




Day 1: 26th of October	
2.00 pm – 2.10 pm	<p>Opening Address Associate Professor Dr Harmahinder Singh Iqbal Singh <i>Chairperson of the Organizing Committee, ICFLP 2021</i></p> <p>Welcome Address Professor Michael John Driscoll <i>Vice-Chancellor & President, Taylor's University</i></p>
2.10 pm – 2.45 pm	<p>Keynote Address Yang Arif Justice Datuk Nallini Pathmanathan <i>Judge of the Federal Court of Malaysia</i></p>
2.45 pm – 2.50 pm	<p>Official Launch of Conference and Photo-Taking</p>
2.50 pm – 3.00 pm	<p>Virtual Networking in Breakout Rooms</p>

[Opening Ceremony](#)

 **CLICK HERE**

Meeting ID: 939 2046 0619
Passcode: 963537

Day 1: 26th of October from 3.00pm to 4.30pm

Parallel Session 1

Parallel Session 1A | Private Law

Theme: Dealing with Disruptive Innovation in the Digital Age

Moderator: Dr. A Vijayalakshmi Venugopal

Presenters	Title	Zoom Link
Ms. Adeline Chin Co-Founder of LawTech Malaysia, Law Asia 365, and Cyrus Book Store	Embracing Disruption: How LegalTech can Change the Delivery of Legal Services	Parallel Session 1A  Meeting ID: 936 9509 4387 Passcode: 231877
Mr. Josh Lee Chairperson, Asia Pacific Legal Innovation and Technology Association (ALITA).	Dealing with Disruptive Innovations	
Ms. Josephine Bhavani Rajendra PhD candidate, Taylor's University	LegalTech Amidst the COVID-19 Pandemic: The Legal Profession's Turning Point	
Dr. Pierre Horna Legal Officer, United Nations Conference on Trade and Development (UNCTAD).	How competition impacts innovation in the digitalised economy?	


4.30pm to 4.45pm: Virtual Networking in Breakout Rooms

Day 1: 26th of October from 3.00pm to 4.30pm

Parallel Session 1B | Healthcare & Medical Law Moderator:

Theme: Mental Health Post-COVID-19 – Practitioner, Academic and Student Perspectives

Moderator: Dr Heama Latha Narayanan

Presenters	Title	Zoom Link
<p>Dr. Paul Jambunathan</p> <p>Consultant Clinical Psychologist & Senior Lecturer, Monash University Malaysia</p>	<p>Processing human behavior – a primer for understanding self & others</p>	<p>Parallel Session 1B</p>  <p>Meeting ID: 960 7712 4238 Passcode: 960820</p>
<p>Associate Professor Dr. Anasuya Jegathevi Jegathesan</p> <p>Department of Social Sciences, School of Liberal Arts & Sciences (SLAS), Taylor’s University</p>	<p>Mental Health: Under the Shadow of Covid 19</p>	


4.30pm to 4.45pm: Virtual Networking in Breakout Rooms

Day 1: 26th of October from 3.00pm to 4.30pm

Parallel Session 1C | Public Law

Theme: “Vulnerable communities: Lessons from the pandemic”

Moderator: Dr. Tamara Joan Duraisingam

Presenters	Title	Zoom Link
Mr. Shaun Kang Wei Hsiang Former Special Advisor, International Committee of the Red Cross)	General State of Global Humanitarian State during Covid, focussing on victims of armed conflict.	Parallel Session 1C  Meeting ID: 968 4640 2887 Passcode: icflp2021
Ms. Prema Arivananthan & Ms. Tee Michelle All Women's Action Society	The Effects of the COVID-19 Pandemic on Women in Malaysia	
Mr. Kenneth Cheng Suara Rakyat Malaysia – SUARAM	Refugees, Migrant Workers and Stateless Persons	
Ms. Lee Su-Anne Child Protection Specialist, UNICEF	Understanding the Impacts of COVID-19 on children affected by migration	
Mr. Lai Mun Onn & Ms. Cynthia Lorraine Silva Senior Lecturer, Taylor’s Law School, Taylor’s University)	Protection of the rights of Refugees in Malaysia during the COVID-19 pandemic	

4.30pm to 4.45pm: Virtual Networking in Breakout Rooms

Day 1: 26th of October from 3.00pm to 4.30pm

Parallel Session 1D | Legal Education

Theme: Legal Education during the Pandemic: An Academic Perspective

Moderator: Ms. Jenita Kanapathy

Presenters	Title	Zoom Link
Mr. Tay Eng Siang, Mr. Clement Hii Zi Kang, Mr. See Keng Ng & Dr. Chee Ying Kuek Faculty of Law, Multimedia University	Peer-Tutoring Programme in a Private Higher Education Institution in Malaysia: Challenges in the Pandemic Era	<p>Parallel Session 1D</p>  <p>Meeting ID: 916 6495 8110 Passcode: 577930</p>
Ms. Puteri Sofia Amirnuddin, Dr. Jesrina Ann Xavier, Ms. Adeline Chin & Mr. Matthew Philip Taylor's University	Incorporating Structured Experiential Learning in Legal Education in times of the COVID-19 pandemic	
Dr. Rosie Fox Lecturer, School of Law, University of Leeds	Scaling Social and Political Issues through Visual Case Report	
Associate Professor Dr. Harmahinder Singh Head of School, Taylor's Law School, Taylor's University	Reimagining Legal Education – Ideals for the Post Pandemic Era	

4.30pm to 4.45pm: Virtual Networking in Breakout Rooms


Day 1: 26th of October from 4.45 pm - 6.15 pm

Parallel Session 2

Parallel Session 2A | Private Law

Theme: The impact of the COVID-19 pandemic on commercial and consumer contract laws

Moderator: Mr. Harcharan Singh Ujagar Singh

Presenters	Title	Zoom Link
Ms. Joan Ting Pang Chung Partner, ZICO Law, Malaysia	Practical issues and considerations on the execution and performance of commercial contracts	<p>Parallel Session 2A</p>  <p>Meeting ID: 975 0885 6502 Passcode: 111034</p>
Mr. Mangyo Kinoshita Founding Partner, Southgate Japan; Attorney-at-law admitted to the Japanese and California Bars	How COVID-19 affected cross border transactions and law firm practice: New style of documentation and transaction management and law firm operations in the new era?	
Mr. Chew Phye Keat Managing Partner, Raja, Darryl & Loh	The impact of the COVID-19 pandemic on commercial and consumer contract laws	
Ms. Rushmila Bintay Rafique Taylor's University	The Doctrine of Strict Compliance in relation to Letters of Credit: Has there been a significant change in its application?	


6.15 pm to 6.30 pm: Briefing to all participants for Day 2 & Closing of Day 1

Day 1: 26th of October from 4.45 pm - 6.15 pm

Parallel Session 2B | Healthcare & Medical Law

Theme: Front liners - Level of Preparedness, Support and Challenges in Handling Bereavement in a Pandemic

Moderator: Dr. Ambikai Thuraisingam

Presenters	Title	Zoom Link
Dr. Sivashanker Kanagasabapathy Medical Practitioner	“The Level of Preparedness During the Pandemic” or “Disaster Management at Hospitals”	<p>Parallel Session 2B</p>  <p>Meeting ID: 925 4335 4308 Passcode: icflp2021</p>
Dr. Kuek Chee Ying Dean & Senior Lecturer, Faculty of Law, Multimedia University & Dr. Sharon Kaur Gurmukh Singh Senior Lecturer, University ofMalaya	Religious Perceptions on the Conception of Saviour Siblings in Malaysia	
Dr. Ong Kong Seng Medical Practitioner, Hospital Shah Alam & alumnus of Taylor’s Law School LLM Programme	We Can Never Be Prepared	
Ms. Hoo Ling Lee Chief Executive Officer,Gleneagles Kuala Lumpur	Are we prepared for a pandemic?	


6.15 pm to 6.30 pm: Briefing to all participants for Day 2 & Closing of Day 1

Day 1: 26th of October from 4.45 pm - 6.15 pm

Parallel Session 2C | Public Law

Theme: Human rights in the pandemic era: Issues and Perspectives

Moderator: Mr. Lai Mun Onn

Presenters	Title	Zoom Link
Mr. Simon Wood Lecturer, Faculty of Law, University of Malaya	Australia's approach to compensation for native land claims: paving the way for Malaysia	<p>Parallel Session 2C</p>  <p>Meeting ID: 969 0180 5505 Passcode: Publiclaw</p>
Ms. Marini Arumugam, Dr. Wilson Tay Tze Vern & Dr. Tamara Joan Duraisingam Taylor's Law School, Taylor's University	Right to Water: National and International Obligations	
Ms. Suzanna Hadi & Mr. Nakeeran Kanthavel Taylor's Law School, Taylor's University	Right to Information and Right to be Forgotten in Cyberspace: Focusing on the Future of Minors in Malaysia	
Ms. Koh Ker Xuan Taylor's University	Covid-19 and The Right to Education: Leaving No Child Behind	


6.15 pm to 6.30 pm: Briefing to all participants for Day 2 & Closing of Day 1

Day 1: 26th of October from 4.45 pm - 6.15 pm

Parallel Session 2C(ii) | Public Law

Theme: Constitutional interpretation in the post- Covid era

Moderator: Ms. Saratha Muniandy

Presenters	Title	Zoom Link
Prof. Dr. Ashgar Ali Ali Mohamed Professor, Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia	Constitutional Oath of Judges: A comparison with Australia, UK, US, and India	Parallel Session 2C(ii)  Meeting ID: 996 7376 2756 Passcode: icflp2021
Ms. Chithra Latha Ramalingam Senior Lecturer, HELP University	Constitutional Supremacy, Rule of Law and the Supreme Policing Authority of Judiciary: Emergence of the Doctrine of Constitutional Oath	
Dr Muhammad Hassan Ahmad Assistant Professor, Ahmad Ibrahim Kuliyyah of Laws, IIUM	Apex Court Flip Flop on Basic Structure Doctrine: A Review of Maria Chin v Director General of Immigration [2021] 1 MLJ 750	
Dr A Vijayalakshmi Venugopal Senior Lecturer, Taylor's LawSchool, Taylor's University	Oddities in Contempt of Court	

6.15 pm to 6.30 pm: Briefing to all participants for Day 2 & Closing of Day 1


Day 2: 27th of October from 2.00 to 3.30pm

Parallel Session 3

Parallel Session 3A | Private Law

Theme: Can the Law Keep Up with the Internet of Things in times of pandemic?

Moderator: Dr. Sia Chin Chin

Presenters	Title	Zoom Link
Mr. Raphael Tay Choon Tien Partner, LAW Partnership, Malaysia	Can the Law Keep Up with the Internet of Things in times of pandemic?	Parallel Session 3A  Meeting ID: 944 2680 7990 Passcode: icflp2021
Mr. Federico Vasoli Partner, dMTV Global, Italy	Covid-19 as a tech accelerator - recent notable legal changes in the EU and its Member States"	
Ms. Raja Eileen Soraya binti Raja Aman Partner, Messrs Raja Darryl & Loh	The Internet of Things and Healthcare	


3.30 pm – 3.45 pm: Virtual Networking in Breakout Rooms

Day 2: 27th of October from 2.00 to 3.30pm

Parallel Session 3B | Healthcare & Medical Law

Theme: Vaccination – Exploring the Legal Perspective of National Vaccine Programme

Moderator: Ms. Marini Arumugam

Presenters	Title	Zoom Link
Prof. Dr. Chong Pei Pei Professor, School of Medicine, Taylor's University	COVID-19 Vaccination Policies – Juggling between public health priority and individual rights	Parallel Session 3B  Meeting ID: 910 7372 3365 Passcode: 341446
Dr. Sudhir Kumar A/L Sri Kumar Medical Practitioner, Ministry of Health Malaysia	Confidentiality of Health Data Analytics in the Pandemic	
Dr. Abdul Gafoor Mubarak Specialist, Island Hospital, Penang	Can vaccines be compelled under laws and implications for medical and legal professionals?	

3.30 pm – 3.45 pm: Virtual Networking in Breakout Rooms

Day 2: 27th of October from 2.00 to 3.30pm

Parallel Session 3C | Public Law

Theme: Constitutional interpretation in the post- Covid era

Moderator: Dr. Wilson Tay Tze Vern

Presenters	Title	Zoom Link
Mr. Lim Wei Jiet Secretary-General, National Human Rights Society –HAKAM	Constitutional interpretation in the post- Covid era	Parallel Session 3C  Meeting ID: 382 545 8686 Passcode: TheZoomies
Prof. Andrew Harding Visiting Research Professor National University of Singapore	"What just happened to law and development?"	
Mr. Srimurugan A/L Alagan Practitioner, Messrs Srimurugan & Co.	Access to Justice in the Covid-19 Era	
Mr. Andrew Khoo Chin Hock Co-Chair, Bar Council Constitutional Law Committee, Malaysian Bar.	Governance, Royalty, Executive, Emergency, Democracy: Constitutional Interpretation and Public Law in a Time of Pandemic	

3.30 pm – 3.45 pm: Virtual Networking in Breakout Rooms

Day 2: 27th of October from 2.00 to 3.30pm

Parallel Session 3D | Legal Education

Theme: Legal Education Pre- and Post-Pandemic: A Practitioner's Point of View

Moderator: Ms. Puteri Sofia Amiruddin

Presenters	Title	Zoom Link
Ms. Santhi Latha Dean, Rajah & Tann AsiaAcademy	The Future of Law through Legal Innovation & Technology	<p>Parallel Session 3D</p>  <p>Meeting ID: 998 1016 8881 Passcode: 799485</p>
Ms. Crystal Wong Wai Chin Partner, Messrs Lee Hishammuddin Allen & Gledhill	Evolving Challenges and Demands of Practice: Legal Education and Beyond	
Mr. Teh Wai Fung Associate, Messrs Lee Hishammuddin Allen &Gledhill		
Ms. Larissa Ann Associate, Messrs Azri Lee Swee Seng	How to enter the legal field confidently	
Mr. Mavin Thillainathan Senior Associate, Messrs Lavania & Balan Chambers	“Walking in the shoes of a Commercial Litigator”	

3.30 pm – 3.45 pm: Virtual Networking in Breakout Rooms


Day 2: 27th of October from 3.45 pm to 5.15 pm

Parallel Session 4

Parallel Session 4A | Private Law

Theme: An ethical perspective of corporate social responsibility (CSR) in a post pandemic era

Moderator: Dr. Bhuvanesh Veerakumaran

Presenters	Title	Zoom Link
Dr. Loganathan Krishnan Lecturer, Monash University, Malaysia	Impact of Covid on CA 2016 and the shift in CSR to address the urgent pandemic?	<p>Parallel Session 4A</p>  <p>Meeting ID: 993 9049 3405 Passcode: 034927</p>
Dr. Pankaj Kumar Gupta & Ms. Manvi Gupta Jamia Millia Islamia, India	Regulatory Dynamics of Corporate Laws and Risk for Professionals in India (Solicited Abstract)	
Ms. Francesca Chin Nyuk Oi, Mr. Gary Ng Kit Ming, Ms. Joanne En Ling Lau & Mr. Tay Eng Siang Multimedia University	Formalities for the Valid Execution of Wills in Malaysia - Legal Challenges and Reforms in the Era of Pandemic	
Dr. Sia Chin Chin & Ms. Jolyn Toh Taylor's Law School, Taylor's University	Post-Pandemic Product Liability Claims: Issues Arising From Third Party Claims for Sub-Standard Products	


5.15 pm – 5.30 pm: Virtual Networking in Breakout Rooms

Day 2: 27th of October from 3.45 pm to 5.15 pm

Parallel Session 4B | Healthcare & Medical Law

Theme: Medical, Healthcare and Food Aid of the marginalised – The Covid-19 Pandemic Experience

Moderator: Dr. Sia Chin Chin

Presenters	Title	Zoom Link
Mr. Luca Polizzi Policy Officer, Research and Innovation Policy on Hydrogen, European Commission Directorate-General for Research & Innovation - Clean Energy Transition	EU strategy of public health and non-exclusive EU domain of legislations	Parallel Session 4B  Meeting ID: 946 1147 7976 Passcode: icflp2021
Ms. Pang Chia Yee Psychologist and Lecturer, School of Liberal Arts & Sciences, Taylor's University	the importance of taking care of own mental health and various methods in doing so.	
Dr Ved Pal Singh Assistant Professor Maharshi Dayanand University, India	Health vis-a-vis Laws During Covid Period: Glimpses From India	


5.15 pm – 5.30 pm: Virtual Networking in Breakout Rooms

Day 2: 27th of October from 3.45 pm to 5.15 pm

Parallel Session 4C | Public Law

Theme: Public Law in the era of COVID-19: Practical Experiences and Perspectives.

Moderator: Ms. Suzanna Abdul Hadi

Presenters	Title	Zoom Link
<p>Mr. Sachin Menon Taylor’s University</p>	<p>Indian judicial activism and dignity of the dead during COVID-19: A model for post- pandemic international legal order?</p>	<p>Parallel Session 4C</p>  <p>Meeting ID: 922 9332 3690 Passcode: 023028</p>
<p>Associate Professor Dr. KhairilAzmin Mokhtar & Mr. Hani Adhani Ahmad Ibrahim Kuliyyah of Laws, International Islamic University Malaysia</p>	<p>Indonesia Constitutional Court: The Guardians of Democracy in Pandemic Era</p>	
<p>Mr. Harpajan Singh, Ms. Syarifah Mastura SA Bakar, Ms. Abidah Saad & Ms. Sukjeet Kaur INTI Education Group Malaysia</p>	<p>Assessing the effectiveness of the Malaysian Regulatory Framework in dealing with the Covid-19 Pandemic</p>	
<p>Dr. Tamara Joan Duraisingam & Ms. Johanna Mahadevan Taylor’s Law School, Taylor’s University</p>	<p>To fish or not to fish? The Malaysian – Australian Perspective</p>	


5.15 pm – 5.30 pm: Virtual Networking in Breakout Rooms

Day 2: 27th of October from 3.45 pm to 5.15 pm

Parallel Session 4D | Legal Education


Theme: Legal Career Paths and Market Outlook, Post- Pandemic”

Moderators: Ms. Sharon Chong Tze Ying Ms. Charmayne Ong (Messrs. Skrine)

Presenters	Title	Zoom Link
Ms. Charmayne Ong Partner, Messrs. Skrine	Legal Career Paths and Market Outlook, Post-Pandemic	<p>Parallel Session 4D</p>  <p>Meeting ID: 382 545 8686 Passcode: TheZoomies</p>
Ms. Tan Lee Quin In-house counsel, GrabMalaysia	Legal Career Paths and Market Outlook, Post-Pandemic	
Ms. Sharon Chong Tze Ying Partner, Messrs. Skrine	Legal Career Paths and Market Outlook, Post-Pandemic	
Ms. Serena Lim Director, Bizibody Technology Pte Ltd, Litigation Edge Pte Ltd	Legal Career Paths and Market Outlook, Post-Pandemic	

5.15 pm – 5.30 pm: Virtual Networking in Breakout Rooms

Day 2: 27th of October from 3.45 pm to 5.15 pm

5.30 pm – 5.50 pm	Awards for Best Papers and Virtual Prize-Giving	<p>Best Paper Award Ceremony and Closing</p>  <p>Meeting ID: 979 7535 9693 Passcode: icflp2021</p>
5.50 pm – 6.00 pm	Closing Address <i>Co-Chairpersons of the Organizing Committee, ICFLP 2021</i>	

6.00 pm: End of Conference

TAYLOR'S INTERNATIONAL CONFERENCE ON THE FUTURE OF LAW AND LEGAL PRACTICE 2021

Theme:

“Law and Legal Practice in the Post-Pandemic Era: Opportunities, Solutions and Innovations”

Title:

**APEX COURT FLIP FLOP ON BASIC STRUCTURE DOCTRINE:
A REVIEW OF *MARIA CHIN v DIRECTOR GENERAL OF
IMMIGRATION* [2021] 1 MLJ 750**

Prof. Dato' Sri Dr. Ashgar Ali Ali Mohamed

Dr. Chithra Latha Ramalingam

Dr. Muhamad Hassan Ahmad

26 October 2021 (Tuesday)

TAYLOR'S UNIVERSITY

INTRODUCTION

- The ‘**Doctrine of Basic Structure**’ was developed by the Indian Supreme Court in the 1970s mainly in the following cases:
 - *Kesavananda Bharati v State of Kerala* [1973] AIR 1461
 - *Indira Nehru Gandhi v Raj Narain* [1975] AIR 2299
 - *Minerva Mills v Union of India* [1980] AIR 1789
- This doctrine dictates that the **Constitution has certain basic features** that are **permanent** which **cannot be altered** or destroyed through amendments **by the Parliament**.
- The **Court can strike down** an **amendment** to the Constitution or the laws enacted by legislature which conflict with or seek to **alter the basic structure of the Constitution**.
- However, the Supreme Court of India noted that: “every provision of the Constitution **can be amended** provided in the result the **basic foundation and structure of the Constitution remains the same**”.

BASIC STRUCTURE DOCTRINE IN MALAYSIA

- The Federal Constitution **does not specifically explicate** the doctrine of basic structure.
- It would include, i.e. the **supremacy of the Constitution**; the doctrine of **separation of the powers** of the three branches of Government namely the judiciary, executive and the legislature, the **federal system** of the Constitution, **fundamental rights and liberties**, among others.

- This doctrine was initially **disapproved** by the **apex court** in the following cases due to some apparent **differences in the Indian Constitution and the Malaysian Constitution.**
 - *Loh Kooi Choon v Government of Malaysia* [1975] 1 LNS 90
 - *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70
 - *Public Prosecutor v Kok Wah Kuan* [2007] 6 CLJ 341

• However, the Federal Court had endorsed this doctrine in the following more recent decisions.

- *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 3 CLJ 507
- *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another* [2017] 5 CLJ 526
- *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545
- *Alma Nudo Atenza v PP & Another Appeal* [2019] 5 CLJ 780



CONT.

- In the most recent case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750: the **Federal Court** had reverted back to their earlier approach of **disapproving this doctrine**.
- The **majority decision** stated, *inter alia*, that: “... the basic structure doctrine was an **abstract doctrine** and it has never been mentioned in the Constitution ...”.
- The apprehension expressed by the majority was that this doctrine will **weaken the Parliament’s power** from **amending or removing constitutional provisions** that will be considered to be ‘basic’.
- On the other hand, the **minority decision** **affirmed** their earlier decision in relation to **the basic structure doctrine**.

CONCLUSION

- By following the established stare decisis principle, namely, when there are conflicting decisions of the Federal Court in relation to the same subject matter, the recent Federal Court's decision should prevail over that of their earlier decision.
- What matters here is on the issue as to whether a majority four to three Federal Court decision in relation to this doctrine in *Maria Chin* case can override a unanimous nine panel Federal Court in *Alma Nudo* case?
- Moreover, there is a possibility for the subsequent Federal Court panel to revert back to their earlier ruling on the basic structure doctrine.
- Accordingly, the Federal Court's flip-flopped ruling on basic structure doctrine could create a chaotic situation.

THANK YOU SO MUCH

Apex Court Flip Flop on Basic Structure Doctrine: A Review of *Maria Chin v Director General of Immigration* [2021] 1 MLJ 750

by

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INTRODUCTION

Malaysia upholds the constitutional supremacy as per Article 4(1) of the Federal Constitution. The constitution provides for the three main organs of the State, namely, the executive, the legislature and the judiciary pursuant to Articles 39, 44 and 121, respectively. The doctrine of separation of power serves as a check against the abuse of power. The greatest challenge in any democratic nation is to balance the might of the State with the rights of its citizens.¹ Article 124 of the Constitution deals with the oath of office and allegiance for the judiciary in which judges of the superior courts are obliged 'to preserve, protect and defend the Constitution'. Further, the doctrine of basic structure, which has gained widespread acceptance in India since the early 1970's, dictates that the constitution has certain basic features that cannot be altered or destroyed through amendments by the Parliament and the judiciary is empowered to strike down an amendment to the constitution and Acts

¹ In *Kerajaan Malaysia v. Shimizu Corporation & Ors* [2018] 1 LNS 202, Lee Swee Seng J stated that: 'The Court's inherent identity under the Constitution is that it is the institution that decides on disputes between parties and when the Government is a party to the dispute, it cannot dictate to the Court that certain matters are out of the bounds where the Court's power to inquire into the action or inaction and interpret the relevant powers under the statute is concerned. Judicial functions of the Court cannot be usurped. The 3 branches of government in the Executive, Legislature and Judiciary are co-equal and all are subject to the Constitution which is supreme. Each would keep the others accountable for inherent in the concept of separation of powers is the keeping in check of any excesses of any branch such that the power of the State is exercised within the constitutional framework of accountability, transparency, fairness, and fundamental liberties'.

enacted by the Parliament which conflict with or seek to alter this basic structure of the constitution.

In Malaysia, this doctrine was initially disapproved by the apex court in the following cases - *Loh Kooi Choon v. Government of Malaysia*,² *Phang Chin Hock v. Public Prosecutor*,³ and *Public Prosecutor v. Kok Wah Kuan*⁴ - partly because of some apparent differences in the Indian Constitution and the Malaysian Constitution. However, the recent decisions in *Sivarasa Rasiah v. Badan Peguam Malaysia*,⁵ *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and another case*,⁶ *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals*,⁷ and *Alma Nudo Atenza v. PP & Another Appeal*,⁸ the Federal Court had endorsed this doctrine. Again, the most recent majority decision in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor*,⁹ the Federal Court had reverted back to their earlier approach of disapproving this doctrine. By following the established *stare decisis* principle, namely, when there are conflicting decisions of the Federal Court in relation to the same subject matter, the recent Federal Court's decision should prevail over that of their earlier decision.¹⁰ What matters here is on the issue as to whether a majority four to three Federal Court decision in relation to this doctrine in *Maria Chin* case can override a unanimous nine panel Federal Court in *Alma Nudo* case? In relation to this issue it would be worthwhile to review the majority and minority's opinion in *Maria Chin* case in relation to this doctrine and also to revisit the horizontal application of the *stare decisis* doctrine with a view of addressing the Federal Court's flip-flop in relation to this doctrine.

BASIC STRUCTURE DOCTRINE IN MALAYSIA

The basic structure doctrine was developed by the Indian Supreme Court in the early 1970's. It provides that the constitution contain certain basic features which are permanent and which cannot be altered or amended. It further provides that the judiciary is empowered to nullify any legislation including any amendment to the constitution when it conflicts with or seeks to alter this basic structure of the constitution. In the words of Richard Malanjum CJ, in delivering the unanimous decision of the Federal Court in *Alma Nudo* observed that: 'Courts can prevent Parliament from destroying the 'basic structure' of the Federal Constitution [FC] ... 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. The role of the Judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide'.

² [1975] 1 LNS 90.

³ [1980] 1 MLJ 70.

⁴ [2007] 6 CLJ 341.

⁵ [2010] 3 CLJ 507.

⁶ [2017] 5 CLJ 526.

⁷ [2018] 1 MLJ 545.

⁸ [2019] 5 CLJ 780, FC.

⁹ [2021] 1 MLJ 750. Tengku Maimun CJ, Rohana Yusuf PCA, Nallini Pathmanathan, Abdul Rahman Sebli, Hasnah Hashim, Mary Lim and Harmindar Singh FCJJ.

¹⁰ See *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645, FC.

The basic features of the constitution have not been specified and hence, it is for the court to decide on a case-by-case basis. Fundamentally, the basic features of the Malaysian constitution would include the position of Islam as the religion of the Federation, supremacy of the constitution, fundamental liberties, constitutional monarchy, federalism and separation of the powers between the three branches of State, among others.¹¹ As stated earlier, this doctrine was not favoured by the apex court in *Loh Kooi Choon, Phang Chin Hock, Mark Koding v. PP*,¹² and *Kok Wah Kuan*. The reason was mainly because of the difference between the Indian Constitution and the Malaysian Constitution particularly the provisions relating to the constitutional amendment. In *Loh Kooi Choon*, Raja Azlan Shah FJ stated that: 'the question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore, not meet for judicial determination'. Again, in *Phang Chin Hock*, Suffian LP opined that: 'Parliament have power to make constitutional amendments that are inconsistent with the Constitution. Secondly, Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself and it is unnecessary for us to say whether or not Parliament's power of constitutional amendment extends to destroying the basic structure of the Constitution'.

At this juncture, it is noteworthy that our constitution has vested power to the Parliament to amend any part of the constitution in any way they think fit, provided that all the conditions precedent prescribed by the constitution itself are followed.¹³ In *Phang Chin Hock*, Suffian LP further stated that: 'If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, art. 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention. On the contrary apart from art. 159, there are many provisions showing that they realised that the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) polity, a living document that is reviewable from time to time in the light of experience and, if need be, amended'.

The method of constitutional amendment was succinctly highlighted by Raja Azlan Shah FJ in *Loh Kooi Choon* as follows: '(1) Some parts of the Constitution can be amended by a simple majority in both Houses of Parliament such as that required for the passing of any ordinary law. They are enumerated in cl. (4) of art. 159 and are specifically excluded from the purview of art. 159; (2) The amending cl. (5) of art. 159 which requires a two-thirds majority in both Houses of Parliament and the consent of the Conference of Rulers; (3) The amending cl. (2) of art. 161E which is of special interest to East Malaysia and which requires a two-thirds majority in both Houses of

¹¹ See *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70.

¹² [1982] 2 MLJ 120 (FC).

¹³ See Tun Abdul Hamid Mohamad, 'No Judge is a Parliament' delivered at the International Islamic University Malaysia symposium entitled "Constitutional Oath, Rule of Law and Supreme Policing Role of the Judiciary" on 30 March 2018: see <https://tunabulhamid.me/2018/03/no-judge-is-a-parliament/>

Parliament and the consent of the Governor of the East Malaysian State in question; (4) The amending cl. (3) of art. 159 which requires a majority of two-thirds in both Houses of Parliament’.

Despite the above, the recent decisions, especially in *Sivarasa Rasiah*, *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo*, the apex court had endorsed the basic structure doctrine. In *Sivarasa Rasiah* case, delivering the unanimous decision of the Federal Court,¹⁴ Gopal Sri Ram FCJ observed that: ‘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’. Again, in *Semenyih Jaya* case, section 40D of the Land Acquisition Act 1960, which had removed the power of the judge to determine the value of the land and vested the same with two professional land valuers, was held unconstitutional because it violated Article 121(1) of the Constitution. Likewise, in *Indira Gandhi* case, the Federal Court noted that it is inaccurate to state that Article 121(1A) of the Federal Constitution excludes or ousts the civil courts jurisdiction on matters within the jurisdiction of Syariah courts. The civil courts and Syariah courts operated on a different footing altogether and ‘the perception that both courts should exercise a mutually reciprocal policy of non-interference may be somewhat misconceived and premised on an erroneous understanding of the constitutional framework in Malaysia’. A five bench Federal Court judges¹⁵ headed by Zainun Ali FCJ in *Indira Gandhi* case, stated that: ‘It would be instructive to now distill the principles as have been illustrated above: (a) under art. 121(1) [Constitution], judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts cannot be confined to federal law. The courts will continually and inevitably be engaged in the interpretation and enforcement of all laws that operate in this country and any other source of law recognised by our legal system; (b) judicial power in particular the power of judicial review, is an essential feature of the basic structure of the Constitution; (c) features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment; (d) judicial power may not be removed from the High Courts; and (e) judicial power may not be conferred upon bodies other than the High Courts, unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence’.

Again, in *Alma Nudo*, a nine member bench led by Richard Malanjum CJ¹⁶ reiterated the acceptance of basic structure doctrine in Malaysia. In delivering the unanimous decision of the court, his Lordship opined that: ‘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

¹⁴ The Federal Court comprising of Richard Malanjum CJ (Sabah & Sarawak), Zulkefli Makinudin FCJ and Gopal Sri Ram FCJ.

¹⁵ The Federal Court comprising of Zulkefli Ahmad Makinudin PCA, Richard Malanjum CJ (Sabah and Sarawak), Zainun Ali FCJ, Abu Samah Nordin FCJ and Ramly Ali FCJ.

¹⁶ This case was heard by a panel of nine Federal Court judges as follows: Richard Malanjum CJ, David Wong Dak Wah CJ (Sabah and Sarawak), Ramly Ali FCJ, Balia Yusof Wahi FCJ, Alizatul Khair Osman FCJ, Rohana Yusof FCJ, Tengku Maimun Tuan Mat FCJ, Abang Iskandar FCJ and Nallini Pathmanathan FCJ.

foundation. The role of the Judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide’.

Despite the unequivocal acceptance of the basic structure doctrine, in *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President of Association of Islamic Banking Institutions Malaysia & Anor (Interveners)*,¹⁷ the majority decision of the Federal Court¹⁸ held, *inter alia*, that sections 56 and 57 of the Central Bank of Malaysia Act 2009¹⁹ did not violate the basic structure doctrine. The majority decision stated that the vesting of power with the Shariah Advisory Council (SAC) in Shariah matter arising in the Islamic financing facility did not breach the Federal Constitution because the SAC’s ruling does not in any way usurp the judicial power of the civil courts. The dissenting judgment of David Wong Dak Wah CJ (Sabah & Sarawak) and Richard Malanjum CJ however held otherwise. David Wong Dak Wah CJ (Sabah & Sarawak), in his judgment, stated that the sections 56 and 57 which had clothed the SAC, a non-judicial body under the Constitution, with judicial power have in fact violated the doctrine of separation of powers. In particular, his Lordship stated that: ‘SAC had by its role of providing a binding ruling on the courts, had in no uncertain terms stepped into the sphere of judicial function which under the FC is solely reserved to the civil courts’.

Similarly, Richard Malanjum CJ in his separate dissenting judgment stated that the following functions of the SAC fell clearly within the core area of judicial power, namely, the SAC exercised an adjudicative function; finally resolved the dispute on the issue of Shariah law; and gave a decision which was immediately enforceable and binding on the High Court. Hence, his Lordship stated that: ‘In the circumstances, s. 57 of the CBMA contravenes art. 121 of the FC in so far as it provide that any ruling made by the SAC pursuant to a reference is binding on the High Court making the reference. The effect of the section is to vest judicial power in the SAC to the exclusion of the High Court on Shariah matters. The section must be struck down as unconstitutional and void’.

More recently, the majority decision of the Federal Court in *Maria Chingheld*, *inter alia*, that Article 121(1) of the Constitution cannot be invalidated by abstract doctrines such as the basic structure doctrine and the doctrine of separation of powers, which

¹⁷ [2019] 5 CLJ 569, FC. This case was heard by a panel of nine- Federal Court judges as follows; Richard Malanjum CJ, Ahmad Maarop PCA, Zaharah Ibrahim CJ (Malaya), David Wong Dak Wah CJ (Sabah and Sarawak), Ramly Ali FCJ, Azahar Mohamed FCJ, Alizatul Khair Osman FCJ, Mohd Zawawi Salleh FCJ, Idrus Harun FCJ.

¹⁸ The majority decision was delivered by Mohd Zawawi Salleh FCJ with Ahmad Maarop PCA, Ramly Ali, Azahar Mohamed, Alizatul Khair Osman FCJJ concurring.

¹⁹ Section 56(1) provides that: ‘Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall – (a) take into consideration any published rulings of the Shariah Advisory Council; or (b) refer such question to the Shariah Advisory Council for its ruling. (2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat’. Further, section 57 provides that: ‘Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under s. 55 and the court or arbitrator making a reference under s. 56’.

are not mentioned in the Constitution. Both the majority decision and the minority decision of the Federal Court in *Maria Chin* case, especially in relation to the basic structure doctrine, are further discussed below. At this juncture it is worthwhile noting the remarks made by Frankfurter J. that: 'the ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it'.²⁰

ECLIPSE OF THE BASIC STRUCTURE DOCTRINE: A CLASH OF THREE TITANS AND *MARIA CHIN*

The recent Federal Court's decision in *Maria Chin* case raised pertinent questions related to the fundamental liberties accorded in the Federal Constitution. Whether a citizen is protected if the executive action infringed the right to travel abroad, the right to freely express, and the right to be heard? Whether the judiciary is empowered to act against an executive action by judicially reviewing the statutory provisions that has breached the fundamental rights of a citizen? Does the doctrine of separation of powers constitutionally sanction the judiciary to review the breaches of these acts under the Federal Constitution? Equally important is to consider the ouster clauses under sections 59 and 59A of the Immigration Act 1959/63 which impedes the judicial power to undertake a review based on the Federal Constitution.

The essence of the following discussion is to elucidate the above, which undeniably is of great importance. The discussion considers firstly, whether any law that is contradictory to the constitution can be declared invalid by the courts, especially when they destroy the basic structure of the constitution; and secondly, the applicability of the doctrine of the eclipse to the basic structure doctrine. The above will be explored in the latter part of this article in relation to the justification that the above sections 59 and 59A of the Immigration Act 1959/63 which infringes the fundamental rights and liberties ingrained Part II of the Federal Constitution.²¹ In addition, reference will also be made to the cases, namely, *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo* (hereinafter referred to as the three titans or the three cases) against the *Maria Chin* case. This is to draw a useful insight on how the basic structure doctrine in the three titans has been accepted and celebrated by the legal fraternity.

As stated earlier, the basic structure doctrine has had an interesting journey in many countries beginning from India to Singapore and now, to Malaysia. The doctrine has been a bane to the Parliament and the executive but a revered doctrine to many judges who have upheld their constitutional judicial oath. The concept of rule of law has been one of the cornerstones of constitutional supremacy against parliamentary supremacy. This doctrine of supremacy is still so misunderstood that there are clashes of viewpoints and remains a contention amongst the legal fraternity and imperfectly justified to each perception.

The *Maria Chin* case reviewed the fundamental aspects of basic structure doctrine - a doctrine that was not recognised by the majority decision²² and hence, declared to

²⁰ Quoted by Raja Azlan Shah FCJ in *Loh Kooi Choo v. Government of Malaysia* [1977] 2 MLJ 187.

²¹ Government of Malaysia, 'Laws of Malaysia: Federal Constitution Incorporating All Amendments up to P.U.(A) 164/2009.'

²² Abdul Rahman Sebli, Hasnah Hashim, Mary Lim, Harmindar Singh FCJJ and Rohana Yusuf PCA.

be unnecessary and inconsistent to Article 4(1) of the Federal Constitution. The Court's ruling in relation to the basic structure doctrine in *Maria Chinhad* in fact moved away from the earlier apex court's rulings in *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo*. The true nature of the basic structure doctrine has been imperfectly understood and this has resulted in differences of opinion in the judiciary camp. The question in the first place is whether the basic structure doctrine exists in the Malaysian constitutional framework. To establish this, it is important to explore and understand this doctrine first.

The basic structure doctrine was first propounded in the dissenting judgement by Justice Mudholkar in 1964 in the Indian case of *Sajjan Singh v. the State of Rajasthan*.²³ In this case, the judge opined that: 'the fundamental features of the Constitution shall not be changed as there are fundamental of every constitution in the world to be preserved and the Parliament does not have a *carte blanche* to amend these rights'. This view was however rejected by the majority who held that the Parliament can amend the fundamental rights of the people.²⁴ In *Kesavananda Bharati v. The State of Kerala*,²⁵ the seven over six majority decision of the Indian Supreme Court had not only explained and clarified the basic structure doctrine but also endorsed it. Pursuant to this doctrine, it finds that: 'in as much the Parliament has the power to amend the constitution, however, the prerogative cannot infringe the basic features of the Constitution'. In the context of the Indian Constitution, the fundamental features of the constitution are as follows: '(i) supremacy of the Constitution; (ii) republican and democratic form of government and sovereignty of the country; (iii) secular character of the Constitution; (iv) separation of powers; (v) federalism; and (vi) dignity of the individual guaranteed by Parts III and IV of the Constitution'.²⁶ It was said by the majority of judges that the above basic structure lists are not an exhaustive list and it was left to the courts to decide what would the fundamental elements be. These features of the constitution are considered so fundamental that if the Parliament exercises its prerogative power to amend the constitution, it will lose its spirit of laws. These basic philosophies are so fundamental to the rights of every citizen.

Therefore, the majority of judges in *Kesavananda Bharati* case recognised that the Parliament has, to a larger extent, its supremacy however with qualifications that it can amend any and every provision as long as these amendments will not violate the basic structure of the constitution.²⁷ Further, whether any amendments to the constitution violates the basic structure doctrine has to be considered on a case-by-case basis. The Parliament does not have the authority to undermine the basic structure doctrine of the constitution nor can it repeal the decree to build a welfare State and a democratic society.²⁸ The emphasis here is that since the constitution is

²³ [1965] AIR 845, [1965] SCR (1) 933.

²⁴ Ibid.

²⁵ [1973] 4 SCC 225; AIR [1973] SC 1461.

²⁶ The judgement of the majority judges was discussed in Mohd Hishamudin Yunus, 'The Malaysian Constitution and the Basic Structure Doctrine' (2018) 159 1.

²⁷ See the majority Judgement *Kesavananda* in <https://lawtimesjournal.in/kesavananda-bharti-vs-state-of-kerala-case-summary/> accessed on 17/5/2021.

²⁸ See <https://lawtimesjournal.in/kesavananda-bharti-vs-state-of-kerala-case-summary/> accessed on 17/5/2021.

a social contract based on social philosophy towards its citizens, it should never be used as a political document to propel any form of political agendas.²⁹

In relation to its application in Malaysia, this doctrine was first discussed in *Loh Kooi Choon* case where the Court considered the validity of the alteration of Article 5(4) of the Federal Constitution. However, it was in the case of *Sivarasa Rasiah* where this doctrine was validly recognised. It was held, *inter alia*, that: 'any constitutional amendment that breaches and violates the basic structure of the Federal Constitution is deemed to be unconstitutional'.³⁰ It is worthwhile adding that to further illustrate on the adoption of basic structure doctrine in Malaysia, it would require a revisit of the 1988 constitutional amendment.³¹

The infamous³² judicial crisis that took place around the same year had led to the amendment of several provisions of the Federal Constitution.³³ One of the most important provisions was Article 121(1) where, before the amendment, the Article conferred the judicial power of the Federation to two High Courts. This was seen in the case of *Public Prosecutor v. Dato' Yap Peng*,³⁴ where it was held that the courts have the power to adjudicate on civil and criminal matters brought to it. However, the 1988 constitutional amendment had completely blanketed the judicial power to the

²⁹ This was the opinions of the learned judges (Hegde & Mukherjeajj) in the above case. "Kesavananda Bharati Vs. State of Kerala – Case Summary" <https://lawtimesjournal.in/kesavananda-bharti-vs-state-of-kerala-case-summary/> accessed on 17/5/2021.

³⁰ [2010] 2 MLJ 333, Gopal Sri Ram FCJ decided that: 'Further, 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. See *Keshavananda Bharati v. State of Kerala* AIR [1973] SC 1461'.

³¹ Sultan Azlan Shah, former Lord President, said extra-judicially: "The precise reason for this amendment remains unclear. But the consequences may be severe. With this amendment, it would appear that the judicial power is no longer vested in the courts, and more importantly the High Courts have been stripped of their inherent jurisdiction. Their powers are now only to be derived from any federal law that may be passed by Parliament. The effect of this change may have far-reaching consequences on the separation of powers doctrine under the Federal Constitution." Found in <https://www.malaymail.com/news/what-you-think/2017/04/27/judicial-power-restored-after-almost-20-years-surendra-ananth/1365025#sthash.h5EDFFHo.dpuf> accessed on 18/5/2021

³² Prof Shad Faruqi stated that a mature and fair evaluation is "not really possible" as the judiciary has delivered thousands of judicial decisions, some admirable and others forgettable. He added that "the 1988 judicial crisis gave birth to a number of other shameful tendencies in the judiciary that are too painful to acknowledge". <https://www.theedgemarkets.com/article/malaysias-judiciary-yet-fully-recover-1988-crisis-says-constitutional-expert> accessed 18/5/2021

³³ It is unfortunate that this can be argued as a political manoeuvre by then Prime Minister who draconically decided the amendment of the Federal Constitution. His misgivings in the judicial power is found in an interview with Time magazine on 24 November 1986 'The judiciary says [to us], 'Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation'. If we disagree, the courts will say, 'We will interpret your disagreement'. If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to interpret it our way. If we find out that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.' Found in Fahri Azzat, Amer Hamzah and Edmund Bon, '(<https://Justlaw.Asia/>)' (2005) 8.

³⁴ [1987] 2 MLJ 311; [1987] 1 CLJ 550.

Federal Courts causing 'a judicial winter to descent on the country'.³⁵ The amendment stated, 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' thereby denying the courts the 'judicial power of the federation' and allowing the judicial powers as the Parliament deems fit. This amendment limited the judicial power of the courts thereby violating the doctrine of separation of powers.

The gerrymandering of the judiciary was a breach of the rule of law. This seems the preferred view in the case of *Kok Wah Kuan*³⁶ where the Federal Court meekly chose to provide a narrow interpretation of Article 121(1) of the Constitution and interpreted that: 'High Courts shall have such jurisdiction and powers as may be conferred by or under federal law'. However, this was not without a 'strong fight' by way of a dissenting judgment from Justice Malanjum.³⁷ The differences in the outcome of the cases have led to different results that do not necessarily give clarity to the entrenched provisions in the Federal Constitution that embrace the basic structure doctrine.

The beginning of spring bloom by bloom was seen when the judicial decisions³⁸ by the Federal Court settled the rule of law and recognised constitutional supremacy in the interpretation of the Federal Constitution and outrightly confirmed that the rule of law in interpreting the constitution is based on constitutional supremacy. These cases courageously recognised that 'constitutionalism is an evolutionary jurisprudence and is not a judicial law-making process in competition to Parliament'. In hindsight, the three postulates³⁹ of AV Dicey must be revisited where he expounds

³⁵ Shad Saleem Faruqi, 'Thirtieth Anniversary of the 1988 Judicial Crisis: Lessons About The Importance Of Judicial Independence And Impartiality' at [https://law.um.edu.my/Research-Consti/Presentations%20and%20Publications/Judicial%20Independence%20and%20Impartiality%20\[13.08.18\].pdf](https://law.um.edu.my/Research-Consti/Presentations%20and%20Publications/Judicial%20Independence%20and%20Impartiality%20[13.08.18].pdf)

³⁶ [2008] 1 MLJ 1. Abdul Hamid PCA (as he then was) held in relation to Act A704: to what extent such 'judicial powers' are vested in the two High Courts depends on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment.

³⁷ "... [S]hould by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law." It must be remembered that the courts, especially the Superior Courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature." Found in <https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/judicial-power-restored-after-almost-20-years>

³⁸ *Semenyih Jaya, Indira Gandhi, and Alma Nudo*.

³⁹ "It means . . . the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may be punished for a breach of law, but he can be punished for nothing else." 2. "It means equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this case excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts." 3. "With us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; . . . the principles of private law have . . . by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land." A V. Dicey,

that the first postulate to the rule of law necessitates punishment only if there exists misconduct based on clear breach of law. His standpoint was that there must be equality before the law irrespective of classes and the citizens must be equally subjected to the laws. Dicey's postulate sufficiently shows that no one should be above the laws, not even the government who ought to equally be subjected and accountable to the laws of which the courts are the guardians.

To lay down the rule of law, a general rule that parliamentary supremacy exists is unsound. In the case of *Ah Thian v. Govt of Malaysia*,⁴⁰ Suffian LP expressed unequivocally that: 'the doctrine of Parliamentary supremacy does not apply in Malaysia as we have a written constitution'.⁴¹ The cases of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan*,⁴² *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor*,⁴³ and *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal*⁴⁴ have validated the principles of natural justice and recognised that this principle is impliedly ingrained within the constitutional rights. Therefore, any arbitrary power by other organs is a clear infringement of the fundamental principles before the law. So unjust that it goes against due process and equal treatment. Hence, Article 4(1) of the Federal Constitution is fundamental to the rule of law and on what grounds has this been denied can be viewed in *Maria Chin* case. One thing or the other, it must be true and this has been sufficiently proven in the recent cases even before *Maria Chin* case.

INCONGRUENT MAJORITY DECISION IN MARIA CHIN CASE AND AWAKENING OF MINORITY OPINION

Groves⁴⁵ said: 'there is, perhaps, no single provision of any democratic constitution about which one could say, if all else were lost yet this one remain, the Government could still be democratic'. He derived this from the decree in clause 40 of the Magna Carta 1215 which states: '[T]o none will we sell, to none will we deny, to none will we delay right or justice'.⁴⁶ He asserted that no modern constitution should be alive without it. This Magna Carta today has given universal applicability not only in the current Constitution of the United States that gave life to it but also in many English speaking countries.⁴⁷ The Malaysian Federal Constitution that is in written form should similarly give good of this concept.

In *Maria Chin* case, the plaintiff, the Chairperson of Bersih 2.0, was stopped at the Kuala Lumpur International Airport (KLIA) by the respondents - the immigration authorities - from flying to South Korea apparently to receive an international

'Introduction to the Study of the Law of the Constitution' [1979] Introduction to the Study of the Law of the Constitution.

⁴⁰ [1976] 2 MLJ 112.

⁴¹ The quote is accessed from the Lecture Series 1 of Sultan Azlan Shah, 'HRH Sultan Azlan Shah' 1984. https://www.sultanazlanshah.com/pdf/2004%20Book%202/Lecture_1.pdf

⁴² [2002] 4 CLJ 105.

⁴³ [1996] 1 MLJ 261.

⁴⁴ See Cyrus V Das, "'Life" Under Article 5: What Should It Be?' (2002) XXXI Insaf 68.

⁴⁵ Harry E Groves, 'Equal Protection of the Laws in Malaysia and India' (1963) 12 Am J Comp L 385.

⁴⁶ Ibid.

⁴⁷ See "The Contents of Magna Carta" in <https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/magnacartaclauses/>

humanitarian award without offering any reason. Hence, she applied for judicial review to make certain that the immigration was wrong in blacklisting and barring her from traveling overseas. In addition, she also invoked against the respondents that they had infringed Articles 5(1), 8, and/or 10(1)(a) of the Constitution. She also asserted that section 59⁴⁸ of the Immigration Act 1959/63 is a direct violation of the constitution as it is against the principle of natural justice.⁴⁹ She also asserted that the above section had denied her the right to be heard and hence, a breach of the natural justice principle. Further, section 59A⁵⁰ of the same Act was in a breach of the Federal Constitution where this section expressly excludes judicial review save for any issue with the compliance with regard to procedural requests or regulations central to the act or decision. Section 59A was challenged on the issues of unconstitutionality and accordingly substantiated that respondents' actions violating the basic structure doctrine that exists in any democratic constitutional document. The quorum of seven judges unanimously held that the appellant could not be blacklisted from overseas travel and hence, the bar to travel was wrong based on the respondent's decision. However, the *ratio decidendi* of the case needs to be explored due to the majority⁵¹ and minority⁵² differences in the decision-making and the various principles of law raised and analysed by the judges.

In this case, the Federal Court had to decide on the following issues, namely; (i) whether section 3(2) of the Immigration Act 1959/63 gave the Director-General of Immigration unfettered discretion to impose a travel ban on a citizen especially if that citizen had been openly critical or disparaging of the government; (ii) whether section 59 of the Immigration Act 1959/63 was valid and constitutional; and (iii) whether section 59A of the Immigration Act 1959/63 was valid and constitutional in the light of the rulings of the Federal Court in *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo*. The above cases are important to be considered as these cases upheld constitutional supremacy, the doctrine of separation of powers, and the rule of law.

⁴⁸ Government of Malaysia, 'Immigration Act 1959/63' [2006] The Commissioner of Law Revision, Malaysia <[http://jpt.mohe.gov.my/RUJUKAN/akta/akta imigresen.pdf](http://jpt.mohe.gov.my/RUJUKAN/akta/akta%20imigresen.pdf)>.

⁴⁹ Derived from two Latin maxims: (i) *Audi alteram partem* translates as 'Hear the other side', but essentially requires that a person affected by a decision must have a proper opportunity to put his case; and *Nemo iudex in sua causa potest* means literally, 'No man shall be judge in his own cause', but acts as a requirement that not only must there be an absence of actual bias in decision making, but there must be an absence of an appearance of bias. Lord Evershed, Master of the Rolls in *Vionet v. Barrett* remarked, that "Natural Justice is the natural sense of what is right and wrong; Maughan J, in *Maclean v. The Workers' Union* [1929] remarked it's a principles of fair play. Mohd Aqib Aslam, 'Principles Of Natural Justice In The Light Of Administrative Law' (2020) 4 Legal Service India <<http://www.legalserviceindia.com/legal/article-1659-principles-of-natural-justice-in-the-light-of-administrative-law.html>>. also Accessed from <http://www.legalserviceindia.com/legal/article-1659-principles-of-natural-justice-in-the-light-of-administrative-law.html> on 18/5/2021

⁵⁰ Section 59A provides that: '(1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision. (2) In this section, "judicial review" includes proceedings instituted by way of— (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari; (b) an application for a declaration or an injunction; (c) any writ of habeas corpus; or (d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act'.

⁵¹ Abdul Rahman Sebli FCJ, Rohana Yusuf PCA, Hasnah Mohammed Hashim FCJ, Mary Lim Thiam Suan FCJ.

⁵² Justices Tengku Maimun CJ and Nallini Pathmanathan FCJ, Harmindar Singh Dhaliwal FCJ.

The ruling in the abovementioned cases was a turning point in the history of the Malaysian constitution as for the longest time since the judicial crisis in 1988 where the court decisions then have supported the doctrine of parliamentary supremacy. The *Alma Nudoc* case could be said to put the final nail on the coffin when the Federal Court by a nine panel members unanimously held and affirmed the constitutional principles in *Semenyih Jaya*, and *Indira Gandhi*. It was held that the judicial review principles cannot be discarded by the Parliament as the doctrines of separation of powers and independence of the judiciary 'were basic structures of the Federal Constitution which could not be destroyed'.

The decision in *Maria Chin* case was perplexing despite the court's decision was unanimous in that. It decided that the respondents has no authority to impose a travel ban on the appellant following the circumstance of the case, however, the majority held that sections 59 and 59A of the Immigration Act 1959/63 were valid and constitutional. The rationale of the majority decision begs clarification to avert the confusion about the basic structure doctrine. Hence before the dust sets in, the basic structure doctrine must be clarified as it is. While it is observed, that the majority of judges distinguished the three cases however they chose to ignore the essence of the basic structure of the constitution, i.e., the fundamental rights in the Federal Constitution. The doctrine of *stare decisis* is also contentious here. If a judge's oath is to be recognised then he undertook an oath to swear and support the constitution and he should only reject the *stare decisis* principles if it is false. This is not the case here, as the basic structure ingrained within the fundamental rights was denied.

Unfortunately, this does not embrace a right-minded interpretation that will secure the rights of the society, i.e., the society feels secure knowing that they have their constitutional rights guaranteed and enforceable through the judiciary. The argument is not well settled on the basis that the majority of judges held that the esteemed judges opinion in the 'three cases' were mere *obiter dicta* and hence had no legal effect on the current case. If one were to revisit *Semenyih Jaya* case, the issue was whether section 40D, an amendment was considered to be constitutionally valid (this is an ouster clause), that allows assessors other than judges to review specific matters within the legislation. Therefore, raising the issue whether the Parliament has the 'judicial power' or when in fact the judicial power rests within the judiciary as per the real interpretation of the Article 121(1) of the Federal Constitution, hence this case challenged non-judicial bodies decisions.

On a closer examination, this case is considered rational if one recognises the democratic doctrine of separation of powers where the independence of the judiciary must be maintained to be the check and balance of any body within the executive or legislature. When these judges delivered the principle judgments in the 'three cases' they recognised that they were under their judicial responsibility to address the basic structure doctrine that has been enshrined in the Federal Constitution. They believed that the principles remain intact and unscathed. Concerning Article 121(1), despite the amendment after 1988, the judicial power is still applicable to the present day.

The argument sets out by the majority concerning Article 121(1) was that the basic structure doctrine was considered to be an abstract doctrine and that the doctrine of separation of powers has never been mentioned in the Constitution. The

apprehension expressed by these judges that the basic structure doctrine will weaken the Parliament's power from amending or removing constitutional provisions that will be considered to be 'basic'. Therefore, this allows for provisions to be changed indefinitely and this would further intensify the power of the courts in that there would be no limitation on the basic structure doctrine. Hence, giving the courts the judicial power to perhaps arbitrarily widen the basic structure doctrine features within the constitution and will be resistant to any changes if in the future recommend. The judges did not recognise this doctrine as a homegrown feature within the constitution and stated that it was a foreign creation that is from the Indian constitutional framework. The judges further stated that the reason why it was recognised and implemented in India was that it disallowed the Parliament from amending the constitution freely.⁵³

In addition, the justification was borne out of the fact that the Indian Constitution did not have a provision equivalent to Article 4(1)⁵⁴ of the Malaysian Federal Constitution and therefore the courts were compelled to discard the doctrine on the basis that Article 4(1) provided adequate supremacy to the constitution. The courts decided that the decision to discard the basic structure doctrine in *Loh Kooi Choon* was valid. Perhaps, what the majority of judges in *Maria Chin* case fail to recognise was that Article 4(1) recognises the constitution to be supreme and therefore provision within the constitution that form the basic features must be valid and given legal effect. This is where the majority judges had failed to consider the efficacy of the real meaning of Article 4(1) of the Federal Constitution. This line of reasoning should not, therefore, have been used to modify the authority in the three cases, rather it should be recognised for clarity in the dissenting judgments.

Unfortunately, the majority of judges were unwilling when there is no reason to find that the basic structure doctrine does not exist and that the legislative power supersedes based on their misinterpretation of the Federal Constitution. This is supported when the supremacy of the constitution was recognised by the Federal Court in *Ah Thian* where Suffian LP held that: 'Parliamentary supremacy cannot be applied in Malaysia as Malaysia has a written constitution'. If this was commonly acknowledged then the objection to the basic structure doctrine enshrined as the fundamental rights might be overcome. To accept responsibility under a judicial oath for the Federal Constitution is to owe more.

In the case of *Indira Gandhi*, Zainun Ali FCJ in recognising the basic structure doctrine, used the term 'beyond a shadow of doubt' that the powers of the judiciary in the hands of the High Courts and includes judicial review, the principles of separation of powers, the rule of law, and the protection of minorities are parts of the basic structure of the constitution. Her ladyship was critical in her judgment and correctly stated that judicial review is fundamental to the role of the courts and an

⁵³ "The mischief that the doctrine aims to strike down is the abuse by the Indian Parliament of its power to amend the Indian Constitution by destroying its basic features. The doctrine therefore works on the footing that Parliament amends the constitution and the amendment destroys its "basic structure". It follows that where no amendment is made to the constitution, the doctrine has no application and is irrelevant" per Abdul Rahman Sebli FCJ.

⁵⁴ Article 4(1) provides that: 'This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'.

integral base within the Constitution. The judge recognised that the basic structure doctrine retains the democratic doctrine of separation of powers and therefore to eliminate this doctrine will result in a miscarriage of justice to the citizens of the country. If this is the case, then this doctrine may not be searched assiduously. This is because to disallow this doctrine such as in *Maria Chin* case may undermine the primary duty of the courts in their judicial oath as the defenders of justice which is owed to the people of Malaysia and beyond. The decision of *Maria Chin* at this moment sadly stands but it may prove to be insignificant as long as judges in potential cases are mindful of the judicial oath to protect the fundamental liberties of the citizens.

Further to the above, the majority decision in *Maria Chin* case rejected the argument of the violation of the doctrine of separation of powers to section 59A of the Immigration Act 1959/63 limits the judicial review powers of procedural non-compliance. They looked at section 59A in extension with Article 121(1) that jurisdiction of courts is 'as may be conferred by or under federal law', and thereby recognising the consistency between section 59A and Article 121(1). Further, based on the historical documents available to the judges in regards to the drafting of the constitution, it was held that a new 'basic feature' of the constitution existed that is the judicial powers were dependent on the legislative powers of the Federation. This inferred that the judges recognised that the new basic feature of the constitution was that the Parliament was supreme over the constitution.

The clarification to be sought here is that if the majority had refused to recognise the existence of the basic structure doctrine in the first place, therefore how can they then call for a new basic structure doctrine within the constitution. The majority in *Maria Chin* also rejected the case of *Semenyih Jaya* in its interpretation of Article 121(1) where they were of the view that the judges in *Semenyih Jaya* case had ignored that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law'. This argument, unfortunately, does not augur with the basic structure doctrine on the basis that it is this doctrine that acts as a check and balance to the abuse of powers by the Parliament in passing laws. Hence, it is a miscarriage of justice for the Parliament to pass laws that limit or take away judicial powers conferred by Article 121(1).

Hence, the majority decision concluded that the right to travel outside of Malaysia is considered to be a privilege given by the Government of Malaysia and the citizens cannot consider this to be fundamental rights as per Article 5 of the Federal Constitution. Applying Article 121(1) of the Constitution, the courts held that anyone can be stopped by the Immigration from traveling abroad based on the procedural rules that may not necessarily be constitutionally valid. The executive has the authority and discretion to prohibit anyone from traveling abroad and the judiciary has no power to review the decision made. This law provides immunity to the Parliament and therefore is shielded from the check and balances of the judiciary. This means that the judiciary is not able to establish the constitutional validity of the actions as the Parliament is given the *carte blanche* to legislate as it pleases. The person who has been barred from traveling has no right to question or object or demand any form of reasoning for this decision. Finally, this case cements the powers of the higher courts concerning judicial review by not giving the judiciary the

power to constitutional review as the only allowance given is in regards to administrative review.

It does not alter the reality that it is reasonable for the right minded citizens within the society to assume that those in the business of making judicial decision ought to be conversant with the legal framework which they operate within and ought to take reasonable steps to protect the citizens of the country from the draconian interpretation of laws. Nor does it mean that citizens should not be accorded protection under the Federal Constitution when it is just and equitable to do. What it should mean is that citizens with *mala fide* intention come to the court and expect the Federal Constitution to protect them from their intentional mischief arising solely for their actions. The basic structure doctrine serves as a symbolic function within the legal framework and it tells the courts to protect the citizens against any infringement of their fundamental liberties or rights. However, the court in *Maria Chin* has gone thru the trouble and fruitless action of insisting based on some external historical documents that there was nothing to prove that the basic structure doctrine existed. In absence of criminal or fraudulent actions by the plaintiff who was invited to receive a humanitarian award for advocating human rights. Can it be said then, the decision in this case does not capture the very spirit of the Federal Constitution for what it was drafted by Reid Commission? It is dubious to dispute that the doctrine within a democratic written constitution is incapable of mitigating the utilisation of equitable principle. It is this harshness of the decisions which now must be explored in later cases albeit courts decision are designed to promote clarity within the principle of *stare decisis*.

Conversely, the net effect of the minority decision was Chief Justice Tengku Maimun⁵⁵ and supported by Nalini FCJ and Harmindar FCJ, where the question was

⁵⁵ “[80] The two judgments aforementioned have held that judicial review cannot be excluded by any Act of Parliament and these two judgments have been approved and followed by a 9-member Bench in *Alma Nudo*. The principles pertaining to judicial power propounded in *Semenyih Jaya* and *Indira Gandhi* have also been applied in *Peguam Negara Malaysia v. Chin Chee Kow and another appeal* [2019] 3 MLJ 444. In *JRI Resources Sdn Bhd v. Kuwait Finance House (M) (Bhd) (President of Association of Islamic Banking Institutions Malaysia & Anor, Interveners)* [2019] 3 MLJ 561, the majority emphasised that it had “no reservations in accepting the proposition of law expounded in the *Semenyih Jaya* case”. [81] Going by the principles that have been elucidated up to this point, it is clear that the supremacy of the FC in Article 4(1) and its corollary device of judicial power are basic features of the FC. Accordingly, the power of the Court to scrutinise State action whether legislative, executive or otherwise, cannot be excluded. This in itself should be a good enough answer to the respondents’ second argument that section 59A can be justified without a definitive ruling on the validity of ouster clauses because it allows for challenges ‘in regard to any question relating to the compliance with any procedural requirement of the Act’. [82] To accede to the submission of learned SFC would mean that Courts can only scrutinise what Parliament allows to be scrutinised. There is no alternative but to reject the submission because it is reminiscent of Parliamentary supremacy. Under Article 4(1), all laws are subject to the FC. And, as garnered from the FC’s legislative history, the intentment of Article 4(1) was to cover all acts whether legislative, executive, quasi-legislative, quasi-judicial, etc. We cannot therefore, in the presence of a written constitution declaring itself to be the highest source of law, adopt the English method of resolving the legality of ouster clauses simply on the basis of statutory construction much in the way the respondents suggest. [83] Accordingly, section 59A of Act 155 must be assessed from the larger angle on whether ouster clauses are, as a whole, constitutionally valid in light of Article 4(1). This is especially so in the context of the respondents’ argument that remedies can be restricted at the discretion of Parliament. The argument will naturally fail if it is found that remedies are an integral aspect of judicial review against which there can be no ouster – whether constitutionally or statutorily evoked”.

whether ouster clauses are valid in light of Article 4(1) of the Federal Constitution. The minority decision held that the said sections 59 and 59A of the Immigration Act 1959/63 that was in contention were unconstitutional and void and therefore clearly infringed the basic structure doctrine that was deeply rooted in the constitution. Nalini FCJ disagreed with the reason given by the majority judges as 'untenable because of Art 4(1) FC, which enshrines constitutional supremacy and not parliamentary supremacy'. Her Ladyship focussed on three questions of law⁵⁶ and stated in answering the questions that Article 121(1) must be read together with Article 4(1).⁵⁷ The fundamental principle of constitutional supremacy under this Article entrenches the doctrine of rule of law and therefore fundamental rights entrenched in the Constitution cannot be in any way considered an ordinary right nor can it be violated by any ordinary laws. This was important as Malaysia practices constitutional supremacy as opposed to the United Kingdom which practices parliamentary supremacy and this was supported with the case of *Ah Thian*.

Further, Raja Azlan Shah in the case of *Loo Koi Choon* said that: 'The framers of our Constitution have incorporated fundamental rights in Part II thereof and made them inviolable by ordinary legislation. Unless there is a clear intention to the contrary, it is difficult to visualise that they also intended to make those rights inviolable by constitutional amendment'. The above quote developed the important idea that the Federal Constitution takes precedence over all organs of State, and therefore this meant that all three State organs must submit to the constitution 'both in spirit and form' and further, the second part of Article 4(1) gives life to the constitution by declaring that any law inconsistent with the constitution will be deemed void. The powers to review such inconsistency will be in the hands of the judiciary to ensure that there is a check and balance against the legislature and the executive.

As stated by Her Ladyship, this article is the 'lifeblood' of the constitution and it is incumbent of the judiciary to defend the constitution.⁵⁸ Hence, Article 4(1) is considered the basic feature of the constitution as it preserves the 'twin pillars of the constitution that is the rule of law and the doctrine of separation of power'. Therefore, to protect the fundamental rights of a citizen, section 59A of the Immigration Act 1959/63 conflicts with the basic structure of the Federal Constitution that allows the courts to judicially review actions that call to inspect the validity of executive action. The rationale to review the validity is to ensure that abuse of powers will not take place. However, this section provides immunity from judicial inquiry and review

⁵⁶ Question 1: Whether section 3(2) of the Immigration Acts 1959/63 empowers the Director General with unfettered discretion to impose a travel ban? In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticizing the Government?

Question 2: Whether section 59 of the Immigration Acts is valid and constitutional?

Question 3: Whether section 59A of the Immigration Acts is valid and constitutional in the light of *Semen yih Jaya*, and *Indira Gandhi*?

⁵⁷ "4. Supreme Law of the Federation This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". "[23] It is evident from a perusal of Article 4(1) FC that it comprises two primary components: (a) First, it provides for constitutional supremacy; (b) Second, it provides for all laws which are inconsistent with any provision of the FC to be declared void, but only to the extent of the inconsistency".

⁵⁸ [30] Hence the oft-quoted truth that it is the Judiciary that is the guardian of the Constitution, and the last bastion for the citizens of Malaysia. The Judiciary acts both as sword and shield to ensure that the Federal Constitution as the supreme law is adhered to.

executive orders under the Immigration Act 1959/63. This also impinges on the judicial power prescribed under the Federal Constitution to judicially review any breach of the rule of law. This is unconstitutional based on the fundamental rights under Article 4(1) and therefore prevails over the ouster clause of section 59A of the Immigration Act 1959/63 and hence, void.

In addition, the three cases⁵⁹ were highlighted in the discussion of Article 121 and these cases were considered to be the constitutional fundamental cause that gives life to the doctrine of separation of powers and the rule of law. The discussion of the cases specifies that the doctrine of separation of powers exists to ensure that the Parliament cannot intrude and infringe the judicial rights and as per section 59A of the Immigration Act 1959/63 where there is a blatant violation and does not augur with the express fundamental of the Federal Constitution thereby destroying the democratic doctrine of separation of powers and the rule of law. As has been mentioned earlier, the above cases are considered important in relation to judicial review.⁶⁰ The Singaporean case of *Mohammad Faizal bin Sabtu v. PP*⁶¹ was cited in *Indira Gandhi* case to clarify the United Kingdom's model versus the Singaporean model which is similar to Malaysia, where the former is based on the supremacy of Parliament whilst the latter is based on the supremacy of the constitution.

The reasons for the decision were articulated with clarity by the dissenting judges and that the courts should follow the established principle with Article 4(1) as it was considered to be 'sacrosanct' and hence, the court is under its constitutional oath and obligation to ensure that it investigates the validity of any statutory provision and complies with the Federal Constitution as per the judicial power sanctioned by the Article read in tandem with Article 121. The dissenting judges rightly held that section 59A of the Immigration Act 1959/63 as void due to the violation of judicial power. The next point was that the three cases applied in the case of *JRI Resources*, were accurate and therefore asserted that independence of the judiciary is important for the check and balance of the other two organs of the State and that judicial power cannot be contravened.⁶² The doctrine of basic structure was discussed with the

⁵⁹ In *Semenyih Jaya, Indira Gandhi, and Alma Nudo*.

⁶⁰ In *Semenyih Jaya*, this Court speaking through Zainun Ali FCJ.

⁶¹ The decision of Chan Sek Keong CJ, the erudite former Chief Justice of Singapore in *Mohammad Faizal bin Sabtu v. PP* [2012] SGHC 163 at paragraphs 14 – 15: "...the Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void. Article 4 of the Singapore Constitution expresses this constitutional principle in the following manner:

"This Constitution is the supreme law of the Republic of Singapore and any law enacted by the legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, void. The specific form of words used in art 4 reinforces the principle that the Singapore parliament may not enact a law, and the Singapore government may not do any act, which is inconsistent with the principle of separation of powers to the extent to which that principle is embodied in the Singapore Constitution".

⁶² [47] However, it is significant that the AGC in taking this stance accepted the following propositions relating to judicial power as pronounced in the trilogy of cases comprising *Semenyih Jaya, Indira Gandhi and Alma Nudo* and summarized in *JRI Resources Sdn Bhd v. Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners* [2019] 3 MLJ 561 ('JRI Resources'):

(a) Judicial power is vested exclusively in the High Courts by virtue of Art 121(1). Judicial independence and the separation of powers are recognized as features in the basic structure of the FC. The inherent judicial power of the civil courts under Art 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism;

argument for the respondent in supporting section 59A of the Immigration Act 1959/63 as valid. Her Ladyship debunked the arguments by stating that such argument was wrong in reading paragraphs 74-77 of the *Semeyih Jaya* case and away from the normal context of the whole judgment and therefore those few paragraphs cannot be justified as the holistic interpretation of the diminishing of the judicial powers thru the amendments. The case analysis stated that courts hold exclusive jurisdiction to judicial power and this was recognised in the original form of Article 121 before the 1988 amendment. The court had refused to adopt the narrow approach adopted by the majority decision in *Kok Wah Kuan* but preferred the following dissenting opinion by Richard Malanjum. In particular, the court noted that: 'I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of federal law. It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature'.⁶³

The basic structure doctrine argument is given force in *Semenyih Jaya* case where the judges established that there exists doctrine of separation of power and independence of judiciary by saying that: 'The judiciary is entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of independence of the judiciary is the foundation of the principle of separation of powers. This is essentially the basis upon which rests the edifice of judicial power'.⁶⁴ The third argument in the same case was with the basic structure doctrine about judicial power where the judges recognised the reasoning by Gopal Sri Ram FCJ in the case of *Sivarasa Rasiah*, as well as the case of *Liyanage v. the Queen*,⁶⁵ and *Keshavananda Bharati*. It is stated that: 'Thus given the strong observations made on the true nature and purpose of the impugned enactment, any

(b) Parliament does not have the power to amend the FC to the effect of undermining the doctrine of separation of powers and the independence of the Judiciary which formed the 'basic structure' of the FC (see paragraphs 74-44 of *Semenyih*; features of the basic structure cannot be abrogated or removed by a constitutional amendment (Indira Gandhi at para 39));

(c) The Courts can prevent Parliament from destroying the 'basic structure' of the FC. 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 (see paragraph 73 of *Alma Nudo*);

(d) A Constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles; the foundational principles of a constitution shape its basic structure

(Indira Gandhi at paragraphs 29 – 30);

(e) Judicial power cannot be removed from the Judiciary; judicial power cannot be conferred upon any other body which does not comply with the constitutional safeguards to ensure its independence; non-judicial Page 7 of 25 *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] MLJU 13 power cannot be conferred by another branch of government onto the judiciary (*Semenyih Jaya* at paragraphs 54, 86 and 105; JRI Resources at paragraph 17) ;

(f) The power of Parliament to make laws with respect to matters enumerated in the Federal or Concurrent Lists of the FC is not to be read as *carte blanche* for Parliament to make law contrary to the doctrine of separation of powers or the exclusive vesting of judicial power under Art 121 (see paragraph 19 of JRI Resources)."

⁶³ *Kok Wah Kuan v. PP* [2007] 4 CLJ 454.

⁶⁴ *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & another* [2017] 3 MLJ 561.

⁶⁵ [1967] 1 AC 259.

alterations made in the judicial functions would tantamount to a grave and deliberate incursion in the judicial sphere ... The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework’.

The Federal Court in the same case decided that the judicial power cannot be discharged to non-qualified persons and if done, it will be ‘*ultra vires*’ of Article 121 of the Federal Constitution. This doctrine has not been hewn out singlehanded and, in the current case of *Maria Chin*, the observations made by Her Ladyship clearly shows that the judiciary must discharge its duty under Article 4(1) to review any action that will cause peril to the Federal Constitution and to do so judicial independence under the purview of Federal Constitution is important as failure to recognise this will render the doctrine of separation of powers and rule of law obsolescent and to move from constitutional supremacy to parliamentary supremacy will be going against the very basic foundation of the written constitution that this country was formed. This also renders that this Article declares that constitutional supremacy boldly supersedes parliamentary supremacy which means that any law which is inconsistent with the constitutional provision shall to the extent of the inconsistency be void. Perhaps, what the majority of judges in this case did was to countenance the possibility without deciding that might be the implied limitations on the power of the executive actions to the power of the constitution and that these procedural limitations must be considered in light of the rule of law. Since the constitution is the supreme law, this approach has had considerable support, that in recent years Malaysian courts have seen fit not to recognise the ouster clauses and felt inclined to reverse their position in support of constitutional supremacy.

THE DOCTRINE OF ECLIPSE IN EXECUTIVE AND JUDICIAL POWER

In delivering the decision, what the judges in *Maria Chin* did not consider was the applicability of the doctrinal principle recognised as the ‘doctrine of eclipse’.⁶⁶ Superlatively, this doctrine posits and visualises that the fundamental rights principles are forthcoming. It proposes that any law made by the legislature that conflicts with the fundamental rights of a constitution will be void and defective to the extent that is eclipsed and dominated by fundamental rights. The best and simple application, in this case, means that sections 59 and 59A of the Immigration Act 1959/63 are in infringement of fundamental rights and thus will be concealed and obscured by these rights due to the constitutional supremacy thereby forming the eclipse on it. To remove such restriction and makes these provision valid, the corresponding constitutional provisions must be amended. This is not the case in Article 4(1) which remains supreme.

This doctrine corresponds to Part II of the Federal Constitution that is in line with the basic structure of the fundamental liberties or rights.⁶⁷ Although fundamental rights

⁶⁶ Leone Niglia, ‘Eclipse of the Constitution (Europe Nouveau Siècle)’ (2016) 22 European Law Journal 132.

⁶⁷ Part II Fundamental Liberties 5. Liberty of the person 6. Slavery and forced labour prohibited 7. Protection against retrospective criminal laws and repeated trials 8. Equality 9. Prohibition of banishment and freedom of movement 10. Freedom of speech, assembly and association 11. Freedom of religion 12. Rights in respect of education 13. Rights to property in Government of Malaysia.

does not eliminate this doctrine in its entirety, it is nevertheless possible to be resolved by constitutional amendments and thus eradicating the eclipse and the desired law will become legal. Hence, the question that has to be answered is whether the basic structure doctrine provides a kind of insurance policy against the ouster clauses in extreme abuse of power that violates the supremacy of the constitutional. Surely, the executive and legislature must have confidence in the constitution and should not consider it as an alien document imposed by the British colonial masters. As stated by Raja Azlan Shah FCJ in the case of *Loi Koi Choon*: 'The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men'.

The constitution is not inscribed in stone and thus it is an ever-evolving document. In a progressive and progressed nation, fundamental rights must and should always be enshrined as the basic structure to the constitution to give people confidence in the governance and administration of the country. The fundamental peculiarity essential to the doctrine of eclipse is commanded by the rule of law which determines what is legitimate and illegitimate.⁶⁸ The fundamental and essential principle to natural justice that is central to administrative law most is the *ultra vires* doctrine, thereby to differentiate the legality or illegality of the law is conferred to the courts. The challenge is that the powers conferred must be used lawfully (by upholding the rule of law), and if otherwise acted, it should be deemed to be illegal and unlawful and there should not be any retrospective revival in future decisions.

The framers of the constitution, when they incorporate the fundamental rights, perhaps foresaw the infringement of fundamental rights by the other two organs of the State through ouster clauses legislative power. Courts, as guardians of the constitution, act through the consciousness of the law, therefore, the Parliament or the executive can justify their actions were valid through the principle of proportionality⁶⁹ to decide and justify the law and the law is appropriate as a means to an end. With respect, for the reasons above, it is intolerable not to settle that if the majority rationale on basic structure principle will become a relic. It is necessary to take responsibility to achieve the anticipated outcome that the written Federal Constitution was enacted to protect the fundamental liberties of a person. This means not only vehemently questioning the judgment of *Maria Chin* case, but it also necessitates an engagement and battle with other similar cases. The Federal Court's

⁶⁸ Sushila Rao, 'The Doctrine of Eclipse in Constitutional Law: A Critical Reappraisal of its Contemporary Scope and Relevance' (2006) 18 Student B Rev 45.

⁶⁹ Three-part proportionality test that asks: (1) whether the law is "rationally connected" to the stated purpose; (2) whether the law "impair[s] the right in question as little as possible"; and (3) whether the limitations are proportional to the objective—"the more severe the deleterious effects of a measure, the more important the objective must be." Ontario Public and others, *R v Oakes* [1986] 1 SCR 103, 1986 CanLII 46 at paras 69–70 accessed from <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do>

decision mentioned in this article have recognised the challenges and struggles within the interpretation in the judiciary decision-making power.

Forsyth said that it is 'apparently equally clear that an unlawful decision is often effective until set aside by a court of competent authority. And, if that unlawful decision is not successfully challenged, it will turn out to be as good as the most proper decision'.⁷⁰ Therefore, the necessary proceeding taken in *Maria Chin* to establish the cause of validity in the Immigration provisions will remain effective and every sense an unlawful administrative act. Hence, the line of reasoning in *Maria Chin* case is respectively, an ambiguous decision in contrast to other decisions of the Federal Court. It is submitted that the reasoning is implicit in the outcome of future Federal Court cases since the reasoning in *Maria Chin* case is defective in that it cracks the principle of fundamental liberties that is the basic human rights of the basic structure of the written constitution. The titans in 'three cases' recognised that fundamental rights exist and the courts owe a duty to its existence which of course is a natural conclusion.

WHETHER MAJORITY OF THE FEDERAL COURT IN *MARIA CHIN* MAY DEPART FROM ITS UNANIMOUS DECISION IN *SEMENYIH JAYA*, *INDIRA GANDHI*, AND *ALMA NUDO*?

The maxim *stare decisis et non quieta movere* literally means 'to stand by the decision', and 'not to disturb the settled matters', i.e., to stick with what has been decided or the like cases should be decided alike. The commonly used term is the doctrine of *stare decisis* or the judicial precedent which dictates that it is necessary for each lower tier to accept loyally the decision of the higher tiers. Thus, a court other than the highest court is obliged generally to follow the decision of the court at a higher or the same level in the court structure subject to certain exceptions. The application of the doctrine from a higher court to a lower court is called the vertical *stare decisis*. Whereas, the notion that a judge is bound to follow or respect the decision of an earlier judge of similar or coordinate jurisdiction is called horizontal *stare decisis*.⁷¹ Further, the rule of judicial precedent shall apply whenever the relevant facts of an earlier case is similar to the facts of a subsequent case, i.e., the relevant facts of the two cases are similar. However, if the facts are not similar then the earlier decision would be distinguished and as such would not be binding on the subsequent case.⁷² There are numerous judicial pronouncements of the superior courts in Malaysia as well as other common law jurisdictions calling for among others, a strict adherence to this doctrine. The observance of the doctrine is necessary in the interest of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Any failure to observe the same may create chaos and the misapprehensions in the judicial system. In *Public Prosecutor v. Datuk Tan Cheng Swee & Anor*,⁷³ where Chang Min Tat FJ said: "It is however necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the

⁷⁰ Christopher Forsyth, *The Metaphysic of Nullity*, in *The Golden Metwand And The Crooked Cord: Essays In Honour Of Sir William Wade* QC 142, 144 (Christopher Forsyth & Ivan Hare eds., 1998).

⁷¹ See *Pengurusan Danaharta Nasional Berhad v. Yong Wan Hoi & Anor* [2007] 6 MLJ 709.

⁷² See *Chai Kok Choi v. Ketua Polis Negara & Ors* [2008] 1 CLJ 113.

⁷³ [1980] 2 MLJ 276, 277.

High Court and other inferior Courts in a common law system such as ours, to follow similarly'. It is necessary for Federal Court vide the horizontal application of the *stare decisis* and the each lower tier vide the vertical application of the *stare decisis* to accept loyally the decision of their predecessor and the higher tiers respectively and if it be otherwise, chaotic consequences would follow.

The basic structure doctrine was affirmed by the Federal Court in *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo*. In fact, in *Alma Nudo*, a 'nine member bench' reiterated the acceptance of basic structure doctrine in Malaysia.⁷⁴ However, the recent *Maria Chin* case a panel of 'four Federal Court judges' forming the majority decision had discarded this doctrine while the minority decision comprising of 'three judges' had reaffirmed this doctrine. The question arises as to whether the majority in *Maria Chin* is entitled to disregard their own earlier ruling on this subject more so when a 'nine member bench' in *Alma Nudo* had unequivocally affirmed this doctrine. It is not disputed of the well established rule that when two decisions of the Federal Court are in conflict, the later decision should prevail over the earlier decision. However, the matter does not rest here since it is always possibility for the subsequent panel of the Federal Court to revert back to their earlier ruling on the basic structure doctrine and hence, this trend could result in chaotic situation.

CONCLUSION

The recent majority Federal Court's decision in *Maria Chin* case had reverted back to their earlier approach of disapproving the basic structure doctrine and hence, going against their own earlier acceptance of this doctrine in *Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo*. The majority decision in *Maria Chin* stated, *inter alia*, that the basic structure doctrine was an abstract doctrine and that the doctrine of separation of powers has never been mentioned in the constitution. The apprehension expressed by the majority was that the basic structure doctrine will weaken the Parliament's power from amending or removing constitutional provisions that will be considered to be 'basic'. The minority decision in *Maria Chin* however affirmed their earlier decision in relation to the basic structure doctrine. In this regard, the accepted rule in relation to conflicting decisions of the apex court is that the later decision of the Federal Court should prevail over their earlier decision. What is feared however is that there is a possibility for the subsequent Federal Court panel to revert back to their earlier ruling on the basic structure doctrine. Accordingly, the Federal Court's flip-flopped ruling on basic structure doctrine, besides creating a chaotic situation, could undermine the doctrine of judicial precedent.

⁷⁴ This case was heard by a panel of nine Federal Court judges as follows: Richard Malanjum CJ, David Wong Dak Wah CJ (Sabah and Sarawak), Ramly Ali FCJ, Balia Yusof Wahi FCJ, Alizatul Khair Osman FCJ, Rohana Yusof FCJ, Tengku Maimun Tuan Mat FCJ, Abang Iskandar FCJ and Nallini Pathmanathan FCJ.



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