NOTES OF CASES

THE DEATH OF A DOCTRINE?

Phang Chin Hock v. *Public Prosecutor*[1]

In the Federal Court's recent decision in the case of *Phang Chin Hock* v. *Public Prosecutor* the court had occasion to deal with a question of great importance in Malaysian jurisprudence, namely whether in Malaysian constitutional law there is a doctrine of implied limitations on the power of constitutional amendment. As will be seen below, this question has not been finally determined by the Federal Court, but certain new arguments have been posed which merit some discussion. They are best considered against the backcloth of previous authorities on the question.

The doctrine of implied limitations on the power of constitutional amendment ("the doctrine") finds its best expression in the decision of the Supreme Court of India in *Kesavananda* v. *State of Kerala*.[2] In that case it was held that Parliament did not have the power to destroy the basic structure of the Constitution, which consisted of the following features:

1. Supremacy of the Constitution.
2. Republican and democratic forms of government.
3. Secular character of the constitution.
4. Separation of powers between the legislature, the executive and the judiciary.
5. Federal character of the constitution.[3]

[1] Judgment was delivered by Suffian L.P. on 21st August 1979. At the time of writing the case has not yet been reported, and the writer is indebted to the learned Lord President for a copy of the judgment which he has made available to the Faculty of Law, University of Singapore

[2] 1973 S.C.R. Supp. 1. The case, occupying 1002 pages, is one of the longest ever reported and necessitated a special supplement to the Supreme Court Reports. Throughout this article, page numbers refer to this supplement unless the context requires otherwise. The relevant facts were briefly as follows. Art. 13(2) of the Constitution prohibited the making of any law taking away or abridging fundamental rights. The word "law" had been held in *Golaknath* v. *State of Punjab* A.I.R. 1967 S.C. 1643 to include constitutional amendments. Parliament enacted the 24th Amendment which expressly provided that Art. 13(2) should not apply to constitutional amendments, and later the 25th Amendment, which had the effect of abridging a fundamental right. The court had to decide *(inter alia)* on the validity of these amendments. Although *Golaknath* was overruled and the amendments were held valid, the importance of the case lies in the principles laid down. Of the thirteen judges seven were of the opinion that Parliament did not have the power to destroy the basic structure of the Constitution, and six were of the opinion that the power of constitutional amendment was unlimited.

[3] *Per* Sikri C.J., p. 165.

The decision has since been followed in *Indira Nehru Gandhi* v. *Raj Narain*[4] and represents settled law in India. The case is of especial importance also because the arguments against as well as for the doctrine were fully canvassed — in Malaysian judicial experience it is often the arguments dealt with in decisions of the Supreme Court of India, rather than the decisions as persuasive authority *per se,* which are of interest and assistance.[5]

The two opposing views in *Kesavananda* were best expressed in the judgments of Sikri C.J. and Ray J. Both judgments are passionate appeals to principle supported by skilful judicial reasoning, and the former contains an extremely detailed review of all the authorities. The following summary of the arguments is inevitably an over-simplified paraphrase, but is intended to assist consideration of the applicability of the doctrine to Malaysia.

Sikri C.J.

1. The word "amendment" has different meanings in different parts of the Constitution; on the principle that a provision must be construed in the light of the whole statute and not *in vacuo,* he adduced several arguments based on the wording of the Constitution and designed to show that the word "amendment" in Article 368 (the constitutional amendment provision) had a limited meaning.[6]

2. Article 368 must be interpreted in the light of the Preamble to the Constitution and the process which led to its drafting, including the Objectives Resolution of the Constituent Assembly, adopted on January 22, 1947.[7]

3. Article 13(2)[8] was expressly subject to other provisions which delineated carefully the exceptions to the principle that no law could abridge a fundamental right; these exceptions must therefore be exhaustive, and so fundamental rights were guaranteed by the Constitution and could not be removed.[9]

4. The provisions of the Indian Independence Act 1947 showed an intention to limit the powers of Parliament for the future (but, as Sikri C.J. himself noted, no such provisions appear in the Federation of Malaya Independence Act 1957).[10]

5. The Privy Council said *obiter* in *Bribery Commissioner* v. *Ranasinghe*[11] with reference to the religious provisions contained in section 29 of the Ceylon Constitution:

4 A.I.R. 1975 S.C. 2299.
5 For a useful account of the Federal Court's approach to Indian decisions in general, see the remarks of Suffian L.P. in *Datuk Haji Harun bin Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155 at p. 165.
6 For example, a procedure more complex than the normal procedure had to be followed to amend certain provisions of the Constitution; some of these provisions presuppose the existence of other provisions or are obviously less important than other provisions, which were therefore intended to be beyond change. See p. 100.
7 See p. 107.
8 See fn. 2, *supra,* for its interpretation.
9 See p. 119.
10 See pp. 127 ff.
11 [1965] A.C. 172.

> [They] set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution.

The Board put their meaning beyond doubt in a later passage in which they distinguished the case of *McCawley* v. *R.*,[12] in which:

> … the legislature, having full power to make laws by a majority… passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with.

Clearly the Board can only have meant that a constitution can be either

a) uncontrolled, in that any later inconsistent legislation repeals the constitution,

b) controlled, in that a special procedure must be followed for the constitution to be amended, or

c) controlled as in b), but containing provisions which are unalterable even by following the special procedure,

and that the Ceylon Constitution fell into category c) with respect to section 29. In other words the Board was implying limitations on the power of constitutional amendment.

Ray J.

1. The learned judge dwelt at some length[13] on the difficulty of distinguishing essential from non-essential features of the Constitution. "If there are no indications in the Constitution as to what the essential features are the task of amendment of the Constitution becomes an unpredictable and indeterminate task." In his view all the provisions of the Constitution were essential, but all were amendable.

2. Since constitutional law is the source of all legal validity and is itself always valid, "an amendment being the Constitution itself can never be invalid. An amendment is made if the procedure is complied with. Once the procedure is complied with it is a part of the Constitution … the Constitution is the touchstone of validity and … no provision of the Constitution can be *ultra vires.*" If the Constitution makers had intended limitations on the power of amendment, they would have expressly provided such limitations.

3. The power of declaring an amendment invalid must lie with the courts. If they assumed such power it would be an usurpation of Parliament's function, even to the extent that the courts would have to lay down a new constitution. The normal operations of government assume that the legislature, executive and judiciary must cooperate.

12 [1920] A.C. 691.
13 *E.g.* p. 358, pp. 409 ff.

4. Ultimately his decision rested squarely on policy grounds:

> Fundamental or basic principles can be changed. There can be radical change in the Constitution like introducing a Presidential system of government for a cabinet system or a unitary system for a federal system. But such amendment would in its wake bring all consequential changes for the smooth working of the new system.[14]

> … those who frame the Constitution also know that new and unforeseen problems may emerge, that problems once considered important may lose their importance, because priorities have changed... that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of government to another.... The framers of the Constitution did not put any limitation on the amending power because the end of a Constitution is the safety, the greatness and wellbeing of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution.[15]

Let us now turn to Malaysian authorities. There are two relevant decisions prior to *Phang Chin Hock's* case — *Government of the State of Kelantan* v. *Government of the Federation of Malaya and Another*[16] and *Loh Kooi Choon* v. *Government of Malaysia*.[17] Since these decisions have been commented upon elsewhere the following observations will suffice.

In the *Kelantan* case Thomson C.J. said with regard to the enactment of the Malaysia Act (Act 26 of 1963):

> I cannot see that Parliament went in any way beyond its powers or that it did anything so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe, that is to say a condition to the effect that the State of Kelantan or any other state should be consulted.

All commentators except Professor Hickling[18] have criticised these words adversely. It should be remembered that the learned Chief Justice was replying specifically to Kelantan's argument that the consent of the states should have been obtained. He clearly thought it possible that there could be fundamentally revolutionary amendments which might be challenged in the courts, but was not prepared to decide the point, presumably because the Malaysia Act was not in his view "fundamentally revolutionary." The unfortunate part of the dictum is rather the words "require fulfilment of a condition." It would clearly be wrong to maintain that a procedural step can in any circumstances be implied into the Constitution. Quite apart from conferring on the courts an impossible jurisdiction to determine con-

14 P. 415.
15 P. 423.
16 [1963] M.L.J. 355. See for discussion: R.H. Hickling, "An Overview of Constitutional Changes in Malaysia: 1957-1977" in *The Constitution of Malaysia — Its Development 1957-1977,* ed. Suffian, Lee and Trindade, at p. 9; Tan Sri Datuk Mohd. Salleh bin Abas, "Federalism in Malaysia — Changes in the First Twenty Years", *op.cit.* at p. 171; H.P. Lee, "The Process of Constitutional Change", *op.cit.* at p. 375; S. Jayakumar (1964) Mal. L.R. 181 at p. 187; L.A. Sheridan and H.E. Groves, *The Constitution of Malaysia,* (Third Edition) p. 4.
17 [1977] 2 M.L.J. 187. See for discussion: H.P. Lee, *op.cit.* at p. 390; Tan Sri Datuk Mohd. Salleh bin Abas [1977] 2 M.L.J., xxxiv at pp. xliii ff.
18 See n. 16 for references.

stitutional procedure,[19] Parliament would be placed in the untenable position of not knowing what procedure to adopt in order to effect a valid constitutional amendment. Such a notion forms no part of any version of the doctrine of implied limitations on the power of constitutional amendment

In *Loh Kooi Choon* a constitutional amendment was considered which had the effect of abridging a fundamental right.[20] In a judgment redolent of that of Ray J. in *Kesavananda*,[21] Raja Azlan Shah F.J. (as he then was) held that any provision of the Constitution could be amended under Article 159. He pointed out that Article 159 is subject to no proviso making fundamental rights inviolable. With direct reference to *Kesavananda* he said:

> A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.

This seems to put the point far too strongly. Even the Supreme Court judges in India cannot be said to have assumed such wide powers. The power they have assumed is to prevent abrogation of the basic structure of the Constitution — a power rather of preservation than amendment.

We can now turn to the recent decision in *Phang Chin Hock's* case.

The appellant was charged with unlawful possession of ammunition contrary to the Internal Security Act 1960, section 57(l)(b). He was tried under the provisions of the Essential (Security Cases) Regulations 1975, made under the Emergency (Essential Powers) Ordinance 1969, convicted and sentenced to death.

Before the Federal Court (Suffian L.P. and Wan Suleiman and Syed Othman F. JJ.) his counsel put three contentions:[22]

1. The Emergency (Essential Powers) Act 1979 ("Act 216"),[23] passed in pursuance of Article 150(5) of the Constitution to enact the 1969 Ordinance as an Act of Parliament and to validate all regulations and all acts done under the 1969 ordinance is invalid because

19 How would consent be signified, and what would be the effect of one or more states withholding their consent? Procedural steps prior to legislation can never be implied; see *Bates* v. *Lord Hailsham* [1972] 1 W.L.R. 1373. That which is *ultra vires* cannot be rendered *intra vires* by the consent or acquiescence of parties affected; see *Attorney-General* v. *Wilts United Dairies* (1921) 39 T.L.R. 781.

20 This was Act A354 of 1976, which provided in effect that the right of an arrested person to be produced before a Magistrate within 24 hours (under Art. 5(4)) should not apply to arrests under the Restricted Residence Enactments.

21 *E.g.* at p. 189 "A Constitution has to work not only in the environment in which it was drafted but also centuries later;" and at p. 190 "the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself."

22 He also contended that the conviction was against the weight of the evidence, but this contention was not upheld.

23 This Act was passed in consequence of the decision of the Privy Council in *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50, q.v.

Parliament, in view of Article 4(1)[24] of the Constitution, in exercise of the power of amendment under Article 159, can only effect amendments which are consistent with the Constitution.

2. Alternatively, Act 216 was enacted under Article 150 as amended by the Malaysia Act; these amendments destroyed the basic structure of the Constitution in that they enabled Parliament and the executive during an emergency to pass by simple majority an Act destroying the basic structure of the Constitution; Act 216 was therefore enacted under an invalid amendment and is itself invalid.

3. Alternatively, even if Act 216 is valid, sections 2(4), 9(3) and 12 thereof[25] are invalid in that they destroy the basic structure of the Constitution.

In support of contentions 1 and 2, counsel cited *Kesavananda* and submitted that the basic structure of the Constitution comprised:

1. Supremacy of the Constitution.
2. Constitutional monarchy.
3. That the religion of the Federation shall be Islam and that other religions may be practised in harmony.
4. Separation of powers of the three branches of government.
5. Federal character of the Constitution.[26]

With regard to the first contention the court had little difficulty:

> 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.... The rule of harmonious construction requires us to give effect to both provisions... .[27]

[24] Which 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."

[25] The sections referred to are as follows:

S.2(4): "An Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of State, other than this Act or in any instrument having effect by virtue of any written law other than this Act."

S.9(3) : "Any prosecution instituted, trial conducted, decision or order given, in respect of any person in any court, or any other proceeding whatsoever had, or any other act or thing whatsoever done or omitted to be done, under or by virtue of the Ordinance or any subsidiary legislation whatsoever made or purporting to have been made thereunder is declared lawful and hereby validated."

S.12: "No court shall have jurisdiction to entertain or determine any application or question in whatever form, on any ground, regarding the validity or the continued operation of any proclamation issued by the Yang di-Pertuan Agong in exercise of any power vested in him under any Ordinance promulgated, or Act of Parliament enacted, under Part XI of the Federal Constitution."

[26] *Cf.* list of basic features set out by Sikri C.J. in *Kesavananda, supra.*

[27] The court declared the position to be the same as in India, see *Shankari Prasad Singh Deo and Others* v. *Union of India and Others* A.I.R. 1951 S.C. 458 and *Sajjan Singh* v. *State of Rajasthan* A.I.R. 1965 S.C. 845. This is consistent also with *Loh Kooi Choon,* see p. 192 *per* Wan Suleiman F.J., "I fail to note any ambiguity when Articles 4 and 159 are read together."

It is submitted that this is a correct statement of the law, and is entirely consistent with the reasoning of the full court in *Kesavananda*.[28]

With regard to the second contention the court expressed agreement with the view of Raja Azlan Shah F.J. in *Loh Kooi Choon* that other constitutions were of little assistance in interpreting the Constitution.[29] A number of arguments were put forward which will be discussed separately.

a) The court argued that the Indian courts have been influenced by the fact that their Constitution was made by a Constituent Assembly and "not by ordinary mortals"; "The Indians did not want their Constitution to be a gift from the British. They wanted to write it themselves." The court went on to describe the ways in which the Malaysian Constitution differed in its genesis:

> In Malaya, on the other hand, the Constitution was the fruit of joint Anglo-Malayan efforts and our Parliament had no hand in its drafting. The first draft was put up by a Royal Commission headed by Lord Reid jointly appointed by the British Sovereign and the Malay Rulers; it was published for public discussion and debate; the amended draft was agreed by the British Government and the Malay Rulers and also by the then Alliance Government; it was approved by the British Parliament, by the Malayan Legislative Council (the then federal legislature) and by the legislature of every Malay state. When the British finally surrendered legal and political control, Malaya had a ready-made Constitution and there was no occasion for Malayans to get together to draw up a Constitution.

This argument seems to suggest that the Constitution does not represent the aspiration of the people of Malaysia in the same way as the Indian Constitution represents the aspiration of the people of India. Yet it was after all accepted by the federal and state legislatures and has been in force, albeit, like the Indian Constitution, with substantial amendments, for twenty two years. The origin of the Malaysian Constitution does not seem to justify according to it some kind of inferior status.

b) It was pointed out that the Malaysian Constitution has no Preamble or Directive Principles, in contrast to the Indian Constitution.

This is an important fact, but by no means decisive. In *Kesavananda* the court did not feel inhibited from looking at other factors than the Preamble to ascertain the intention of the Constitution-makers. The Directive Principles were not accorded any great significance in *Kesavananda.*

c) A distinction was drawn in *Kesavananda* between the power of the Indian Parliament to amend the Constitution in its constituent capacity and its power to make laws in its legislative capacity. No such distinction can be drawn with regard to the Malaysian Parliament.

This argument however can cut the other way. If the Malaysian Parliament does not act in a constituent capacity when amending the Constitution it should, logically, have less power and not more to alter the basic structure of the Constitution. Its authority in all matters derives from the Constitution.

[28] See n. 2, *supra.*
[29] See *Loh Kooi Choon,* p. 188.

d) The court said that "fear of abuse of Parliament's power to amend the Constitution in any way they think fit cannot be an argument against the exercise of such power... for actual abuse of power can always be struck down."

It is not clear what this means. Cases where the doctrine is likely to be invoked would be cases of actual abuse in that Parliament will have purported to destroy a basic feature of the Constitution. If the doctrine is not applied then Parliament will always be able to amend the Constitution before enacting the legislation it desires, and no such legislation nor indeed any act lawfully done under it could be struck down by the courts, however much of an "abuse" it might seem.

However, it may be that a more subtle meaning can be attributed to this argument. It was used elsewhere in the judgment against the appellant's contention that section 2(4) of Act 216 may be misused by the Yang di-Pertuan Agong to destroy the basic structure of the Constitution. Thus the court could be indicating that it might be prepared to invoke the doctrine or something like it in the event of an attempt by the Yang di-Pertuan Agong (acting on cabinet advice) in pursuance of Act 216 to introduce legislation which in the court's view did destroy the basic structure of the Constitution.

This brings us to the third contention.

a) The arguments relating to section 2(4) have been dealt with.

b) With regard to section 9(3) counsel argued that it had the effect of finding accused persons guilty by legislative act, thus encroaching on the judicial power vested in the courts under Article 121.

This argument was rejected, and the court held, applying the decision in *Piare Dusadh* v. *Emperor*,[30] that section 9(3) was an exercise of legislative not judicial power. The appellant's guilt was decided as a "matter of fact by a court which was directed to follow a certain judicial procedure." The court observed that the large number of accused persons tried under the same procedure as the appellant meant it would be a serious demand on public time and funds to retry all of them.

c) With regard to section 12 the court said that it only precluded the courts from questioning the validity of proclamation issued under Acts or Ordinances based on Part XI of the Constitution, not proclamations of emergency issued under the Constitution.

In the event the court felt that since in its opinion none of the amendments complained of and none of the impugned provisions had destroyed the basic structure of the Constitution, it was unnecessary to express its view on the question whether Parliament had power to amend the Constitution so as to destroy its basic structure. Thus while potential appellants will now be discouraged from advancing arguments based on *Kesavananda,* the point is still not finally determined.

30 A.I.R. 1944 S.C. 1.

When the Federal Court is eventually faced with a case in which the point has to be decided it is to be hoped that the following considerations will receive attention:

1. The doctrine may not be in the nature of an Indian jurisprudential deviation. Sikri C.J. examined many cases from other jurisdictions (none of which have had to decide the point directly), especially Canada, Australia, Ireland and the United States. In particular the dictum in *Ranasinghe's* case mentioned earlier needs to be dealt with carefully.

2. The task of ascertaining what is the basic structure of the Constitution is not in truth a difficult one. The major difficulty in applying the doctrine is rather in deciding when the basic structure has been destroyed. It is surely not however any more difficult than any other judicial line-drawing exercise.

3. Ray J.'s jurisprudential argument cited above[31] is circular — it assumes its conclusion. If there are limitations on the power of amendment then, even if the correct procedure is followed, an amendment may never become part of the Constitution and the Constitution is never therefore at any time inconsistent with itself. The *grundnorm* remains inviolate. The learned judge may perhaps have been misled by considering the Constitution to be merely the written document as amended.

4. The policy arguments are ultimately in favour of the doctrine. It is necessary to provide a legal safeguard for the basic structure of the Constitution. The less permanence the judges attach to the Constitution, the more easily can it be swept away, and the less confidence will the people have in electing a government which promises strong action to deal with external and internal threats to society. In addition, the doctrine is all the more necessary where the governing party has the capacity to obtain amendments with ease.[32]

5. The doctrine might be a nuisance to the government with regard to internal security matters, but could usefully be invoked by the government should it lose power or be under pressure to effect fundamental changes which it is reluctant to make.

6. The Federal Court could develop a peculiarly Malaysian and more selective version of the doctrine which would be consistent with the different wording of the Malaysian Constitution and the requirements of Malaysian society. This might involve overruling the *Kelantan* case and not following the Court's opinion in *Phang Chin Hock* that section 2(4) of Act 216 does not destroy the basis structure of the Constitution. Administrative chaos could be avoided by use of the doctrine of prospective overruling.[33]

[31] Argument No. 2, *supra.*

[32] The Malaysian Parliament has been criticised, see *e.g.* H.P. Lee, *op. cit.,* for raising the proportion of federally-appointed Senators and thereby reducing opposition to proposed amendments.

[33] This entails a fiction whereby an amendment is invalid only from the date it is held to be invalid.

Under such a doctrine the Federal Court would retain a discretion to strike down amendments which are not in the long term public interest. These would include amendments which hit at the democratic system Malaysia has adopted or which give unnecessarily sweeping powers to the executive. This in turn would involve adopting a new approach to cases involving executive discretion. There is no room for over-legalised conceptions of constitutional function here — decisions must be guided by instinct. If the Federal Court retains a discretion of this kind the Constitution and the judiciary will be more likely to earn the loyalty of future generations of Malaysians, who will feel that Constitutional legality, being the very heart of the polity, is something worth preserving at any price.

A.J. HARDING