Book Review

YVONNE TEW, CONSTITUTIONAL STATECRAFT IN ASIAN COURTS (Oxford University Press, 2020)†

*Reviewed by Masahiko Kinoshita**

Constitutional Statecraft in Asian Courts by Yvonne Tew is a brilliant book that serves as a guiding beacon illuminating the direction for courts within fragile democracies where the path forward is obscured amidst turbulent storms.[1] The arguments presented in this book are based on qualitative case studies of two Southeast Asian countries: Malaysia and Singapore. It is neither a global comparison of numerous jurisdictions nor a study employing quantitative methods, which are currently highlighted in comparative constitutional academia.[2] Nevertheless, these factors do not detract from the book's importance. On the contrary, the book proves that meticulously analyzing deep case studies can yield far-reaching implications with considerable impact.

In the post-colonial era, Malaysia and Singapore embarked upon state-building endeavors, anchored by codified constitutions that instituted a parliamentary democracy, a bill of rights, and constitutional judicial review. These states possessed the requisite framework to cultivate liberal democratic outcomes; however, the principal architects of such undertakings were predominantly a single party and coalition: the Barisan Nasional in Malaysia and the People's Action Party in Singapore. Professing "Asian values," the leaders of these parties pursued policies that prioritized communitarian interests and economic advancement over civil and political liberties. These regimes have been variously labeled as "semi-authoritarianism,"[3] "electoral

† https://doi.org/10.1093/ajcl/avae008

* Professor, Kobe University Graduate School of Law, Japan. I would like to thank Hironobu Asano, Keigo Fuchi, Yukio Okitsu, and Bryan Dennis G. Tiojanco for giving me valuable feedback. I take all responsibility for this Review. This work was supported by JSPS KAKENHI Grant Number JP22H00043.

1. YVONNE TEW, CONSTITUTIONAL STATECRAFT IN ASIAN COURTS (2020).

2. For a sampling of multi-jurisdiction comparisons, see YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS (2017); RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS (2019). For a sampling of quantitative comparisons, see ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009); ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER (2020).

3. MARINA OTTAWAY, DEMOCRACY CHALLENGED (2003).

authoritarianism,"[4] or "authoritarian constitutionalism,"[5] occupying an intermediate position on the spectrum between democracy and authoritarianism. Drawing upon the terminology of this book, these political systems can be described as "aspiring democracies" on the path toward mature democracy. Concurrently, they also embody "fragile democracies," wherein dominant political actors retain the capacity to undermine democratic progress.

In her book, Tew explores the strategies that courts can and should use in their quest to construct democratic states within the context of fragile democracies.[6] The book targets judges who seek to contribute to the development of a democratic state as its primary readers.[7] However, Tew posits that these judges should not embody Hercules, who would be solely preoccupied with arriving at a singular, best interpretation of the Constitution.[8] Within the confines of a dominant-party democracy, the most heroic decisions embodying constitutional ideals may ultimately be counteracted by the prevailing regime, rendering them not invariably advantageous in the long term. Simultaneously, Tew contends that judges should not assume the role of Sisyphus, merely complying with the edicts of hegemonic governments. Instead, she argues that even under the auspices of dominant party regimes, courts can embrace strategies that fortify their own authority, thereby contributing to the establishment of a constitutional democratic state.

Tew provides rebuttals to the two criticisms of judicial empowerment.[9] The first is the theory of "counter-majoritarian difficulty," which challenges the legitimacy of courts overturning the decisions of democratically elected representatives.[10] She claims that the "counter-majoritarian difficulty" argument presupposes interparty competition and a pervasive commitment to constitutional values within society—conditions absent in Malaysia and Singapore.[11] In these countries, elected representatives do not necessarily represent the will of majority. In other words, no democratic institutions exist there to challenge the democratic legitimacy of the courts.

The second criticism is the dialogue theory elaborated by Po Jen Yap in the context of semi-authoritarian regimes.[12] Dialogue theory posits that fostering constitutional order through dialogue between the judiciary and the legislature is desirable, and that, to this end,

4. Electoral Authoritarianism (Andreas Schedler ed., 2006); Andreas Schedler, The Politics of Uncertainty (2013).

5. Mark Tushnet, *Authoritarian Constitutionalism*, 100 Cornell L. Rev. 391 (2015).

6. Tew, *supra* note 1, at 4–5.

7. I perceive that this book is for "good" judges who seek to develop democracy, not for constitution designers who aim to preemptively control "bad" judges wishing to consolidate authoritarianism.

8. Ronald Dworkin, Law's Empire (1986).

9. Tew, *supra* note 1, at 125–31.

10. *See* Alexander Bickel, The Least Dangerous Branch (1962); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1341 (2006).

11. Tew, *supra* note 1, at 125–26.

12. Po Jen Yap, Constitutional Dialogue in Common Law Asia (2015).

constitutional review by the courts should not be final, leaving the power to overrule judicial decisions to the legislature. This theory embodies political pragmatism, aiming concurrently to advance the realization of constitutional ideals while mitigating the risk of reprisals from the dominant party government against the judiciary.[13] However, Tew counters that this dialogue strategy ultimately falters in both paths.[14] In her view, the dialogue strategy merely enables backlash legislation by the dominant party and nurtures a culture of judicial deference. Tew maintains that under circumstances where the political branches do not engage in the same dialogue game, the power of courts to issue binding decisions on constitutionality is indispensable for safeguarding democracy.

Nevertheless, the judicial empowerment Tew envisions transcends even constitutionally codified powers. She asserts that courts in fragile democracies should possess the power to invalidate not only legislation but also constitutional amendments.[15] Since 1973, when the Supreme Court of India formulated the basic structure doctrine which empowered courts to strike down constitutional amendments that modify the basic structure of the Constitution, this doctrine has migrated on a global scale.[16] Of course, it would constitute extreme counter-majoritarianism in the context of mature democracies for courts to annul constitutional amendments that have passed through higher obstacles than the ordinary legislative procedure. However, Tew highlights the reality that in Malaysia and Singapore, the supermajority does not pose a significant barrier to dominant political parties. She underscores the risk of sliding toward authoritarianism through constitutional amendments that could arise in the absence of judicial power to overturn such amendments.[17] This argument reminds us that the implication of the distinction between a majority and a supermajority, between ordinary legislations and constitutional amendments, could change depending on the political regime.

Of course, the Tewian courts in this book are not Hercules. That is, while these courts do not capitulate entirely to an authoritarian government, they strive for the second best within the given political context. If the court which had been deferential even to ordinary legislation were to suddenly declare a constitutional amendment unconstitutional, tensions with the political branches would escalate rapidly. Instead of such an abrupt and drastic measure, the author encourages a phased strategy for the courts: initially, affirm the basic structure doctrine within judicial reasoning, and subsequently entrench that power incrementally through a series of decisions. Tew calls this

13. *Id*. at 57, 77–78, 103–06.
14. Tew, *supra* note 1, at 129–30.
15. *Id*. at 140–47.
16. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (India). For a discussion of jurisdictions that reject unconstitutional constitutional amendment doctrine, see Richard Albert, Malkhaz Nakashidze & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 Hastings L.J. 639 (2019).
17. Tew, *supra* note 1, at 144.

strategic maneuver *Marbury*-style tactics or, in the words of Dixon and Issacharoff, the "judicial deferral" strategy.[18]

This strategy is not confined to a theoretical realm but is also discernible in the dynamic narrative surrounding judicial constitutional power in Malaysia. In 1987, Malaysia's Federal Court, which had refrained from issuing decisions that might clash with the political branches since the country's independence, delivered a series of aggressive judgments that provoked the Mahathir government's ire. This precipitated the 1988 Malaysian judicial crisis and retaliatory moves by the political branches against the courts, during which Federal Court judges, including the chief justice, were ousted from office, and Article 121 (1) of the Constitution which precluded other governmental branches from usurping judicial power was amended.[19] Although the implications of this 1988 constitutional amendment remain contested, its phrasing implies a shift in the scope of judicial power from one that previously hinged on constitutional interpretation to one contingent upon legislation; the 2008 Federal Court decision interpreted it accordingly.[20]

The 2017 *Semenyih Jaya* case marks a significant turning point in this situation.[21] Drawing upon the Indian precedent of *Kasavananda*, the Federal Court adopted the basic structure doctrine and held that the parliament lacks the power to amend the constitution in a manner that would undermine the separation of powers and the independence of the judiciary.[22]

Tew designates *Semenyih Jaya* as Malaysia's *Marbury*. Nevertheless, the logic of *Semenyih Jaya* is somewhat more complex. The Federal Court held that the 1960 Land Acquisition Act which curtailed the court's jurisdiction over determining compensation for land acquisition was unconstitutional. However, this conclusion was reached not because the 1988 constitutional amendment per se was found to be unconstitutional. Although *Semenyih Jaya* insisted that the 1988 amendment was inconsistent with the basic structure of the Constitution, it allowed the 1988 amendment itself to persist.[23] Instead, by interpreting the amendment's meaning as substantially akin to the original Constitution, the Federal Court arrived at the conclusion that the legislation was unconstitutional. While some critics have argued that the court should have adopted a more resolute stance and wholly invalidated the 1988 constitutional amendment, the author perceives the *Semenyih Jaya* decision positively, regarding

18. *Id*. at 133; Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 685. For a detailed discussion of the rationale for *Marbury*-style strategy, see Sergio Verdugo, *How Judges Can Challenge Dictators and Get Away with It: Advancing Democracy While Preserving Judicial Independence*, 59 COLUM. J. TRANSNAT'L L. 554, 574–82 (2021).

19. TEW, *supra* note 1, at 95–96.

20. *Id*. at 96–97; Public Prosecutor v. Kok Wah Kuan [2008] 1 MALAY. L.J. 1 (F.C.) (Malay.).

21. Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat [2017] 3 MALAY. L.J. 561 (F.C.) (Malay.).

22. *Id.* [76]–[91].

23. *Id.* [74]–[76]. TEW, *supra* note 1, at 99–104, 134–36.

it as a strategic maneuver to bolster the judiciary while circumventing confrontation with the political branches.[24]

The story does not end there. The 2018 *Indira Gandhi* case further entrenched Malaysia's basic structure doctrine.[25] This case involved jurisdictional disputes between civil and sharia courts, concerning a conflict in which an ex-wife challenged the conversion of her children by her ex-husband to Islam. The 1988 amendment introduced Article 121(1A) to demarcate the jurisdiction between civil and sharia courts. Nonetheless, the Federal Court clarified that civil courts take precedence over sharia courts in constitutional matters, even in cases involving Islamic law. This holding was based on the premise that civil courts' power to interpret the Constitution forms its basic structure and, therefore, cannot be diminished by constitutional amendments.[26] This decision which successfully empowered the courts to move toward the next stage is so important for this book that the entire volume might have been written as a justification for that decision.

Some readers might contend that the strategic approach commended by this book, as outlined above, does not significantly diverge from Yap's dialogue theory. Indeed, they share the dual objectives of promoting democracy and minimizing conflict with the dominant government. However, Tewian courts, even when not concluding that executive or legislative acts are unconstitutional, consistently endeavor to strengthen their own power through judicial reasoning at every opportunity, and do not hesitate to wield the power they have cultivated when a dominant government undermines the core of the constitution. Thus, Tewian courts exhibit greater dynamism than Yap's as they strive to transform constitutional order through self-empowerment.

This book establishes a theoretical pillar for practical strategies of courts in semi-authoritarian regimes/fragile democracies. However, Tew's strategy might not necessarily replace Yap's dialogue theory. Tew's strategy is not without risks to the courts. Ruling governments are attuned to their powers and limitation, and if courts attempt to build their own power, they will most certainly be aware of such attempts. Consequently, the ruling government might seek to remove progressive judges and transform the Constitution into a more authoritarian one through constitutional amendments, as happened during the 1988 Malaysian judicial crisis.

Of course, such a backlash is also perilous for the government because an authoritarian backlash can incite popular opposition. When an authoritarian government is weakened, popular resentment may prove fatal to a regime and could lead to a regime change that is more unfavorable for the regime's leaders than would have otherwise been possible. Thus, Tew's strategy is more likely to succeed when a semi-authoritarian regime becomes increasingly vulnerable. Indeed, both

24. *Id.* at 136.

25. Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak [2018] 1 MALAY. L.J. 545 (F.C.) (Mal ay.).

26. *Id.* [104]; TEW, *supra* note 1, at 138.

Semenyih Jaya and *Indira Gandhi*, which Tew praises, emerged when the dominant party was considerably weakened in anticipation of the first change in government in 2018. However, when the power of the dominant party or coalition has stabilized or is already in the consolidation phase, courts are more likely to lose their battle with the ruling government, which ultimately has physical as well as personnel power. In this case, Yap's more moderate dialogue strategy might be more suitable than that of Tew.

Semi-authoritarian regimes/fragile democracies are conceived of as an intermediate category between authoritarian regimes and mature democracies; however even within this category, various subcategories should be identified according to the strength of the dominant government. This book's discussion may be most appropriately viewed as a judicial strategy in the twilight of semi-authoritarian regimes rather than simply a judicial strategy in semi-authoritarian regimes.

Additionally, while this book addresses critical constitutional issues (such as the separation of powers, the rule of law, and the protection of minorities) as encountered in *Semenyih Jaya* and *Indira Gandhi*, further examination is necessary to determine whether the book's arguments on these issues can also be applied to matters related to the political process. Severe gerrymandering and malapportionment have become chronic in semi-authoritarian states, contributing to the prolonged dominance of the ruling party. Without reforms, democracy may remain fragile or even deteriorate. When the political branches are unwilling to change political processes, the courts represent the last hope.[27]

However, judicial intervention in the political process can generate greater tension between courts and political branches than what was observed in *Semenyih Jaya* and *Indira Gandhi*. Indeed, despite issuing a series of landmark decisions, Malaysian courts are still hesitant to intervene in the political processes.[28] A strategy distinct from the cases of *Semenyih Jaya* and *Indira Gandhi* may be required to address the political process issues. In other words, there remains an extensive range of areas in which judicial strategies should be developed. Nevertheless, even when we endeavor to investigate such uncharted territories, this book will be referred to as a classic of judicial review studies in fragile democracies.[29]

27. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Stephen Gardbaum, *Comparative Political Process Theory*, 18 INT'L J. CONST. L. 1429 (2020).

28. *See* Dian A.H. Shah, *The Malaysian Election Commission: Navigating Electoral Authoritarianism and Political Change*, 16 ASIAN J. COMP. L. 105 (2021).

29. For a discussion of further diverse judicial strategies by the author, see Yvonne Tew, *Strategic Judicial Empowerment*, 71 AM. J. COMP. L. (forthcoming 2023). *See also* Nicola Tommasini, *Judicial Self-Empowerment and Unconstitutional Constitutional Amendments*, INT'L J. CONST. L (forthcoming 2023).