

DOCTRINE OF BASIC STRUCTURE: A COMPARISON BETWEEN INDIA AND MALAYSIA

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ABSTRACT

The aim of this paper is to focus on the Doctrine of Basic Structure, which is a judicial principle that was established in the case of *Kesavananda Bharati v State of Kerala*ⁱ. It outlines that there are certain basic principles in The Constitution that cannot be amended by the legislature. It provides for a regulatory mechanism on the amendments of The Constitution and is a method of judicial review to check on any kind of state action.ⁱⁱ These basic principles are the very structure and heart of The Constitution, without which The Constitution would lose its value as the ultimate document of governance.

This paper aims to show the applicability of the basic structure doctrine in other countries by making a comparative study between India and Malaysia. Even though both India and Malaysia are federal states and their law is based on common law, there are many differences in the way their respective Constitutions have been interpreted. Hence the application of the Basic Structure Doctrine comes into question in the interpretation of the Malaysian Constitution.

This paper will be discussing about the brief history of how the doctrine originated and its interpretation in India and Malaysia through a few landmark cases.

India and Malaysia both have constitutions that give rise to a federal structure but India is a parliamentary democracy whereas Malaysia is a democratic constitutional monarchy.

In both countries, the Constitution is the ultimate document of governance. The purpose of the Constitution is not only to create state organs (the Legislature, the Judiciary and the Executive) but also to keep limitation measures so that the authority given respectively to each organ does not lead to abuse of this power.ⁱⁱⁱ

Since both follow common law, legal principles are established through the judicial decisions of courts. Therefore, the legal principles of limitation for abuse of power by state organs are interpreted through court cases.

As the Constitution is the supreme law of the land, such changes in power are brought about by its amendment. These amendment powers display the extent to which a Constitution is entrenched.^{iv} If a Constitution is too inflexible, then it is likely that it demands less legitimacy because a Constitution needs to change according to the views and aspirations of the people.^v Yet, it is important to limit these changes so that there is no abuse of power.

One main principle to limit the amendment powers of the legislature, is the Doctrine of Basic Structure. This paper aims to explain what the Doctrine of Basic Structure is through its history and use in India and Malaysia. This paper will show the development and how differently the judicial principle was established in India and Malaysia through the examination of the landmark cases.

The doctrine outlines that there are certain basic principles in the constitution that cannot be altered by the parliament. Basic structure can be seen as a form of constitutional judicial review which acts as a regulatory check on the actions of the state, to ensure that the 'basic features of the constitution' are not damaged or changed by these state actions.^{vi}

It holds that courts have the jurisdiction to hold constitutional amendments unconstitutional if such amendments go against the 'spirit' of the Constitution.^{vii} The Supreme Court of India has had one of the most important post war engagements with the unconstitutionality of constitutional amendments and it created the 'basic structure/features' doctrine through interpretation.^{viii} Though the doctrine was established in the case of *Kesavananda Bharati v State of Kerala*^{ix}, there were cases before which set the environment for this judicial principle.

It is said to be the ‘bedrock’ of constitutional interpretation in India, one such that defined the democratic processes of the country to an immense magnitude.^x

The first case where constitutional amendments were questioned was the case of *Sankari Prasad Singh v Union of India*^{xi}, where the first constitutional amendment was challenged to violate Article 13^{xii} of the Constitution. The Supreme Court ruled that the power to amend the Constitution under Article 368^{xiii} included the power to amend fundamental rights. Using the rule of harmonic construction, interpretation of the word “law” in Article 13 included only ordinary law made in use of the legislative powers and not Constitutional amendments which are made in exercise of constituent power. So, it was held that a Constitutional amendment will be valid even if it took away any of the fundamental rights.

In *Sajjan Singh v State of Rajasthan*^{xiv}, the bench disposed of the main contention (the Seventeenth Amendment limited the jurisdiction of the High Courts and so required ratification by one-half of the States under the provisions of Article 368), but addressed the second submission asking for the decision in *Shankari Prasad v Union of India*^{xv} to be reconsidered. The majority of the court concurred with the view in the previous case. However, the minority judges were of the opinion that there is no explicit mention of when an amendment made by the parliament, is through a different capacity rather than from its constituent capacity.

In *Golak Nath v State of Punjab*^{xvi}, the eleven-judge bench held that the Parliament of India had no power to amend any of the Fundamental Rights guaranteed by abridging or taking them away. The court used the Doctrine of Prospective Ruling to hold that the three constitutional amendments (the First, Fourth and Seventeenth) would be held valid but the Parliament would no longer hold the power to amend the provisions of Part III of The Constitution for the future.

The concept of ‘basic structure’ was first recognized in *Kesavananda Bharati v State of Kerala*^{xvii}, where it was held that the parliament could amend any constitutional provision as long as it did not ‘damage’, ‘weaken’, ‘destroy’, ‘abrogate’, ‘change’ or ‘alter’ the ‘basic structure’ or framework of the Constitution. Hence, the court was able to strengthen its power of judicial review.

The doctrine was applied in *Indira Nehru Gandhi v Raj Narain*^{xviii} and struck down Cl(4) of Article 329-A^{xix}, inserted by the 39th Amendment in 1975. Justice Chandrachud, then laid out four basic features (Sovereign democratic republic status, Equality of status and opportunity of

an individual, secularism and freedom of conscience and the rule of law) to consider as unamendable.

Following this, the 42nd Amendment was passed, providing that no amendments shall be questioned but was invalidated in *Minerva Mills Ltd v Union of India*^{xx}. The Court reaffirmed that The Parliament did not have the power to change the basic structure of the constitution. Consequently, the basic structures were listed by Chief Justice Sikri, Justices Shelat and Grover, which are broadly the following:

1. Supremacy of The Constitution.
2. Republican and Democratic form of Government and sovereignty of the country.
3. The federal and secular character of the Constitution.
4. Maintaining separation of powers between the Legislature, Executive and Judiciary.
5. Dignity of Individual (basic fundamental rights/freedoms).
6. Unity and integrity of the nation.
7. Mandate to build a welfare state.

The doctrine is used in circumstances where the meaning of constitutional norms is open to disagreement.^{xxi} When other countries refer to judgements of other countries/foreign jurisdictions (for purposes of interpretation), certain judicial ideas migrate and are used as legal reasoning in other countries as well.

Many times, this idea of limited power to amend has migrated to other jurisdictions in its purest form or has been absorbed in a way by being influenced by local events the past experiences so as to fit in the judicial climate of the country which has borrowed these ideas. This migration of a constitutional idea involves both the acceptance of a legal doctrine and the ratification of the legal theory behind it or its rejection.^{xxii}

While migrating into the constitutional forum, the Doctrine of Basic Structure faced certain hurdles like that in the case of Malaysia. Constitutions may allow for express limits to the power to change the constitution. These limitations assume a certain form, which are either interpretation based, such as the 'Basic Structure' doctrine that is used in India or express

‘eternity clauses’ which explicitly list out what lies outside the jurisdiction of constitutional amendments.^{xxiii}

Malaysia’s constitution does have some eternity clauses entrenched into its constitution (that of the social contract which specifies citizenship to be granted to notable Chinese and Indian immigrant populations in return for the recognition of a special position for the indigenous Malay majority). However, these entrenched clauses were only inserted into The Constitution after the May 13 racial riots in the year of 1969 through the Constitution (Amendment) Act 1971.

But, by interpreting cases, the courts of Malaysia have considered the Doctrine of Basic Structure and ultimately integrated it as a principle of interpreting the Malaysian constitution to question the constitutionality of amendments.

The Basic Structure Doctrine was initially rejected in Malaysian courts. The first case where the point of the basic structure came up was the case *Loh Kooi Choon v Government*^{xxiv}, where, an amendment to Article 5(4)^{xxv} was challenged to be violative of the basic structure of the Constitution. However, Federal Justice Raja Azlan Shah said that looking at other constitutions was just a method of interpretation and the courts are not bound to interpret the Malaysian constitution in the same manner as other constitutions have been interpreted since the Malaysian constitution stands in its own right. FJ Wan Suleiman mentioned that since the restriction of power to amend was based on the Preamble and that the Malaysian Constitution did not have a Preamble, the doctrine could not be used.

This stance was further solidified in *Phang Chin Hock v Public Persecutor*^{xxvi}, the court held that the parliament did have the power to have constitutional amendments inconsistent with the constitution itself as long as they were in accordance with the form provided (Article 159^{xxvii} in The Constitution). The difference mentioned in the case of *Loh Kooi Choon*^{xxviii} was elaborated upon. Apart from the non-existence of a Preamble, there were no Directive Principles of State Policies. Another difference was that the Indian Constitution had been drafted by a constituent assembly, whereas drafting of the Malaysian Constitution involved the Reid Commission, the British Parliament, the Federal Legislative Council and respective state legislative councils. The court reasoned that fear of breach of power to amend the Constitution was not a valid argument and concluded that the Parliament was authorized to amend the

Federal Constitution in any way, provided the form of amendment prescribed in the Constitution was followed.

The doctrine was again discussed in *Sivarasa Rasiah v Badan Peguan Malaysia And Anor*^{xxix}. Through this, the decision in *Loh Koi Choon* was rejected and reasoned that provisions of The Constitution should be interpreted by keeping the doctrine of procedural and substantive fairness (Article 8(1)^{xxx}) in mind. This would apply to amendments as well. Moreover, the way the Malaysian Constitution has been drafted by the British, uses the supremacy of parliamentary doctrine as they did not have a written constitution which means that there was to be a basic structure. So, the tone for acceptance of the doctrine was set.

The next case where the doctrine was actually used for the first time is *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daebur Hulu Langat*^{xxxii}. The contention under this case was that Article 121(1)^{xxxii} was interpreted in a way that it gave the Parliament the power to limit jurisdiction of the courts by the federal law. The Doctrine of Basic Structure was used to hold that this power of jurisdiction remained with the courts.

The latest case which affirms the doctrine is *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals*^{xxxiii}. The case affirms the power of civil courts and distinguishes when cases lie in civil court or the Syariah court. It confirmed the usage of the basic structure doctrine in Malaysian jurisprudence and that the power of judicial review and interpretation of the constitution is a power inherent to civil courts and no constitutional amendment or an act of the parliament can nullify the same.

Hence, we can see that this doctrine has been accepted in both India and Malaysia as well. The fact that this doctrine travelled into a different legal system proves that an idea can be successfully taken from a different legal system and incorporated into the law of another country.^{xxxiv}

ENDNOTES

ⁱ Kesavananda Bharti v. State of Kerala (1973) 4 S.C.C 225 (India).

ⁱⁱ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, September 20, 2012).

<<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198071617.001.0001/acprof-9780198071617>>.

ⁱⁱⁱ Pran Chopra, *The Supreme Court versus the Constitution a Challenge to Federalism* (Sage Publications, 2006).

^{iv} Andrew Harding & Peter Leyland, *Comparative Law in Constitutional Contexts*, *Comparative Law: A handbook* (David Nelken & Esin Orucu eds., Hart Publishing 2007).

^v Kevin YL Tan, Yeo Tiong Min & Lee Kiat Seng, *Constitutional Law in Malaysia and Singapore* (2nd Edition, Butterworth Legal Publishers).

^{vi} Krishnaswamy, *supra* note 2.

^{vii} Richard Albert, *Non-Constitutional Amendments* 22 *Canadian Journal of Law and Jurisprudence* 5, 282 (2009).

^{viii} Wen-Chen Chang, Li-ann Thio et al, *Constitutionalism in Asia: Cases and Materials* (Hart Publishing, 2014).

^{ix} *Kesavananda Bharti v. State of Kerala* (1973) 4 S.C.C 225 (India).

^x Granville Austin, *Working a Democratic Constitution- A History of the Indian Experience* (Oxford University Press, 2003).

^{xi} *Sankari Prasad v Union of India* [1951] AIR SC 458 (India).

^{xii} **Article 13(Amended) of The Indian Constitution, 1950**- Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality.

^{xiii} **Article 368(Amended) of The Indian Constitution, 1950** - Power of Parliament to amend the Constitution and procedure therefore

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in Article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

^{xiv} *Sajjan Singh v State of Rajasthan* [1965] 1 SCR 933 (India).

^{xv} *Supra* note 11.

^{xvi} *Golak Nath v State of Punjab* [1967] AIR SC 1643 (India).

^{xvii} *Supra* note 1.

^{xviii} *Indira Nehru Gandhi v Raj Narain* [1975] AIR SC 2299 (India).

^{xix} **Article 329A in The Constitution of India, 1950 (Rep. by the Constitution (Forty-fourth Amendment Act))** - The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

^{xx} *Minerva Mills Ltd. V Union of India* [1980] AIR SC 1789 (India).

^{xxi} Rosalind Dixon and David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment" 13 *International Journal of Constitutional Law*, 606–638. (2015), doi:10.1093/icon/mov039.

^{xxii} Yaniv Roznai, Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea 61 *American Journal of Comparative Law* 657 (2013) <www.jstor.org/stable/43668170>.

^{xxiii} Chang, Thio et al, *supra* note 8.

^{xxiv} *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (Malaysia).

^{xxv} **Article 5(4) of The Malaysian Constitution, 1957** - Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority: Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:

Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":

And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.

^{xxvi} *Phang Chin Hock v Public Prosecutor* [1980] MLJ 70 (Malaysia).

^{xxvii} **Article 159 of The Malaysian Constitution, 1957** - (1) Subject to the following provisions of this Article and to Article 161E, the provisions of this Constitution may be amended by federal law.

(2) (Repealed).

(3) A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.

(4) The following amendments are excepted from the provisions of Clause (3), that is to say:

(a) any amendment to Part III of the Second or to the Sixth or Seventh Schedule;

(b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76;

(bb) subject to Article 161E any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to the application of this Constitution to a State previously so admitted or associated;

(c) any amendment consequential on an amendment made under paragraph (a).

(5) A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, Clause (4) of Article 63, Article 70, Clause (1) of Article 71, Clause (4) of Article 72, Article 152, or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers.

(6) In this Article "amendment" includes addition and repeal; and in this Article and in paragraph (a) of Article 2 "State" includes any territory.

^{xxviii} *Supra* note 24.

^{xxix} *Sivarasa Rasiah v Badan Pegaum Malaysia & Anor* [2010] 2 MLJ 333 (Malaysia).

^{xxx} **Article 8(1) of The Malaysian Constitution** - All persons are equal before the law and entitled to the equal protection of the law.

^{xxxi} *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*, Civil Appeal No. 01(f)-47-11/2013 (B) & 06-3-05/2013 (B) (Malaysia).

^{xxxii} **Article 121(1) of The Malaysian Constitution** - (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed), and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

^{xxxiii} *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 3 CLJ 145 (Malaysia).

^{xxxiv} Alan Watson, *Legal Transplants: An approach to Comparative Law* (University of Georgia Press, 1993).

