recognise or intend 'amendment' or 'repealing' to result in the consequences of dismemberment. It is only when it can be discerned through the amendment rules that a constitution recognises the different outcomes of amendment and dismemberment can the constitution be said to allow for both.[64] As such, it is submitted that the foundation of the Constitution is amendment *per se*, especially when Albert defines dismemberment as thoroughly transformative.

(ii) The Framework

There are two general and two special amendment procedures in the Constitution, each catering to different provisions of the Constitution. One general rule to amend the Constitution is that a Bill making any amendment shall be passed only with the support of at least two-thirds of the total number of members for both the Second and Third Readings in both the House of Representatives and the Senate.[65]

The Constitution provides that the matters mentioned in Article 159(4) are exceptions to the general rule and need not be amended by requiring the two-thirds majority. This follows that the matters may be amended in accordance with the procedure of passing a federal law as laid down in Article 66 requiring only a simple majority, which is the general threshold of passing a federal law. As such, for all practical purposes, the amendment rule for those matters is also a general one.

In addition to the two-thirds requirement of the general rule, any amendment to the matters mentioned in Article 159(5) shall be passed with the consent of the Conference of Rulers. This is the first special procedure which incorporates the two-thirds majority general procedure. The author is of the view that Article 159(5) is not the only provision in the Constitution providing for the matters requiring the consent of the Conference of Rulers. Another provision is Article 38(4).

Article 38(4) provides that "[n]o law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers." Reference should be made to the definition of 'law' in Article 160(2)[66] and

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62 arts 159(6) and 161E(5), Federal Constitution.

63 Yap Po Jen, The Conundrum, n 53, p. 120.

64 Richard Albert, Formal Amendment Rules, n 11, p. 24.

65 Art 159(3), Federal Constitution.

66 Lee Hoong Phun, Constitutional Conflicts in Contemporary Malaysia, 2nd ed., Oxford University Press, 2017, p. 44.

'law' includes the 'written law' and 'written law' includes the Constitution. Hence, 'law' in Article 38(4) includes a law which amends the Constitution.

The author is aware that the Federal Court ruled that 'law' refers to "ordinary laws enacted in the ordinary way" and not "Acts affecting the Constitution,"[67] relying on two decisions of the Indian Supreme Court, namely *Shankari Prasad Singh Deo & Ors v The Union of India & Ors*[68] and *Sajjan Singh v State of Rajasthan*.[69] However, the Federal Court was interpreting Article 4(1) (which has the same effect as Article 13(2) in the Indian Constitution interpreted by the aforementioned two cases), in which it was decided that "law" does not include Acts of Parliament amending the Constitution *which can be inconsistent with the Constitution*. Neither did the Federal Court decide in the context of Article 38(4) nor lay a definition of 'law' applicable to all provisions of the Constitution.

Most importantly, the Federal Court did not refer to the definition of 'law' in conjunction with the meaning of 'written law' in the Constitution. In any event, the Constitution cannot be clearer in that 'law' includes the Constitution and by implication, federal law amending the Constitution. To argue for a restrictive meaning of 'law' does violence to the express words of the Constitution. Interestingly, the Special Court in *Faridah Begum Abdullah v Sultan Haji Ahmad Shah*[70] investigated whether the Constitution (Amendment) Act 1993 was consented to by the Conference of Rulers by virtue of Article 38(4),[71] indicating that Article 38(4) is indeed part of the amendment procedures in the Constitution.

The Constitution does not define the meaning of "privileges," "position," "honours" and "dignities." However, H.P. Lee has argued that changing the privileges of the State Rulers from having an unspecified period to assent to a Bill to having a period of 15 days[72] is directly affecting their privileges, position, honours and dignities.[73] Hence, obtaining the consent of the Conference of Rulers would be a prior step to be taken before a Bill is passed into law if the Bill affects the privileges of the Rulers.[74]

Similarly, for the second special amendment procedure, the consent of the Yang di-Pertua Negeri of Sabah or Sarawak or of each of the States concerned is required to pass any amendment relating to matters mentioned in Article 161E(2). This second special procedure also incorporates the two-thirds majority general procedure.

Examining the framework of constitutional amendment in the Constitution through the lens of Albert, it can be seen that the Constitution adopts the restricted single-track framework. Recall that in this framework, different amendment procedures cater to specific provisions. As aforementioned, when constitutional authors prioritised provisions by the ease or difficulty of amending those provisions, the hierarchy reflects constitutional

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67 *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, 72.

68 AIR 1951 SC 458.

69 AIR 1965 SC 845.

70 *Faridah Begum Abdullah v Sultan Haji Ahmad Shah* [1996] 1 MLJ 667.

71 *Faridah Begum Abdullah v Sultan Haji Ahmad Shah* [1996] 1 MLJ 667, 622, 630, 633 & 634.

72 S. 21, Constitution (Amendment) Bill 1983.

73 Lee Hoong Phun, n 68, p. 43.

74 Shad Saleem Faruqi, n 36, p. 560; Lee Hoong Phun, n 68, pp. 41-42.

values embodied in the constitutional text.[75] As such, the matters caught by Articles 38(4), 159(5) and 161E(2) may be the starting point in finding what is the basic structure of the Constitution, the constitutional values and subsequently, the constitutional identity.

(iii) The Specifications

The specifications found in the formal amendment rules of the Constitution are best explained together with explicit unamendability, to which this short note now turns.

Explicit Unamendable Provisions in the Federal Constitution

Article 150(5) of the Constitution provides that the Parliament may make emergency laws with respect to any matter during an emergency. Further, Article 150(6) provides that emergency legislation passed under Article 150 shall be valid even if it is inconsistent with any provision of the Constitution. Notwithstanding Articles 150(5) and (6), Article 150(6A) renders six constitutional subjects immune[76] from the reach of Parliament's law-making power during emergency: Islamic law, custom of the Malays, native law or customs in the State of Sabah or Sarawak, religion, citizenship and language.

Although the safeguard applies to emergency laws during an emergency, the specific mention of the six subjects shows the constitutional matters which are of special importance in the Constitution. This is helpful in identifying the constitutional values and is also instructive on what the constitutional drafters desired to prevent from being rashly tinkered with. Viewed from this perspective, Article 150(6A) sheds light on the implicit substantive limitations on constitutional amendments during normalcy, which is discussed in the next section.

The author also submits Article 150(7) to be an unamendable provision of the Constitution. Article 150(7) by implication prevents lasting changes to be made upon the Constitution and acts as a defence mechanism against rushed amendments in the face of an emergency.[77] How is this so? According to Article 150(7), emergency legislation ceases to operate six months after the end of the emergency. Shad Faruqi has argued and the author agrees that given the presence of Article 150(7), permanent alterations to the Constitution cannot be made during an emergency via Articles 150(5) and (6).[78]

Although Articles 150(5) and (6) may suspend the entire basic structure of the Constitution during an emergency, including the formal amendment rules, the temporal nature of the emergency ordinances or laws means that Article 150(7) would undo any constitutional amendment after the emergency. It follows therefore that in an emergency, Article 150(7) has the effect of an unamendable provision of the Constitution, safeguarding the Constitution from changes operating beyond the emergency.

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75 Richard Albert, The Structure of Constitutional Amendment Rules, n 19, p. 962.

76 Elster, n 3. See Section I above.

77 Richard Albert, The Structure of Constitutional Amendment Rules, n 19, p. 955.

78 Shad Saleem Faruqi, n 36, p. 566.

The Inception, Rejection and Reception of the Basic Structure Doctrine

The following case law narrative traces the inception, rejection and reception of the basic structure doctrine in Malaysia. As will be demonstrated by the narration, Malaysia has finally and unequivocally adopted the basic structure doctrine; however, the purpose of preserving the basic structure is to retain the identity of the constitution. It is this constitutional identity that the author notes is yet to be found in Malaysian constitutional jurisprudence.

(iv) The Inception

Shad Faruqi has argued that the seed of the basic structure doctrine was planted in the soil of Malaysian constitutional jurisprudence[79] by the case of *The Government of the State of Kelantan v The Government and Tunku Abdul Rahman Putra Al-Haj*.[80] In this case, the admission of North Borneo (Sabah), Sarawak and Singapore into the then Federation of Malaya was opposed by the Government of the State of Kelantan on a few grounds. Essentially, it was because the consent of the State of Kelantan had not been obtained for the constitutional amendments required for the admission. However, the constitutional amendments did not touch on any matter requiring consent.

The then Chief Justice Thomson held as follows:

> "I cannot see that Parliament went in any way beyond its powers 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. It is true in a sense that the new Federation is something different from the old one. It will contain more States. It will have a different name. But if that state of affairs be brought about by means contained in the Constitution itself and which were contained in it at the time of the 1957 Agreement, of which it is an integral part, I cannot see how it can possibly be made out that there has been any breach of any foundation pact among the original parties."[81]

From the passage, Chief Justice Thompson acknowledged the possibility that Parliament may do something "so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe…" This acknowledgement, however, does not mean that the basic structure doctrine had been supplanted in Malaysia. The "fulfilment of a condition" suggests that the Chief Justice had in mind a limitation of a procedural nature.[82] This reading is supported by the very next phrase when Thomson CJ explained that the condition would be merely consultation.

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79 Shad Saleem Faruqi, n 36, p. 563.

80 *The Government of the State of Kelantan v The Government and Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLJ 355.

81 *The Government of the State of Kelantan v The Government and Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLJ 355, 359 (Italics added).

82 Andrew Harding, "Law, Government and the Constitution in Malaysia," Malayan Law Journal Sdn. Bhd., 1996, p. 52.

The basic structure doctrine is however substantial, preventing the constitutional identity from being amended away. This requires the recognition of and the search for the constitutional identity of the Constitution. It may be argued that there is reference to substantive limitation when Thomson CJ said that there was no "breach of any foundation pact among the original parties." The 'foundation pact,' however, was in reference to the delegation of power to Parliament and the exercise of the delegated power within the four corners of the Constitution. The basic structure doctrine recognises that there are substantive limitations despite having the delegated power exercised in accordance with the textual terms of the Constitution.

The case of *Loh Kooi Choon v Government of Malaysia*[83] has been regarded as the rejection of the basic structure doctrine.[84] The author is of the view that it is true but it is not the whole truth. Raja Azlan Shah FJ (as he then was) held that as long as Parliament follows the procedure, a fundamental right can be removed. If the framers had intended the fundamental rights to be inviolable by constitutional amendments, they would have provided for so.[85]

The Federal Court was unconvinced by the doctrine of implied restrictions. Raja Azlan Shah FJ was concerned that the doctrine granted the courts "a more potent power of constitutional amendment through judicial legislation."[86] The author respectfully submits that the concern was misplaced. The doctrine is not an exercise of constitutional amending power; it is a limitation on the exercise of such power by Parliament. Besides, since His Lordship had misconceived the doctrine, it is unfair to conclude that His Lordship rejected the doctrine as is properly understood.

Wan Suleiman FJ was of similar opinion; however, the reasoning was slightly different. It is in this difference of reasoning that the author opined earlier that *Loh Kooi Choon* is not just a rejection of the basic structure doctrine. Wan Suleiman FJ opined as follows:

> "…whilst *abrogation* of the fundamental rights *may not come within the ambit of our Article 159*, *reasonable abridgement* of such rights are constitutional; that Parliament should decide when such amendment is necessary and it is not for this court to question the wisdom or need for such amendment."[87]

While Raja Azlan Shah FJ was of the view that a fundamental right can be taken away if the procedure in Article 159 is followed, Wan Suleiman was inclined to hold that 'abrogation' of the fundamental rights may not be allowed by Article 159. Further, though abridgement of fundamental rights are constitutional, such abridgement must be

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83 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

84 Surendra Ananth, "The Basic Structure Doctrine: Its Inception and Application in Malaysia" Malayan Law Journal, 2016, Vol. 1, p. cxlvi at p. xiv.

85 *Loh Kooi Choon v Government of Malaysia, Supra* n.83 at p.189.

86 *Ibid.* at p. 190.

87 *Ibid.* at p. 193

a 'reasonable.' In addition, Raja Azlan Shah FJ in his introductory remarks did mention the Constitution is anchored by three 'basic concepts'[88]:

1. An individual has certain fundamental rights which may not be encroached by the power of the State.
2. Separation of powers between the Federation and the States; and
3. Separation of powers between the Executive, Legislature and Judiciary.

As Raja Azlan Shah FJ was aware the Constitution had 'basic concepts,' it is peculiar that His Lordship brushed aside the doctrine of implied restrictions, underneath which are the basic concepts. As such, while the thrust of the judgement in *Loh Kooi Choon* rejected the doctrine, it is in this very case that the sparks of the doctrine are ignited. Intentionally or otherwise, Raja Azlan Shah FJ caused the inception of the basic structure doctrine in Malaysia.

Shad Faruqi has also argued that the "echoes of the basic structure doctrine"[89] are found in *Faridah Begum Abdullah v Sultan Haji Ahmad Shah*.[90] In this case, the issue was whether the Singaporean plaintiff had the right to sue the Sultan of Pahang in his personal capacity in the Special Court. Prior to this case, the Constitution was amended in 1993.[91] As a result of the amendment, the *Yang di-Pertuan Agong* (the King) and Rulers lost the immunity from being sued or charged with a criminal offence but the proceedings must be brought in the Special Court. Article 182(3) has since conferred exclusive jurisdiction on the Special Court to try all offences committed by a Ruler and all civil cases brought by, or against, a Ruler.

The Special Court in *Faridah Begum* interpreted Article 182(3) through the lens of Article 155(1), which forbids Parliament from enacting a law which permits a Commonwealth citizen to sue a Malaysian Ruler when the Commonwealth country has not reciprocally granted such a right to Malaysians. Singapore had not granted the right to Malaysians to sue its President. As such, the then Chief Justice held, "even if Parliament were to confer by express language under Article 182, any right on a Singapore citizen to sue the *Yang di-Pertuan Agong* or a Ruler, such conferment of right is unlawful under Article 155 and is of no effect."

On the basis that Article 182 could not be amended without having Article 155(1) being adhered to, Shad Faruqi has argued that this indicates that Parliament's power to amend the Constitution is substantively limited.[92] The author appreciates that the reasoning by the Special Court reflects the basic structure doctrine; however, only partially so. That the power of Parliament to amend the Constitution is limited is only part of the doctrine. The other premise is that the basic structure cannot be amended away.

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88 *Ibid.* at p. 188.

89 Shad Saleem Faruqi, n 36, p. 564.

90 *Faridah Begum Abdullah v Sultan Haji Ahmad Shah* [1996] 1 MLJ 667.

91 See Constitution (Amendment) Act 1993, Malaysia.

92 Shad Saleem Faruqi, n 36, p. 564.

What then is the basic structure in issue in *Faridah Begum*? Article 155(1) merely qualifies the application of Article 182(3). This certainly does not render nor is suggested in the judgement that Article 155(1) is part of the basic structure of the Constitution. The sovereignty of the Rulers may be considered as part of the basic structure and so the amendment of Article 182(3) cannot destroy it. This argument, however, does not engage Article 155(1) at all and consequently, is not the thrust of *Faridah Begum*.

(v) The Rejection

The basic structure doctrine was rejected in *Phang Chin Hock v Public Prosecutor*.[93] In this case, Lord President Suffian adopted the rule of harmonious construction when reading Article 4(1) and Article 159 together. The Lord President drew a distinction between constitutional amendments and ordinary laws. It is only the latter which have to be consistent with the Constitution as envisaged by Article 4(1).[94] Parliament may amend the Constitution in any way they think fit as long as the procedures prescribed by the Constitution are complied with.[95]

It has been argued that the position taken by the Lord President "is correct and an end of the matter." This is so because the Constitution is the supreme law, not parts of the Constitution or its basic structure, and Article 159 is as supreme as any other provision.[96] However, as the amendment rules have shown, some provisions are better protected than others; they are not equally supreme. In addition, to say that the Constitution is supreme but not its parts or its basic structure does not answer what exactly is supreme, for is not the Constitution made up of the sum of its parts and its basic structure?

On the argument that a constitutional amendment cannot be allowed to destroy the basic structure of the Constitution, Lord President Suffian found that Indian Supreme Court derived their implied limitations on the constitutional amending power, which in turn was drawn from the fact that the Indian Constitution was conceived by a constituent assembly and had a preamble and directive principles of state policies.[97] The Constitution, however, was not drafted by a constituent assembly and not 'given by the people'. The Constitution also does not contain preamble and directive principles from which 'ideas and philosophies' can be inferred.[98]

A couple of counter arguments can be made against the aforementioned findings. First, constitution amending power is a delegated power and Parliament only has secondary constituent power. It follows that it is immaterial whether the Constitution was drafted by a constituent assembly. The very nature of the delegated amending power possessed by Parliament means the power is limited. In this regard, Andrew Harding has questioned the meaning of the Federal Court's remark that the Constitution was drawn up

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93 *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70.

94 *Ibid.* at p. 72.

95 *Ibid.* at p. 74.

96 K.C. Vohrah, Philip T.N. Koh & Peter S.W. Ling, Sheridan & Groves: The Constitution of Malaysia (Student Edition), 5th edn., LexisNexis, 2004, p. 670.

97 *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, p.73.

98 *Ibid.*

by a constituent assembly. If Parliament does not amend the Constitution in its constituent capacity, then it has less basis to destroy the basic structure.[99] Secondly, as shown above, the features which may form part of the basic structure of the Constitution may be found from the provisions themselves.[100] Reading the Constitution as a whole may also lead one to discover the principles embedded in the Constitution.[101]

Nonetheless, the Federal Court did not go so far as to hold that Parliament's power extends to destroying the basic structure of the Constitution. The Federal Court only concluded that Parliament may amend the Constitution in any way they think fit as long as they followed the manner and form prescribed by the Constitution.[102] In other words, the last nail of the coffin was not hit. The Federal Court found it unnecessary to draw the contours of Parliament's power of constitutional amendment as none of the constitutional amendments and provisions of the law in contention had destroyed the basic structure of the Constitution.[103]

It is interesting for Harding to note that the Malaysian courts had up to that point expressed their views only in *obiter* and not in *ratio*. It seemed that the question of whether Parliament could by constitutional amendment destroy the Constitution's basic structure had been deliberately left open to guard against extreme use of the amending power. Consequently, Harding projected that it would not be necessary for the courts to overrule any previous decision if the courts see fit to reverse the position.[104] Nonetheless, as the passage of time revealed, the reception of the basic structure doctrine in Malaysia was staged by a 'frontal attack' on *Loh Kooi Choon*.

(vi) The Reception

Mohd Nazim has argued that the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*[105] "forcefully"[106] adopted the basic structure doctrine. The author is in total agreement. The appellant was an advocate and solicitor and desired to be elected to the Bar Council. Section 46A(1) of the Legal Profession Act 1976 prohibited him from doing so because the appellant was also an office bearer of a political party. The appellant challenged the constitutionality of Section 46A(1). Gopal Sri Ram FCJ (as he then was), after acknowledging that the counsel had launched a frontal attack on *Loh Kooi Choon*,[107] declared as follows:

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99 Andrew Harding, "The Death of a Doctrine" Malaya Law Review, 1979, Vol. 21, p. 365 at p. 371.

100 See Section IIIA & B above.

101 Shad Saleem Faruqi, n 36, p. 565.

102 *Phang Chin Hock v Public Prosecutor*, Supra n. 97 at p. 74.

103 *Ibid.* at p. 75.

104 Andrew Harding, Law, Government and the Constitution in Malaysia, n 84, p. 53.

105 *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333.

106 Mohd. Nazim Ganti Shaari, "Unconstitutional Constitutional Amendments?": Exploring The 1973 Sabah Constitutional Amendment That Declared Islam The State Religion" Kajian Malaysia, 2014, Vol. 32, No. 2, p. 1 at p. 14.

107 *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 at para. 7.

> …it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution...[108]

The author wishes to point out that the basic structure doctrine and the power of Parliament to amend the Constitution were not the issues in this case. The Federal Court nonetheless referred to the basic structure doctrine at the beginning of the judgement as part of His Lordship's 'preliminary observations.' The remarks though forceful in the context of the case are certainly apt but certainly not helpful as the passage does not give substance to the basic structure of the Constitution.

The basic structure doctrine then began to take shape when courts began to point out features which are part of the basic structure of the Constitution. In *Public Prosecutor v Gan Boon Aun & Anor*,[109] the High Court held that the doctrine of separation of powers is a basic structure of the Constitution.[110] As such, judicial power vests in the Judiciary and not in the Executive or in the Federal Legislature.[111] The same position was taken in the Court of Appeal in the case of *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor.*[112]

The recent case of *Indira Gandhi*[113] has the most elaborate exposition on the basic structure doctrine and it is the clearest judicial pronouncement that Malaysia adopts this doctrine. The Federal Court, with Zainun Ali FCJ writing the main opinion, found that the basic structure of a constitution is "intrinsic to, and arises from, the very nature of a constitution."[114] The features of the basic structure cannot be abrogated or removed by a constitutional amendment.[115] Her Ladyship noted that the features include the separation of powers, the rule of law and the protection of minorities. Being principles forming part of the basic structure of the Constitution, they cannot be abrogated or removed.[116]

Another feature of the basic structure is "the role of the Judiciary as the ultimate arbiter of the lawfulness of state action."[117] To enable itself to perform this role, the Federal Court observed that "the power of judicial review is essential to the constitutional role

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[108] *Ibid.* para. 8.

[109] *Public Prosecutor v Gan Boon Aun & Anor* [2012] MLJU 1225.

[110] *Ibid.* at para. 208.

[111] *Ibid*. at p.211.

[112] *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660.

[113] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.

[114] *Ibid.* at para 39.

[115] *Ibid.*

[116] *Ibid.* at para. 90.

[117] *Ibid.* at para. 32.

of the courts, and inherent in the basic structure of the Constitution."[118] The significance of finding that the power of judicial review is part of the basic structure is twofold: (1) judicial power cannot be removed from the civil courts[119] and (2) judicial power cannot be conferred on any other body whose members do not enjoy the same level of constitutional protection as civil court judges do to ensure their independence.

All in all, the Malaysian jurisprudence on the basic structure doctrine has oscillated from an understated inception, to an overstated rejection and to an insufficient reception. It is insufficient because the courts have only laid down the features of the basic structure of the Constitution without informing why it is crucial to retain those features.

V. CONCLUSION

This short note has demonstrated that the formal amendment rules and emergency provisions in the Constitution reflect the explicit substantive limitations in the doctrine of unconstitutional constitutional amendments. The formal amendment rules, through the difficulty of amending certain provisions, and a couple of emergency provisions provide clues as to what form part of the basic structure of the Constitution. In this regard, the author has also submitted that the emergency provision of Article 150(7) reflects the idea of unamendability as it prevents changes to the Constitution to last beyond the emergency.

Malaysia has finally adopted the basic structure doctrine – the implicit substantive limitations of the doctrine of unconstitutional constitutional amendments. However, insufficient discourse has been given to the importance of retaining the basic structure, the core of the Constitution. That importance is to preserve Malaysia's soul – the constitutional identity. The author projects that the constitutional identity can be found by the rereading of the amendment rules in the Constitution, by the reminder of past experiences through historical documents[120] and by the reference to constitutional dialogues and developments locally[121] and internationally.[122]

Now that the courts have identified the core of the Constitution, it is time to search for its soul.

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118 *Ibid*. at 48.

119 *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1998] 4 MLJ 742, 756.

120 *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 at para. 112.

121 Chandra Muzaffar, "Why Rukunegara must be preamble to Constitution" *The Star Online*, 15 February 2017, <http://www.thestar.com.my/opinion/letters/2017/02/15/why-rukunegara-must-be-preamble-to-constitution/>. Site accessed on 29 August 2018.

122 Rosalind Dixon and David Landau, Transnational Constitutionalism, n 44, p. 628.