

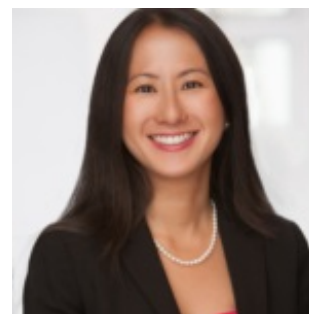
# Beyond Sisyphus and Hercules: Crafting Constitutionalism in Fragile Democracies in Asia

[iconnectblog.com/2020/08/beyond-sisyphus-and-hercules-crafting-constitutionalism-in-fragile-democracies-in-asia/](https://iconnectblog.com/2020/08/beyond-sisyphus-and-hercules-crafting-constitutionalism-in-fragile-democracies-in-asia/)

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[Editor’s note: This is one of our biweekly I-CONnect columns. For more information about our four columnists for 2020, please click [here](#).]



It is an epic tale of one of the world’s largest financial frauds. <sup>[2]</sup> Between 2009 and 2015, billions of dollars were siphoned from government-run sovereign wealth fund 1Malaysia Development Berhad (1MDB). Spectacular amounts of money were spent on luxury properties, private jets, lavish yachts, and champagne-drenched parties.<sup>[3]</sup> Some was used to fund a Hollywood film on greed and corruption—in an ironic instance of life imitating art—“The Wolf of Wall Street.”<sup>[4]</sup> The 1MDB financial scandal spanned the globe, reaching from Malaysia to Wall Street and Hollywood, and has even become the subject of an [international bestselling book](#).<sup>[5]</sup> The U.S. Department of Justice, which has helped recover a portion of the \$4.5 billion misappropriated funds, called it the “largest kleptocracy case” in its history.<sup>[6]</sup>

The 1MDB affair has been back in the news of late. In April 2020, the U.S. repatriated \$300 million in recovered money to Malaysia.<sup>[7]</sup> A few months later, Goldman Sachs agreed to a \$3.9 billion settlement with the Malaysian government for the investment bank’s role underwriting bond offerings for 1MDB.<sup>[8]</sup> Tim Leissner, Goldman’s former chairman for Southeast Asia, had already pleaded guilty to U.S. prosecutors to bribery and conspiracy to money-launder.<sup>[9]</sup> In July, the focus was on the outcome of the trial involving Najib Razak, the former prime minister and co-founder of the fund, who faced numerous charges relating to the 1MDB scandal.

On July 28, 2020, the Kuala Lumpur High Court convicted Najib Razak of seven charges of abuse of power, breach of trust, and money-laundering.<sup>[10]</sup> The judge decisively found the former prime minister guilty on all counts, dismissing as “far-fetched” Najib’s claim that he had thought that the 42 million ringgit (\$11 million) that had ended up in his personal bank account had been donated by an unnamed Saudi royal. <sup>[11]</sup> High court judge Nazlan Mohammed Ghazali sentenced Najib to twelve years in jail and a fine of \$49 million. It was the first time that a former prime minister in Malaysia had been convicted of corruption-related charges.

The Malaysian court delivered its decision amidst a fraught political climate. Najib had been arrested and charged following a momentous general election in 2018 in which voters had ousted Najib and, for the first time in more than six decades, voted out his party, the United Malays National Organisation (UMNO).[12] Two years later, though, the political landscape had changed. In early 2020, the Pakatan Harapan government collapsed, resulting in the rise of a new governing coalition, Perikatan Nasional, which is dominated by UMNO. [13] Many observers inside and outside Malaysia had raised concerns about the effect of UMNO's return to power on the ongoing trials of the party's former leader, Najib.[14]

In light of the state of play in Malaysian politics, the High Court's decision is an especially significant—and courageous—assertion of the rule of law. Of course, the saga is far from over. Najib is appealing the verdict and remains out of prison on bail. Some have suggested that the decision may be overturned on appeal.[15] Still, speculations about what may (or may not) happen with the appellate courts should not detract from *this* decision's importance. The Malaysian High Court's decision, in and of itself, shows willingness to assert judicial authority and independence in the face of dominant political power.

More broadly, widening the lens beyond the 1MDB affair, this instance is part of a larger story of judicial efforts to assert authority in fragile democracies. That story has immediate resonance outside Malaysia, too.

### **Crafting Constitutionalism in Fragile Asian Democracies**

Courts in nascent democracies in Asia face special challenges. In countries where consolidated political power has been the norm, courts must delicately balance the demands of powerful political actors. That task becomes all the more challenging in times of political transition, especially as states emerge from dominant party rule and judiciaries seek to renegotiate their position as institutional stakeholders. While the East Asian states of Taiwan and Korea have managed to develop strong constitutional cultures following successful democratization, many other Asian democracies do not have a developed constitutional culture. Some states, like Singapore, continue to be controlled by a single political party; others have a history of military rule. Vestiges of colonialism are evident in the colonial-era emergency powers, sedition laws, and penal codes inherited by Hong Kong, India, Indonesia, Malaysia, Myanmar, Pakistan, and Singapore. Religious and ethnic divisions further complicate dynamics in states seeking to accommodate religious courts within their pluralistic societies, like India, Indonesia, Malaysia, and the Philippines. Many of these tenuous Asian democracies remain at risk of veering back into authoritarianism.

Central to the project of state-building are courts and constitutionalism. My new book, *Constitutional Statecraft in Asian Courts* (OUP, 2020), explores how courts in these aspiring, yet deeply fragile, democracies in Asia engage in constitutional state-building.

Courts can help strengthen the institutional and legal underpinnings of effective constitutional governance by using strategic and dynamic mechanisms. Different judicial strategies may be suited for different political or constitutional stages.

Courts can play an important part in protecting fragile constitutional orders by defending fundamental elements of the constitutional order. This judicial role as a constraint on consolidated political power is all the more important in states accustomed to control by a dominant political party.<sup>[16]</sup> One potent judicial mechanism that courts can wield to protect a constitutional core of basic principles from being amended by an overreaching legislature is to assert the power to review constitutional amendments. Declaring the authority to nullify a constitutional amendment is a highly assertive, often risky, move for a fragile court. While the doctrine of limits on constitutional amendments was famously introduced by the Indian Supreme Court,<sup>[17]</sup> and has since migrated to Bangladesh and Taiwan, few other Asian courts have caught on. Yet in two landmark decisions, the Malaysian apex court established, applied, and entrenched a notion of an unamendable constitutional core. It first laid the foundation for safeguarding foundational constitutional elements from being altered by the legislature in its 2017 decision in *Semenyih Jaya*.<sup>[18]</sup> A year later, in *Indira Gandhi*, the apex court expressly affirmed a constitutional basic structure doctrine and invoked the power to nullify a constitutional amendment in a case involving the authority of the civil courts over religious courts.<sup>[19]</sup>

Additionally, besides acting in a protective capacity, courts can take on a constructive role to build the foundational principles of an emerging constitutional order, especially in an aspiring democracy seeking to transition from dominant party rule. To facilitate a culture of constitutionalism, courts should seek to approach constitutional rights adjudication purposively and proportionately. In Taiwan, South Korea, Hong Kong,<sup>[20]</sup> and now Malaysia,<sup>[21]</sup> judges have begun to embrace a structured proportionality analysis to strike down government actions that infringe rights. Purposive interpretation and proportionality analysis offer mechanisms that courts can apply robustly yet flexibly, which can be developed incrementally over time to enhance effective constitutional review.

### **Judges as Hercules or Sisyphus?**

It's tempting to valorize judges as heroes. Ronald Dworkin famously articulated the model of judge Hercules, who strives to interpret the constitution to reach a right decision that achieves justice and integrity.<sup>[22]</sup> But a vision of Herculean judges forcing governing powers into legal compliance is too often farfetched in the messy, real world of courts in newer democracies seeking to assert fragile authority.<sup>[23]</sup>

Still, although judges may not be Hercules, neither are they Sisyphus, doomed to labor fruitlessly by rolling a boulder up a hill, only to have it fall back down again. Courts and judicially enforced constitutionalism have long been seen as ineffective and inapt for many Asian states. For courts to act as a constraint on dominant political power may appear a

task as hopeless as the one Sisyphus is condemned endlessly to confront.[24] Yet courts can and do rise to the occasion—as the Malaysian Federal Court did in its assertive decisions in 2017 and 2018,[25] and as the Malaysian High Court demonstrated last month when it ruled decisively against former prime minister Najib Razak.[26]

Moving the constitutional story forward calls for a judicial role that goes beyond Sisyphus and Hercules. To reclaim their constitutional position as a co-equal branch of government, courts need to break out of their old Sisyphean mold of reflexive deference to the political branches. Courts in these Asian democracies must be prepared to use judicial strategies to entrench core constitutional principles and to protect rights proportionately in line with the constitution’s overarching purposes. Only then can courts realize their role as partners in the enterprise of constitutional statecraft.

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[1] Yvonne Tew is the author of *Constitutional Statecraft in Asian Courts* (OUP, 2020), available now from [OUP](#) or [Amazon](#).

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[16] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* 13 (2015).

[17] *See Kesavandana Bharati v. State of Kerala* AIR 1973 SC 1461 (India).

[18] *Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat*[2017] 3 Malayan L.J. 561.

[19] *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors.* [2018] 1 Malayan L.J. 545.

[20] *See Proportionality in Asia* (Po Jen Yap ed., Cambridge University Press, forthcoming 2020).

[21] *Alma Nudo v. Public Prosecutor*[2019] 5 Current L.J. 780.

[22] Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057 (1975); Ronald Dworkin, *Law's Empire* (1986).

[23] *See Samuel Issacharoff, Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. Rev. 1 (2019).

[24] *See H.P. Lee & Richard Foo, The Malaysian Judiciary: A Sisyphean Quest for Redemption?*, in *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* 231(H. P. Lee & Marilyn Pittard eds., 2018).

[25] *See Semenyih Jaya*, 3 Malayan L.J. 561; *Indira Gandhi*, 1 Malayan L.J. 545.

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