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CHAPTER

Malaysia

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Abstract

This chapter provides an account of constitutional law and adjudication in Malaysia against the broader political context of a dominant party state that has fractured into a fragile democracy. With a written constitution that came into force at the country's independence in 1957, Malaysia has formal constitutional commitments to fundamental rights, the rule of law, and judicial review. Yet courts in Malaysia have traditionally adopted a rigid, insular approach to constitutional adjudication, characterized by strict formalism and extensive deference to the political branches. Fault lines of constitutional challenge involve religion and the state, as well as emergency powers and national security laws. For much of the country's history, courts have navigated the fraught dynamics of dominant political power. Recent displays of assertiveness by the Malaysian judiciary toward developing the doctrinal tools to protect the constitution's basic structure, however, signal judicial willingness to take on a more empowered role in constitutional governance.

Keywords: Malaysia, courts, constitutional adjudication, constitutional politics, basic structure doctrine, religion and state, emergency powers, national security laws, judicial power, fragile democracies

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1. Introduction

Constitutional law and adjudication in Malaysia take place against the broader political context of a dominant party state that has fractured into a fragile democracy. With a written constitution that came into force at the country's independence in 1957, Malaysia has formal constitutional commitments to fundamental liberties, the rule of law, and judicial review. Yet courts in Malaysia have traditionally adopted a rigid, insular approach to constitutional adjudication, characterized by strict formalism and extensive deference to the political branches. Fault lines of constitutional challenge involve religion and the state, as well as emergency powers and national security laws. For much of the country's history, courts have navigated the fraught dynamics of dominant political power. Recent displays of assertiveness by the Malaysian judiciary toward developing legal tools to protect the constitution's basic structure, however, signal judicial willingness to take on a more empowered role in constitutional governance.

1.1 Constitutional History: The Birth of the Malaysian Federation

Malaysia's Constitution originated in the post-colonial climate of a nation at the cusp of independence. Following colonization by the Portuguese and the Dutch, the Malay Peninsula came under British control in the eighteenth century. In 1786, the British began their intervention in Penang, a port city which—along with Singapore in 1819 and Malacca in 1824—would eventually be controlled directly by the British as the Straits Settlements. Over the late 1800s and early 1900s, nine Malay States and much of Northern Borneo came under British control. Following the Japanese occupation of Malaya, Borneo, and Singapore during the Second World War, the British sought to unify Penang, Malacca, and the nine Malay states into a unitary Malayan Union in 1946, which was widely opposed by the Malays. The Malayan Union was eventually dissolved and replaced by the Federation of Malaya in 1948.

After years of growing momentum towards independence, the Federation of Malaya held its first elections in 1955 while still under British colonial rule. The Alliance Party—a coalition made up of the United Malays National Organisation (UMNO), the Malaysian Chinese Association (MCA), and the Malaysian Indian Congress (MIC)—assumed control of the Federal Legislative Council, with Tunku Abdul Rahman as the first Chief Minister. In 1956, the Tunku led a delegation to London to negotiate the Federation's independence from Britain. Following successful negotiations, a constitutional commission was established to draft a constitution for the new nation.

Five legal experts from the United Kingdom, Australia, India, and Pakistan were appointed to a commission chaired by Lord Reid, a British appellate judge. The Reid Commission was given specific terms of reference for drafting the new constitution outlined in the Alliance Memorandum submitted to the constitutional conference in London.[1] After a period of consultation in Malaya, the Reid Commission prepared a draft constitution accompanied by a report. After the Reid Report was released in February 1957, a Working Party was established to examine the Commission's recommendations. Several changes relating to issues of citizenship, ethnicity, religion, and language were made to the draft constitution. The final draft of the constitution was accepted by the Malayan Conference of Rulers and adopted by the Federal Legislative Council. The *Merdeka*—or Independence—Constitution came into force as the Federation of Malaya became a fully independent nation on August 31, 1957.[2]

Six years later, the 1957 *Merdeka* Constitution would become the basis for the Federal Constitution of Malaysia when Singapore and the Borneo states of Sabah and Sarawak joined the Federation to form the new nation of Malaysia in 1963. Singapore left to become a sovereign state in 1965. The Federation of Malaysia currently consists of thirteen states and three federal territories.

1.2 Brief Overview: Constitutional Structure

Malaysia is a federal constitutional monarchy with a Westminster model of government comprised of legislative, executive, and judicial branches.[3] The Federal Constitution established a bicameral federal Parliament, consisting of the *Dewan Rakyat* (House of Representatives) and *Dewan Negara* (Senate). Legislative power is also divided between the federal and state legislatures. In line with the Westminster model, the executive is headed by a Prime Minister appointed based on the confidence of the majority in Parliament by the *Yang di-Pertuan Agong*. The *Yang di-Pertuan Agong*— —the King of Malaysia—is the constitutional monarch and head of state; the King is elected by the Conference of Rulers, which is made up of the sultans of the nine Malay states and the governors of the four other states.[4]

The Federal Constitution of Malaysia provides that the "Constitution is the supreme law of the Federation and any law … shall, to the extent of the inconsistency, be void."[5] The Constitution contains a chapter on fundamental liberties, which includes the right to life and liberty, the right to equality, freedom of speech and assembly, freedom of religion, and the right to property.[6]

Courts in Malaysia possess the power to review and invalidate legislative and executive actions for unconstitutionality.[7] The highest court is the Federal Court (known as the Supreme Court from 1985 to 1994),[8] which has original and advisory jurisdiction over certain matters and also hears appeals from the Court of Appeal.[9] The superior courts consist of the Court of Appeal and two High Courts of coordinate standing, one in Malaya and the other in Sabah and Sarawak.[10] Alongside the civil court system exists a system of *Sharia* courts that come under the purview of individual states within the federation; these religious courts have jurisdiction over persons professing the religion of Islam with respect to matters governed by state Islamic law such as personal and family law.[11]

Constitutional amendment rules depend on the provision involved.[12] Generally, an amendment is passed by at least two-thirds of the total membership of each House of Parliament.[13] For amendments to provisions regarding citizenship, the Conference of Rulers, the Malay national language, and the special position of the Malays and the natives of Sabah and Sarawak, the consent of the Conference of Rulers is also required in addition to a two-thirds parliamentary majority.[14] The state governments of Sabah and Sarawak must consent to alterations to the safeguards for the constitutional position of their respective states.[15] Other amendments—such as admitting a new state into the federation—may be passed with a simple majority in Parliament.[16]

2. Courts and Constitutional Adjudication

2.1 Judicial Review and Constitutional Politics

Courts in Malaysia historically have not been robust in exercising their powers of judicial review, even though the Federal Constitution of Malaysia empowers the judiciary with oversight over the legislature and executive.[17] Malaysia's constitutional politics provides the context for understanding the judiciary's passive stance in the past.

For much of the country's history since its independence in 1957, Malaysia operated under dominant political coalition rule. Until the 2018 general elections, the Barisan Nasional coalition had never lost its grip on power.[18] For most of those six decades, this dominant political alliance had also controlled more than two-thirds of the seats in Parliament. This legislative supermajority enabled the Barisan Nasional government to amend most constitutional provisions at will—a power it wielded frequently: during its time in power, it passed more than fifty constitutional amendment acts, comprising approximately 700 individual textual amendments.[19]

The foundations of the judiciary—and its independence—were severely shaken during the country's 1988 constitutional crisis.[20] Tensions between the judiciary and the executive began to simmer in the 1980s after the Supreme Court struck down several executive and legislative actions.[21] Frustrated, then-Prime Minister Mahathir Mohamad publicly criticized the judiciary in several speeches and interviews. The Lord President of the Supreme Court, Tun Salleh Abas, eventually sent a letter to the *Yang di-Pertuan Agong* expressing disappointment with the Prime Minister's accusations against the judiciary. The King consulted the Prime Minister, who advised the monarch that the Lord President of the Supreme Court be removed for misbehavior. The head of the judiciary was suspended and removed from office, along with two other senior judges of the Supreme Court, despite serious objections raised against the tribunal convened to investigate the charges of judicial misbehavior.[22] It would take two decades before a panel commissioned by the Malaysian Bar Council found the removal of the three judges unjustified.[23] Widely considered one of the low points in Malaysia's constitutional history, the 1988 judicial crisis was perceived as a deep erosion of judicial independence and the rule of law.

The Malaysian government has also employed constitutional amendments to curtail judicial power. In the 1988 case of *Dato Yap Peng v. Public Prosecutor*, the Supreme Court struck down a statutory provision allowing the Attorney General to transfer a criminal case before a lower court to the High Court because it infringed the Article 121(1) constitutional provision vesting judicial power solely in the courts.[24] The Mahathir-led government responded by amending Article 121(1) of the Constitution to remove the textual reference to judicial power being vested in the courts. It was replaced by a modified Article 121(1) that provides that the courts "shall have such jurisdiction and powers as may be conferred by or under federal law."[25]

2.2 Constitutional Adjudication and Interpretation

Courts in Malaysia have traditionally adopted a rigid, insular approach to constitutional adjudication, marked by strict formalism and extensive deference to the political branches. More recent decisions, though, have seen a perceptible shift in the Malaysian appellate courts' approach toward more assertive constitutional adjudication. Significantly, this has included judicial endorsement of a doctrine of an immutable constitutional basic structure beyond the reach of legislative amendment.[26]

2.2.1 The "Four Walls" of the Constitution

Malaysian courts have a long history of dismissing comparative and international law sources as irrelevant to interpretation of Malaysia's Constitution. Half a century ago, the Supreme Court articulated what has become known as the "four walls" approach in *Government of Kelantan v. Government of Malaya*:[27] "The Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia."[28] For decades, the "four walls" approach was the dominant position taken in Malaysian constitutional adjudication.[29]

The conflicting positions over the relevance of international and transnational legal materials are illustrated by the various decisions in *Indira Gandhi*, a case involving the conversion of children to Islam by one parent without the knowledge or consent of the other parent. Citing various international conventions that Malaysia had ratified, the High Court quashed the children's conversion certificates on the basis that each parent had a constitutionally guaranteed equal right to determine the children's religious upbringing.[30]

In a decision emblematic of the "four walls" approach, the Court of Appeal overruled the High Court, rebuking the lower court for using international norms as a guide to interpreting the Malaysian Constitution.[31] According to the Court of Appeal, the approach of "sticking very closely to the standard of

international norms in interpreting the Federal Constitution is not in tandem with the accepted principles of constitutional interpretation."[32]

In a landmark decision issued in 2018, however, the Federal Court overturned the Court of Appeal's decision. The apex court endorsed the High Court's approach, which the Federal Court characterized as "consistent with international norms and conventions vesting equal rights in both parents."[33]

2.2.2 Strict Formalism

Malaysian courts have shown a long-standing tendency to employ a formalistic approach to constitutional interpretation, which has typically resulted in extensive deference to the legislature and executive. For example, in *Danaharta Urus v. Kekatong*,[34] the Federal Court held that access to justice did not form part of the constitutional right to equal protection.[35] It overruled the Court of Appeal's decision that access to justice constituted a fundamental principle of natural justice integral to the right of equality,[36] rejecting the Court of Appeal's call for a "broad, liberal and purposive construction" of fundamental liberties.[37] Instead, the Federal Court took a highly formalistic approach, declaring that "the manner and the extent of the exercise of the right to access to justice is subject to and circumscribed by the jurisdiction and powers of the court as provided by federal law."[38]

Indications of a move toward a more generous approach to interpreting constitutional rights emerged in the 2010 case of *Sivarasa Rasiah v. Badan Peguam Malaysia* in which the Federal Court considered a challenge to a statute preventing a Bar Council member from holding office in a political party.[39] Although the Court upheld the challenged provision, it made clear that "the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted," and emphasized that restrictions on constitutionally guaranteed freedoms must be "reasonable."[40] Drawing on transnational sources from the United Kingdom, Canada, and South Africa, the Court adopted a proportionality analysis, which it stated requires determination of whether

> (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[41]

Four years later, in *Nik Nazmi bin Nik Ahmad v. Public Prosecutor*, the Court of Appeal held unconstitutional a provision of the Peaceful Assembly Act that imposed criminal sanctions on organizers of public assemblies.[42] Relying on *Sivarasa*, the Court of Appeal ruled that the statutory provision had no nexus to public order or national security, therefore it was neither a reasonable nor proportionate restriction on freedom of assembly.[43]

Several later decisions signaled a retreat from the judicial assertiveness displayed in these cases. In 2015, in an about-face from its approach in *Nik Nazmi*, the Court of Appeal in *Public Prosecutor v. Yuneswaran* held the Peaceful Assembly Act provision to be constitutional.[44] A few days later, the Federal Court in *Public Prosecutor v. Azmi Sharom* unanimously upheld the Sedition Act against a freedom of expression challenge,[45] holding the restrictions imposed by the sedition law to be proportionate.[46]

In its 2018 decision in *Indira Gandhi*, however, the Federal Court adopted a rights-oriented interpretive approach.[47] Ruling that consent is required from both parents for a child's religion to be officially changed to Islam,[48] the Court declared that "the provisions of the Constitution are not to be interpreted literally or pedantically."[49] Its unanimous decision explicitly employed a "purposive" interpretation of the parental rights under Article 12(4), holding that the word "parent" should be read as "parents" in line with the principle of equality and the Constitution's fundamental liberties provisions.[50]

2.2.3 A Constitutional Basic Structure Doctrine?

The notion that constitutions have a non-derogable core that courts can enforce against constitutional amendment—a doctrine articulated by the Indian Supreme Court in *Kesavananda v. State of Kerala* that has since spread globally to other jurisdictions[51]—was initially met with skepticism in Malaysia. The Malaysian Supreme Court considered and dismissed the basic structure doctrine in the 1963 case of *Government of Kelantan v. Government of Malaya*,[52] affirming this position in two later cases.[53] Nevertheless, although the apex court in these cases refused to apply the basic structure doctrine, it ultimately left unresolved the question of whether the doctrine could ever apply in the Malaysian context.[54]

A shift in judicial attitudes toward the idea of implied unamendability emerged decades later. Glimmers of a judicial openness toward the notion appeared in *Sivarasa Rasiah* in 2010, when the Federal Court noted, albeit *obiter*, that "Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure," and the "fundamental rights guaranteed under [the Constitution] is part of the basic structure of the Constitution."[55]

And then, in a series of unanimous decisions, the Malaysian Federal Court endorsed and established the doctrine that certain core features of Malaysia's constitution are protected from legislative change. In the 2017 case of *Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat*, the Court struck down a statutory provision dealing with land acquisition that placed restrictions on the courts' power, declaring that judicial power is vested only in the judiciary.[56] It was the first time in twenty years that the apex court had struck down a federal statute. What's more, the Federal Court explicitly declared that "Parliament does not have power to amend the Federal Constitution to the effect of undermining" basic features of the constitution, like the separation of powers and independence of the judiciary.[57] Repudiating the idea that the 1988 constitutional amendment removing the vesting of judicial power in the courts had the effect of subordinating the courts to Parliament, the Court made clear that "the judicial power of the court resides in the Judiciary and no other as is explicit in art. 121(1) of the Constitution."[58]

A year later in the 2018 case of *Indira Gandhi*, the Federal Court drew on the foundations for the basic structure doctrine that it had set out earlier in *Semenyih Jaya* to nullify another constitutional amendment and affirm the basic structure doctrine.[59] At stake was another constitutional provision that had been introduced along with the other 1988 constitutional amendments. Article 121(1A) provides that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Sharia courts." In another unanimous opinion—written by Justice Zainun Ali, who had also authored the *Semenyih Jaya* decision—the Federal Court declared that the powers of judicial review and constitutional interpretation are "part of the basic structure of the constitution," which "cannot be abrogated from the civil courts or conferred upon the Syariah Courts, whether by constitutional amendment, Act of Parliament or state legislation."[60]

3. Constitutional Challenges

3.1 Religion, State, and the Individual

Religion has become one of the major fault lines of contemporary Malaysian constitutional law and politics. Article 3(1) of the Malaysian Constitution declares that "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony." Article 3(4) also specifies that "[n]othing in this Article derogates from any other provision of this Constitution." Under the Constitution's fundamental liberties chapter, Article 11(1) guarantees that "[e]very person has the right to profess and practise his [or her] religion."

Historical accounts of the making of the Malaysian Constitution show that the constitutional framers shared an understanding that the incorporation of Article 3(1) would not undermine the state's secular status.[61] The Alliance party maintained that the declaration of Islam as the state religion had symbolic, rather than practical significance; Tunku Abdul Rahman, who had led the independence movement and would become the first Prime Minister, declared that "the whole Constitution was framed on the basis that the Federation would be a secular state."[62]

Growing Islamist political and social discourse over the last few decades has challenged this understanding of Article 3(1). The politicization of Islam occurred throughout the 1980s and 1990s as UMNO, the Malay component party of the Barisan Nasional coalition, competed against the Pan-Malaysian Islamic Party (PAS), an opposition Islamist party, to secure the support of the Malay-Muslim majority electorate, with various political leaders declaring Malaysia "an Islamic state."[63]

Tensions over Islam's position in Malaysia's constitutional order are complicated by the interrelationship between ethnicity and religion. Malay ethnicity and Islam are perceived as inextricably intertwined, buttressed by the Federal Constitution's definition of "Malay" under Article 160 as "a person who professes the religion of Islam."[64] This dynamic has been fueled by the rise of Malay-Islamist rhetoric portraying Islam's supremacy as closely connected to protecting the "special position" of Malay-Muslims in Malaysia.[65]

Courts have played a key role in the discourse on religion and the state in Malaysia. In 1988, the Supreme Court affirmed the Federal Constitution's secular nature in *Che Omar bin Che Soh v. Public Prosecutor*.[66] Over the following two decades, however, judicial decisions by the secular civil courts elevated Islam's place in Malaysia's constitutional order through jurisdictional deference to the *Sharia* courts and expansive interpretations of the Article 3(1) Islamic constitutional clause.[67] Central to the discourse has been the Article 121(1A) constitutional provision—inserted along with the other constitutional amendments relating to judicial power in 1988—stating that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."[68] For years following this amendment, the civil courts had interpreted Article 121(1A) to justify extensive deference to *Sharia* courts, vastly expanding the reach of the religious courts.[69]

Apostasy cases, involving individuals who wish to convert out of Islam, has been a major area of jurisdictional controversy. A prominent example is the case of Lina Joy,[70] an ethnically Malay woman born to a Malay-Muslim family who converted to Catholicism as an adult and wished to marry her Catholic fiancé. The National Registration Department refused to remove "Islam" as the religion specified on her national identity card without a certificate of apostasy from the *Sharia* Court, even though apostasy is regarded as an offense in several states in the Malaysian federation.[71] Lina Joy brought a constitutional challenge before the civil courts, arguing that her right to "profess and practice" her religion had been violated.[72] In 2007, in a 2:1 majority decision, the Federal Court ruled against Lina Joy, holding that apostasy is "a matter that relates to Islamic Law" and thus exclusively within the jurisdiction of the *Sharia* Court.[73] The majority held that her right to freedom of religion "required [the individual] to comply with the practices or law of the Islamic religion in particular with regard to converting out of the religion."[74]

Another area of tension between the civil courts and *Sharia* courts involves battles over child conversion and custody when one parent converts the children to Islam without the knowledge of the other parent.[75] Indira Gandhi's decade-long legal battle over her husband's conversion of their three children to Islam illustrates this jurisdictional dilemma. Unbeknownst to her, Indira Gandhi's ex-husband converted to Islam, and then obtained certificates of conversion for their three children and custody of them from the *Sharia* courts. Indira Gandhi, a Hindu woman, was left unable to contest the conversion or custody orders as non-Muslims are not subject to the *Sharia* courts' jurisdiction.

In the 2018 decision bearing her name, the Federal Court asserted the authority of the civil courts over the state religious courts. The highest appellate court established that "Article 121(1A) does not constitute a blanket exclusion of the jurisdiction of the civil courts whenever a matter relating to Islamic law arises."[76] It effectively nullified the 1988 constitutional amendment that had inserted Article 121(1A), stating that the provision "does not oust the jurisdiction of the civil courts nor does it confer judicial power on the Sharia courts."[77] And in an express affirmation of the basic structure doctrine, the Court declared that the principles of "the separation of powers, the rule of law and the protection of minorities" are "part of the basic structure of the Constitution" that "cannot be abrogated or removed."[78]

In other areas, an expansionist interpretation of Islam's supremacy has been used to restrictively interpret constitutional rights of religious liberty and freedom of expression. One example is the "Allah" case, which involved a government directive prohibiting a Catholic Church weekly newsletter from using the word "Allah."[79] In 2013, the Court of Appeal upheld the government ban, ruling that the church's religious freedom had not been infringed on the grounds that the term "Allah" did not constitute an integral part of the faith and practice of Christianity.[80] According to the Court of Appeal, the purpose and intention of the words "in peace and harmony" in Article 3(1) is "to protect the sanctity of Islam as the religion of the country and also to insulate against any threat faced or any possible and probable threat to the religion of Islam."[81]

Publications deemed offensive to Islam have also been restricted by the federal and state governments. The 2015 case of *ZI Publications v. Kerajaan Negeri Selangor* involved a freedom of expression challenge to a state *Sharia* law criminalizing publishing and distributing books that the state religious authority had deemed against "Islamic law."[82] The Federal Court unanimously dismissed the challenge, concluding that the freedom of expression guarantee "must be read in particular" with Article 3(1)'s declaration of Islam as the religion of the Federation; thus, "a Muslim in Malaysia is not only subjected to the general laws enacted by Parliament but also to the state laws of religious nature enacted by the Legislature of a state."[83]

3.2 Emergency Powers and National Security Laws

Emergency powers and security laws have long been endemic features of Malaysia's legal landscape.[84] Malaya's first emergency was declared in 1948 while still under British rule to counter a communist insurgency and stayed in force until 1960. Other emergencies were proclaimed in 1964, 1966, 1969, and 1977. Three of these proclamations remained in force until 2011. In 2021, an emergency proclamation was issued during the COVID-19 pandemic.

Article 150(1) of the Constitution empowers the *Yang di-Pertuan Agong* to declare an emergency if satisfied that there is a threat to the "security, or the economic life, or public order" in the Federation.[85] During an emergency, the King may make promulgations that have the same effect as an Act of Parliament,[86] and Parliament may pass laws that cannot be invalidated for incompatibility with any constitutional rights guarantees.[87] A constitutional amendment passed in 1981 declares that courts have no jurisdiction over the validity of any emergency proclamation.[88]

In addition to the emergency powers provisions, the Constitution's Article 149 allows Parliament to pass laws inconsistent with fundamental rights in situations involving action taken or threatened to cause the fear of organized violence against persons or property, to excite disaffection against the government, to promote ill-will and hostility between the races likely to cause violence, and actions prejudicial to the state's public order or security.[89] One prominent law passed under Article 149 was the Internal Security Act (ISA) of 1960, which authorized preventive detention of those considered to pose a security threat.[90] The ISA's controversial uses include *Operasi Lalang* in 1987, an operation in which more than 100 people,

including opposition politicians and rights activists, were detained without trial.[91] In 1998, the ISA was also used to detain Anwar Ibrahim after his removal as Deputy Prime Minister.

In 2011, then-Prime Minister Najib Razak announced that all emergency proclamations and the ISA would be repealed.[92] Shortly after, however, the government passed the Security Offences (Special Measures) Act 2012 and Prevention of Terrorism Act 2015, which revived detention without trial for suspected terrorists. The Barisan Nasional government also pushed through the National Security Council Act in 2016, granting the executive the power to declare national security areas,[93] as well as an anti-fake news law shortly before the 2018 general elections.[94] In addition, the government strengthened the Sedition Act, creating a new seditious offense and introducing harsher penalties.[95] Even after the Barisan Nasional government was ousted from power in 2018, these national security laws have remained in force.[96]

Historically, Malaysian courts have tended to be highly deferential toward legislative and executive actions defended in national security terms. In the 2015 case of *Public Prosecutor v. Azmi Sharom*, the Federal Court unanimously upheld the constitutionality of the sedition law.[97] The Court observed that since the word "reasonable" had been omitted from the final draft of the Article 10 freedom of expression guarantee it was "not for the Court to determine whether the restriction imposed by the legislature … is reasonable or otherwise;"[98] to do so would amount to "rewriting" the constitutional provision.[99] Although the Federal Court purported to apply a proportionality test,[100] its analysis was far from rigorous. The Court found the Sedition Act's provisions proportionate without considering whether the breadth of the "seditious tendency" definition was no more restrictive than necessary beyond observing that the statute provides for several exceptions.

The Court of Appeal in *Mat Shuhaimi* exhibited more robust judicial review when it invalidated a provision of the Sedition Act criminalizing sedition on a strict liability basis, ruling that the law disproportionately infringed the right to freedom of expression.[101] The Court of Appeal's decision, however, was set aside by the Federal Court on procedural grounds.[102] Ruling the matter *res judicata* because it had been raised in earlier criminal proceedings, the Federal Court effectively revived the strict liability provision of the sedition law.[103]

4. On the Journey to Judicial Empowerment?

The Malaysian judiciary has shown signs of assertiveness in contemporary times, exhibiting a bolder approach to judicial review and constitutional adjudication. Indications of a shift away from a "traditional and narrow" rights adjudication approach appeared in the Federal Court's 2010 decision in *Sivarasa Rasiah*.[104] This apex court declared that "the fundamental liberties guaranteed [by the Constitution] must be generously interpreted" in line with a "prismatic approach to interpretation,"[105] endorsed using proportionality to scrutinize governmental rights infringements,[106] and gestured toward the notion of a constitutional basic structure doctrine.[107]

In the wake of *Sivarasa*, though, Malaysian courts demonstrated an uneven approach to constitutional review.[108] In 2011 and 2014, the Court of Appeal struck down two statutory provisions as violations of freedom of expression and assembly.[109] Yet, barely a year later, the Court of Appeal upheld as constitutional the same Peaceful Assembly Act provision it had previously invalidated.[110] And in *Azmi Sharom*, the Federal Court upheld the Sedition Act's constitutionality, finding the statute to be a proportionate restriction on freedom of expression.[111]

Signs of judicial self-empowerment, though, have been on display by the Malaysian Federal Court in recent years. Consider the series of landmark decisions by the apex court establishing and developing the constitutional basic structure doctrine. In the 2017 case of *Semenyih Jaya*, a unanimous Federal Court

invalidated the statute as unconstitutional—striking down a federal law for the first time since 1988—for infringing on the courts' judicial power.[112] Repudiating the 1988 constitutional amendment, which had removed the reference to judicial power being vested in the courts, as "manifestly inconsistent with the supremacy of the Federal Constitution,"[113] the Court declared that "any alterations made in the judicial functions would be tantamount to a grave and deliberate incursion in the judicial sphere."[114] The Court forcefully affirmed that the "judicial power, judicial independence, and the separation of powers are as critical as they are sacrosanct" in Malaysia's constitutional framework.[115]

A year later, in another unanimous decision by a five-member bench, the Malaysian Federal Court in *Indira Gandhi* further endorsed the establishment of the basic structure doctrine in Malaysian constitutional jurisprudence.[116] Declaring that the civil courts retain jurisdiction over matters relating to Islamic law that involve constitutional matters, the Court affirmed the hierarchy of the civil courts over the *Sharia* courts in another express assertion of judicial power.[117] Referring to the precedent laid down in *Semenyih Jaya*, the Court asserted that judicial power lies solely with the civil courts and is intrinsic to the basic structure doctrine of Malaysia's Constitution.[118] "The powers of judicial review and of constitutional or statutory interpretation are pivotal constituents of the civil courts' judicial power," declared the Court. "As part of the basic structure of the constitution, it cannot be abrogated from the civil courts …, whether by constitutional amendment, Act of Parliament, or state legislation."[119]

Then, in the 2019 case of *Alma Nudo v. Public Prosecutor*, a nine-member panel of the Federal Court not only affirmed that "courts can prevent Parliament from destroying the 'basic structure' of the [Constitution]," it also endorsed a robust proportionality analysis in striking down a statutory provision that allowed a double presumption against accused drug traffickers.[120] The Court articulated a proportionality test in three stages: first, whether there is a sufficiently important objective to justify the right infringement; second, whether the governmental means has a rational nexus with its intended objective; and third, whether the rights restriction is proportionate to the importance of the right at stake.[121] Embracing the doctrine of proportionality into Malaysian constitutional jurisprudence,[122] the Court held that the Constitution's Article 8(1) equal protection guarantee "imports the principle of substantive proportionality."[123]

With this trilogy of unanimous decisions, the Federal Court displayed statecraft in strengthening its own institutional power,[124] while developing the judicial tools to protect the constitution's basic structure and to adjudicate constitutional rights purposively and proportionately.[125] Since then, some later decisions have shown that some judges on the apex court resist the notion that the Constitution has an unamendable core;[126] still, there remain robust judicial voices on the apex court that continue to reaffirm the precedents of *Semenyih Jaya* and *Indira Gandhi* protecting certain fundamental principles as part of the Constitution's basic structure.[127]

5. Conclusion

Courts in Malaysia, as in many other fragile democracies, have long faced the challenging task of negotiating its position amidst powerful political actors. Political landscapes, though, can shift dramatically. For more than half a century, the Barisan Nasional coalition had held unbroken power since Malaysia's independence in 1957. In May 2018, the Barisan Nasional ruling coalition was defeated in an unprecedented national election outcome, resulting in the country's first change of government. Two years later, however, in March 2020, the new Pakatan Harapan government toppled as a result of various political defections, leading to a battle for the premiership and a splintering of political parties. The *Yang di-Pertuan Agong* appointed Muhyiddin Yasin as prime minister at the helm of a hastily assembled Perikatan Nasional alliance. The months that followed were tumultuous; amidst the COVID-19 pandemic, a national emergency was declared and Parliament suspended. By August 2021, Muhyiddin Yassin was replaced as premier by Ismail Sabri Yaakob. And in 2022, following a general election that resulted in a hung parliament, Anwar Ibrahim became prime minister, with a government alliance made up of Pakatan Harapan and a number of other parties that had traditionally been political rivals.

Modern Malaysia is no longer, as it once was, characterized by a dominant coalition that had never been ousted from power; recent political transitions, the splintering of political parties, and uneasy political coalition alignments have resulted in a deeply fragile democracy. Amidst this unstable political regime, though, there have been signs of judicial willingness to reassert power. Of course, the trajectory toward the rule of law in a fragile democracy rarely advances in an unbroken line; it is often uneven. Still, the overall arc appears to be bending in the direction of a constitutional jurisprudence that lays the foundation for the judiciary to take on a more empowered role in Malaysia's constitutional governance.

Notes

1 See Federation of Malaya Constitutional Commission, *Report of 1956–57* § Colonial No. 330 para. 3 (HM Stationary Office) [a.k.a. "the Reid Report"].

2 *Merdeka* in Malay means "independence." For more discussion of Malaysia's constitutional history, see, e.g., Joseph M. Fernando, *The Making of the Malayan Constitution* (Malaysian Branch of the Royal Asiatic Society 2002).

3 Constitution of Malaysia, arts. 44–65 (federal legislature); arts. 39–43 (executive); arts. 121–31 (judiciary).

4 Ibid, arts. 32–7.

5 Ibid, art. 4(1).

6 Ibid, arts. 5–13.

7 Ibid, art. 4(1). See *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112.

8 The possibility of final appeal to the Privy Council was abolished in 1985, leaving the Federal Court as Malaysia's court of final resort.

9 Constitution of Malaysia, arts. 128–30.

10 Ibid, arts. 121(1), 121(1B).

11 Ibid, Ninth Schedule, List II, art. 1.

12 Ibid, art. 159.

13 Ibid, art. 159(3).

14 Ibid, art. 159(5).

15 Ibid, art. 161E(2).

16 Ibid, art. 159(1), (4).

17 See Yvonne Tew, *Constitutional Statecraft in Asian Courts* (Oxford University Press 2020) 57–61.

18 See "After Six Decades in Power, BN Falls to 'Malaysian Tsunami'," *Malaysiakini* (May 10, 2018) https://www.malaysiakini.com/news/423990 [https://perma.cc/KTS2-UUTU]; Tew, *Constitutional Statecraft in Asian Courts* (n 17) 1–3, 214–19.

19 Cindy Tham, "Major Changes to the Constitution" *The Sun* (July 17, 2007) https://www.malaysianbar.org.my/article/news/legal-and-general-news/general-news/major-changes-to-the-constitution https://perma.cc/HQC3-5K65/5LU7-LRQ9.

20 See generally Visu Sinnadurai, "The 1988 Judiciary Crisis and its Aftermath" in Andrew Harding and H.P. Lee, *Constitutional Landmarks in Malaysia*: the First 50 Years, 1957–2007 (LexisNexis 2007); (n 17) 173–96.

21 See, e.g., *Berthelsen v. Director General of Information* [1987] 1 MLJ 134; *Public Prosecutor v. Dato' Yap Peng* [1987] 1 MLJ 311. The Supreme Court was also set to hear the "UMNO-11" case involving a challenge to the results of UMNO's internal party elections. See *Mohamed Noor bin Othman v. Mohamed Yusoff Jaafar* [1988] 2 MLJ 129.

22 Among the many objections was that the tribunal was chaired by the judge who would assume the position of head of the judiciary if the Lord President were dismissed.

23 Malaysian Bar Council, *Report of the Panel of Eminent Persons to Review the 1988 Judicial Crisis in Malaysia* (Malaysian Bar Council, 2008).

24 *Dato Yap Peng v. Public Prosecutor* [1987] 2 MLJ 311.

25 Constitution of Malaysia, art. 121(1) (amended by the Constitutional (Amendment) Act 1988).

26 See Tew, *Constitutional Statecraft in Asian Courts* (n 17) 46–65, 92–122.

27 *Government of the State of Kelantan v. Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] 29 MLJ 355.

28 Ibid, [369].

29 See, e.g., *Kok Wah Kuan v. Public Prosecutor* [2008] 5 MLJ 1, [19] (quoting from earlier decision with approval that "the wording of our Constitution … 'can never be overridden by the extraneous principles of other Constitutions'").

30 *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [2013] 5 MLJ 552 (HC), [85]–[111].

31 *Pathmanathan a/l Krishnan v. Indira Gandhi a/p Mutho* [2016] 4 MLJ 455 (CA).

32 Ibid, [71].

33 *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 (FC), [144].

34 [2004] 2 MLJ 257.

35 Constitution of Malaysia, art. 8(1) ("All persons are equal before the law and entitled to the equal protection of the law").

36 *Kekatong Sdn Bhd v. Danaharta Urus Berhad* [2003] 3 MLJ 1 (CA).

37 *Danaharta Urus v. Kekatong* [2004] 2 MLJ 257 (FC).

38 Ibid, [27].

39 *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, [3].

40 Ibid, [3], [5].

41 Ibid (citing *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] UKPC 30, [29]).

42 *Nik Nazmi bin Nik Ahmad v. Public Prosecutor* [2014] 4 MLJ 157.

43 Ibid, [27].

44 *Public Prosecutor v. Yuneswaran* [2015] 9 CLJ 873, [75]–[76].

45 *Public Prosecutor v. Azmi Sharom* [2015] MLJU 594.

46 Ibid, [41]–[43].

47 *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors.* [2018] 1 MLJ 545 (FC).

48 Ibid, [181].

49 Ibid, [154].

50 Ibid, [150]–[172]. "[T]he religion of a person under the age of eighteen years shall be decided by his parent or guardian." Constitution of Malaysia, art. 12(4).

51 See *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461. See generally Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017).

52 [1963] 29 MLJ 355.

53 See *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187; *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70, [73].

54 Andrew Harding, "The Death of a Doctrine? *Phang Chin Hock v. Public Prosecutor*" (1979) 21 MLJ 365.

55 *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, [7].

56 *Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat* [2017] 5 CLJ 526, [54].

57 Ibid, [74]–[76].

58 Ibid, [86]. The art. 121(1) constitutional provision relates to the judicial power of the federation.

59 *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545.

60 Ibid, [48].

61 See, e.g., *Report of 1956–57* [a.k.a. "the Reid Report"] (n 1) [11].

62 Joseph M. Fernando, "The Position of Islam in the Constitution of Malaysia" (2006) 37 Journal of Southeast Asian Studies 249, 258 (citing Minutes of the 19th Meeting of the Working Party, April 17, 1957, CO 941/87).

63 See, e.g., Mahathir Mohamad, Speech at the 30th Annual General Meeting of the Gerakan Party Malaysia (September 29, 2001); Najib Razak, "Full Text of UMNO Presidential Speech" *New Straits Times* (Kuala Lumpur, November 27, 2014) https://www.nst.com.my/news/2015/09/full-text-umno-presidential-speech [https://perma.cc/ZS4X-5J7C].

64 Constitution of Malaysia, art. 160.

65 Ibid, art. 153(1), 153(3) (providing that it is the responsibility of *Yang di-Pertuan Agong* to "safeguard the special position of the Malays" through the reservation of certain privileges, "such as positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities"). See generally Joseph Chinyong Liow, *Religion and Nationalism in Southeast Asia* (Cambridge University Press 2016) 135–74.

66 [1988] 2 MLJ 55.

67 See Yvonne Tew, "Stealth Theocracy" (2018) 58 Virginia Journal of International Law 31.

68 Constitution of Malaysia, art. 121(1A).

69 See, e.g., *Kok Wah Kuan v. Public Prosecutor* [2008] 5 MLJ 1. According to the Federal Court majority opinion, the scope of judicial power "depends on what federal law provides" and that the amended art. 121(1) meant that "'the courts' powers and jurisdictions were indeed subject to federal law." Ibid, [11].

70 *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan*, [2007] 4 MLJ 585 (FC).

71 Apostasy is punishable in some states by fines, imprisonment, mandatory rehabilitation, or whipping. See Mohammad Azam Mohamed Adil, "Law of Apostasy and Freedom of Religion in Malaysia" (2007) 2 Asian Journal of Comparative Law 29.

72 Constitution of Malaysia, art. 11(1).

73 *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585, [16].

74 Ibid, [14]. Subsequent apostasy cases have affirmed the Federal Court's majority approach in *Lina Joy* of jurisdictionally deferring matters regarding religious status to the *Sharia* courts' exclusive jurisdiction. See, e.g., Sulok Tawie, "Federal Court Defers to Shariah Courts in Sarawak Apostasy Cases" *Malay Mail* (Kuala Lumpur, February 27, 2018) https://www.malaymail.com/news/malaysia/2018/02/27/federal-court-defers-to-shariah-courts-in-sarawak-apostasy-cases/1586381 [https://perma.cc/2FVM-U9LS].

75 See, e.g., *Viran a/l Nagapan v. Deepa a/p Subramaniam* [2016] 3 CLJ 505 (FC); *Subashini Rajasingam v. Saravanan Thangothoray* [2008] 2 MLJ 147 (FC).

76 *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 (FC), [98].

77 Ibid, [92].

78 Ibid, [90].

79 *Menteri Dalam Negeri v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468 (CA).

80 Ibid, [51].

81 Ibid, [33].

82 *ZI Publications v. Kerajaan Negeri Selangor* [2016] 1 MLJ 153.

83 Ibid, [17], [31].

84 See Tew, *Constitutional Statecraft in Asian Courts* (n 17) 189–213.

85 Constitution of Malaysia, art. 150(1).

86 Ibid, art. 150(2B)–(2C).

87 Ibid, art. 150(5) (as amended by the Malaysia Act 1963 (No. 26), § 39).

88 Ibid, art. 150(8)(b) (as amended by the Constitution (Amendment) Act (A514), 1981, § 15(d)).

89 Ibid, art. 149.

90 Act 82 of 1960, Statutes of Malaysia.

91 Therese Lee, "Malaysia and the ISA: The Insecurity of Human Rights After Sept 11" (2002) Singapore Journal of Legal Studies 56, 58–9 (citing Parliamentary Debates: Dewan Rakyat (House of Representatives), June 21, 1960).

92 Najib Razak, Prime Minister of Malaysia, Malaysia Day Address (September 20, 2011), https://www.malaysiakini.com/news/175970 [https://perma.cc/CD57-JLRR].

93 See Library of Congress, "Malaysia: National Security Council Act Comes into Force" *Library of Congress* (August 4, 2016), https://www.loc.gov/item/global-legal-monitor/2016-08-04/malaysia-national-security-council-act-comes-into-force/

[https://perma.cc/Z9AA-5EEH].

94 See "Malaysia's Anti-Fake News Legislation Becomes Law, Is Now Enforceable" *Straits Times* (Kuala Lumpur, April 11, 2018) https://www.straitstimes.com/asia/se-asia/malaysias-anti-fake-news-legislation-becomes-law-is-now-enforceable [https://perma.cc/X2YQ-BNYU].

95 Sedition (Amendment) Act 2015, ss. 3(a)(iv)–(v), 4(a). See Amanda Whiting, "Strengthened Sedition: Part II" *New Mandala* (April 21, 2015), https://www.newmandala.org/strengthening-sedition/ [https://perma.cc/7J62-VCRB].

96 See "Hundreds Held under Sosma, Poca and Pota Last Year" *The Star* (Kuala Lumpur, March 7, 2023) https://www.thestar.com.my/news/nation/2023/03/07/hundreds-held-under-sosma-poca-and-pota-last-year.

97 *Public Prosecutor v. Azmi Sharom* [2015] MLJU 594.

98 Ibid, [36]–[37].

99 Ibid, [40].

100 Ibid, [41]–[43].

101 *Mat Shuhami bin Shafiei v. Kerajaan Malaysia* [2017] 1 MLJ 436.

102 *Government of Malaysia v. Mat Shuhaimi* [2018] 2 MLJ 133, [19]–[41] (FC).

103 Ibid, [69].

104 *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor.* [2010] 2 MLJ 333, [19].

105 Ibid, [3], [19].

106 Ibid, [27]–[32].

107 Ibid, [7].

108 See Yvonne Tew, "On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary And Constitutional Politics" (2016) 25 Washington International Law Journal 673.

109 See *Muhammad Hilman v. Kerajaan Malaysia* [2011] 6 MLJ 507; *Nik Nazmi bin Nik Ahmad v. Public Prosecutor* [2014] 4 MLJ 157.

110 *Public Prosecutor v. Yuneswaran* [2015] 9 CLJ 873.

111 *Public Prosecutor v. Azmi Sharom* [2015] MLJU 594. Similar battle lines are evident in *Mat Shuhami*, in which the Court of Appeal's decision to invalidate the Sedition Act's strict liability provision was formalistically set aside by the Federal Court as an abuse of court process. *Mat Shuhaimi v. The Government of Malaysia* [2017] 1 MLJ 436 (CA); *Government of Malaysia v. Mat Shuhaimi* [2018] 2 MLJ 133 (FC).

112 *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat* [2017] 5 CLJ 526.

113 Ibid, [75].

114 Ibid, [84].

115 Ibid, [90], [74], [76], [90].

116 *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 (FC).

117 Ibid, [92]–[99].

118 Ibid, [42].

119 Ibid, [104].

120 [2019] 4 MLJ 1 (FC).

121 Ibid, [143]–[145].

122 Ibid, [126].

123 Ibid, [118]. Constitution of Malaysia, art. 8(1) ("All persons are equal before the law and entitled to equal protection of the law.").

124 Yvonne Tew, "Strategic Judicial Empowerment" (forthcoming 2023) 71(3) Am J Comp L https://papers.ssrn.com/abstract=3323022.

125 See Tew, *Constitutional Statecraft in Asian Courts* (n 17) 123–53.

126 See, e.g., *Maria Chin Abdullah v. Director-General of Immigration* [2021] 2 CLJ 579 (Justice Abdul Rahman Sebli).

127 See, e.g., *Maria Chin Abdullah v. Director-General of Immigration* [2021] 2 CLJ 579 (Chief Justice Tengku Maimun); *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah* 3 MLJ 456 [2022] (Justice Nallini Pathmanathan). See H.P. Lee and Yvonne Tew, "The law and politics of unconstitutional constitutional amendments in Malaysia" in Rehan Abeyratne and Bui Ngoc Son (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021).