

Constitutional Statecraft in Asian Courts

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Author's Note

Gajah sama gajah berjuang, pelanduk mati di tengah-tengah.

Malay proverb

There's an old Malay saying, "When elephants fight, it is the mouse deer between them that perishes." In February 2020, the Malaysian government, led by the democratically elected, multi-ethnic Pakatan Harapan coalition, the Alliance of Hope, collapsed. While the Malaysian public watched, largely from the sidelines, political giants battled for power in a high-stakes drama.

As this book goes to press, Malaysia has a new prime minister and government. By the end of February, Mahathir Mohamad was replaced as premier after the country's king appointed Muhyiddin Yassin as the head of government. Muhyiddin came into power at the helm of a predominantly mono-ethnic Malay-Muslim coalition, which includes member parties of the Barisan Nasional alliance that had ruled Malaysia since independence before being voted out in 2018 in the wake of corruption scandals. Amid threats that a vote of no confidence would be brought at the next parliamentary sitting, the newly appointed prime minister delayed the start of the next parliamentary session by more than two months.

Malaysia's change of government, triggered by political defections and followed by a dizzying leadership battle among allies-turned-rivals as well as unprecedented royal intervention, stands in stark contrast to the country's democratic transition two years earlier. In 2018, Pakatan Harapan scored a stunning electoral victory over the Barisan Nasional coalition that had ruled the country for six decades. Malaysia's democratic breakthrough had stood out as an outlier to the global rise of illiberal nationalism. Now that tale of democratic triumph appears to have faltered.

Ultimately, though, this volatility underscores a central theme of this book: political fates are fickle, and narratives focused on political heroes are fraught. It is thus imperative, as this book argues, to focus on the institutions that can help build and strengthen an enduring constitutional democracy. Courts and constitutional statecraft are crucial to that endeavor.

Political landscapes are ever-changing, after all, and Malaysia's remains in flux. As of March 2020, Prime Minister Muhyiddin announced an expansive Cabinet lineup that further consolidates his new administration. Still, ever since it ascended to power, the Perikatan Nasional coalition has been beset by charges that it lacks any electoral mandate. Even if this governing coalition manages to cling to power, it will be far more fragile than the Barisan Nasional ruling regime that

enjoyed decades-long dominance. And it is in fragile democracies that the role of courts in constitutional state-building is all the more important.

As contemporary political crises only underscore, the crafting and strengthening of institutions that can help a constitutional democracy endure is ever more urgent.

Yvonne Tew
March 12, 2020

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This book reveals the intersection of my intellectual passions and personal experiences. The seeds of this project were sown years ago; growing up in Malaysia's richly pluralistic yet fractured society, I became aware of the challenges of negotiating race, religion, and rights in an emerging constitutional democracy. The ideas that developed into this work have travelled with me across three continents and various institutional homes—from Malaysia to the Cambridge in England as well as the one in Massachusetts, and from New York to Washington, D.C. Along the journey I have been blessed by many mentors, colleagues, friends, and family.

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Introduction

Building Constitutionalism in Fragile Democracies

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On May 9, 2018, history reached a tipping point in Malaysia. For the first time since it gained independence more than half a century ago, Malaysia experienced a democratic change of government. In an unprecedented national election outcome, the Barisan Nasional ruling coalition lost its six-decade-long grasp on power.¹

Kuala Lumpur erupted. Crowds reveled in the streets of the capital, cheers breaking out across the city. Forty-nine years earlier, on May 13, 1969, in the aftermath of another general election, the city had also exploded—but in violence. Communal race riots broke out, leaving hundreds dead, after the governing coalition managed to hold onto power but suffered large losses to ethnic minority-dominated opposition parties.² Now, half a century later, almost to the day, the city burst into celebration that the Malaysian electorate had just overturned the only government the country had ever known. The Barisan Nasional coalition, which had controlled the federal government since 1957 and survived the 1969 tumult, was finally, peacefully, removed from power.

The drama did not end with the election. The Pakatan Harapan coalition—the Alliance of Hope—that had swept to victory in the 2018 elections formed the new government under the leadership of Mahathir Mohamad. Opposition leader Anwar Ibrahim, freshly released from prison as part of Pakatan Harapan’s pledge

¹ See *After Six Decades in Power, BN Falls to “Malaysian Tsunami”*, MALAYSIAKINI (May 10, 2018), <https://perma.cc/YY6E-TQG7>; Richard Paddock, *Malaysia Opposition, Led by 92-Year-Old, Wins Upset Victory*, N.Y. TIMES (May 9, 2018), <https://perma.cc/F3CY-Q8YS>.

² See *Race War in Malaysia*, TIME (May 23, 1969), <https://perma.cc/KS45-QNLN>.

that he would eventually succeed Mahathir, finally appeared set to become the next prime minister.³ Meanwhile, Najib Razak, the ousted premier who had been at the helm of Barisan Nasional, was stopped trying to leave the country on a private jet; authorities later arrested and charged him in connection with one of the world's largest corruption scandals, which involved the siphoning of billions of dollars from the government fund 1Malaysia Development Berhad.⁴

The story of Malaysia's 2018 regime transformation was held up as a triumph of democracy. With the rupture of the ruling party's power, democracy and constitutionalism appeared ascendant. "What we want to do is restore the rule of law," declared Mahathir minutes after Pakatan Harapan announced its electoral victory.⁵ Malaysia's disruption of dominant party rule has been described as a "miracle," and an outlier to the global trend of rising illiberal nationalism.⁶ Many in Asia and in the West hailed what happened in Malaysia as a democratic breakthrough,⁷ and in many ways it was.

But there is a darker portrait of Malaysia's transition story. Mahathir, the ninety-two-year-old former prime minister lauded as a hero for returning to politics to lead Pakatan Harapan to victory, first imprisoned Anwar—his then protégé and deputy prime minister—two decades earlier on what was widely regarded to be politically trumped-up charges of corruption and sodomy. And during his tenure as prime minister and head of Barisan Nasional, it was Mahathir who weakened the government's system of checks and balances, creating the centralized executive power that Najib's administration would later enjoy. Embedded within the narrative of Malaysia's 2018 political turnover is thus a deep irony: the leader celebrated as democracy's savior was also responsible for dismantling many of the democratic institutions that enabled the ruling coalition to maintain dominance for so long.⁸

These contrasting portraits of the Malaysian transition underscore that regimes change, political destinies are uncertain, and popular narratives are fickle. As history has shown us, heroes can turn out to be villains, and return to be redeemed as saviors, all within a generation. Narratives that revolve around the appeal of

³ See Simon Denyer, *Malaysian Reformist Anwar Ibrahim Released from Prison, Granted Royal Pardon*, WASH. POST (May 16, 2018), <https://perma.cc/439NXX5R>.

⁴ See Hannah Ellis-Petersen, *Ousted Malaysian Leader Najib Prevented from Leaving Country*, GUARDIAN (May 12, 2018), <https://perma.cc/2CL33KVV>; Yantoultra Ngui, *Former Malaysian Leader Najib Arrested, Faces New Charges in 1MDB Scandal*, WALL ST. J. (Sept. 19, 2018), <https://perma.cc/LGE8-E62H>.

⁵ See Alyaa Alhadjri, *Harapan Gov't Will Not Seek "Revenge" on Najib, Says Dr M*, MALAYSIKINI (May 9, 2018), <https://perma.cc/P977-B4BU>.

⁶ See Marvin Ott, *Malaysian Miracle*, ASIA DISPATCHES (May 24, 2018), <https://perma.cc/H8KW-5T5G>; Anwar Ibrahim, *How Malaysia's Democratic Disruption Stands Apart in a Year of Populist Nationalism*, S. CHINA MORNING POST (Dec. 13, 2018), <https://perma.cc/HU3B-J4XS>.

⁷ See Larry Diamond, *Malaysia's Democratic Breakthrough*, AM. INTEREST (May 15, 2018), <https://perma.cc/ZQ2E-E9S6>; Tsu Chong Chan, *Democratic Breakthrough in Malaysia—Political Opportunities and the Role of Bersih*, 37 J. CURRENT SE. ASIAN AFF. 109 (2018).

⁸ See Laignee Barron, *Malaysia's Longest-Serving Prime Minister Returns to Power Promising a Tide of Change*, TIME (May 11, 2018), <https://perma.cc/69VJ-FWAB>.

individuals and leaders are vulnerable to the capricious political winds of the time. For constitutional democracy to thrive, in Malaysia or elsewhere, requires a shift away from preoccupation with particular personalities or political parties.⁹ This book focuses on the constitutional institutions and legal mechanisms that can help build an enduring framework for a developing democracy.¹⁰

Central to the project of state-building are courts and constitutionalism. Courts in developing democracies have both a protective role and a constructive role.¹¹ In their protective capacity, courts serve to defend fundamental elements of the constitutional order from being altered or destroyed. 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.¹² In such contexts with a history of authoritarian rule, characteristic of many fragile Asian democracies, strong judicial review reinforces democratic governance by safeguarding core structures of democracy from being eroded by political actors.¹³ One powerful judicial strategy that courts can use to preserve this constitutional core is to assert the power to review amendments that undermine the basic structure of the present constitution. Declaring the authority to nullify a constitutional amendment is an assertive, even audacious, judicial move, but it can be achieved—as the Malaysian apex court illustrated when it carefully built the framework to declare certain constitutional

⁹ See Bridget Welsh, “Saviour” Politics and Malaysia’s 2018 Electoral Democratic Breakthrough: Rethinking Explanatory Narratives and Implications, 37 J. CURRENT SE. ASIAN AFF. 85, 86 (2018) (observing that “[t]he analytical focus has ... been primarily on the role of individuals and leaders, in keeping with what is arguably the dominant paradigm for understanding Malaysian politics as a whole”).

¹⁰ Indeed, as this book goes to press, Malaysia has a new governing coalition and prime minister after a government crisis in early 2020. Malaysia’s 2020 political crisis was triggered by political defections and followed by a battle for the country’s premiership among political elites as well as unprecedented royal intervention. At the end of February 2020, two years after its victory in the 2018 national elections, the Pakatan Harapan government, the Alliance of Hope, collapsed. On March 1, 2020, Muhyiddin Yassin was sworn in as prime minister at the helm of the new Perikatan Nasional governing coalition, which includes parties from the Barisan Nasional alliance that had been voted out in 2018.

Malaysia’s change of government in March 2020 was sudden and unexpected. Yet, ultimately, political crises such as these underscore this book’s central argument: political narratives are fragile, and it is thus all the more important to strengthen constitutional institutions, like the courts, that can help construct an enduring constitutional democracy.

See Hannah Beech, *Malaysia’s Premier, Mahathir Mohamad, Is Ousted in a Surprising Turn*, N.Y. TIMES (Feb. 29, 2020), <https://perma.cc/98KE-6YSH>; see also Yvonne Tew, *Malaysia’s 2020 Government Crisis: Revealing the New Emperor’s Clothes*, INT’L J. CONST. L. BLOG (Apr. 15, 2020), <https://perma.cc/7NZR-ZMP7>.

¹¹ See David S. Law & Hsiang-Yang Hsieh, *Judicial Review of Constitutional Amendments: Taiwan, in CONSTITUTIONALISM IN CONTEXT* 1, 21–22 (David S. Law ed., forthcoming) (manuscript on file with author) (describing the judiciary’s “rear-guard or protective use of amendment-review” to “defend key elements of the existing order” and “vanguard actions” to “facilitate regime transformation” specifically in the context of judicial review of constitutional amendment).

¹² See SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* 13 (2015).

¹³ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing for a “representation-reinforcing” approach to judicial review that focuses on protecting democratic processes).

fundamentals, including judicial power and the separation of powers, as beyond the reach of the political institutions.¹⁴

There is also a constructive role for courts to build and develop the foundational principles of an emerging constitutional order. In aspiring democracies, like Asian states transitioning from dominant party regimes, judiciaries have the potential to build a culture of constitutionalism. While its protective role focuses on the existing structures of constitutional governance, this facilitative role is explicitly forward-looking: it calls on courts to be conscious about crafting principles of constitutionalism and rights protection. In reaching for judicial tools to employ in practice, courts can use an interpretive approach informed by the constitution's overarching purposes and a proportionality analysis in constitutional rights adjudication. Purposive interpretation and proportionality review offer adjudicative mechanisms that can be applied robustly yet flexibly, which courts can develop incrementally over time to enhance effective constitutional review.

This book explores the role of judicial review and constitutionalism in safeguarding democracy and facilitating constitutional governance. It considers how the judiciary can negotiate institutional power to consolidate its position vis-à-vis the dominant political branches of government. It also examines the facilitative role courts can play in crafting the foundational principles of a fragile constitutional order. The strategies evident in Malaysia and Singapore suit the challenges of many other emerging Asian democracies, providing both guidance and caution as these states negotiate their evolving constitutionalism. At the heart of this book is an account of how judicial strategies of constitutionalism can sculpt the contours of state-building. It is, in brief, about how courts engage in constitutional statecraft.

I. Courts, Constitutional Politics, and Statecraft

A hallmark of the global rise of modern constitutions created in the twentieth and twenty-first centuries has been the proliferation of constitutional courts and judicial review.¹⁵ Different visions have emerged of the judicial role. One pictures courts in a heroic frame: as constitutional guardians and protectors of rights. The judge as Hercules, famously articulated by Ronald Dworkin, is engaged in seeking to interpret the constitution in its best light to reach a right decision that achieves justice, fairness, and integrity.¹⁶

¹⁴ See *Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MALAYAN L.J. 561 [hereinafter *Semenyih Jaya*]; *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors.* [2018] 1 MALAYAN L.J. 545 (F.C.) [hereinafter *Indira Gandhi* (F.C.)].

¹⁵ See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS AND JUDICIALIZATION* (2002).

¹⁶ See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); RONALD DWORIN, *LAW'S EMPIRE* (1986).

A contrasting vision portrays courts as ineffectual and the promise of judicial constitutionalism as largely illusory. In Asian democracies controlled by a dominant political party, for example, courts are considered to be on the fringes of constitutional politics.¹⁷ Judicially enforced constitutionalism has been dismissed as “inapt” for non-liberal polities in Asia.¹⁸ Others have characterized courts as serving the instrumental goals of authoritarian regimes.¹⁹ For courts to act as a constraint on consolidated political power appears to be a hopeless undertaking. The task confronting these courts does not appear Herculean, but Sisyphean.²⁰

This book sees the judicial role as neither heroic nor futile. Rather, it recognizes that courts both possess the capacity to intervene in the political environment and are themselves impacted by the forces and constraints of the broader context within which they operate. The question I seek to explore is not simply about the judicial role in an emerging democratic order but how courts in these aspiring democracies can and should carry out their constitutional task. My central concern is what strategies courts can use to strengthen their own institutional position and engage in constitutional state-building.

Constitutional statecraft involves special challenges, of course, for courts in fragile political orders. A key part of this book’s account focuses on how courts interact with their system’s particular configuration of political power.

Singapore and Malaysia have long been considered exemplars of dominant party democracies. Both states have been controlled for decades by a single party or coalition, which has dominated political power since each country gained independence. Singapore’s People’s Action Party has governed continuously since the country became a unitary sovereign state in 1965. The ruling party has never lost a single election, controlling an overwhelming majority of more than 90 percent of all elected parliamentary seats post-independence. With a ruling party that dominates politics and policymaking, the Singaporean state practices what has been described as authoritarian constitutionalism.²¹

Malaysia’s story, too, begins under the long shadow of dominant coalition rule. The Barisan Nasional alliance, which held a dominant political position even before the country gained independence from the British in 1957, maintained its grip on governing power for more than six decades.²² Yet, even a seemingly impervious

¹⁷ See PO JEN YAP, *COURTS AND DEMOCRACIES IN ASIA 2* (2017).

¹⁸ See Li-ann Thio, *Soft Constitutional Law in Nonliberal Asian Constitutional Democracies*, 8 INT’L J. CONST. L. 766, 767 (2010).

¹⁹ See Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Tamir Moustafa eds., 2008).

²⁰ 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).

²¹ See Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015).

²² The Alliance, Barisan Nasional’s predecessor, won the first general elections held in 1955 before Malaya’s independence by a landslide.

regime can slip from power. Contemporary Malaysia presents a striking example of a fragile democracy after the rupture of the only ruling government it had ever experienced in 2018, and then the new governing coalition's collapse in 2020. Following the regime changes of 2018 and 2020, post-transition Malaysia is in the process of renegotiating the dynamics of power for its nascent constitutional democracy.

II. Situating Constitutions and Courts in Context

On August 31, 1957, at the stroke of midnight, the *Merdeka*—or Independence—Constitution came into force when Malaya gained independence from the British. Six years later, Singapore, together with the Borneo states of Sabah and Sarawak, joined Malaya to form the new Federation of Malaysia, with a new Constitution of Malaysia. The union was unhappy and brief. On August 9, 1965, after hastily cobbling together a makeshift constitution, Singapore separated from the federation to become its own sovereign state.

Malaysia and Singapore are situated at the heart of Asia between China and India, described as places where the East meets the West. Labeled the Golden Peninsula by ancient Greek and Roman geographers,²³ the Malay Peninsula rose to prominence in the fifteenth century, with ports in Malacca, Penang, and Singapore becoming key hubs of trade routes for ships carrying spices, silks, and tea between the Indian and Pacific Oceans. Upon arriving in Malacca in 1854, Alfred Russel Wallace, a British naturalist and geographer, marveled: “This place is the market of all India, of China . . . and of other islands around about—from all which places, as well as from Banda, Java, Sumatra, Siam, Pegu, Bengal, Coromandel, and India—arrive ships which come and go incessantly, charged with an infinity of merchandises.”²⁴ The countries that would emerge from this archipelago of gold are a heady mix of cultures and communities, made up of different ethnicities, religions, and languages. Their stories take place amidst a long history of colonialism, as these lands changed hands from the Portuguese to the Dutch, and then to the British.

The Southeast Asian democracies of Malaysia and Singapore are richly illustrative examples for this book's exploration of constitutional adjudication and politics. Malaysia and Singapore present a unique dual case study. They share a common constitutional origin: both post-colonial states were part of the same country—the Federation of Malaysia—after gaining independence from the British, before

²³ W. Linehan, *The Identifications of Some of Ptolemy's Place Names in the Golden Khersonese*, 24 J. MALAYAN BRANCH OF ROYAL ASIATIC SOC'Y, pt. 3, at 86–98 (1951), <https://perma.cc/F9JA-L6PQ>.

²⁴ ALFRED RUSSEL WALLACE, *THE MALAY ARCHIPELAGO* 26 (London, 1872).

splitting apart and developing as two separate sovereign nations. Both countries have common law systems based on British legal traditions and parliamentary systems modeled on Westminster.

Crucially, though, unlike Britain, Malaysia and Singapore possess codified constitutions with bills of rights and judiciaries constitutionally empowered with judicial review. Their written constitutions share many similarities, unsurprisingly, since Singapore's Constitution is heavily based on the Constitution of Malaysia of which it was once part. Still, there are significant differences. Religion is one prominent example: Singapore's Constitution does not establish an official religion, while Malaysia constitutionalized Islam as the religion of the federation²⁵—a constitutional design arrangement that would have serious, if unintended, implications.

Constitutions capture a nation's imagination in different ways. Some nations may celebrate their constitution as indissolubly linked to their independence and founding—a marker of a break from the past. Such a narrative resonates in Malaysia, where local political leaders negotiated independence from the British colonial power. Other narratives of the constitution are more skeptical. Post-colonial constitutions have been described as maps that legitimate and reproduce power in governance,²⁶ and, indeed, the Malaysian and Singaporean constitutions authorize broad emergency powers and security regimes. Another strand born of skepticism toward Western liberal traditions advances instead an inward-looking constitutionalism based on purported Asian values. Still other narratives perpetuate an illiberal, even authoritarian, constitutionalism rooted in divisions of race and religion.

The struggles between these different constitutional narratives were evident at the founding of Malaysia and Singapore, reflected in battles over citizenship, language, identity, and religion. And these battles would be fought again in the decades to come, in recurring conflicts over race and religion, and over state power and individual rights.

Courts in these Asian democracies are expressly empowered to invalidate legislation and executive actions that violate constitutional guarantees. Yet, in practice these judiciaries have been highly passive, deferring extensively to the political branches. Tellingly, Singapore's highest court has never once struck down a

²⁵ FED. CONST. (MALAY.), art. 3(1) ("Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.")

²⁶ See generally H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 67 (Douglas Greenberg et al. eds., 1993) (arguing that "all law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of power").

legislative provision as unconstitutional.²⁷ And, until recently, its Malaysian counterpart had done so only a handful of times.²⁸

The constitution has itself been the site of struggle between the courts and the political branches of government. Most provisions in the Malaysian and Singaporean constitutions can be amended by a simple two-thirds majority of parliament—an easy task for a government controlled by a dominant party.²⁹ In both countries, the government has amended the constitution frequently in the past. The Singapore Constitution has been amended more than forty times,³⁰ while the Malaysian government has passed upwards of fifty constitutional amendment bills.³¹ Some of these amendments have been expressly aimed at curtailing judicial power. In 1988, the Malaysian Constitution was altered to subordinate the courts' powers to the legislature's control.³² The same year, Singapore's government swiftly amended its constitution to reverse the impact of a Singapore apex court decision and restrict judicial review.³³

In light of this political environment, it is especially challenging for courts to seek an empowered role. Indeed, courts have been thought to play little more than a “marginal role” in the constitutional governance of these fragile or dominant party states.³⁴ Following such aggressive political efforts to curtail judicial review through amendments, many commentators assumed that the state had effectively suppressed judicial power.³⁵ And some argue that these courts should avoid strong-form review, viewing political confrontation under such conditions as imprudent.³⁶ Attempting to achieve judicial empowerment appeared futile.

²⁷ The Singapore High Court has declared a statutory provision unconstitutional in only one case, and even this decision was later overturned by the Court of Appeal. See *Taw Cheng Kong v. Public Prosecutor* [1998] 1 SING. L. REP. 943 (H.C.), *overruled by* *Public Prosecutor v. Taw Cheng Kong* [1998] 2 SING. L. REP. 410 (C.A.).

²⁸ Prior to *Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MALAYAN L.J. 561, the Malaysian Federal Court had not declared a statute unconstitutional in twenty years. See *Mamat bin Daud v. Gov't of Malaysia* [1988] 1 MALAYAN L.J. 119; *Public Prosecutor v. Dato' Yap Peng* [1987] 2 MALAYAN L.J. 311.

²⁹ Singapore's People's Action Party has always controlled far more than two-thirds of the parliamentary seats. The Barisan Nasional coalition maintained a two-thirds legislative majority for decades until the 2008 national elections, when it obtained only a simple majority.

³⁰ See LI-ANN THIO, A TREATISE ON SINGAPORE CONSTITUTIONAL LAW ¶ 04.052 (2012).

³¹ See Cindy Tham, *Major Changes to the Constitution*, THE SUN (July 17, 2007), <https://perma.cc/5LU7-LRQ9> (noting that there have been more than fifty constitutional amendment acts totaling about 700 individual textual amendments to Malaysia's Constitution since 1957).

³² The Malaysian government amended the Federal Constitution to remove the reference in Article 121(1) to “judicial power being vested in a Supreme Court and such inferior courts as may be provided by federal law.” The amended Article 121(1) now stipulates that “courts shall have such jurisdiction and powers as may be conferred by or under federal law.” See Chapter 4, The Separation of Powers, section III.

³³ When the Court of Appeal ruled against the government on constitutional grounds in *Chng Suan Tze v. Minister of Home Aff.* [1988] 2 SING. L. REP. (R.) 525, the Singapore government responded by quickly passing constitutional and statutory amendments to reverse the Court's decision and limit judicial review. For more detailed discussion, see Chapter 5, The Rule of Law, section III(B).

³⁴ Thio, *Soft Constitutional Law*, *supra* note 18, at 767; see also YAP, COURTS AND DEMOCRACIES IN ASIA, *supra* note 17, at 2–4.

³⁵ See, e.g., Richard Foo, *Malaysia—The Death of a Separate Constitutional Judicial Power*, 2010 SING. J. LEGAL STUD. 227 (2010); Ratna Rueban Balasubramaniam, *Has Rule by Law Killed the Rule of Law in Malaysia?*, 8 OXFORD UNI. COMMONWEALTH L.J. 211 (2008).

³⁶ See PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA 77–78 (2015).

Still, it can be accomplished. In 2017, the Malaysian Federal Court unanimously invalidated a federal statute as unconstitutional—for the first time in twenty years—for infringing judicial power and the separation of powers.³⁷ Even more striking is that the Malaysian court repudiated the 1988 constitutional amendment, declaring that Parliament does not have the power to amend the Constitution to the effect of undermining the separation of powers and judicial power, which it called “critical” and “sacrosanct” to the Constitution’s framework.³⁸ A year later, in another remarkable assertion of power, the Federal Court expressly affirmed that the civil courts’ power of judicial review and constitutional interpretation are part of the Constitution’s basic structure—beyond even constitutional amendment.³⁹

While the Singaporean courts have taken a more incremental approach toward asserting constitutional review compared to their Malaysian counterparts, they have nevertheless begun to reveal a subtle but perceptible shift.⁴⁰ In several recent decisions,⁴¹ the Singapore Court of Appeal expressly affirmed the notion that “all power has legal limits,” recovering the significance of this principle of legality from earlier jurisprudence that had declared that the courts are able to examine any exercise of governing power.⁴²

A pliant court can transform itself into an assertive one, but it must do so strategically. Political forces matter, of course, and so some accounts counsel judicial restraint in the interest of self-preservation when faced with consolidated political power.⁴³ But it is not enough to wait for an opportunity to arise. Courts must also be capable of seizing the opportunity.⁴⁴ By exercising strategic assertions of power, a court can lay the groundwork for judicial tools that it can later employ to reinforce its position, whether or not the political space opens up. These legal tools can expand the court’s capacity to fulfill its protective role or to capitalize on the opportunity, if it presents itself, to exercise more transformative judicial review in constructing constitutionalism for a new political order. This book considers how.

³⁷ *Semenyih Jaya*, [2017] 3 MALAYAN L.J. 561.

³⁸ *Id.* at [90].

³⁹ *Indira Gandhi* (F.C.), [2018] 1 MALAYAN L.J. 545.

⁴⁰ See Jaclyn Neo, *Introduction to CONSTITUTIONAL INTERPRETATION IN SINGAPORE: THEORY AND PRACTICE* 8 (Jaclyn Neo ed., 2016) (noting “a discernible shift from strong judicial deference to Parliament and the executive towards an increasing openness to creating a real conversation about the proper scope and limits of their constitutional powers”).

⁴¹ See *Tan Seet Eng v. Att’y Gen.* [2016] 1 SING. L. REP. 779; *Vellama d/o Marie Muthu v. Att’y Gen.* [2013] 4 SING. L. REP. 1.

⁴² *Chng Suan Tze v. Minister of Home Aff.* [1988] 2 SING. L. REP. (R.) 525, at [86].

⁴³ See YAP, *CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA*, *supra* note 36.

⁴⁴ See Law & Hsieh, *Judicial Review of Constitutional Amendments: Taiwan*, *supra* note 11, at 24 (arguing that “for a docile court to transform into a robust and assertive agent of transformation . . . there are two basic requirements: an opportunity must present itself, and the court must be capable of capitalizing on the opportunity”); see also Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8 INT. J. CONST. L. 885 (2010).

The book charts a path forward for courts to protect and build constitutionalism in aspiring but fragile democracies in Asia. On a contextual level, the account offered here is embedded within a detailed study of the Asian democracies of Malaysia and Singapore.⁴⁵ The foundational constitutional principles it draws on are located in the framework of these post-colonial Southeast Asian constitutional orders, not from what are perceived as Western universal traditions. I aim to develop a contextually attentive approach to constitutional adjudication that draws legitimacy from within the Malaysian and Singaporean constitutions. At the same time, the analysis of these two contexts has resonance for other fledgling democracies in Asia that have not yet developed a robust constitutional culture and grapple with similar challenges from colonial legacies and authoritarian rule to societies divided by race, religion, and identity.

There is another aspect in which this book's focus on courts is deeply contextual, one of more individual potency: courtrooms are theaters for the stories of people whose battles are part of broader constitutional contestations. My account seeks to make visible the individuals who approach the courts as fora for their disputes and, in the process, show how their legal conflicts constitute wider social and political struggles.⁴⁶ Many of the cases in the following chapters involve people whose lives are intimately bound up with the conflict before the courts: from Lina Joy, the Malay-Muslim woman seeking to leave Islam and marry her non-Muslim fiancé, and Yong Vui Kong, the nineteen-year old drug courier sentenced to death for trafficking, to Indira Gandhi, the Hindu mother who has not seen her youngest child in a decade after her ex-husband converted their children to Islam.⁴⁷ These cases are not merely legal disputes but also focal points for larger clashes over the country's constitutional identity. Religion cases, for example, engage issues that go to the very core of the Malaysian state's character as secular or religious. Often, they involve people who have pushed, pulled, and struggled to advance their constitutional vision within the constraints of a hegemonic state.⁴⁸ Unlike doctrine-driven

⁴⁵ The Southeast Asian states of Malaysia and Singapore are relatively underexplored in the comparative constitutional law literature. See RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 207 (2014) (critiquing comparative constitutional law for its selection bias toward the "global north" countries, which typically include North America, Europe, Australia, New Zealand, and East Asia, and the lack of comparative studies on "global south" polities, which includes much of Asia).

⁴⁶ See TAMIR MOUSTAFA, *CONSTITUTING RELIGION: ISLAM, LIBERAL RIGHTS, AND THE MALAYSIAN STATE* 3 (2018) (arguing that courts constitute ideological conflicts over religion in Malaysia).

⁴⁷ *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MALAYAN L.J. 585 (F.C.); *Yong Vui Kong v. Public Prosecutor* [2015] 2 SING. L. REP. 1129; *Indira Gandhi* (F.C.), [2018] 1 MALAYAN L.J. 545.

⁴⁸ In Malaysia, the litany of case names that include lawyers, politicians, academics, activists, and civil society organizations show a growing culture of rights constitutionalism and the rise of strategic rights litigation over the last decade. See, e.g., *Public Prosecutor v. Azmi Sharom* [2015] M.L.J.U. 594; *Public Prosecutor v. Yuneswaran* [2015] 9 CURRENT L.J. 873; *Nik Nazmi v. Public Prosecutor* [2014] 4 MALAYAN L.J. 157; *Karpal Singh v. Public Prosecutor* [2016] M.L.J.U. 1675; *Lim Kit Siang v. Dr. Mahathir Mohamad* [1987] 1 MALAYAN L.J. 383; *Maria Chin Abdullah v. Pendakwa Raya* [2016] M.L.R.H. 260; *Sisters in Islam Forum & Ors. v. Jawatankuasa Fatwa Negeri Selangor & Ors.* [2018] 3

scholarship, the narrative told here focuses not only on the legal implications of judicial decisions; it also considers how these cases and the litigants that bring them interact with historical, political, and social dynamics, and tell us something about a particular constitutional culture.

Looking outward, this book contributes to broader comparative constitutional studies. It participates in a global discourse on the role of courts in a constitutional democracy. Much of the debate on the place of judicial review has developed from the standpoint of mature liberal democracies in North America and Europe,⁴⁹ with premises that do not apply to younger, fragile democracies.⁵⁰ In terms of courts in new democracies, scholars have focused on the wave of democratization at the end of the twentieth century.⁵¹ But the experience of post-colonial Asian democracies is different from the constitutional transitions in Eastern Europe, South Africa, and Latin America, where strong constitutional courts played highly interventionist roles in facilitating the democratization process. Nor does it reflect the ethnically homogenous and economically stable East Asian democracies of South Korea, Taiwan, and Japan, which have developed into fully thriving constitutional democracies.⁵² For nascent democracies in Southeast Asia, which have yet to develop robust constitutional cultures, scholars have generally advocated for courts to avoid exercising strong judicial review.⁵³

MALAYAN L.J. 706. And in Singapore, rising public law litigation has been noted as a recent trend. See V.K. Rajah, Attorney-General, Speech at the Opening of the Legal Year 2015, *The Rule of Law* (Jan. 5, 2015), at [16], <https://perma.cc/HQ7Q-D2QE> (“Another cultural change in recent years is the increase in civil litigation between the public and the state in administrative and constitutional law issues . . . due to the rise of an educated class with more awareness of their civil and constitutional rights.”).

⁴⁹ See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (1962); ELY, *supra* note 13; Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-Majoritarian Difficulty*, 112 *YALE L.J.* 153 (2002); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1341, 1346 (2006); RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* 261 (2007).

⁵⁰ See David Landau, *A Dynamic Theory of Judicial Role*, 55 *B.C. L. REV.* 1501 (2014); Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 *N.C. L. REV.* 1 (2019).

⁵¹ See, e.g., ISSACHAROFF, *FRAGILE DEMOCRACIES*, *supra* note 12; Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 *AM. J. COMP. L.* 585 (2014); TOM DALY, *THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS* (2017); WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* (2008); Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 *U. PA. L. REV.* 1757 (2006); THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005* (2013).

⁵² Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 *AM. J. COMP. L.* 805, 839 (2011); see also Jiunn-rong Yeh & Wen-Chen Chang, *ASIAN COURTS IN CONTEXT* (Jiunn-rong Yeh & Wen-Chen Chang eds., 2015); ANDREW HARDING & PENELOPE NICHOLSON, *NEW COURTS IN ASIA* (2010); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIA* (2003).

⁵³ See, e.g., Thio, *Soft Constitutional Law*, *supra* note 18; YAP, *COURTS AND DEMOCRACIES IN ASIA*, *supra* note 17; YAP, *CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA*, *supra* note 36.

The account in this book integrates the Malaysian and Singaporean examples into the comparative scholarship on courts and constitutionalism in evolving democracies. These Asian case studies show how courts negotiate their institutional dynamics of power and also pluralize constitutional accounts beyond familiar notions of liberal constitutionalism.⁵⁴ These two polities illustrate different stages of an evolving democracy: Singapore's dominant party state remains a model of authoritarian constitutionalism,⁵⁵ while Malaysia offers the experience of an aspiring, yet fragile, democracy. Further, the Malaysian experience adds the complicated, but deeply salient, dimension of religion.⁵⁶ Malaysia's constitutional arrangements on religion contribute to comparative scholarship on the constitution-making and design of religion clauses,⁵⁷ particularly in societies riven by religious and ethnic cleavages. The politicization and judicialization of Islam's position as the state religion—fueled by a febrile combination of religion and ethno-nationalism—is a case study in how religion, courts, and constitutional identity are central to the story of many pluralistic constitutional orders.⁵⁸

Finally, this book's project faces forward. For courts to play a more vibrant role in constitutional governance requires developing jurisprudence that enables them to protect and construct constitutionalism. In what follows, I am concerned not only with the judicial role but also with how courts can develop specific mechanisms to shape constitutional adjudication. The chapters that follow outline a framework of core constitutional elements—such as constitutional supremacy grounded in the original framework, the separation of powers, and the rule of law—that courts can use to chart a path forward in constitutional adjudication.⁵⁹ Courts building on this constitutional framework can develop specific legal interventions in the form of a basic structure doctrine to safeguard the constitution's core, a purposive interpretive approach that draws on overarching constitutional principles, and proportionality review in rights adjudication.

⁵⁴ See Mark Tushnet, Editorial, *Varieties of Constitutionalism*, 14 INT'L J. CONST. L., <https://perma.cc/J7TZ-B4QV>.

⁵⁵ Singapore's governance regime has often been referred to as a model for other authoritarian Asian states, most notably China. See Audrey Jiajia Li, *Is Singapore Still the Model Authoritarian State for China?*, S. CHINA MORNING POST (Dec. 13, 2016), <https://perma.cc/TL2W-T3SK>.

⁵⁶ As Ran Hirschl has observed, "Malaysia . . . features what is arguably one of the most fascinating and complex settings for studying the dynamic intersection of constitutional and religious law." RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 127 (2010).

⁵⁷ See, e.g., CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Aslı Ü Bâli & Hanna Lerner eds., 2017); TAMIR MOUSTAFA, *CONSTITUTING RELIGION: ISLAM, LIBERAL RIGHTS, AND THE MALAYSIAN STATE* (2018); DIAN SHAH, *CONSTITUTIONS, RELIGION AND POLITICS IN ASIA: INDONESIA, MALAYSIA AND SRI LANKA* (2017); Kristen Stilt, *Contextualizing Constitutional Islam: The Malayan Experience*, 13 INT'L J. CONST. L. 407 (2015).

⁵⁸ See Yvonne Tew, *Stealth Theocracy*, 58 VA. J. INT'L L. 31 (2018); see also HIRSCHL, *CONSTITUTIONAL THEOCRACY*, *supra* note 56.

⁵⁹ See Chapter 3, Constitutional History; Chapter 4, The Separation of Powers; Chapter 5, The Rule of Law; Chapter 6, Courts in Transition.

III. Book Schema

Part I sets the scene for the book by describing the constitutional rights discourse and the role of courts in the Asian democracies that it explores. Chapter 1, *Rights Rhetoric*, begins with the competing narratives of rights constitutionalism that have emerged in the rights discourse in Asia. One account has been characterized as a universalist approach toward individual rights, driven by Western notions of liberalism and focused on civil and political liberties. In contrast, some Asian states have asserted a relativist approach toward rights, prioritizing communitarian interests and economic development over individual freedoms of expression, assembly, and personal liberty. Pitted against each other, these two frames have produced dichotomies perceived as in tension with each other: between universalism and relativism, between individualism and communitarianism, and between civil-political rights and economic development. These constructed dichotomies perpetuated during the “Asian values” debate have continued even in the aftermath of that discourse to shape rights rhetoric and practice in the states that had been its strongest proponents. This broader discourse on constitutionalism and rights sets the backdrop for understanding the ineffectual approach toward rights protection in these Asian states.

Chapter 2, *Constitutional Adjudication and Constitutional Politics*, turns to the role of courts and how judicial review operates in practice within the wider constitutional politics of these Asian democracies. Judiciaries in Malaysia and Singapore are empowered by their written constitutions to invalidate legislation and executive actions for rights violations. Yet these Asian courts have long adopted an insular, rigidly formalistic approach toward constitutional review, marked by extensive deference to the political branches. This chapter considers why. Constitutional adjudication in practice is inextricably bound to constitutional politics. Courts facing a dominant political party operate within a challenging environment for exercising strong judicial review. In the 1980s, for example, the government’s aggressive backlash to judicial decisions with which it disagreed resulted in constitutional crises in Malaysia and Singapore. Chastened, the courts retreated to an exceedingly subdued position toward constitutional review. Over the next twenty years, the Malaysian apex court would refrain from invalidating any federal statute, while its Singaporean counterpart has not once struck down any law. Occasional displays of judicial assertiveness, particularly in Malaysia, hinted that judicial power had not been completely extinguished, but for decades the courts’ path to reinvigoration appeared uneven.

Part II develops a framework of the foundational elements that comprise these Asian constitutions, aimed at constructing an account of constitutionalism in theory to guide constitutional adjudication in practice. Chapters 3 to 5 explore the fundamental principles at the core of these constitutions: I use constitutional history to illuminate the constitution’s original framework and then examine the

foundational principles of the separation of powers and the rule of law. Chapter 6 draws these strands together to articulate a conception of the judicial role based on the constitutional core and how courts use particular mechanisms to structure adjudication.

Chapter 3, *Constitutional History*, begins at the founding. It examines the constitution-making process and road to independence in the post-colonial states of Malaysia and Singapore. This chapter provides the historical context for understanding the constitution's text and the foundations of the constitutional framework. Understanding the broader purposes that motivated the constitutional project provides us with the context necessary to interpret the constitutional text. For example, Malaysia's constitutionalization of Islam as the state religion was part of a social contract memorialized in a constitutional bargain that also sought to protect minorities and individuals. This historical context is vital for understanding the role that religion would play in the new constitutional order. More generally, the constitutions of Malaysia and Singapore set in place an overarching framework for governance that envisaged continuing constitutional construction in these independent democracies. Rather than mandating a narrow focus on the framers' specific expectations,⁶⁰ constitutional history helps reveal the foundational elements of a polity that can guide a contemporary adjudication approach. Faithfulness to the constitution calls for a deeper understanding of the foundational principles that underlie its structure and rights guarantees.

Chapter 4, *The Separation of Powers*, explores the judiciary's institutional role in maintaining balance among the branches of government. To contextualize the judiciary's fraught position, the chapter recounts how Malaysia's dominant party government infamously amended the Constitution in 1988 to remove the provision vesting judicial power in the courts. The Malaysian judiciary's response was initially anemic, with the Federal Court appearing to concede that the courts' powers were now at the mercy of the federal legislature.⁶¹ This chapter uses as its central case study the landmark decision of the Malaysian Federal Court in the 2017 case of *Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat*.⁶² For the first time in decades, the Court struck down a federal statute, declaring that constitutional judicial power is vested solely in the courts; to wit, nullifying the 1988 constitutional amendment. *Semenyih Jaya* represents a constitutional inflection point: it recognized judicial power and the separation of powers as features so central to the constitutional framework that they cannot be altered by the legislature, effectively establishing that a basic structure doctrine applied to the Malaysian Constitution. By affirming judicial power as fundamental to the constitution, the Malaysian Federal Court reinvigorated the separation of powers.

⁶⁰ Cf. *Yong Vui Kong v. Public Prosecutor* [2010] 3 SING. L. REP. 489.

⁶¹ See *Public Prosecutor v. Kok Wah Kuan* [2008] 1 MALAYAN L.J. 1 (F.C.).

⁶² [2017] 5 MALAYAN L.J. 561.

Chapter 5, *The Rule of Law*, turns to another foundational element of the constitution's framework. Accounts of the rule of law in some Asian states have typically been portrayed in highly formalistic terms. Singapore, for example, has long been characterized as having a stable, efficient legal system that perpetuates a "thin" rule of law in service of the state's objectives.⁶³ This chapter constructs a more robust conception of the rule of law, which is fundamentally connected to the courts' power of judicial review. The 2018 Malaysian case of *Indira Gandhi v. Pengarah Jabatan Agama Islam*⁶⁴ reveals a notion of the judicial power of the courts as a necessary corollary of the rule of law. What's more, the Federal Court expressly declared the civil courts' judicial review power and constitutional interpretation as basic features of the Constitution that cannot be altered by formal amendment. This rule of law conception reflects the principle of legality, premised on the notion that all power has legal limits, articulated by the Singapore Court of Appeal in the 2016 case of *Tan Seet Eng v. Attorney General*.⁶⁵ The emerging account of the rule of law is inextricably linked to judicial review as integral to the constitution's core framework.

Chapter 6, *Courts in Transition*, draws together the strands in Part II to make the case for a more empowered judicial role in the constitutional governance of the aspiring democracies of Malaysia and Singapore. Courts play a significant role in both checking political power in dominant party states and building foundational principles of constitutionalism in fragile democracies. In the face of concentrated political power, the judiciary can strengthen its institutional role through strategic assertiveness, as the Malaysian apex court illustrates in its two seminal decisions in 2017 and 2018.⁶⁶ This chapter takes on the question of how courts can develop the constitutional jurisprudence necessary to support a more robust judicial role. It argues that the constitution's foundational elements—the constitution's original framework, the separation of powers, and the rule of law—provide a core basis for courts to safeguard and draw on in structuring constitutional adjudication. It then explores specific legal mechanisms that courts can invoke in practice: a constitutional basic structure doctrine, purposive interpretation, and proportionality analysis in constitutional adjudication. Taken together, these judicial interventions equip courts in developing democracies to defend the constitution's core structure and to further construct principles of constitutionalism.

Part III turns from theory to practice. It explores how to apply the theoretical framework outlined in Part II in constitutional practice. Chapters 7 and 8 each

⁶³ See Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 73 (Tom Ginsburg & Tamir Moustafa eds., 2008); JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* (2012).

⁶⁴ [2018] 1 MALAYAN L.J. 545 (F.C.).

⁶⁵ [2016] 1 SING. L. REP. 779.

⁶⁶ *Semenyih Jaya*, [2017] 5 MALAYAN L.J. 561; *Indira Gandhi* (F.C.), [2018] 1 MALAYAN L.J. 545.

examine one of the two fault lines that epitomize the deep tensions between individual liberty and state power in these Asian democracies: religion and security powers.

Chapter 7, *Judicializing Religion*, focuses on a highly fraught area in the Malaysian public order: the role of religion within the state and religious freedom. As historical evidence shows, the constitutional arrangements on religion were meant to establish a generally secular state. Politicization of religion over the last two decades, however, has led to an expansion of Islam's role, fueling polarizing debate over the Malaysian state's identity as secular or Islamic. Courts have contributed to elevating Islam's position by deferring jurisdiction to the Sharia courts and expansively interpreting Islam's constitutional position. This chapter shows that the constitution's original framework is crucial for understanding religion's place in the public order. It also examines how the power of the civil courts is fundamental to the constitution's basic principles of the separation of powers, the rule of law, and the protection of minorities. Judicial review and constitutional interpretation are solely the province of the civil courts, as affirmed in 2018 by the Malaysian Federal Court in *Indira Gandhi*.⁶⁷ Drawing on the constitution's basic structure to restore the federal civil courts to their proper role vis-à-vis the religious Sharia courts, this chapter argues, would enable courts to reclaim jurisdiction over areas implicating fundamental rights, such as apostasy. Judges could also use a purposive approach toward interpreting religious liberty and equality rights to reverse the trend of prioritizing Islamic norms over constitutional principles. Finally, a robustly applied proportionality analysis would enable courts to enforce constitutional rights against government regulations on religion that restrict religious freedom or freedom of expression.

Chapter 8, *Balancing Security and Liberty*, considers the emergency powers and national security laws wielded by a powerful state. In addition to extensive emergency powers, security laws have long been features of the authoritarian regimes in Malaysia and Singapore, from preventive detention to public order statutes restricting the freedom of expression and assembly. Courts traditionally have been passive in scrutinizing government actions taken in the name of national security or public order, refusing to assess whether the vast powers wielded by the executive were reasonable. This chapter makes the case for greater judicial scrutiny over whether government restrictions on individual liberties are justified. Proportionality analysis offers a rigorous, yet flexible, framework that the court can use to engage directly with the government's justifications of national security and public order. On some occasions the court may have to rely on a constitutional basic structure doctrine to strike down legislative efforts, through constitutional amendment or statutes, to remove judicial review or erode institutional safeguards.

⁶⁷ *Indira Gandhi* (F.C.), [2018] 1 MALAYAN L.J. 545.

These doctrinal tools would aid courts in the critical, but sensitive, endeavor of balancing security and liberty.

* * *

The story of Malaysia's political transition unfolds like a Greek drama, along themes of power, glory, betrayal, reconciliation, and irony. Sometimes such dramas end in redemption, but they can also end in tragedy. The forces that drive democratic movements focused on particular political leaders or parties can equally fuel the rise of an illiberal populism—as trends the world over illustrate, from Asia and the Middle East to Europe and Latin America.⁶⁸

Whether a constitutional narrative ends in redemption or tragedy ultimately depends on the strength of the polity's institutions. Many democratic institutions—like the legislature, the media, the electoral commission, and civil society organizations—are important for a project of constitutional governance like Malaysia's to succeed. Constitutions and legal institutions on their own are not enough, but they can and should play a critical role. This book focuses on how courts can chart a path forward in developing constitutionalism.

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, these Asian courts must break out of their old Sisyphean mold of reflexive deference to the political branches. At the same time, enduring institutions can no more be built on judicial heroes than on political ones, and this book does not seek to place uncritical faith in the wisdom of Herculean judges.⁶⁹ My account of courts is located in their institutional capacity to serve as a protective check on political power and as agents that can facilitate constitutional construction. Fulfilling this task of crafting the principles that form the foundation of a constitutional order calls for courts to use strategies of state-building. Building an enduring institution that is capable of maintaining a constitutional balance of power in a democracy beats the efforts of a spasmodic Hercules.⁷⁰

The future of constitutional statecraft in Malaysia, Singapore, and other developing constitutional democracies in Asia has not yet been scripted. It is time for courts to shape their own destiny, and the ending of that constitutional narrative.

⁶⁸ See TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 49–119 (2018) (describing the democratic collapse and erosion of constitutional democracies globally).

⁶⁹ See ISSACHAROFF, *FRAGILE DEMOCRACIES*, *supra* note 12, at 241.

⁷⁰ To paraphrase Anthony Trollope, see ANTHONY TROLLOPE, *AN AUTOBIOGRAPHY* (Vol. 1) 161 (1883) (“A small daily task . . . will beat the labours of a spasmodic Hercules.”).

Conclusion

Beyond Sisyphus and Hercules

The constitutional transitions of contemporary Malaysia and Singapore tell a story of the legacies of colonialism, of politics rooted in race and religion, and of state hegemony fortified by emergency and security regimes. This story would be immediately recognizable outside Malaysia and Singapore, too.

Across many other fledgling democracies in Asia, the same core issues of democratic constitutionalism are playing out. Many Asian states have a history of authoritarian control; some continue to be under single party or military rule, while others are only now transitioning from a dominant party regime. Race, religion, and identity remain potent and often divisive forces in the religiously or ethnically pluralistic societies of Indonesia, Myanmar, Sri Lanka, India, and Pakistan. Vestiges of Western colonialism are evident in most Asian democracies; like Malaysia and Singapore, the jurisdictions of Myanmar, Hong Kong, Sri Lanka, India, Bangladesh, and Pakistan inherited common law legal systems from Britain, along with colonial-era emergency powers, sedition laws, and penal codes. Evolving democracies in Asia do not have robust constitutional cultures, yet rising political participation and civil society engagement—from Thailand and Indonesia to Malaysia and Hong Kong—reflect sustained efforts among the nation's citizens toward developing constitutional democracy. Still, these aspiring democracies remain deeply fragile, at risk of veering back into authoritarianism.

These developing post-colonial Asian states are finding new paths to constitutional democratization. Their experience is fundamentally different from the constitutional transitions in Eastern Europe, Latin America, and South Africa at the end of the twentieth century, where highly active courts were instrumental to the democratization process.¹ It is also different from the East Asian states of South Korea, Taiwan, and Japan, all of which have developed stable cultures of constitutionalism on the back of ethnically homogenous societies, strong economies, and successful democratization.²

¹ See, e.g., SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015); TOM DALY, *THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS* (2017); THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005* (2013).

² See Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805 (2011); see also PO JEN YAP, *COURTS AND DEMOCRACIES IN ASIA*

Courts in nascent Asian democracies face special challenges. In countries where consolidated political power has been the norm, courts must delicately balance the demands of powerful political institutions and actors.³ That task becomes all the more challenging in times of political transition, especially when states emerge from dominant party rule, and courts seek to renegotiate their position as institutional stakeholders. Religious and ethnic divisions further complicate judicial dynamics in pluralistic legal systems that accommodate religious courts and personal law, like those in Indonesia, Brunei, the Philippines, Bangladesh, and India, where constitutional disputes often reflect deep conflict over the state's secular or religious character.

Asian courts in aspiring democracies can play a crucial part in constitutional state-building. This book has explored the strategic and dynamic ways in which courts can strengthen the legal and institutional underpinnings of effective constitutional governance. Drawing on the case studies of Malaysia and Singapore to situate and sharpen our understanding, a picture emerges of how courts can develop and refine the judicial tools needed to reshape institutions and craft constitutionalism.

Different judicial strategies may be suited for different political or constitutional stages. One potent judicial mechanism for emerging democracies, for instance, is the doctrine that protects an implied constitutional core of basic principles so that it cannot be altered by an overreaching legislature through amendment. With the Malaysian Federal Court's landmark decisions in 2017 and 2018, which expressly entrenched the notion that parliament does not have the power to amend the constitution's basic structure,⁴ the doctrine of unconstitutional constitutional amendments now has a concrete foothold in Southeast Asia. The scope and limits of a basic structure doctrine are ultimately connected to democratic legitimacy,⁵ as the Malaysian case study illustrates. When the power to amend the constitution is concentrated in a dominant governing power, which might abuse constitutional amendment for authoritarian purposes,⁶ sometimes it is necessary for courts to enforce the constitution's basic structure against the majoritarian branches of government.⁷ Remarkably, the Malaysian court accomplished this step in a fraught area involving civil courts and religious courts, explicitly safeguarding the protection of minorities as part of the pluralistic constitution's fundamental core.

7–10 (2017) (characterizing South Korea and Taiwan as dynamic democracies with multi-party political competition).

³ See Jiunn-rong Yeh & Wen-Chen Chang, *Introduction to ASIAN COURTS IN CONTEXT* (Jiunn-rong Yeh & Wen-Chen Chang eds., 2015).

⁴ *Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MALAYAN L.J. 561 [hereinafter *Semenyih Jaya*]; *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors.* [2018] 1 MALAYAN L.J. 545 (F.C.) [hereinafter *Indira Gandhi* (F.C.)].

⁵ See Yaniv Roznai, *Constitutional Amendability and Unamendability in South-East Asia, in CONSTITUTIONAL AMENDMENT IN SOUTHEAST ASIA*, 14 J. COMP. L. 188, 194–95 (2019).

⁶ See David Landau, *Abusive Constitutionalism*, 47 U.C.D. L. REV. 189 (2014).

⁷ See Roznai, *supra* note 5, at 194–95; see also Jaclyn Neo, *Beyond Mortals? Constitutional Identity, Judicial Power, and the Evolution of the Basic Structure Doctrine in Malaysia*, in CPG PUBLICATION: “IDENTITY AND CHANGE—THE BASIC STRUCTURE IN ASIAN CONSTITUTIONAL ORDERS” (2016).

While the idea of limits on formal constitutional amendment was famously introduced by the Indian Supreme Court,⁸ and has since migrated to courts in Bangladesh,⁹ Pakistan,¹⁰ and Taiwan,¹¹ few courts in Southeast Asia have caught on. Some variants of the basic structure doctrine have registered in fits and starts in the practice of the Thai Constitutional Court,¹² the Supreme Court of the Philippines,¹³ and attracted extra-judicial support in Singapore.¹⁴ In general, though, it has not thrived in the region's jurisprudence, as yet remaining a constitutional novelty with an uncertain future.

Many of Southeast Asia's emerging democracies are important democratic battlegrounds of constitutional change. Amendment has been the primary mode of changing the constitution for many countries in the region,¹⁵ which, by and large, have easily amendable constitutions and powerful governing elites. Cambodia, Indonesia, and Thailand—like Malaysia and Singapore—have all experienced major constitutional revision at the hands of the governing powers. The Malaysian example illustrates the careful use of the doctrine to protect judicial power, and the conditions under which judicial scrutiny of constitutional amendments are democratically justified. Significantly, too, Malaysia has revealed a vision of the Constitution's basic structure that recognizes its pluralistic character and embeds within it protection for minorities and individuals.

Proportionality analysis has emerged as another judicial tool that can be used to great effect in rights adjudication at particular stages of a constitutional democracy's development. Despite its prevalence elsewhere in the world, in Asia, only the courts of Taiwan, South Korea, and Hong Kong apply a structured form of proportionality analysis to scrutinize government restrictions on rights.¹⁶ Among other Asian courts, the invocation of proportionality has been sporadic and anemic.¹⁷ Of especial significance, therefore, is the Malaysian apex court's decision in 2019, which

⁸ Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India).

⁹ See Ridwanul Hoque, *Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?, in AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES* 195, 195–229 (Richard Albert & Emrah Oder eds., 2018).

¹⁰ See Zeeshaan Zafar Hashmi, *Unconstitutional Constitutional Amendments or Amending the Unamendable: A Critique of District Bar Association Rawalpindi v. Federation of Pakistan*, PAKISTAN L. REV. IX (2018).

¹¹ See David S. Law & Hsiang-Yang Hsieh, *Judicial Review of Constitutional Amendments: Taiwan, in CONSTITUTIONALISM IN CONTEXT 1* (David S. Law ed., forthcoming) (manuscript on file with author).

¹² See Khemthong Tonsakulrungruang, *Constitutional Amendment in Thailand: Amending in the Spectre of Parliamentary Dictatorship, in CONSTITUTIONAL AMENDMENT IN SOUTHEAST ASIA*, 14 J. COMP. L. 173 (2019) (citing Constitutional Court Decision 18-22/2555 (2012)).

¹³ See Dante Gatmaytan, *Constitutional Change as Suspect Projects: The Philippines, in CONSTITUTIONAL AMENDMENT IN SOUTHEAST ASIA*, 14 J. COMP. L. 139 (2019).

¹⁴ See Chapter 2, *Constitutional Adjudication and Constitutional Politics*, section IV(C).

¹⁵ See Jaclyn Neo & Bui Ngoc Son, *Expanding the Universe of Comparative Constitutional Amendments in Southeast Asia, in CONSTITUTIONAL AMENDMENT IN SOUTHEAST ASIA*, 14 J. COMP. L. 46, 49 (2019).

¹⁶ See Po Jen Yap, *Introduction to PROPORTIONALITY IN ASIA 1* (Po Jen Yap ed., forthcoming 2020) (manuscript on file with author).

¹⁷ *Id.*

used a robust, multi-stage proportionality analysis to strike down a federal law.¹⁸ The Malaysian Federal Court's embrace of proportionality marks not merely a shift in legal doctrine but, more broadly, a shift in the judiciary's perception of its own institutional position.

This story has important resonance for courts in other emerging Asian democracies that operate in systems with dominant political parties or military regimes. While the journey may be long, and uneven, the Malaysian experience shows that it is nevertheless possible for courts in challenging political circumstances to embed, develop, and eventually fully wield a doctrine that empowers courts to enforce constitutional rights against the government. These Asian courts sit at different points on that uneven path. In Indonesia and Thailand, although proportionality has not generally been applied in a robust fashion to invalidate legislation, constitutional courts have endorsed the notion that rights derogations must be proportionate.¹⁹ At the other end of the spectrum stands Singapore, whose courts have so far stubbornly refused to adopt any form of proportionality, instead granting substantial deference to the political branches.²⁰ Proportionality offers a path between a position of reflexive deference to the political powers and a Herculean model of categorical rights reasoning.²¹ As the Malaysian case study illustrates, the adaptability of rights balancing as a doctrinal device allows it to be used in a context-sensitive manner by courts negotiating different stages of political and constitutional transition.

This book advances neither an ideal of Herculean judges forcing the governing powers into legal compliance nor a view of a futile judiciary cowed into passivity seeking to avoid political confrontation. More broadly, beyond specific judicial strategies, it is an account of the careful and strategic expansion of judicial power in an emerging democracy, as illustrated by the Malaysian judiciary's deliberate two-stage process to entrench judicial authority and expand constitutional review.²² At its core, the story that this book tells is one of judicial statecraft and constitutional vision.

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Malaysia's astonishing government transition in 2018 appeared to be a democratic breakthrough, a turning point of political and constitutional magnitude. And in many ways, it was. The Pakatan Harapan government—the Alliance of Hope—took

¹⁸ *Alma Nudo v. Public Prosecutor* [2019] 5 CURRENT L.J. 780

¹⁹ See Stefanus Hendrianto, *Against the Currents: The Indonesian Constitutional Court in an Age of Proportionality*, in PROPORTIONALITY IN ASIA 169 (Po Jen Yap ed., forthcoming 2020); Narongdech Srukhsot, *Manifest Disproportionality and the Constitutional Court of Thailand*, in PROPORTIONALITY IN ASIA 192 (Po Jen Yap ed., forthcoming 2020).

²⁰ See Alec Stone Sweet & Jud Mathews, *Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan—Whither Singapore?*, 29 SING. ACAD. L.J. 774 (2017).

²¹ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

²² See *Semenyih Jaya*, [2017] 3 MALAYAN L.J. 561; *Indira Gandhi (F.C.)*, [2018] 1 MALAYAN L.J. 545.

power, fresh from its electoral victory, with an agenda of governance reforms. It repealed an anti-fake news law and promised to abolish several oppressive security laws. At the U.N. General Assembly, Prime Minister Mahathir Mohamad pledged to ratify all core U.N. human rights conventions.²³ Government officials swiftly arrested former premier Najib Razak and filed criminal charges against Wall Street bank Goldman Sachs for allegedly being embroiled in the billion-dollar 1Malaysia Development Berhad state fund corruption scandal²⁴—a tale of such spectacular financial fraud that it has become the subject of a global bestseller.²⁵ Over the next year, the new government would appoint two new chief justices, putting in place the first non-Muslim and then the first female head of the Malaysian judiciary.²⁶

Yet challenges quickly became apparent. A swath of national security and public order laws, including a colonial-era sedition law, remained on the books. Deeper issues around race and religion resurfaced. Tens of thousands of Malay-Muslims gathered in a mass protest against the International Convention on the Elimination of All Forms of Racial Discrimination. Later, the Pakatan Harapan government backtracked from ratifying the U.N. Convention and withdrew from joining the International Criminal Court.²⁷

And then, in 2020, the Alliance of Hope collapsed. After a government crisis in February 2020, spurred by a series of political defections and alliance realignments that resulted in three leading contenders competing for premiership, a new governing coalition and prime minister ascended to power.²⁸ The Perikatan Nasional alliance consists predominantly of Malay-Muslim parties, including the United Malays National Organisation—a constituent party of the Barisan Nasional coalition voted out two years earlier—as well as the Malaysian United Indigenous Party and the Malaysian Islamic Party. The political developments culminating in the

²³ Yushaimi Yahaya, *Dr M Pledges to Uphold UN Principles in New Malaysia*, NEW STRAITS TIMES (Sept. 28, 2018), <https://perma.cc/K2Q4-CLWJ>.

²⁴ Jamie Fullerton, *Malaysia's ex-PM Najib Razak Goes on Trial over 1MDB Scandal*, GUARDIAN (Apr. 3, 2019), <https://perma.cc/8E48-J6HD>; Liz Hoffman & Aruna Viswanatha, *Goldman Sachs in Talks to Admit Guilt, Pay \$2 Billion Fine to Settle 1MDB Probe*, WALL ST. J. (Dec. 19, 2019), <https://perma.cc/2E5A-239H>.

²⁵ See BRADLEY HOPE & TOM WRIGHT, *BILLION DOLLAR WHALE: THE MAN WHO FOOLED WALL STREET, HOLLYWOOD, AND THE WORLD* (2018).

²⁶ In July 2018, Justice Richard Malanjum was appointed as the Chief Justice of Malaysia. Malanjum, who became Malaysia's first non-Muslim Chief Justice, authored the landmark dissents in the Federal Court's decisions in *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MALAYAN L.J. 585 (F.C.), and *Public Prosecutor v. Kok Wah Kuan* [2008] 1 MALAYAN L.J. 1. After Malanjum retired in 2019, when he reached the mandatory retirement age, he was succeeded by Tengku Maimun Tuan Mat, who became the first woman to head the Malaysian judiciary. See *Richard Malanjum is New Chief Justice*, NEW STRAITS TIMES (July 11, 2018), <https://perma.cc/S6XZ-RDQ6>; *Malaysia Appoints Its First Woman Chief Justice*, STRAITS TIMES (May 3, 2019), <https://perma.cc/9YJN-FRW3>.

²⁷ See Yantoultra Ngui & James Hookway, *Thousands of Malaysians Rally to Defend Race-Based Policies*, WALL ST. J. (Dec. 8, 2018), <https://perma.cc/NBN4-AEGS>; Joseph Sipalan, *Malaysia Backpedals on U.N. Race Measure in Face of Protests*, REUTERS (Nov. 23, 2018), <https://perma.cc/5WAA-KNB8>; *Malaysia Withdraws from the Rome Statute*, THE STAR (Apr. 5, 2019), <https://perma.cc/9A9M-28F6>.

²⁸ See Hannah Beech, *Malaysia's Premier, Mahathir Mohamad, Is Ousted in a Surprising Turn*, N.Y. TIMES (Feb. 29, 2020), <https://perma.cc/98KE-6YSH>; Laignee Barron, *Malaysia's 94-Year-Old Prime*

2020 regime change appeared to underscore that identity politics driven by race and religion have not disappeared from the heart of Malaysian society.

For decades, democratic change in Malaysian politics primarily meant breaking the hegemony of the dominant ruling party. The 2018 political transition was the first change of government achieved through a democratic election. But as has quickly become apparent, political regime change alone is not sufficient. An illiberal constitutionalism rooted in ethno-nationalism and authoritarianism is not easily eradicated.

And yet, from the immediacy of history, more than one story can emerge. Glimmers of a new constitutional vision are now visible, too.

To build a stable constitutional democracy requires strengthening the institutions that sustain its endurance. Courts and constitutional mechanisms are central to that endeavor. And while, like Sisyphus's rock, the burdens of an authoritarian past may sometimes set back the enterprise, the judicial strategies this book has explored provide the constitutional footholds needed to prevent the tragedy of democratic backsliding. Courts can use particular strategies to entrench basic constitutional structures and to protect rights proportionately in line with the constitution's overarching purposes. This book shows how judicial institution-building can be undertaken in service of crafting a culture of constitutionalism.

Courts in developing Asian democracies have lain passive for too long, regarding the task before them as formidable as the mountain that Sisyphus is condemned to confront endlessly. Still, there is another narrative: one that speaks to a new project of constitutional imagination. Courts are now realizing their role as partners in the enterprise of constitutional statecraft. Where once the climb to democratic constitutionalism appeared impossibly steep, the task no longer seems to be without hope.

Minister Is Out. The New Leader Is Likely to Inflame Racial Tensions, TIME (Mar. 4, 2020), <https://perma.cc/B3X5-W4V3>.

The February 2020 regime change was not generated through a democratic national election, but came about after a battle among political elites for the country's leadership, precipitated by a faction of defectors, and eventually resolved through royal appointment.