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THE GERMAN ETERNITY CLAUSE, HANS KELSEN AND THE MALAYSIAN BASIC STRUCTURE DOCTRINE

MONIKA POLZIN[1]

The present article explores the use of comparative constitutional law through the recent development of jurisprudence by the Malaysian Federal Court to justify the existence of the basic structure doctrine in the Malaysian Constitution. Firstly, it reviews the dissenting opinion of Malaysian Chief Justice Tengku Maimun in 2021 and the unanimous decision of the Malaysian Federal Court in 2022. Here, the existence of implied limits for constitutional amendments is also explained with a reference to the works of the Austrian constitutional lawyer Hans Kelsen and German constitutional law. Secondly, the article describes in detail the German and Austrian sources used by the Malaysian decisions. Finally, it focuses on the crucial theoretical question about the limits on the use of abstract ideas of constitutionalism during constitutional interpretation in relation to the basic structure doctrine. It argues that the concept of a basic structure should only be applied in the framework of democratic and liberal constitutional orders or at least if there is a hybrid order only with regard to democratic and liberal constitutional elements. The reason is that the ultimate purpose of the basic structure doctrine should not be the preservation of a given constitution as such, but only the protection of a democratic and liberal constitution from autocratic erosion.

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INTRODUCTION

"*Und die Blumen blüh'n überall gleich*"

("*And the flowers bloom everywhere the same*")

is a song by the famous Austrian singer Udo Jürgens. This song describes the common theme of coexistence of all human beings. While their interdependence is appreciated on one hand, their individuality is appreciated on the other.

The field of comparative constitutional law possesses structural similarities to the aforementioned idea as constitutional orders are characterised by common features, themes, and legal links, while also possessing a unique constitutional individuality expressed in specific provisions which express a distinctive constitutional culture.[2] The relationships between constitutional individuality, foreign constitutional provisions, and their interpretation as well as the abstract ideas of constitutions and constitutionalism,[3] are very important subjects for a (comparative) lawyer. The core theoretical issues within are the limits on the use of comparative (foreign) law and the abstract ideas of constitutionalism in the course of a constitutional interpretation.

The present article explores the recent use of comparative constitutional law by the Malaysian Federal Court ("**The Federal Court**") to justify the existence of the basic structure doctrine in Malaysia. *First*, it shall review a

[2] The notion of constitutional individuality is different from the theoretical idea of constitutional identity as it is not related to the relevant identity of a community or a group of people but describes only the banal fact that every Constitution has different elements. On the different ideas and concepts of constitutional identity, *see, e.g.*, Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GER. L. J. 1595, 1595-1616 (2017).

[3] A different formulation resp. image is used by JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 3 (Yale Univ. Press 2012). He argues that "*convergent currents of foreign statutes, foreign constitutional provisions, and foreign precedents sometimes add up to a body of law that has its own claim on us: the law of nations, or ius gentium, which applies simply as law, not as the law of any particular jurisdiction*."

unanimous decision of the Malaysian Federal Court of Justice in 2022[4] and the dissenting opinion of the Malaysian Chief Justice Tengku Maimun in 2021,[5] which argued expressly that the Malaysian Federal Constitution ("**Malaysian Constitution**" **or** "**FC**") enshrines in itself the basic structure doctrine.

The peculiar nature of their arguments is that the existence of implied limits for constitutional amendments is not justified with a reference to the famous *Kesavananda Bharati* v. *State of Kerala* ("**Kesavananda**") judgement of the Supreme Court of India[6] but, surprisingly, with a reference to the works of the Austrian constitutional jurist Hans Kelsen and German constitutional law, which are seen as examples of the right idea of a constitution and constitutionalism by the Federal Court.[7] This aspect is discussed by the author in the first section of the paper. *Second*, the article shall attempt to comprehensively describe the German and Austrian sources used by the Malaysian Justices to support their rationale regarding the basic structure doctrine. *Third*, the author focuses on the crucial theoretical questions about the limits on the use of comparative constitutional law and abstract ideas which are referred to while justifying the basic structure doctrine.

The conclusion shall provide that the contemporary justifications of the Malaysian basic structure doctrine by the Federal Court are unfortunately based on weak comparative law arguments rather than the more persuasive rationale for this doctrine, which can be found in the idea that certain constitutional principles have to be protected because they constitute the very core of a democratic and liberal order.

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[4] Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356 (Malaysia).

[5] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (per Tengku Maimun, J., dissenting).

[6] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India).

[7] In this regard Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356, ¶ 196 (Malaysia): "*A consideration of constitutionalism in general bears out such a construction to be afforded to Article 4(1) of the FC, and thus the Constitution as a whole*." *See also* in more detail below.

THE RECENT JUSTIFICATIONS

A. THE BACKGROUND

The idea of implied limits for constitutional amendments, namely that certain basic features of a constitution cannot be modified by a Parliament having the amendment power, is an old and disputed constitutional doctrine.[8] The Supreme Court of India was the first constitutional court to adopt this doctrine with a slight majority (7:6) in its landmark *Kesavananda* judgement.[9]

In Malaysia, the situation is different, as a "*Kesavananda moment*"[10] is still missing. The Federal Court has never annulled constitutional amendments to date. Instead, the basic structure doctrine is used "only" as an interpretational device while deciding on the constitutional validity of an ordinary law[11] or interpreting constitutional amendments.[12] Moreover, in the absence of an express provision in the Malaysian Constitution,[13] the basic structure doctrine is an inherently contested idea.[14] The Malaysian

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[8] *See* regarding its origins in French and German constitutional thought at the beginning of the 20th century: Monika Polzin, *The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting*, 5 Indian L. Rev. 45 (2021); extensively on implied limits: YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (Oxford Univ. Press 2017).

[9] Kesavananda Bharati v. State of Kerala.

[10] Wilson Tze Vern Tay, *Basic Structure Revisited: The Case of Semenyih Jaya and the Defence of Fundamental Constitutional Principles in Malaysia*, 14 ASIAN J. COMP. L. 113, 143 (2019).

[11] *See* Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356 (Malaysia).

[12] Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Dearah Hulu Langat and another case, Federal Court, [2017] 3 MLJ 561, ¶¶ 61-91 (Malaysia); Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors, Federal Court, [2018] 1 MLJ 545 (Malaysia).

[13] MALAYSIA CONST.

[14] *See* discussions of the Malaysian basic structure doctrine before the recent decisions: *e.g.*, very comprehensively: Tze Vern Tay, *supra* note 10, at 113; Low Hong Ping, *The Doctrine of Unconstitutional Amendments in Malaysia: In Search of our Constitutional Identity*, 45(2) J. MALAYSIA & COMP. L. 53 (2018); Jaclyn L. Neo, *A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia,* 15 ASIAN J. OF COMP. L. 69 (2020); Hafidz Hakimi Haron, *The Doctrine of Basic Structure in Malaysia: Between the Protection of Fundamental Liberties, National Identity and Islam* (International Convention on the Basic Structure of the Constitution, 2021),

Constitution solely contains procedural requirements for constitutional amendments and imparts four different amendment procedures for the same.[15] The most important one is enshrined in Article 159, paragraph 3 of the Malaysian Constitution,[16] which provides a requirement for the adoption of a proposed constitutional amendment by at least a two-thirds majority of the total number of members in both the Houses of Malaysia's Federal Parliament[17] (**the Senate "*Dewan Negara*" and the House of Representatives "*Dewan Rakyat*"**).[18]

Therefore, it comes as little surprise that the Federal Court has rejected the basic structure doctrine in several decisions since 1977,[19] providing various justifications for the same. One core argument is that the Malaysian Constitution does not contain any express material limits, but only procedural limitations. Furthermore, it is provided that if the drafters of the Malaysian Constitution had intended to include material limits, they would have done so expressly.[20] Therefore, the courts are only allowed to

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https://oarep.usim.edu.my/jspui/bitstream/123456789/16096/1/The%20Doctrine%20of%20Basic%20Structure%20In%20Malaysia.pdf.

15 *See* Neo, *supra* note 14, at 75.

16 *Id.*

17 MALAYSIA CONST. art. 159, ¶ 3 reads as follows: "*A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.*"

18 *See* MALAYSIA CONST. art. 44.

19 *See, e.g.*, Loh Kooi Choon v. Government of Malaysia, Federal Court, [1977] 2 MLJ 187 (Malaysia); Phang Chin Hock v. Public Prosecutor, Federal Court, [1980] 1 MLJ 70 (Malaysia); Public Prosecutor v. Kok Wah Kuan, Federal Court, [2008] 1 MLJ 1, 15 (Malaysia); Goh Leong Young v. ASP Khairul Fairoz Rodzuan & Ors, Zabariah Mohd FCJ (majority), Federal Court, [2021] 5 MLRA 554 (Malaysia); Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor, Federal Court, [2021] 3 MLRA 1 (Malaysia); Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and Other Appeals, Federal Court, [2021] 3 MLRA 260 (Malaysia); Zaidi bin Kanapiah v. ASP Khairol Fairoz bin Rodzuan and other cases, Hasnah Hashim FCJ, [2021] 3 MJJ 830 (Malaysia).

20 *See, e.g.*, Phang Chin Hock v. Public Prosecutor, Federal Court, [1980] 1 MLJ 70, 72 (Malaysia); Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and Other Appeals, Federal Court, [2021] 3 MLRA 260; paras. 191 and 193 (Malaysia); see also Zaidi bin Kanapiah v. ASP Khairol Fairoz bin Rodzuan and other cases, Hasnah Hashim FCJ, [2021] 3 MJJ 830, ¶ 263 (Malaysia) citing the first judgement Loh Kooi Choon v. Government of Malaysia (1977).

strike down constitutional amendments that are not adopted in accordance with the procedural requirements as set out in the Malaysian Constitution, otherwise, it would amount to disregarding the supremacy of the Constitution contained in Article 4(1).[21]

Another line of analysis involves a comparison between the Constitutions of India and Malaysia. The key difference between both of them comes in their origins, wherein it is argued that, in contrast to the Indian Constitution of 1950, the Malaysian Constitution was not adopted by a constituent assembly and given by the people.[22] The Malaysian Constitution was instead approved by the British Parliament, the Malayan Legislative Council (the then-federal legislature) and the legislature of every Malay State after a draft of the same was agreed to by the British Government, the Malay Rulers and by the then-Alliance Government.[23] It is therefore argued that because the Malaysian Constitution was not elaborated by a constituent assembly and given by the people, the distinction between the power of the Parliament to amend the Constitution via a constituent capacity and to make ordinary laws in its legislative capacity is inapplicable.[24] The basic structure doctrine is viewed as a foreign concept that cannot be incorporated via an interpretation in the Malaysian Constitution, which in itself contains no indication that it enshrines such a doctrine.[25]

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[21] *See, e.g.*, Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and Other Appeals, Federal Court, [2021] 3 MLRA 260, ¶ 192 (Malaysia); repeated in: Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, Hasnah Hashim FCJ, [2021] 3 MJJ 830, ¶ 271 (Malaysia).

[22] Phang Chin Hock v. Public Prosecutor, Federal Court, [1980] 1 MLJ 70, 73-74 (Malaysia); repeated in Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, Hasnah Hashim FCJ, [2021] 3 MJJ 830, ¶ 268 (Malaysia).

[23] Phang Chin Hock v Public Prosecutor, Federal Court, [1980] 1 MLJ 70, 73 (Malaysia).

[24] *Id.*

[25] Very clear in Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and Other Appeals, Federal Court, [2021] 3 MLRA 260; ¶ 194: "*The basic structure concept which took root in an alien soil under a distinctly different constitution and differs from our own historical and constitutional context, should not be pressed into use in aid of interpretation of our very own FC*." Cf. already Loh Kooi Choon v. Government of Malaysia, Federal Court, [1977] 2 MLJ 187, 188-89 (Malaysia).

B. THE NEW JUSTIFICATIONS

Other decisions of the Federal Court have (sometimes) indicated a subtle support for the basic structure doctrine.[26] Finally, in 2022, the judgement written by Federal Justice Nallini Pathmanathan expressly stated, "*In this way, constitutional amendments cannot operate to change the identity of the FC itself as borne out by the express words of art. 4(1) of the FC.*"[27] (see under (i)). This judgement and a previous dissenting opinion of Chief Justice Tengku Maimun (see under (ii)) support the idea of a basic structure doctrine based on the supremacy clause in Article 4(1) ("**Art. 4(1)**"). Art. 4(1) of the Malaysian Constitution states, "*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.*"

Dhinesh Tanaphll v. Lembaga Pencegahan Jenaya 11th April, 2022 – (i)

While examining the constitutionality of Section 15B ("**S.15B**") of the Prevention of Crime Act, 1959 ("**POCA**"), an ordinary law,[28] Justice Pathmanathan argued that the Malaysian Constitution encompasses the basic structure doctrine, which can be understood as "*the constitutional principle that the basic features or basic structure of a constitution cannot be destroyed or emasculated by a constitutional amendment duly passed by Parliament in accordance with prescribed procedures …*"[29] S.15B of the POCA contains an ouster clause and limits the scope of judicial review for the decisions of the Prevention of Crime Board, an executive organ, in relation to preventive detentions. It

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[26] Cf. the obiter dictum in: Sivarasa Rasiah v. Badan Peguam Malaysia & Anor, Federal Court, [2010] 2 MLJ 333, 342 (Malaysia); alluding to the basic structure doctrine: Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Dearah Hulu Langat and another case, Federal Court, [2017] 3 MLJ 561, ¶¶ 75-91 (Malaysia); see also the review of this judgement by Tze Vern Tay, *supra* note 10; clearer statements in: Alma Nudo Atenza v. PP & Another Appeal, Federal Court, [2019] 3 MLRA 1; ¶¶ 69-74 (Malaysia) and Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors, Federal Court, [2018] 1 MLJ 545, ¶¶ 48-49, 58 and 90 (Malaysia).

[27] Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors., Federal Court, [2022] 3 MLJ 356, ¶ 195 (Malaysia).

[28] *Id.* ¶¶ 112 et seq.

[29] *Id.* ¶ 166. The Definition is the one adopted by the former Chief Justice of Singapore, the Right Honourable Dato' Seria Chan Sek Keong. (*Id.* ¶ 166).

excluded judicial scrutiny save for procedural irregularities relating to the procedural provisions in the POCA only.[30] Justice Pathmanathan argued that S.15B of the POCA is inconsistent with Art. 4(1) of the Malaysian Constitution as it prevents the scope of judicial review.[31] In order to come to this conclusion, she undertook an extensive interpretation of the supremacy clause in Art. 4(1). As the supremacy clause ensures that all laws comply with the FC, it "*also recognises, embraces and encompasses the concept of the basic structure or fundamental legal structure of the Federal Constitution*".[32]

The idea that the supremacy of the Constitution also implies implicit limits for constitutional amendments is based on three core arguments.

The first one is the well-known[33] idea that a modification or abrogation of the fundamental provisions or essential features of the Constitution would lead to the creation of "*a new Constitution*."[34] Such an amendment would be "*clearly contrary to the spirit, purpose and object of the Federal Constitution itself.* "[35]

The second line of argument is based directly on the wording of Art. 4(1). Justice Pathmanathan argues, like Chief Justice Mainum earlier (see below under II.), that the word "*law*" used in Art. 4(1) encompasses not only ordinary laws but also constitutional amendments. Amendments are introduced and enacted as federal laws adopted by the Parliament as

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[30] *Id.* ¶¶ 30-36 and ¶ 104. The Clause reads as follows: "15B(1) *There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision*." (¶ 30).

[31] *Id.* ¶ 212.

[32] *Id.* ¶ 120; *see also* ¶ 201.

[33] This argument can be found in various sources, such as *e.g.*, Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India), ¶¶ 91, 225-6, 311 (S. M. Sikri, J.); ¶ 580 (J.M Shelat & A.N. Grover, JJ); ¶¶ 1196-7, 1260 (P. Jagmohan Reddy, J.) and ¶ 1480 (H. R. Khanna, J.). *See also* the German constitutional lawyer CARL SCHMITT, VERFASSUNGSLEHRE [CONSTITUTIONAL THEORY] 104 (Dunker & Humblot 1928, repr. 2017). However, the decision does not refer to these sources.

[34] Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors., Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶¶ 125, 192.

[35] *Id.* ¶ 192.

required by Articles 159 and 160(2) of the Malaysian Constitution.[36] Art. 4(1) therefore prohibits amendments inconsistent with the Malaysian Constitution. In order to prevent the amendment provision in Article 159 from becoming nugatory, not all constitutional amendments are prohibited, but only those relating to the identity of the Constitution.[37]

The third idea is the justification of this interpretation with a reference to constitutionalism and comparative law arguments. The core argument is that the construction of Art. 4(1) as an eternity clause is required by the idea of constitutionalism.[38] To justify this outcome under the heading of "*constitutionalism*",[39] Justice Pathamanthan makes a short comparative exercise (encompassing 5 paragraphs)[40] by referring in particular to the Constitution of Germany and the works of the former German constitutional judge Dieter Grimm. This reference might be explained by the fact that Dieter Grimm had previously given a presentation (on Feb. 9, 2022) at the 12th Tun Suffian Memorial, Faculty of Law Golden Jubilee Lecture at the University of Malaya on "*Reflections and Lessons of a Constitutional Judge: Decision-Making, Law and Politics, Legitimacy and Acceptance*" [A1].[41] Justice Pathmanathan cites the work of Dieter Grimm,[42] arguing that the amending power as an intermediate power cannot enact a new constitution and refers to his statement that since the amendment power is a constituted power, there is no amendment power without limits.[43] She then refers to the express eternity clause of the German Basic Law which also incorporates substantial limits to constitutional amendments,[44] and

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[36] *Id.* ¶¶ 175-186.

[37] *Id.* ¶¶ 189-195.

[38] *Id.* ¶ 196. She wrote: "*A consideration of constitutionalism in general bears out such a construction to be afforded to Article 4(1) of the FC, and thus the Constitution as a whole*."

[39] *Id.* ¶¶ 196-200.

[40] *Id.*

[41] Available at: Faculty of Law, Univisiti Malaya, The 12th Tun Suffian Memorial - Faculty of Law Golden Jubilee Lecture, YOUTUBE (Feb. 9, 2022), https://www.youtube.com/watch?v=tHqQm23g1NA.

[42] Dhinesh a/l Tanaphll v. Lembaga Pencegahan Jenayah & Ors., Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶ 196. She refers to Dieter Grimm, *Constituent Power and Limits of Constitutional Amendments*, 2 NOMOS. LE ATTUALITÀ NEL DIRITTO (2016).

[43] Dhinesh a/l Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶ 197.

[44] The German eternity clause in Article 79 ¶ 3 of the German Basic law reads as follows: "(3) *Amendments to this Basic Law affecting the division of the Federation into Länder, their*

cites Grimm's statement that the clause limits the amendment power in the interest of democracy.[45]

In the next paragraph she states, without giving further explanations, that the supremacy clause in Art. 4(1) is the "*eternity clause*" of the Malaysian Constitution and "*...ensures that the fundamental identity and the guarantees offered by the FC are not removed or abrogated.*"[46] Therefore, there is no need to adopt the basic structure doctrine of the Supreme Court of India, as the Malaysian Constitution itself contains Art. 4(1) that protects its identity.[47] The underlying idea here seems to be that every constitution either has express limits for constitutional amendments or implied limits. Justice Pathamanthan makes the distinction between constitutions with eternity clauses, including the Malaysian Constitution, and countries with constitutions without eternity clauses that develop the idea of implied limitations.[48]

Zaidi bin Kanapiah v. ASP Khairul Rodzuan 27th April 2021[49] – (ii)

The forerunner of Justice Pathmanathan's decision was the dissenting opinion of Chief Justice Tengu Maimun on April 27, 2021. The Chief Justice argued that the Malaysian basic structure doctrine is engrained in Art. 4(1). Art. 4(1) incorporates the principle of constitutional supremacy that also includes the basic structure doctrine given by the founding fathers of the Constitution. Therefore, there is no need to adopt the Indian basic structure doctrine.[50]

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participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." *See* English Translation of the German Basic Law at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0415.

[45] Dhinesh a/l Tanaphll v. Lembaga Pencegahan Jenayah & Ors., Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶ 198.

[46] *Id.* ¶ 199.

[47] *Id.* ¶ 200.

[48] *Id.* ¶¶ 199, 200.

[49] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (Tengku Maimun, J., dissenting).

[50] *Id.* ¶ 94. *See also* ¶ 102.

The dissenting opinion of Chief Justice Tengku Maimun is particularly based on the idea that the basic structure doctrine can be justified by the work of the Austrian constitutional jurist Hans Kelsen. She starts her justification with the assumption that the doctrine should rather be attributed to Kelsen and his idea of a "*Grundnorm*" developed in the book "*Pure Theory of Law*" than to the Supreme Court of India.[51] Kelsen lived at a time "*when the many States in Europe gained independence and started drafting their own written constitutions.*"[52] She directly links the basic structure doctrine to the works of Kelsen. She argues that according to Kelsen's theory, the "*Grundnorm*" is the "*First Constitution*" and is presupposed to be binding as the basis for validating all laws including the Constitution.[53] Therefore, according to her, "*changing the basic features of the FC would result in a change of the Grundnorm or the first Constitution of this country and thus effectively eliminate the very foundation of Malaysia itself.*"[54] This assessment is regarded as the "*thrust of*" the basic structure doctrine.[55]

The arguments provided by Chief Justice Maimun, like Justice Pathmanathan, are based on a formal reading of the text of the Malaysian Constitution, namely that Art. 4(1) is not limited to ordinary laws but also encompasses constitutional amendments.[56] The core idea is that the wording "*any law*" in Art. 4(1) indicates that it is more broadly defined than the words "*federal law*" in the amendment provisions in Art. 159 and that Art. 4(1) therefore also covers constitutional amendments.[57] Furthermore, another argument is that Art. 4(1) uses the term "*this Constitution*" and Art. 159 of the FC uses the words "*provisions of this Constitution*", implying that "*this Constitution*" is suggesting "*something wider.*"[58]

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[51] *Id.* ¶ 68.

[52] *Id.* ¶ 69.

[53] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (Tengku Maimun, J., dissenting) ¶ 71, she cites: Julius Cohen, *The Political Element in Legal Theory: A Look at Kelsen's Pure Theory*, 88 YALE L.J. 1, 12 (1978).

[54] *Id.* ¶ 72.

[55] *Id.* ¶ 72.

[56] *Id.* ¶¶ 79-85.

[57] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (Tengku Maimun, J., dissenting) ¶ 82.

[58] *Id.* ¶ 84.

It is further argued by Chief Justice Maimun that the formulation "*this Constitution is the supreme law of the Federation*" relates to the concept of constitutionalism, which validates the Malaysian Constitution.[59] She cites the works of Larry Baker, "*From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*" that "*Constitutionalism (…) might be understood as a systematisation of thinking about constitutions grounded in the development since the mid-20th century of supranational normative systems against which constitutions are legitimated.*"[60] Her conclusion is that the drafters of the Malaysian Constitution "*had in mind certain basic principles which ought to form the bedrock of this country and that under art 159(1), Parliament may amend certain provisions of it without amending the central tenets of 'this Constitution'. This is a safeguard as couched in the wide language of the first limb of art. 4(1) to cast away any attempt to cause the FC to implode on itself by abuse of the legislative process*."[61] The surprising conclusion is that Article 4(1) contains substantially the same principles as the eternity clause of the German Basic Law.[62]

C. CONCLUSION

The aforementioned observations justify, quite uniquely, that the Malaysian basic structure doctrine is in essence a required component of the principle of constitutional supremacy enshrined in Art. 4(1) of the Malaysian Constitution. This new line of reasoning distinguishes the Malaysian doctrine from the earlier classical theoretical explanations of the basic structure doctrine. *First*, it is completely different from the theoretical justification advanced by the German constitutional lawyer Carl Schmitt that there is a distinction between an amendment and constituent power and his idea of an almighty and mystical constituent power.[63] Furthermore, the recent Malaysian approach has no similarities with the related rule of law idea that the parliament, through its amending power, should not have

[59] *Id.* ¶¶ 86-7.
[60] *Id.* ¶ 87.
[61] Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases, [2021] 3 MLJ 759 (Malaysia) (Tengku Maimun, J., dissenting) ¶ 88.
[62] *Id.*
[63] *See* in detail below under "Constitutional Individuality and Constitutionalism", section B.

the power to destroy the constitution, as this power ultimately lies with the people acting through a constituent assembly.[64]

Second, even though it has some closeness with the theoretical justification that certain provisions are unamendable because they incorporate fundamental, natural law principles essential for a democratic constitutional state,[65] the Malaysian approach is quite unique. The justification is less concerned with the preservation of judicial independence as a specific natural law or fundamental principle to be identified in the Malaysian Constitution but is primarily guided by the core idea that the idea of a constitution and its supremacy itself necessitates the existence of the basic structure doctrine. This approach is accompanied by a special method of constitutional interpretation. Both the judges refer to foreign sources, in particular the German Constitution and/or the work of Hans Kelsen. However, they do not use these sources as particular examples but mostly as proof of a more abstract argument, that the basic structure doctrine is justified by the abstract and general idea of constitutionalism and the idea of a constitution. Chief Justice Tengku Maimun uses Kelsen's idea of a "*Grundnorm*" as the real basis of the basic structure doctrine[66] and the abstract idea of constitutionalism in order to determine that the drafters intended to incorporate the basic structure in Art. 4(1).[67] Justice Pathamanathan argues that constitutionalism, exemplified in particular by German constitutional law, is further proof that the supremacy clause contains the basic structure doctrine. She implies that every constitution has either express or implicit limits for constitutional amendments. It is observed that an examination and

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[64] *See, e.g.*, Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India), ¶¶ 570-71 (Shelat and Grover, JJ.). The idea that the amendment power should be distinguished from the legislative branch, i.e., the Parliament and should lie within a special constitutional organ (such as a constitutional assembly) was developed in particular in French constitutional thought by EMMANUEL JOSEPH SIEYÈS, QU'EST-CE QUE LE TIERS ÉTAT? 60 (Édition du Boucher 1789, repr. 2002). *See* extensively from a more modern perspective ROZNAI, *supra* note 8, at ¶¶ 103-175.

[65] *See* in particular the work of Maurice Hauriou, *see* in detail note 123.

[66] *See* above "The New Justifications", section B (ii).

[67] *See* above "The New Justifications", section B (ii).

discussion of the Indian basic structure doctrine is missing and instead, any similarities with the Indian basic structure doctrine are rejected.[68]

This new line of argumentation is also different from earlier pronouncements of the Federal Court that were in favour of the basic structure doctrine.[69] The main line of reasoning provided in particular by Federal Court Justices Tan Sri Zainun Ali and Richard Malanjum was that judicial review and the separation of powers are sacrosanct and of utmost importance and have therefore been protected as such and included in the basic structure doctrine.[70] Here, Federal Court Justice Tan Sri Zainun Ali also refers to the *Kesavananda* judgement for highlighting that judicial review and the idea of separation of powers are indispensable.[71]

CONSTITUTIONAL INDIVIDUALITY AND CONSTITUTIONALISM

The Austrian-German ideas in the justification of the Malaysian Basic Structure Doctrine are rather surprising, as the German eternity clause protects specific norms of the German Basic Law (see under A.) and the Austrian jurist Hans Kelsen was opposed to implicit constitutional limits (see under B.). Finally, the most interesting twist is that the important similarity between German and Malaysian constitutional thought, namely that both countries experienced a constitutional dispute on whether implicit limits for constitutional amendments exist, is blended out in the recent justifications (see under C.).

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[68] *See* above "The New Justifications", section B (i). Differently the previous justification in Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors., Federal Court, [2018] 1 MLJ 545 (Malaysia), ¶¶ 48-9.

[69] *Supra* note 26.

[70] Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Dearah Hulu Langat and another case, [2017] 3 MLJ 561 (Malaysia), ¶¶ 75-91, in particular ¶¶ 87-90; Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors., Federal Court, [2018] 1 MLJ 545 (Malaysia), ¶¶ 48-51, 58; Alma Nudo Atenza v. PP & Another Appeal, [2019] 3 MLRA 1 (Malaysia), ¶¶ 72-4.

[71] Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Dearah Hulu Langat and another case, [2017] 3 MLJ 561 (Malaysia), ¶ 87; Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors., Federal Court, [2018] 1 MLJ 545 (Malaysia), ¶ 48.

A. THE CONSTITUTIONAL INDIVIDUALITY OF THE GERMAN ETERNITY CLAUSE

The German eternity clause, which is referred to in the recent justification[72] of the Malaysian basic structure doctrine has a variety of individual features that are hard to reconcile with the idea that it can be incorporated into the supremacy clause of the Malaysian Constitution.

The first ground is that the content of the German eternity clause is specifically related to the German Constitution, the current German Basic Law that entered into force in 1948.[73] The German eternity clause in Art. 79 para. 3 states, "*amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible*". Art. 1 of the Basic Law enshrines the protection of human dignity (para. 1), the general acknowledgement of the German people of inviolable and inalienable human rights as the basis of every community, of peace and justice in the world (para. 2) and that the basic rights of the German Basic Law directly bind the legislature, the executive and the judiciary (para. 3). Art. 20 of the Basic Law contains the constitutional principles regarding state organisation. It states that Germany is a democratic and social federal state (para. 1); that the state's authority is derived from the people, exercised through elections, votes, and specific legislative, executive, and judicial bodies (para. 2). Finally, it incorporates the legality principle and constitutional supremacy, namely that the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice (para. 3).

The second ground is that the German eternity clause is justified with different theoretical ideas but never with the argument that it is a necessary component of the principle of constitutional supremacy. Several constitutional jurists,[74] as well as the German constitutional court, argue

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[72] Dhinesh a/l Tanaphll v. Lembaga Pencegahan Jenayah & Ors, Federal Court, [2022] 3 MLJ 356 (Malaysia), ¶ 197; Article 79 ¶ 3 of the German Basic law.

[73] The official English translation of the German Basic Law can be found here: https://www.gesetze-im-internet.de/englisch_gg/.

[74] *See*, *e.g.*, DIETRICH MURSWIEK, DIE VERFASSUNGGEBENDE GEWALT NACH DEM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [THE CONSTITUENT POWER UNDER THE BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY] 97 et seq. (Duncker

that the eternity clause encapsulates the general principle that the constituted powers cannot decide upon the identity of the Constitution and that this is a decision that is reserved for the constituent power, which is the people. This became particularly clear in the famous Lisbon judgement of June 30, 2009. Here, the German Constitutional Court held:

> "*From the perspective of the principle of democracy, the violation of the constitutional identity codified in article 79.3 of the Basic Law [the German eternity clause] is at the same time an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential pursuant to article 79.3 of the Basic Law. The Federal Constitutional Court monitors this*."[75]

Only the constituent power of the people can, to the extent that it is not limited by natural law principles,[76] determine the constitutional identity and provide the people with a new Constitution. However, another perspective regards Art. 79 para. 3 as a norm that protects certain norms and values as such because they are of paramount importance for the existence of a democratic and constitutional order.[77] This approach was eminent during

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& Humblot 1978); Peter Badura, *§ 270 Verfassungsänderung, Verfassungswandel und Verfassungsgewohnheitsrecht* [*Constitutional Amendment, Constitutional Change and Constitutional Customary Law*], *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, Vol. XII ¶¶ 20-1 (Josef Isensee & Paul Kirchhoff eds., C.F. Müller, 3rd ed., 2014).

[75] BVerfGE 123, 276 (343), Lisbon Judgement (Germany), ¶ 218, the official English translation of the judgement is available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

[76] BVerfGE 123, 276 (343), Lisbon Judgement (Germany), ¶ 217: "*It may remain open whether, due to the universal nature of dignity, freedom and equality alone, this commitment even applies to the constituent power, i.e. to the case that the German people, in free self-determination, but in a continuity of legality to the rule of the Basic Law, gives itself a new constitution [citation omitted]. Within the order of the Basic Law, the structural principles of the state laid down in Article 20 of the Basic Law, i.e. democracy, the rule of law, the principle of the social state, the republic, the federal state, as well as the substance of elementary fundamental rights indispensable for the respect of human dignity are, in any case, not amenable to any amendment because of their fundamental quality.*"

[77] *See, e.g.*, MONIKA POLZIN, VERFASSUNGSIDENTITÄT 130-132 (Mohr Siebeck 2018).

the first draft of the German eternity clause. During the first round of drafting of the German Basic Law (the preparatory work of the Constitutional Convention on the Isle of Herrenchiemsee), material limits on constitutional amendments were proposed to protect the free and democratic order as given by natural law and to safeguard the Constitution from destruction. The draft Basic Law produced by the Constitutional Convention provided that "*[p]roposals for constitutional amendments that would abolish the liberal and democratic basic order . . . shall be inadmissible.*"[78] This idea was later articulated by Hans Nawiasky, who was a scholar of Hans Kelsen, and a law professor in Germany. Nawiasky proposed an eternity clause for the Constitution of the German land "*Bavaria*" and also took part in the first deliberations regarding the German Basic Law. He commented on the introduction of the German eternity clause in 1950,

> "*The newest development in constitutional law has led to the general insight that there are unchangeable constitutional provisions, which cannot be amended by legal means. Those provisions can only be eliminated through extra-legal force – i.e. a revolution or coup d'état – that cannot be regarded as legal. Such unamendable provisions theoretically have a higher rank than the constitution itself, as they are binding on the constitution. They can be described as the fundamental norms of a state.*"[79]

B. THE WORKS OF HANS KELSEN

Hans Kelsen opposed implied limits to constitutional amendments. His works are therefore not suitable for justifying the basic structure doctrine. This becomes evident in light of the famous German constitutional

[78] Translation provided by the author. The draft Basic Law adopted by the Constitutional Convention on the Isle of Herrenchiemsee is reprinted in: *Bericht über den Verfassungskonvent auf Herrenchiemsee vom 10. bis 23. August 1948*, in DER PARLAMENTARISCHE RAT: 1948 – 1949, AKTEN UND PROTOKOLLE. VOL. 2: DER VERFASSUNGSKONVENT AUF HERRENCHIEMSEE 504, 558 (Deutscher Bundestag/Bundesarchiv eds., Harald Boldt Verlag 1981).

[79] HANS NAWIASKY, DIE GRUNDGEDANKEN DES GRUNDGESETZES FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [THE BASIC IDEAS OF THE CONSTITUTION FOR THE FEDERAL REPUBLIC OF GERMANY] 123 (Kohlhammer 1950).

dispute[80] that took place in the 1920s. Like today in Malaysia, German constitutional jurists discussed whether the then-German Constitution, the Weimar Constitution, contained implicit limits for constitutional amendments. The amendment provision in Article 76 of the Weimar Constitution stated that the constitution could be amended through the legislative process.[81] Constitutional amendments needed a two-thirds majority in the Reichstag (the parliamentary assembly) and the Reichsrat (the assembly of the representatives of the Länder, which however, only had the right to an objection) or the majority of the votes in a referendum.[82] Based on Art. 76, the majority of constitutional lawyers during the Weimar Republic (e.g., Anschütz[83] and Thoma[84])[85] argued that there were no material limits on constitutional amendments. They based their arguments

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[80] Christoph Gusy, *Demokratische Verfassungsänderung: Selbstschutz oder Selbstpreisgabe der Verfassung* [*Democratic constitutional change: Self-protection or self-surrender of the constitution*], 20 DER STAAT 159, 159-60 (Supp. 2012).

[81] WEIMAR CONST. art. 76 reads as follows: "*The Constitution can be amended via legislation. However, a decision of the Reichstag regarding the amendment of the Constitution only takes effect when two-thirds of those present consent. Decisions of the Reichsrat regarding amendment of the Constitution also require a two-thirds majority of the votes cast. If a constitutional amendment is concluded by initiative in response to a referendum, then the consent of the majority of enfranchised voters is required. If the Reichstag passes a constitutional change against the objection of the Reichsrat, the President is not permitted to promulgate this statute if the Reichsrat demands a referendum within two weeks*." The English translation of the Weimar Constitution can be found in: CARL SCHMITT, CONSTITUTIONAL THEORY 421 (Jeffrey Seitzer trans., orig. publ. 1928, Duke Univ. Press Books 2008).

[82] This part is based on previous publications, in particular Monika Polzin, *Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law*, 14 IN'TL J. CONST. L. 411, 419-421 (2016); Polzin, *supra* note 8, at 46-51.

[83] GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHES, KOMMENTAR FÜR WISSENSCHAFT UND PRAXIS [THE CONSTITUTION OF THE GERMAN REICH – COMMENTARY FOR ACADEMICS AND PRACTITIONERS], 401-06 on Article 76 (Verlag von Georg Stilke, 14th ed., 1933).

[84] *E.g.*, Richard Thoma, *§16 Das Reich als Demokratie* [*The Reich as a Democracy*], *in* HANDBUCH DES DEUTSCHEN STAATSRECHTS VOL. 1 at 186, 199 (Richard Thoma & Gerhard Anschütz eds., Mohr Verlag 1930).

[85] Other proponents of this view were, *inter alia*, SIGMUND JESELSOHN, BEGRIFF, ARTEN UND GRENZEN DER VERFASSUNGSÄNDERUNG [CONCEPT, MODES AND LIMITS OF CONSTITUTIONAL AMENDMENTS] 62–64 (especially at 62) (1929); Margit Kraft Fuchs, *Prinzipielle Bemerkungen zu Carl Schmitts Verfassungslehre* [*Principle Remarks on Carl Schmitt's Constitutional Theory*], 12 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [ZÖR] 511, 532 (1930).

on the wording of Art. 76 itself and on the theoretical assumption that the Reichstag (the then-parliamentary assembly) was both the legislature and constitution-making body.[86] A different approach was advanced by the well-known theory of Carl Schmitt, who justified material limits on constitutional amendments according to his idea of an almighty constituent power existing outside the constitution and not subject to any legal regulations. Schmitt derived his theory of implied limits on constitutional amendments from the idea that the constituent power was the basis for all powers ("*Grundlage aller Gewalten*").[87] He argued that the constituent power was a legal entity that existed outside, or alternatively alongside, a Constitution. The will of this almighty constituent power (which could either be the people or the monarch)[88] was the reason for the existence and validity of a Constitution.[89] Only the constituent power itself was able to decide on fundamental questions relating to the "*manner and form of its own political existence*" ("*Art und Form der eigenen politischen Existenz*").[90] These fundamental decisions, such as the form of government, the introduction of fundamental rights, the separation of powers and so on, formed the "*constitution in its positive sense*" ("*Verfassung im positiven Sinn*"), which had to be distinguished from the written Constitution.[91] According to this distinction, the then-German Constitution of 1919 consisted of norms that incorporated fundamental decisions, which made up the "*real Constitution*", and further, less important norms that were not part of the "real Constitution", and that could be described as being only "*constitutional laws*" ("*Verfassungsgesetze*").[92] Schmitt further argued that under the amendment provisions as provided by Art. 76[93] of the Weimar Constitution, only such provisions which constituted constitutional laws could be amended by the amending power as a constituted power ("*pouvoir constitué*").[94] The amending power was not permitted to change those norms that made up the Constitution in the material sense. Those provisions

86 ANSCHÜTZ, *supra* note 83, at 401.
87 SCHMITT, *supra* note 33, at 77.
88 *Id.* at 23, 75 et seq.
89 *Id.* at *e.g.*, 9, 75-6.
90 *Id.* at 76.
91 *Id.* at 21.
92 *Id.* at 20 et seq. 76 and 104.
93 WEIMAR CONST. art. 76. *See also* SCHMITT, *supra* note 33.
94 SCHMITT, *supra* note 33, at 101-2.

could only be amended or altered by the constituent power. In relation to the Weimar Constitution, this constituent power was the people.[95] Schmitt wrote,

> "*A competence given only by a constitutional law to amend the constitution means that one or several constitutional laws can be changed, but only on the condition that the identity and continuity of the constitution as a whole are preserved.*"[96]

However, Schmitt did not specify how the people could act as the constituent power. The use of the constituent power was not and could not be subject to a legal process.[97] Neither a real constitution nor a constitutional law could regulate the use of the people's constituent power as the basis for all powers.[98] The people could instead use this constituent power "*through any recognizable or visible expression of direct will that is directed towards deciding on the manner and form of existence of a political union.*"[99]

Kelsen, along with the majority of German constitutional jurists at that time,[100] did not recognise the idea of an almighty constituent power outside the constitution. The arbitrary and dangerous approach of Schmitt which can be used to overcome any constitutional provision with the argument that there is a different will of a non-tangible and almighty constituent power was rejected. Instead, Kelsen adopted a rule of *law-based* approach and regarded the constituent power, in contrast to the ordinary legislative branch, as a special constitutional organ (for example, a special constituent assembly) that had the authority to amend the Constitution. Kelsen wrote

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[95] *Id.* at 27, 105 and 177-8.

[96] *Id.* at 103. The German original text reads as follows: "*Die Grenzen der Befugnis zur Verfassungsänderungen ergeben sich aus dem richtig erkannten Begriff der Verfassungsänderung. Eine durch verfassungsgesetzliche Normierung erteilte Befugnis, die ‚Verfassung zu ändern', bedeutet, daß einzelne oder mehrere verfassungsgesetzliche Regelungen ersetzt werden können, aber nur unter der Voraussetzung, daß Identität und Kontinuität der Verfassung als eines Ganzen gewahrt bleiben.*" Translation by the author.

[97] *Id.* at 82 and 84.

[98] *Id.* at 79.

[99] *Id.* at 82. The German original text reads as follows: "*durch irgendeinen erkennbaren Ausdruck seines unmittelbaren Gesamtwillens, der auf eine Entscheidung über Art und Form der Existenz der politischen Einheit gerichtet ist.*" Translation by the author.

[100] Nawiasky, supra note 79; Gusy, supra note 80; WEIMAR CONST. art. 76.

that some constitutions distinguished between the legislative and the constituent powers. This was the case if constitutional laws could only be amended by a special constitutional organ (such as a special assembly) and not by the ordinary legislative branch.[101] According to Kelsen, the doctrine of constituent power consisted of situations where positive law demanded special provisions, i.e., more elaborate procedures for amending certain norms either by a special majority of the legislative organ, approval by a special organ, such as a constitutional assembly, or by a referendum.[102] Kelsen emphasised that the idea that certain norms could exclusively be amended by the will of the people could only be derived from natural law.[103] In line with this positivist view, Kelsen concluded that unamendable constitutional norms (which he regarded rather sceptically) exist if a constitution contained an express provision declaring the whole constitution or certain norms eternal.[104]

Finally, his theoretical works on the "*Grundnorm*" cannot be used in order to justify implicit limits for constitutional amendments. Kelsen developed his theory of a "*Grundnorm*" for the sole reason to explain the validity of a constitution.[105] His theory is not concerned with the question of implied limits for constitutional amendments.[106] Rather, his remarks in his work on the pure theory of law confirm his positivist view that if a constitution does not contain an express eternity clause, the constitution can be amended in accordance with the procedural norms.[107]

C. CONSTITUTIONAL INDIVIDUALITIES AND THE MISSING COMMONALITY

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101 HANS KELSEN, ALLGEMEINE STAATSLEHRE [GENERAL THEORY OF THE STATE] 253 (Springer 1925).

102 *Id.* The German original reads as follows: "*Es kann sich bei der Lehre von dem pouvoir constituant nur um einen der positivrechtlich zu begründenden Fälle erschwerter Normänderung handeln*." Translation by the author.

103 *Id.*

104 *Id.* at 254.

105 Expressly HANS KELSEN, REINE RECHTSLEHRE [PURE THEORY OF LAW], 196-227 (Verlag Österreich, 2nd ed., 1960, repr. 2020).

106 Aptly and extensively Stephanie Chng, *The Federal Constitution of Malaysia: A Kelsenian Perspective*, 17(2) ASIAN J. OF COMP. L. 323 (2022).

107 Cf. KELSEN, *supra* note 105, in particular at 213.

As outlined, the constitutional individualities of the German eternity clause and the works of Kelsen make them doubtful examples for the current justification of the Malaysian basic structure doctrine. Kelsen was opposed to implicit limits, and the German eternity clause is a specific feature of the German constitution. However, the most obvious link between Malaysian and German constitutional thought is that both legal orders know that the existence of implied limits for constitutional amendments is not discussed. The current Constitution of Malaysia as well as the Weimar Constitution of 1919 does not contain express material limits for constitutional amendments, and the discussions in Germany in the 1920s and the 2020s in Malaysia are the same, raising questions about whether implicit material limits for constitutional amendments exist. The interesting twist here is that even though the Federal Court in recent statements refers to the current German eternity clause and German constitutional law, the Weimar dispute is not mentioned and the German and Malaysian discussions in themselves are again very different: The German conflict was sparked by anti-democratic[108] constitutional lawyer Carl Schmitt and was centred around the question of whether it is possible to read material limits into a constitution due to a certain understanding of the idea of constituent power. Namely, the idea that there exists an absolute and almighty constituent power outside the Constitution that is competent to decide about the basic features of a constitution. The Malaysian discussion is determined by the conflict about whether it is possible to have an implied eternity clause due to the principle of the supremacy of the Constitution enshrined in Article 4(1) of the Malaysian Constitution in order to protect the role of the judiciary in the separation of powers.

D. CONSTITUTIONAL INDIVIDUALITY AND CONSTITUTIONALISM

The final question of this article relates to the relationship between the constitutional individuality of the Malaysian Constitution and the use of abstract ideas of constitutionalism during constitutional interpretation.

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[108] *See, e.g.*, Carl Schmitt, *Der Führer schützt das Recht* (*The leader protects the law*), 34 DEUTSCHE JURISTEN-ZEITUNG [DJZ] 946, 947 (1943) as an example of his works during the Nazi-regime in Germany.

As already outlined, the perspective adopted by Justice Nallini Pathmanathan and Justice Tengku Maimun is particular. Their core argument is not that the Malaysian basic structure is derived from foreign sources but that it is a doctrine incorporated in the Malaysian Constitution itself and also justified by the ultimate idea of constitutionalism. The foreign sources are not used as particular examples but as proof of an even more general and abstract idea, namely that all constitutions in the end require an interdiction of amendments of their basic and core elements or their identity either by way of explicit or implicit material limits for constitutional amendments. Therefore, the core question is to what extent the abstract idea of implicit limitations for constitutional amendments can be used to justify an innovative interpretation of a constitution that itself does not contain an express provision in this regard.[109]

The first problem with abstract ideas of constitutions or constitutionalism is that they are generally disputed theoretical ideas and not absolute truths. This is also relevant to the basic structure doctrine. The basic structure doctrine is not a universally accepted doctrine,[110] but an inherently disputed one.[111] The very idea of material limits for constitutional amendments is disputed as it gives the judiciary a "*super-strong*" and in principle, an unreviewable power.[112] It increases the power of judges to the detriment of a democratic parliamentary decision.[113] Furthermore, it is debatable whether material limits are advisable as they might be overruled by factual movements for constitutional amendments.[114] Another argument is that the proponents of constitutional changes might not frame them as a new

[109] *See* the recent discussion in Kenya of the judgement of the Supreme Court of Kenya, the Hon. Attorney General v. David Ndii & Others (2022) 8 KLR (S.C.K) (Kenya) (M. K. Koome, SCJ.), available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/PETITION_NO_12_OF_2021.pdf.

[110] *See, e.g.*, Richard Albert, Malkhaz Nakashidze & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendment*s, 70 HASTINGS L. J. 639 (2019).

[111] *See also*, *e.g.*, Tze Vern Tay, *supra* note 10, at 139-140.

[112] Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 IN'TL J. OF CONST. L. 606, 611 (2015).

[113] More problems regarding the relationship to democratic decision arise if the basic structure doctrine is applied to constitutional referendums or constituent assemblies. *See generally* on the relationship between constitutionalism and democracy regarding unamendable provisions: Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L. REV. 663 (2010).

[114] KELSEN, *supra* note 101, at 254.

constitutional provision, but try to redefine the constitutional notions in their own sense in order to circumvent the limits of constitutional amendments. Furthermore, the question remains as to how to determine the basic elements of a constitution[115] and whether this competence should be a judicial one.[116] Finally, the basic structure doctrine can only be read into a constitution by way of judicial creativity disregarding the constitutional text and using arguments similar to or close to natural law. Therefore, there exist very good arguments for rejecting the basic structure doctrine as a concept of judicial interpretation and for the idea that it should rather be introduced by way of a formal constitutional amendment.[117] This is particularly true if the parliament is not the only body having the amending power, but the constitution also enshrines different amendment procedures including a constitutional referendum. A classic example is Art. 44 para. 3 of the Constitution of Austria, that states,

> "*Every total revision (Gesamtänderung) of the Federal Constitution (…), is to be submitted to a referendum (Abstimmung) by the entire nation.*"[118]

However, judges might find themselves in a particularly difficult situation if they are confronted with a constitutional amendment that would abolish or destroy core elements of a liberal constitutional order. The classic historical example is the German Enabling Act of March 24, 1933,[119] which regulated that laws can also be adopted by the executive branch and that these laws could deviate from the then-German Constitution, the Weimar Constitution of 1919.

In such an instance, recourse to the basic structure doctrine based on natural law ideas might seem justified. However, this also means that the concept of a basic structure should only be applied in the framework of democratic and liberal constitutional orders or at least if there is a hybrid

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115 Kesavananda Bharati v. State of Kerala (note 6), ¶ 949 (India).

116 Neo, *supra* note 14, at 71.

117 *See* the Hon. Attorney General v. David Ndii & Others (2022) 8 KLR ¶¶ 178-227 (S.C.K) (Kenya).

118 An English translation of the Austrian Constitution is available at: https://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf.

119 Gesetz zur Behebung der Not von Volk und Recht, Reichsgesetzblatt 1933 I p. 141.

order only with regard to democratic and liberal constitutional elements. The reason is that the ultimate purpose of the basic structure doctrine should not be the preservation of a given constitution as such, but only the protection of a democratic constitution from autocratic erosion. The basic structure doctrine has to be used restrictively and only as an instrument of last resort in order to protect the democratic polity and rule of law at the core of a constitution.[120] The reason for the strict limitation is the inherent risk of the basic structure doctrine. If it is used outside of a democratic and liberal constitution, it becomes an instrument for the protection of an autocratic order. If it is applied extensively within a liberal constitutional order or a hybrid system, it can turn into a device for judges to prevent social change and even be used to hinder a more democratic rule of law development within a state.[121]

CONCLUSION

The recent justification of the basic structure doctrine of the Federal Court is based on rather weak comparative law arguments. The recourse to German and Austrian jurisprudence is not very convincing as the German eternity clause is a particular provision of the German Constitution and Kelsen was opposed to implicit limits for constitutional amendments. Therefore, it shows clearly the risks of the use of foreign sources while interpreting a constitution as the use of comparative constitutional law is a difficult legal exercise and prone to errors.

This is unfortunate, as more convincing arguments for the basic structure doctrine exist. Such persuasive arguments can be found in particular in the idea that certain constitutional principles have to be protected as such, as they are the very core of a democratic and liberal order.[122] Such an approach is visible in earlier decisions of the Federal Court, particularly those written by Justice Tan Sri Zainun Ali that underline the utmost importance of

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[120] *See also* Dixon & Landau, *supra* note 112, at 606; Akech Migai, *The Basic Structure 'Doctrine' and the Politics of Constitutional Change in Kenya: A Case of Judicial Adventurism?* to be published in: STELLENBOSCH HANDBOOK IN AFRICAN CONSTITUTIONAL LAW (Charles M. Fombad and Nico Steytler eds., Oxford Univ. Press 2023*). See also* the Hon. Attorney General v. David Ndii & Others, (2022) 8 KLR ¶ 747 (S.C.K.) (Kenya) (Ibrahim, SCJ., dissenting).

[121] *See also* Dixon & Landau, *supra* note 112, at 606.

[122] NAWIASKY, *supra* note 79.

judicial review and separation of powers and includes it for this very reason in the basic structure doctrine.[123]

Finally, coming back to the overall theme of the article "*And the flowers bloom everywhere the same*", the recent justification of the Malaysian basic structure doctrine is, despite its methodical shortcomings, an example of an international constitutional dialogue and an example of the legal links between our constitutional orders as well as common themes of constitutional jurists, namely, how to assure the protection of judicial independence and the separation of powers.

[123] *See* above under I.3. A similar idea can also be found in the work of Maurice Hauriou, a French constitutional lawyer. Maurice Hauriou (1856-1929) developed a structured and rule of law-based unconstitutional amendments theory rooted in a commitment to democracy in his constitutional law treatises "*Précis de Droit Constitutionnel*" and "*Précis Elémentaire de Droit Constitutional*" that were first published in 1923. Hauriou argued that certain principles are so important and essential that they have a higher rank and legitimacy than the written Constitution itself, irrespective of whether those principles are contained in the Constitution or not. He describes them as "principles that have a higher legitimacy than the text of the written constitution and that are unnecessary to be expressly embodied in the constitution. MAURICE HAURIOU, PRÉCIS ÉLÉMENTAIRE DE DROIT CONSTITUTIONNEL 81 (1st ed., Recueil Sirey 1923). *See* in more detail Polzin, *supra* note 8, 51-4.