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## ON THE UNEVEN JOURNEY TO CONSTITUTIONAL REDEMPTION: THE MALAYSIAN JUDICIARY AND CONSTITUTIONAL POLITICS

Yvonne Tew<sup>†</sup>

*Abstract:* This article explores the Malaysian judiciary's approach toward interpreting the Federal Constitution of Malaysia and situates it within the context of the nation's political and constitutional history. It traces the judiciary's movement toward a more rights-oriented approach followed by its more recent retreat, which has been marked by strict formalism and insularity in several appellate court decisions. This article argues that the Malaysian courts' journey toward constitutional redemption has been uneven so far. In order to reclaim its constitutional position as a co-equal branch of government, the Malaysian judiciary must be willing to uphold its constitutional duty to assert its commitment to constitutional supremacy and the rule of law.

### I. INTRODUCTION

The story of the Malaysian judiciary is inextricably linked to the nation's constitutional politics. It is a tale of the judicial institution's rise, fall, and ensuing struggle toward constitutional restoration. Constitutional interpretation is, in large part, an underlying theme to this story: it is the means by which the judiciary articulates how it sees its role and molds its fate within the political climate that it finds itself. This article explores the Malaysian courts' approach toward interpreting Malaysia's Federal Constitution and situates it within the context of the nation's political and constitutional history.

Since its independence in 1957, Malaysia has been governed by the same ruling coalition. Judicial attitude toward constitutional adjudication must be understood against the backdrop of Malaysia's dominant ruling party system. For more than half a century, the *Barisan Nasional* ruling coalition has maintained control of the Malaysian federal government. Until the 2008 general elections it had also controlled a two-thirds majority in Parliament, providing the government with the power to employ the constitutional amendment process to change most constitutional provisions.

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Judicial attempts to challenge state power in the past have been rebuffed by legislative and constitutional amendments.

The face of Malaysian politics in the twenty-first century has begun to change. For the first time in the nation's history, *Barisan Nasional* lost its two-thirds legislative majority in the 2008 general elections. Between 2011 and 2012, Prime Minister Najib Razak took the unprecedented step of repealing the Internal Security Act, which had permitted preventive detention without trial, and lifted the emergency proclamations that had been in force over four decades.<sup>1</sup> Optimism over the Prime Minister's reforms, however, was short-lived. In the aftermath of the 2013 general elections—in which *Barisan Nasional* failed to regain its two-thirds legislative majority and, in addition, lost the popular vote—the government enacted several contentious new security laws. Pushed through during controversial late night sessions of Parliament, these bills created new anti-terror legislation reviving detention without trial and a national security council law with enhanced powers for the executive, and also strengthened the existing sedition law.<sup>2</sup>

Part II of this article sets the scene by providing an overview of Malaysia's constitutional system and the operation of judicial review within its political context. In Part III, I identify the prevailing strands in the judicial approach to constitutional interpretation. I show how the Malaysian courts have generally adopted a strict literalism that is formalist and insular in its approach toward the interpretation of constitutional rights. Part IV draws out recent developments and trends in the Malaysian courts' constitutional adjudication. I trace the judiciary's shift toward a more purposive, rights-oriented approach followed by its more recent retreat,

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<sup>1</sup> *PM announces repeal of ISA, three Emergency proclamations*, STAR (Sept. 15, 2011), <http://thestar.com.my/news/story.asp?file=/2011/9/15/nation/20110915205714&sec=nation>. For the full text of the Prime Minister's speech, see *Malaysia Day Message by Dato' Sri Mohd Najib bin Tun Haji Abdul Razak, Prime Minister of Malaysia*, BADAN PEGUAM MALAYSIA [THE MALAYSIAN BAR] (Sept. 16, 2011), [http://www.malaysianbar.org.my/legal/general\\_news/malaysia\\_day\\_message\\_by\\_dato\\_sri\\_mohd\\_najib\\_bin\\_tun\\_haji\\_abdul\\_razak\\_prime\\_minister\\_of\\_malaysia.html](http://www.malaysianbar.org.my/legal/general_news/malaysia_day_message_by_dato_sri_mohd_najib_bin_tun_haji_abdul_razak_prime_minister_of_malaysia.html).

<sup>2</sup> See Thomas Fuller, *Malaysia Revives Detention Without Trial With New Law*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/world/asia/malaysia-resurrects-detention-without-trial-alarming-government-critics.html>; *Malaysia approves security law amid warning it could lead to dictatorship*, GUARDIAN (Dec. 3, 2015), <http://www.theguardian.com/world/2015/dec/04/malaysia-approves-security-law-amid-warning-it-could-lead-to-dictatorship>.

which has been marked by its strict formalism in several 2015 and 2016 appellate court decisions. The Malaysian courts' journey toward constitutional redemption has, so far, been uneven at best. In order for the Malaysian judiciary to restore its position as a co-equal branch of government, it will need to take firmer steps to assert its commitment to constitutional supremacy and its willingness to protect the fundamental liberties guaranteed by the Constitution.

## II. SETTING THE SCENE: MALAYSIA'S CONSTITUTIONAL AND POLITICAL BACKDROP

### A. *Brief Overview of Malaysia's Constitutional System*

The Malaysian Constitution has its origins in the *Merdeka* Constitution of 1957, which was conceived in the climate of a nation on the cusp of independence.<sup>3</sup> In 1824, the British began their colonialization in Malacca, which, along with Penang and Singapore, eventually became part of the Straits Settlements under British rule. Nine Malay states—known as the Federated<sup>4</sup> and Unfederated Malay States<sup>5</sup>—would all come under indirect British rule as protectorates throughout the late nineteenth to the early twentieth century. After the Second World War—during which Japanese forces occupied Malaya, Borneo, and Singapore—the British sought to unify Penang, Malacca, and the Malay States, leading to the Malayan Union being formed in 1946. The Union was short-lived. Following outrage from the Malays at the British government's “high-handed” implementation of the Malayan Union,<sup>6</sup> it was replaced by the Federation of Malaya in 1948.

Political development toward independence in the Federation of Malaya quickly gained momentum. After an overwhelming victory in the 1955 elections, the Alliance Party—a coalition made up of United Malays National Organisation (UMNO), the Malaysian Chinese Association (MCA), and the Malaysian Indian Congress (MIC)—assumed power of the Federal

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<sup>3</sup> *Merdeka* in Malay means “independence.” For more information, see generally Rais Yatim, *The Road to Merdeka*, in CONSTITUTIONAL LANDMARKS IN MALAYSIA: THE FIRST 50 YEARS 1957–2007 1 (Andrew Harding & H.P. Lee eds., 2007); ANDREW HARDING, THE CONSTITUTION OF MALAYSIA: A CONTEXTUAL APPROACH (2012).

<sup>4</sup> Negeri Sembilan, Pahang, Perak, and Selangor.

<sup>5</sup> Johor, Kedah, Kelantan, Perlis, and Terengganu.

<sup>6</sup> HARDING, *supra* note 3, at 27.

Legislative Council, with Tunku Abdul Rahman as the first Chief Minister. Negotiations in London led by Tunku Abdul Rahman took place between representatives of the British Government, the Government of Malaya, and the Malay Rulers. The Conference resulted in the agreement to secure Malaya's independence and to establish a Constitutional Commission to draft a new Constitution.

On August 31, 1957, the *Merdeka* Constitution came into force when the Federation of Malaya became a fully independent state. Six years later, on September 16, 1963, this 1957 Independence Constitution would become the Federal Constitution of Malaysia when Singapore and the Borneo states of Sabah and Sarawak joined the Federation to create the new nation of Malaysia.

The Malaysian Constitution establishes a federal system of government with a bicameral legislature, federal executive, and judiciary.<sup>7</sup> Malaysia has a parliamentary system of government, where the Prime Minister and Cabinet are drawn from the majority party in Parliament, and the King—the *Yang di-Pertuan Agong*—is the constitutional head of the Federation.<sup>8</sup> Unlike the United Kingdom, however, Malaysia has a codified Constitution with a justiciable bill of rights. The fundamental liberties are guaranteed in Part II of the Constitution, which include the right to life and personal liberty, freedom from slavery and forced labor, the right to equality, freedom of speech and expression, freedom of religion, and the right to property.<sup>9</sup>

The courts' power of judicial review over the constitutionality of legislation has been assumed as a natural corollary of the Malaysian Constitution's supremacy clause.<sup>10</sup> The Federal Court of Malaysia is the nation's apex appellate court. It hears appeals from the Court of Appeal, and has exclusive jurisdiction over federalism issues, and disputes arising between the Federation and a state, or between individual states.<sup>11</sup> The other

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<sup>7</sup> Federal Constitution, Arts. 39–65, 121–31.

<sup>8</sup> *Id.* Arts. 32–37.

<sup>9</sup> *Id.* Arts. 5–13.

<sup>10</sup> *Id.* Art. 4(1) (“This Constitution is the supreme law of the Federation and any law . . . which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”).

<sup>11</sup> *Id.* Art. 128(1).

appellate courts consist of two High Courts—one in Malaya and the other in Sabah and Sarawak. The possibility of final appeal to the Privy Council was abolished in 1985, leaving the Federal Court as Malaysia's court of final resort.

Constitutional amendment requirements vary depending on the provision that is to be amended.<sup>12</sup> The most common rule is that an amendment must be supported by two-thirds of the total membership of each House of Parliament.<sup>13</sup> There are some exceptions to this rule. Amendments to citizenship, the Conference of Rulers, the Malay national language, and the special position of the Malays and the natives of Sabah and Sarawak require the consent of the Conference of Rulers in addition to the two-thirds parliamentary majority requirement.<sup>14</sup> Alterations to the provisions concerning the safeguards for the constitutional position of Sabah and Sarawak require the consent of the respective State Governments.<sup>15</sup> Some other amendments—like those altering supplementary citizenship provisions, admitting a new state into the Federation, or concerning oaths and affirmations—may be passed by a simple majority in Parliament.<sup>16</sup>

In practice, the ruling coalition's dominance of legislative seats has enabled the government to amend the Federal Constitution extensively. There have been approximately more than fifty amending acts and 700 individual textual amendments made to the Malaysian Constitution since its enactment in 1957.<sup>17</sup> Until the 2008 general elections, when *Barisan Nasional* lost its two-thirds parliamentary majority for the first time since independence, the executive could—and did—employ the amendment process with ease and frequency to effect changes to the Malaysian Constitution.<sup>18</sup>

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<sup>12</sup> *Id.* Art. 159.

<sup>13</sup> Federal Constitution, Art. 159(3).

<sup>14</sup> *Id.* Art. 159(5). The Conference of Rulers is constituted of the Malay Rulers of individual states in Malaysia. Its primary function is to elect or remove the constitutional head of State in Malaysia, the *Yang di-Pertuan Agong*.

<sup>15</sup> *Id.* Art. 161E(2).

<sup>16</sup> *Id.* Art. 159(1), (4).

<sup>17</sup> Cindy Tham, *Major Changes to the Constitution*, THE SUN (July 17, 2007), [http://www.malaysianbar.org.my/echoes\\_of\\_the\\_past/major\\_changes\\_to\\_the\\_constitution.html](http://www.malaysianbar.org.my/echoes_of_the_past/major_changes_to_the_constitution.html).

<sup>18</sup> For example, following executive frustration with several judicial decisions that worked against the Malaysian Government's interests in the 1980s, the Parliament amended Article 121(1) of the Constitution to remove the provision of "judicial power" being "vested" in the courts. Instead, the new

*B. Malaysian Courts and Constitutional Politics*

Courts in Malaysia have the authority to review the constitutionality of legislative and executive actions. Judges are empowered under the Malaysian Constitution to declare laws invalid for constitutional rights violations. The Article 4 supremacy clause states that the Constitution is regarded as the supreme law and that any law inconsistent with the Constitution is void.<sup>19</sup> In Malaysia, the power of judicial review over the constitutionality of legislation established by the United States Supreme Court in *Marbury v. Madison* is assumed.<sup>20</sup> Unlike its United Kingdom counterpart, courts in Malaysia are not subordinate to a supreme Parliament, and thus have the power to strike down legislation for rights violations. In practice, however, the Malaysian courts have been far from robust in protecting constitutional rights through the exercise of judicial review, resulting in a system of *de facto* legislative supremacy.

Constitutional adjudication in Malaysia needs to be understood in the context of its dominant ruling party system. The influence of a Westminster system of government, with a bicameral Parliament closely fused with the Cabinet, has meant that the executive and legislature maintain a strong control over government power.<sup>21</sup> The *Barisan Nasional* ruling coalition has been in power since independence, and until the 2008 elections in Malaysia, with a supermajority in Parliament.

The foundations of the judicial institution were severely shaken during the constitutional crisis of 1988 in Malaysia, an episode that involved an intense confrontation between the judiciary and the executive.<sup>22</sup> Following several Supreme Court decisions that incurred the frustration of

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provision now states that the courts “shall have such jurisdiction and powers as may be conferred by or under federal law.” See Federal Constitution, Art. 121(1).

<sup>19</sup> Federal Constitution, Art. 4(1) (“This Constitution is the supreme law of the Federation and any law . . . which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”). The drafters of the *Merdeka* Constitution clearly intended the Supreme Court to have the power to protect individual rights by having the final interpretation of the Constitution. See JOSEPH M. FERNANDO, *THE MAKING OF THE MALAYAN CONSTITUTION* 92 (2002).

<sup>20</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>21</sup> See JOSEPH M. FERNANDO, *FEDERAL CONSTITUTIONS: A COMPARATIVE STUDY OF MALAYSIA AND THE UNITED STATES* 37 (2007).

<sup>22</sup> See Visu Sinnadurai, *The 1988 Judiciary Crisis and its Aftermath*, in *CONSTITUTIONAL LANDMARKS IN MALAYSIA*, *supra* note 3, at 173.

the administration, Prime Minister Mahathir Mohamad advised the *Yang di-Pertuan Agong* that the Lord President of the Malaysian Supreme Court should be removed on grounds of misbehavior.<sup>23</sup> Despite several objections against, the Tribunal convened to investigate the alleged misbehavior, including that the Tribunal was chaired by the judge who would benefit by succeeding the Lord President if he was dismissed, the Lord President was eventually controversially removed from office. This unprecedented removal of the Lord President, along with two other Supreme Court judges, is widely considered one of the lowest points in Malaysian constitutional history.<sup>24</sup> The 1988 judicial crisis caused a tremendous blow to the Malaysian judiciary's institutional integrity and the public's confidence in the country's legal system and political institutions.

The political reality in Malaysia is that external constraints undoubtedly color the courts' exercise of judicial review. Consider, as another example, the government's move to curtail judicial power through constitutional amendment. In 1988, the Malaysian Supreme Court in *Dato Yap Peng v. Public Prosecutor* struck down a statutory provision which allowed the Attorney General to withdraw criminal cases before a lower court as a violation of the constitutional provision that vests judicial power solely in the courts.<sup>25</sup> The provision was a "legislative incursion to facilitate executive incursion" and, as Supreme Court Justice Eusoffe Abdoolcader observed, was "both a legislative and executive intromission into the judicial power of the Federation" vested in the courts under Article 121.<sup>26</sup> The Malaysian Government responded by amending the Constitution to remove the reference to judicial power being "vested" in the courts.<sup>27</sup> Article 121(1)

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<sup>23</sup> The Lord President of the Supreme Court is the equivalent of the Chief Justice of the United States Supreme Court.

<sup>24</sup> See, e.g., HARDING, *supra* note 3, at 216 (noting that the Malaysian Bar and many commentators consider the 1988 judicial crisis a "watershed" in Malaysian constitutional history following which "both the appearance and reality of judicial autonomy were compromised").

<sup>25</sup> *Dato Yap Peng v. Public Prosecutor* [1988] 1 M.L.J. 119.

<sup>26</sup> *Id.* at 318.

<sup>27</sup> Federal Constitution, Art. 121(1) ("[T]he judicial power of the Federation shall be vested in two High Courts of coordinate jurisdiction and status . . . and in such inferior courts as may be provided for by federal law.") (before amendment).



now simply provides that the courts “shall have such jurisdiction and powers as may be conferred by or under federal law.”<sup>28</sup>

Public confidence in the independence of the Malaysian judiciary continued to erode throughout the 1990s and 2000s. Several episodes compounded the perception of the judiciary’s downward slide post-1988. In 2007, for example, controversy erupted over an exposed videotaped conversation from 2002 that showed lawyer V.K. Lingam speaking on the phone with someone suspected to be Ahmad Fairuz, at the time the Chief Judge of the High Court of Malaya and later the Chief Justice of Malaysia.<sup>29</sup> The conversation allegedly involved discussions regarding fixing the appointment of senior judges and also suggested that a senior judge had been politically motivated in deciding a case against an Opposition MP.

The Malaysian Bar Council and civil society activists were vocal in criticizing these issues and calling for reforms.<sup>30</sup> In response, the Government eventually set up a Royal Commission of Inquiry, whose report in May 2008 found the Lingam videotape was authentic and that it provided evidence for concern regarding political involvement in judicial appointments.<sup>31</sup> The Government adopted the Commission’s recommendation to establish a Judicial Appointments Commission, but no action was taken against any of the individuals implicated in the Lingam affair.

Despite the establishment of the Judicial Appointments Commission in 2009, concerns persist regarding the judicial appointments process in Malaysia. In 2015, retired Court of Appeal Judge Hishamuddin Yunus noted in a public interview that he had been bypassed for a promotion to the

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<sup>28</sup> *Id.* Art. 121(1) (“There shall be two High Courts . . . and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.”) (as amended by the Constitutional (Amendment) Act 1988).

<sup>29</sup> *Special Report: The Lingam Tape*, MALAYSIAKINI (Sept. 24, 2007), <http://www.malaysiakini.com/news/72772>.

<sup>30</sup> See Jalil Hamad, *Malaysia lawyers hold rare demonstration for reform*, REUTERS (Sept. 26, 2007), <http://www.reuters.com/article/us-malaysia-judiciary-idUSKLR19425220070926>. See generally Andrew Harding & Amanda Whiting, *Custodian of Civil Liberties and Justice in Malaysia: The Malaysian Bar and the Moderate State*, in FORTUNES AND MISFORTUNES OF POLITICAL LIBERALISM (T.C. Halliday, et al. eds., 2011).

<sup>31</sup> REPORT OF THE COMMISSION OF ENQUIRY ON THE VIDEO CLIP RECORDING OF IMAGES OF A PERSON PURPORTED TO BE AN ADVOCATE AND SOLICITOR, ETC. (May 9, 2008).

Federal Court due to Prime Minister Najib Razak's disagreement with the Commission's recommendation to appoint him to the apex court.<sup>32</sup>

While institutional reforms of the judiciary are no doubt important, such external reforms like the Judicial Appointments Commission need to be accompanied by a shift in the judiciary's own internal approach in order for the Malaysian courts to affirmatively regain its role as an independent branch of government committed to the rule of law.

### III. INTERPRETING THE MALAYSIAN CONSTITUTION

#### A. *The "Four Walls" of the Constitution*

Courts in Malaysia strongly emphasize an inward-looking approach to interpreting the Malaysian Constitution, an exercise conducted "within its own four walls."<sup>33</sup> Judges operating under this principle refuse to engage with sources from comparative jurisdictions or international law principles, viewing such influences as irrelevant to the task of interpreting Malaysia's domestic Constitution.

Half a century ago, the Malaysian Supreme Court articulated the "four walls" approach in *Government of Kelantan v. Government of the Federation of Malaya*.<sup>34</sup> "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," wrote the Court.<sup>35</sup> In 1987, the Supreme Court in *Attorney General v. Arthur Lee Meng Kuang* likewise declared that having regard for local conditions meant that "criticisms which are considered as within the limit of reasonable courtesy elsewhere are not necessarily so here."<sup>36</sup>

The "four walls" doctrine remains alive and well in practice in contemporary Malaysian constitutional adjudication. In 2016, the Malaysian

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<sup>32</sup> *Ex-appellate judge Hishamudin says hit glass ceiling because didn't get PM's nod*, MALAY MAIL ONLINE (Sept. 20, 2015), <http://www.themalaymailonline.com/malaysia/article/ex-appellate-judge-hishamudin-says-hit-glass-ceiling-because-didnt-get-pms>.

<sup>33</sup> *Government of the State of Kelantan v. Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] 29 M.L.J. 355.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 369.

<sup>36</sup> *Attorney General v. Arthur Lee Meng Kuang* [1987] 1 M.L.J. 207, 209.

Court of Appeal illustrated its use in *Indira Gandhi*.<sup>37</sup> At stake in this case was the issue of whether a parent could unilaterally convert a child to Islam without the knowledge or consent of the other parent. Indira Gandhi's ex-husband had converted from being Hindu to Muslim. Without her knowledge, he then converted all their three children to Islam and obtained custody over the children from the Sharia court—a religious court which Indira Gandhi could not access as a non-Muslim. Indira Gandhi brought her case to the civil courts, arguing against the children's conversion and asking for custody.

The High Court held in favor of Indira Gandhi, quashing the children's conversion certificates by the Sharia Court and awarding Indira Gandhi custody.<sup>38</sup> The lower appellate court reasoned that the Article 12(4) constitutional provision, which specifies that a minor's religion "shall be decided by his parent or guardian," should be read in line with the Article 8 guarantee of equal protection to guarantee both parents an equal right to determine the religion of their child.<sup>39</sup> As such, a child of a civil law marriage could not be converted to Islam unilaterally by one parent without the consent of the other non-converting parent. Justice Lee Swee Seng further stated that "as a member of the international community, Malaysia cannot ignore our commitment to various conventions that we have adopted and indeed we have amended our laws to more clearly reflect our commitments."<sup>40</sup>

The Court of Appeal, however, rejected the lower court's approach and ruled against Indira Gandhi.<sup>41</sup> The majority opinion held that the Sharia court had exclusive jurisdiction to determine the validity of any conversion

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<sup>37</sup> *Pathmanathan a/l Krishnan v. Indira Gandhi a/p Mutho* Civil Appeals No A-02-1826-08/2013 (Dec. 30, 2015) (Court of Appeal) [hereinafter *Indira Gandhi* (CA)].

<sup>38</sup> *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [2013] 5 M.L.J. 552 [hereinafter *Indira Gandhi* (HC)].

<sup>39</sup> *See id.* at para 15. *See also* Federal Constitution, Art. 12(4) ("For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian."); Federal Constitution, Art. 8(1) ("All persons are equal before the law and entitled to the equal protection of the law.").

<sup>40</sup> *Indira Gandhi* (HC), *supra* note 38, at para. 62. According to the High Court, this interpretation would be in line with Malaysia's commitments under the Universal Declaration of Human Rights (UDHR), the Convention on Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). *See id.* at paras. 62–76.

<sup>41</sup> *Indira Gandhi* (CA), *supra* note 37 at para. 33.

to Islam.<sup>42</sup> The Court of Appeal's majority rebuked the lower court for considering Malaysia's commitments under international law, declaring that judges "should not use international norms as a guide to interpret our Federal Constitution."<sup>43</sup> Such norms were merely statements of principle "devoid of any obligatory character" and "not part of [domestic Malaysian] law."<sup>44</sup>

According to the Court of Appeal, the court was not free "to stretch or pervert the language of the Constitution in the interest of any legal of constitutional theory" nor to decide whether a legislative act is "in contravention of generally acknowledged principles of international law."<sup>45</sup> It concluded by observing that the approach taken by the lower High Court 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."<sup>46</sup>

This employment of the "four walls" approach, however, is unduly insular. The Supreme Court asserted in *Loh Kooi Choon v. Government of Malaysia* that "in the end it is the wording of our Constitution itself that is to be interpreted and applied, and this wording can never be overridden by extraneous principles of other Constitutions."<sup>47</sup> But this is surely axiomatic. Looking beyond the "four walls" of the Constitution need not entail the overriding of domestic constitutional provisions by external constitutional sources. The starting point of any constitutional interpretation approach is of course its own constitution.

None of this means, though, that Malaysian courts should refuse to engage with the experiences of other constitutional systems. Even in *Loh Kooi Choon*, the Supreme Court acknowledges that: "We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law."<sup>48</sup> Rigidly applying the "four walls" doctrine simply binds courts to the

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at para. 66 (citing *Public Prosecutor v. Kok Wah Kuan* [2007] 6 C.L.J. 341, 355).

<sup>44</sup> *Id.* at para. 65 (citing *Merdeka University Berhad v. Government of Malaysia* [1981] C.L.J. (REP) 191, 209).

<sup>45</sup> *Id.* at para. 69.

<sup>46</sup> *Id.* at para. 71.

<sup>47</sup> *Loh Kooi Choon v. Government of Malaysia* [1997] 2 M.L.J. 187, 188–89.

<sup>48</sup> *Id.*

“austerity of tabulated legalism,” which the Privy Council denounced in *Minister of Home Affairs v. Fisher* as an inappropriate means of interpreting a Westminster model constitution.<sup>49</sup> In *Fisher*, the Privy Council emphasized that the relevant approach to constitutional interpretation for constitutions based on the Westminster model called for a “generous interpretation” to give individuals the “full measure” of fundamental rights and freedoms.<sup>50</sup>

### B. *Strict Literalism and Formalism*

Malaysian courts have generally been extremely formalist and legalist in interpreting constitutional rights provisions. Judges tend to employ a strict legalism toward constitutional interpretation. The Federal Court of Malaysia, in particular, has predominantly relied on a literalist and formalist approach in interpreting constitutional rights guarantees.

Consider, for example, the Federal Court’s approach to the right to equality in the case of *Danaharta Urus v. Kekatong*.<sup>51</sup> A statute provided that the courts could not make any order that would stay, restrain, or affect any action taken by Danaharta, the nation’s asset management company. The Court of Appeal had held that this provision violated the constitutional guarantee of equal protection of the law, finding access to justice—a fundamental principle of natural justice—an integral part of the right to equality.<sup>52</sup> Propounding a generous approach to the interpretation of “the fundamental liberties guaranteed by Part II,” the Court of Appeal asserted that the rights “should receive a broad, liberal and purposive construction.”<sup>53</sup>

The Federal Court disagreed, unanimously overruling the Court of Appeal’s decision.<sup>54</sup> Adopting a formalistic approach toward the right of equality, Justice Augustine Paul declared: “the manner and the extent of the

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<sup>49</sup> *Minister of Home Affairs v. Fisher* [1980] AC 319, 328.

<sup>50</sup> *Id.* at 328.

<sup>51</sup> See *Danaharta Urus v. Kekatong* [2004] 2 M.L.J. 257; Federal Constitution, Art. 8(1) (“All persons are equal before the law and entitled to the equal protection of the law.”).

<sup>52</sup> See *Kekatong Sdn Bhd v. Danaharta Urus Berhad* [2003] 3 M.L.J. 1.

<sup>53</sup> *Id.* at para. 48.

<sup>54</sup> *Danaharta Urus v. Kekatong* [2004] 2 M.L.J. 257.

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.”<sup>55</sup>

In a similar vein, the Federal Court rejected the High Court’s endorsement of a rights-oriented approach to interpretation in *Tan Boon Wah v. Datuk Seri Ahmad Said Hamdan*.<sup>56</sup> This case was brought following the controversial death of Teoh Beng Hock while in the custody of the Malaysian Anti-Corruption Commission (MACC). In considering whether the MACC Act’s provision for “day-to-day” questioning allowed the Commission to interrogate witnesses continuously beyond normal working hours, the High Court held that such prolonged questioning violated the Article 5 right of protection for personal liberty.<sup>57</sup> With regard to interpreting legislation affecting fundamental liberties, the High Court declared, “[t]here should be less room for literalism, but greater scope for a rights-oriented approach to interpretation.”<sup>58</sup>

The High Court’s approach was rejected by both the Court of Appeal and the Federal Court. The Court of Appeal adopted a literalist interpretation of the MACC Act that “day-to-day” questioning allowed witnesses to be continuously interrogated beyond regular working hours.<sup>59</sup> In stark contrast to the High Court’s rights-oriented approach, the Court of Appeal emphasized “the importance of giving effect to the plain words in a legislation.”<sup>60</sup> The Federal Court upheld the Court of Appeal’s decision, dismissing an appeal against the intermediate appellate court’s ruling.<sup>61</sup>

Yet, for a while, there appeared to be indications of a shift in judicial attitudes away from strict literalism toward a more generous, purposive constitutional interpretation approach. Consider, for example, the 2010 case of *Sivarasa Rasiah v. Badan Peguam Malaysia*.<sup>62</sup> In this landmark decision, the Federal Court held that restrictions on the Article 10 right to freedom of association had to be both reasonable and proportionate, reasoning that

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<sup>55</sup> *Id.* at 27.

<sup>56</sup> See *Tan Boon Wah v. Datuk Seri Ahmad Said Hamdan* [2010] 2 M.L.J. 411.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at para. 11.

<sup>59</sup> M. Mageswari, *MACC can quiz witnesses after office hours*, THE STAR (May 21, 2010), <http://www.thestar.com.my/story/?file=%2F2010%2F5%2F21%2Fnation%2F6310423&sec=nation>.

<sup>60</sup> *Datuk Seri Ahmad Said Hamdan v. Tan Boon Wah* [2010] 3 M.L.J. 193 at para. 11.

<sup>61</sup> M. Mageswari, *supra* note 59.

<sup>62</sup> *Sivarasa Rasiah v. Badan Peguam Malaysia* [2010] 2 M.L.J. 333.

“restrictions that limit or derogate from guaranteed rights must be read restrictively.”<sup>63</sup> Strikingly, the apex court endorsed “a prismatic approach to interpretation,” exhorting that “the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted....”<sup>64</sup>

Another significant decision was delivered four years later by the Court of Appeal in the 2014 case of *Nik Nazmi bin Nik Ahmad v. Public Prosecutor*.<sup>65</sup> The case involved section 9(1) and 9(5) of the Peaceful Assembly Act, which imposed criminal sanctions on organizers of public assemblies for failure to notify the police at least ten days before the date of the assembly.<sup>66</sup> The Court of Appeal struck down the provision as an unreasonable restriction on the constitutional right to freedom of assembly guaranteed under Article 10. Ruling that Article 10 must be read “in conformity with the general jurisprudence relating to reasonableness and proportionality,”<sup>67</sup> the court held that the section 9(5) failed the reasonableness test as well as the proportionality test as it has no nexus to public order, national security or a non-peaceful assembly.<sup>68</sup> As the Court of Appeal declared, the court had a “constitutional duty...to ensure that enshrined freedom is not violated by retrogressive legislation...without meaningful grounds consistent with the Federal Constitution.”<sup>69</sup>

These decisions by the Federal Court and Court of Appeal in *Sivarasa* and *Nik Nazmi* seemed to inaugurate a departure from the appellate courts’ excessively restrictive and formalist approach to constitutional rights adjudication.

More recent decisions, however, appear to signal a significant retreat from this emerging trend toward a more expansive approach to rights adjudication. In *Public Prosecutor v. Yuneswaran*, the courts were again tasked with considering the constitutionality of the Peaceful Assembly Act.<sup>70</sup>

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<sup>63</sup> *Id.* at para. 5.

<sup>64</sup> *Id.* at para. 3.

<sup>65</sup> See *Nik Nazmi bin Nik Ahmad v. Public Prosecutor* [2014] 4 M.L.J. 157.

<sup>66</sup> Peaceful Assembly Act, 2012, s.9.

<sup>67</sup> *Nik Nazmi bin Nik Ahmad v. Public Prosecutor* [2014] 4 M.L.J. 157, at para. 26.

<sup>68</sup> *Id.* at para. 27.

<sup>69</sup> *Id.* at para. 16.

<sup>70</sup> *Public Prosecutor v. Yuneswaran* [2015] 9 C.L.J. 873.



Yuneswaran Ramaraj, the organizer of a rally, was charged with failing to give adequate notice to the police in advance of the event. The High Court acquitted Yuneswaran,<sup>71</sup> relying on the Court of Appeal's earlier *Nik Nazmi* ruling that section 9(1) and 9(5) of the Peaceful Assembly Act were unconstitutional infringements of the right to freedom of assembly.<sup>72</sup> The Federal Court dismissed an application for the court to determine the issue, citing jurisdictional grounds, leaving the prosecution's appeal to be decided by the Court of Appeal.<sup>73</sup>

In a stark departure from its earlier decision in *Nik Nazmi*, the Court of Appeal in October 2015 held that the Peaceful Assembly Act provisions were valid and did not violate Article 10 of the Constitution. The intermediate appellate court refused to follow the Federal Court's approach in *Sivarasa*,<sup>74</sup> which had established that restrictions on freedom of assembly had to be "reasonable."<sup>75</sup> Instead, the Court of Appeal declared that "[t]he correct approach is to look at the legislative competency of Parliament," signaling a return to a strict legalist and literalist approach.<sup>76</sup> "The Courts in this country do not comment on the quality of a law," wrote the Court of Appeal, "that is to say, the Courts do not consider it any part of its judicial function to paint any law as 'reasonable' or 'unreasonable' or 'harsh' or 'unjust' . . . ."<sup>77</sup>

In addition, the Court of Appeal adopted an originalist stance to justify its position that Article 10 did not contain an implied "reasonableness" qualification on its restriction. The court relied heavily on the legislative history of Article 10, reasoning that "the non-inclusion of the word 'reasonable' in Article 10 was not some oversight on the part of the Reid Commission."<sup>78</sup> Rather, it was a "deliberate decision" on the part of the framers to leave the judgment of what was reasonable to Parliament, not

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<sup>71</sup> *Yuneswaran v Public Prosecutor* [2014] 6 M.L.R.H. 607.

<sup>72</sup> *See Nik Nazmi bin Nik Ahmad v. Public Prosecutor* [2014] 4 M.L.J. 157.

<sup>73</sup> *Citing lack of jurisdiction, Federal Court refuses to hear the legality of the Peaceful Assembly Act*, MALAYSIAN INSIDER (March 29, 2015), <https://sg.news.yahoo.com/citing-lack-jurisdiction-federal-court-refuses-hear-legality-035749064.html>.

<sup>74</sup> *Sivarasa Rasiah v. Badan Peguam & Anor* [2010] 2 M.L.J. 333.

<sup>75</sup> *Public Prosecutor v. Yuneswaran* [2015] 9 C.L.J. 873, at para. 58 (citing *Sivarasa Rasiah v. Badan Peguam & Anor* [2010] 2 M.L.J. 333, at para. 5).

<sup>76</sup> *Id.* at para. 56.

<sup>77</sup> *Id.* at para. 63.

<sup>78</sup> *Id.* at para. 75.



the courts.<sup>79</sup> Although the Court of Appeal acknowledged that “the words used or not used by the framers of our Constitution are not etched in stone,” it reasoned that amending the Constitution is “surely...a task for Parliament.”<sup>80</sup> The court concluded that: “To allow the Court to reinstate the word reasonable would be tantamount to the Courts amending the Federal Constitution against the decision of the framers of our Constitution, in fact usurping the powers of the Parliament.”

On October 6, 2015, several days after the Court of Appeal’s judgment in *Yuneswaran*, the Federal Court delivered its decision in *Public Prosecutor v. Azmi Sharom*.<sup>81</sup> The case involved a challenge to the constitutionality of the 1948 Sedition Act.<sup>82</sup> This challenge was brought by law professor Azmi Sharom, who had been charged under the Sedition Act for stating his opinion regarding the legality of an aspect of the 2009 Perak constitutional crisis.

The Federal Court unanimously upheld the Sedition Act as constitutional, ruling that the law did not infringe upon the Article 10 right to freedom of expression. The Court explicitly departed from the reasonableness test articulated by the Federal Court in its earlier 2010 decision in *Sivarama*.<sup>83</sup> Chief Justice Arifin Zakaria, writing for the Court, observed—as the Court of Appeal did in *Yuneswaran*—that the word “reasonable” as a qualification to restrictions on freedom of speech in Article 10 was omitted from the final draft of the Constitution by its framers.<sup>84</sup> “For this reason,” asserted the Chief Justice, “it is not for the Court to determine whether the restriction imposed by the legislature pursuant to Art. 10(2) is reasonable or otherwise.”<sup>85</sup> To do so, would

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<sup>79</sup> *Id.* at para. 75–76.

<sup>80</sup> *Id.* at para. 78.

<sup>81</sup> *Public Prosecutor v. Azmi Sharom* [2015] M.L.J.U. 594.

<sup>82</sup> The Sedition Act has been used with increasing frequency since 2013. In 2015 alone, there have been at least 91 cases of individuals charged for sedition. See Amnesty USA, *Critical Crackdown: Freedom of Expression under Attack in Malaysia*, AMNESTY INTERNATIONAL LTD. (2016), <https://www.amnestyusa.org/sites/default/files/asa2831472016.pdf>.

<sup>83</sup> *Public Prosecutor v. Azmi Sharom* [2015] M.L.J.U. 594, at para. 35.

<sup>84</sup> *Id.* at para. 36.

<sup>85</sup> *Id.* at para. 37.

amount to the Court “rewriting the provisions of Art. 10(2)” of the Constitution.<sup>86</sup>

The Court, however, seemed to accept the use of proportionality—the other test established in *Sivarama*—in determining the validity of a law.<sup>87</sup> Yet despite quoting the proportionality test employed by the Privy Council in a 1998 decision, the Federal Court did not appear to apply the structured analysis of this proportionality test in its own opinion.<sup>88</sup> According to the Federal Court, the Sedition Act’s provision “is directed to any act, word, or publication having a ‘seditious tendency’ . . . .” Offering little analysis for its conclusion, it immediately goes on to hold: “This in our view is consistent with . . . the Constitution, as it cannot be said that the restrictions imposed [by the Sedition Act] is too remote or not sufficiently connected to the subjects/objects enumerated in Art.10(2)(a).”<sup>89</sup> The Chief Justice’s opinion does not subject the breadth of the legislation’s definition of acts with a “seditious tendency” to any analysis of whether the measure is proportionate by being no more restrictive than necessary, beyond observing that the Act provides for a number of exceptions.<sup>90</sup> It concludes that the restrictions on fundamental rights imposed by the Sedition Act “fall[s] squarely within the ambit . . . of the Constitution.”<sup>91</sup>

It is striking that the Federal Court expressly rejected the “reasonableness” standard but accepted proportionality, which is considered in most common law jurisdictions to be a more stringent standard of review than reasonableness.<sup>92</sup> The proportionality review exercised by the Court in this case, though, appears far from rigorous. Applied in this perfunctory

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<sup>86</sup> *Id.* at para. 40.

<sup>87</sup> *Id.* at para 41–43.

<sup>88</sup> *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] UKPC 30 (“In determining whether a limitation is arbitrary or excessive . . . the court would ask itself: 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.”).

<sup>89</sup> *Public Prosecutor v. Azmi Sharom* [2015] M.L.J.U. 594 at para. 43.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See, e.g., R v. Shayler* [2003] 1 AC 247, at para. 61 (per Lord Hope) (calling the proportionality analysis “a close and penetrating examination of the factual justification”). *See also Smith and Grady v United Kingdom* [1999] I.R.L.R. 734 (in which the European Court of Human Rights held that even intensive scrutiny on the basis of reasonableness was inadequate for the purposes of protecting rights under the European Convention of Human Rights).

manner, the adoption of proportionality is unlikely to exercise any meaningful review over government intrusions on constitutional rights.

C. *Unconstitutional Constitutional Amendments: A “Basic Structure” Doctrine?*

The Malaysian courts have traditionally been skeptical of the basic structure doctrine articulated by the Indian Supreme Court in *Kesavananda v. State of Kerala*, which stipulates that a law seeking to amend the Constitution is invalid if it would destroy the Constitution’s basic structure.<sup>93</sup> The applicability of the “basic structure” doctrine to the Malaysian Constitution has been considered by the Supreme Court in several cases. In the 1977 case of *Loh Kooi Choon v. Government of Malaysia*,<sup>94</sup> Raja Azlan Shah declined to adopt a notion of a “doctrine of implied restrictions on the power of constitutional amendment,” stating that “it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.”<sup>95</sup> And in *Phang Chin Hock v Public Prosecutor*,<sup>96</sup> the Supreme Court in 1988 observed that “it is enough for us merely to say that Parliament may amend the Constitution in the way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself.”<sup>97</sup>

Strikingly, however, in the 2010 case of *Sivarasa Rasiah v. Badan Peguam Malaysia*,<sup>98</sup> Malaysia’s highest appellate court declared that “Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure.”<sup>99</sup> In considering the Supreme Court’s earlier decision in *Loh Kooi Choon*, the Federal Court called the Supreme Court’s reliance on the English decision of *Vacher v. London Society of*

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<sup>93</sup> *Kesavananda v. State of Kerala*, (1973) 4 SCC 258 (India). See also Po Jen Yap, *Constitutional Fig Leaves in Asia*, 25 WASH. INT’L L.J. 421, 441 (2016).

<sup>94</sup> *Loh Kooi Choon v. Government of Malaysia* [1977] 2 M.L.J. 187

<sup>95</sup> *Id.* at 189.

<sup>96</sup> See *Phang Chin Hock v. Public Prosecutor* [1980] 1 M.L.J. 70.

<sup>97</sup> See *id.* at 70, 73.

<sup>98</sup> *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 M.L.J. 333.

<sup>99</sup> *Id.* at para. 7.

*Compositors*<sup>100</sup> “misplaced.”<sup>101</sup> According to Justice Gopal Sri Ram, writing for the Federal Court in *Sivarasa*, the *Vacher* endorsement of the view that courts should interpret and not pronounce on the policy of legislation had been made “in the context of a country whose Parliament is supreme.”<sup>102</sup> Unlike the UK, the doctrine of parliamentary supremacy does not apply in Malaysia, which has a written constitution.<sup>103</sup> According to the Federal Court, the “fundamental rights guaranteed under [the Constitution] is part of the basic structure of the Constitution.”<sup>104</sup>

The Federal Court’s endorsement of the basic structure doctrine in *Sivarasa* opened up new prospects for Malaysian courts to adopt a bolder approach toward reviewing the validity of legislative actions. In 2011, the Court of Appeal in *Muhammad Hilman bin Idham* relied on *Sivarasa* to invalidate a legislative provision that it held to be an unreasonable restriction on the freedom of expression.<sup>105</sup> Justice Mohamad Hishamuddin Yunus underscored that the Federal Court in *Sivarasa* had given “recognition for the first time, albeit in a limited fashion, to the doctrine of basic structure of the Constitution.”<sup>106</sup>

The Court of Appeal in *Yuneswaran v. Public Prosecutor* in 2015, though, refused to follow the approach of the Federal Court in *Sivarasa*.<sup>107</sup> Although there was no explicit reference to the basic structure doctrine in *Yuneswaran*, the Court of Appeal refused to follow the Federal Court’s determination in *Sivarasa* that restrictions on guaranteed constitutional rights had to be “reasonable” in considering a potential infringement to Article 10. The Court of Appeal disavowed the Federal Court’s statements in *Sivarasa* as “merely obiter”—and, moreover, held that the *dicta* should not be followed—indicating a mixed reception among the Malaysian appellate courts to the approach articulated in *Sivarasa*.<sup>108</sup>

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<sup>100</sup> *Vacher & Sons Ltd. v. London Society of Compositors* [1913] AC 107 (HL) 118.

<sup>101</sup> *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 M.L.J. 333, at para. 8.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at para. 7.

<sup>105</sup> *Muhammad Hilman v. Kerajaan Malaysia* [2011] 6 M.L.J. 507.

<sup>106</sup> *Id.* at 523, para. 44.

<sup>107</sup> *Public Prosecutor v. Yuneswaran* [2015] 9 C.L.J. 873.

<sup>108</sup> *Id.* at para. 79.

## IV. THE UNEVEN JOURNEY TO CONSTITUTIONAL REDEMPTION

Since the 1988 judicial crisis, the Malaysian judiciary has struggled to regain the public's confidence in the nation's constitutional system. In the period following that dark period in Malaysia's constitutional history, the concentration of extensive powers in the political branches has been unimpeded by the judiciary's deferential attitude to the executive and legislature. Judicial reluctance to exercise review over constitutional rights infringements has been characterized by its strict literalist and formalist approach toward constitutional interpretation within the "four walls" of the Constitution.

Yet, in recent years, there have been indications of a movement in several judicial decisions toward a greater willingness to exercise more robust protection of constitutional rights. Take, for instance, the Federal Court's exhortation in *Sivarasa Rasiah* in 2010 for courts to adopt a "prismatic approach to interpretation" that would support a generous approach toward the interpretation of fundamental rights guaranteed by the Constitution. In addition, the apex court also explicitly endorsed the notion that Parliament cannot enact laws to amend the Constitution that would violate its basic structure.<sup>109</sup>

The Court of Appeal in its 2011 and 2014 decisions in *Muhammad Hilman bin Idham*<sup>110</sup> and *Nik Nazmi bin Nik Ahmad*<sup>111</sup> relied on the approach articulated in *Sivarasa* to strike down laws as unconstitutional violations of the Article 10 right to freedom of assembly. In *Muhammad Hilman*, the appellate court declared Section 15(5) of the Universities and University Colleges Act 1971—which prevented students from "expressing support for or sympathy with or opposition to any political party"—invalid for unreasonably restricting the students' freedom of expression.<sup>112</sup> Three years later, the Court of Appeal in *Nik Nazmi* struck down the notification requirement for organizers of public assembles in Section 9(5) of the

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<sup>109</sup> *Sivarasa Rasiah v. Badan Peguam Malaysia* [2010] 2 M.L.J. 333, at para. 3.

<sup>110</sup> See *Muhammad Hilman v. Kerajaan Malaysia* [2011] 6 M.L.J. 507.

<sup>111</sup> See *Nik Nazmi bin Nik Ahmad v. Public Prosecutor* [2014] 4 M.L.J. 157.

<sup>112</sup> See *Muhammad Hilman v. Kerajaan Malaysia* [2011] 6 M.L.J. 507.

Peaceful Assembly Act for infringing Article 10.<sup>113</sup> The Malaysian judiciary appeared to have taken clear steps toward constitutional restoration.

Several recent appellate court decisions, however, have shown a retreat from this trend. For instance, the Court of Appeal backtracked from its rights-oriented approach in its 2015 *Yuneswaran* decision. Taking an entirely conflicting approach from its earlier decision in *Nik Nazmi*, the Court of Appeal concluded that Section 9(5) of the Peaceful Assembly Act was constitutionally valid and enforceable. Moreover, the court disavowed *Sivarasa* as *dicta* that should not be followed, rejecting the Federal Court's establishment of a reasonableness requirement for restrictions on the right to freedom of assembly.

The battle over the spirit of the judiciary's approach toward constitutional rights protection continues. The High Court's 2013 ground-breaking decision in 2013, which held that unilateral conversion of a child to Islam would infringe the other parent's right of equality and religious freedom, was short-lived.<sup>114</sup> In January 2016, the Court of Appeal overruled the lower appellate court, repudiating the High Court for paying attention to international norms in considering how to interpret the rights under the Constitution in line with Malaysia's commitments under international conventions.<sup>115</sup> Using strict literalist and formalist reasoning, the Court of Appeal stressed that the court was not free "to stretch or pervert the language of the Constitution."<sup>116</sup>

This pattern of the Malaysian Federal Court overruling bolder, more rights-expansive judgments rendered by the High Court recurs elsewhere. In 2013, the Court of Appeal unanimously overturned the High Court's decision that a government order prohibiting a Catholic publication from using the word "Allah" violated the Catholic Church's right to religious

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<sup>113</sup> See *Nik Nazmi bin Nik Ahmad v. Public Prosecutor* [2014] 4 M.L.J. 157.

<sup>114</sup> *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak*, [2013] 5 M.L.J. 552 at paras. 34–35, 54 [hereinafter *Indira Gandhi* (HC)]. See *Ground-breaking Indira Gandhi Custody Decision*, LOYAR BUROK (June 10, 2014), <http://www.loyarburok.com/2014/06/10/ground-breaking-indira-gandhi-custody-decision/>.

<sup>115</sup> *Pathmanathan a/l Krishnan v. Indira Gandhi a/p Mutho* Civil Appeals No A-02-1826-08/2013, at para. 71 (Dec. 30, 2015) (Court of Appeal) [hereinafter *Indira Gandhi* (CA)].

<sup>116</sup> *Id.* at para. 69.

freedom.<sup>117</sup> The Federal Court dismissed the Catholic Church's application for leave to appeal, holding that the Court of Appeal had applied the correct test.<sup>118</sup>

This tendency to find that laws passed by a religious state authority do not infringe basic rights is further demonstrated by the 2015 case of *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor* unanimously dismissed an application to nullify a Selangor Sharia legislation that made it a criminal offence for Muslims to publish books that the state religious authority deemed to be against "Islamic law."<sup>119</sup> The Court concluded that the state law did not infringe freedom of expression or religious liberty as these rights had to be interpreted restrictively in light of the constitutional provision declaring Islam as the religion of the Federation of Malaysia.<sup>120</sup>

Another recent case involved a challenge to a Sharia law that made it an offence for any Muslim male to dress in women's attire brought by three transgender applicants. The Court of Appeal's 2014 decision that the state's Sharia law was void as it unconstitutionally infringed several constitutional rights provided a fleeting victory for the transgender community.<sup>121</sup> In 2015, the Federal Court overturned the Court of Appeal's decision on procedural grounds, in effect allowing the state ban to remain valid.<sup>122</sup>

## V. CONCLUSION

Under Malaysia's Federal Constitution, courts are empowered to invalidate legislative and executive action for rights infringements. Yet the Malaysian judiciary has been far from vigorous in protecting the rights

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<sup>117</sup> *Menteri Dalam Negeri & Ors v. Titar Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 M.L.J. 468; *Titar Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor*, [2010] 2 M.L.J. 78.

<sup>118</sup> *Titar Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 4 M.L.J. 765. See *Top Malaysian court dismisses 'Allah' case*, ALJAZEERA (Jul. 23, 2014), <http://www.aljazeera.com/news/asia-pacific/2014/06/top-malaysian-court-dismisses-allah-case-20146232448487953.html>.

<sup>119</sup> See *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor* [2016] 1 M.L.J. 153.

<sup>120</sup> *Id.* at para. 17.

<sup>121</sup> *Muhamad Juzaili bin Mohd Khamis & Ors v. State Government of Negeri Sembilan & Ors* [2015] 3 M.L.J. 513. The Court of Appeal held that the state law violated rights to life and personal liberty, equality, freedom of movement, and freedom of speech, assembly, and association.

<sup>122</sup> *State Government of Negeri Sembilan & Ors v. Muhammad Jazaili Mohd Khamis & Ors* [2015] C.L.J. 13.



guaranteed in the Constitution. The prevailing judicial stance has been to adhere to a strict legalist and literalist approach, marked by insularity and an unwillingness to contemplate fundamental underlying principles. The courts have tended to defer extensively to the political branches exercising little meaningful review over government intrusions on fundamental liberties.

Constitutional politics have clearly played a role. Despite constitutional supremacy being the acknowledged framework of the Malaysian legal system, the dominance of the ruling coalition government has contributed to a situation of *de facto* legislative—and executive—supremacy. For much of the nation's history since independence, the ruling coalition's control of more than two-thirds of the legislature has enabled the government in the past to amend the Constitution with ease, weakening constitutional safeguards. Aggressive rebuffs to judicial challenges through legislative or constitutional amendments have contributed to the courts' reluctance to exercise robust review over the powerful political branches.

Over the first two decades of the twenty-first century, however, the dominance of Malaysia's ruling government has increasingly been challenged. In the 2008 general elections, the *Barisan Nasional* coalition lost its two-thirds legislative majority for the first time in the nation's history since independence. Nor did it regain its control in the 2013 general elections. The ruling coalition not only failed again to secure a two-thirds legislative majority but also lost the popular vote to the opposition, although the coalition managed to obtain a bare majority of parliamentary seats to stay in power.

For a time, the Malaysian judiciary appeared reinvigorated. In the years following 2008, the Malaysian appellate courts articulated a more generous interpretation of the rights guaranteed by the Constitution in several bold decisions. The courts showed a greater willingness to check on legislative and executive actions, striking down legislative provisions that infringed fundamental liberties.

More recently, however, the Federal Court and Court of Appeal seem to have faltered on the road toward constitutional restoration. In several high profile cases decided in 2015 and 2016, these top appellate courts exhibit a retreat to an unduly formalistic and legalistic approach toward



rights protection, overruling several decisions of the lower High Court that manifest a more robust, rights-oriented approach.

In order to reclaim its constitutional position as a co-equal branch of government, the Malaysian judiciary must be willing to uphold its constitutional duty to assert its commitment to constitutional supremacy and the rule of law. This remains the case even—or especially—when it appears that the powerful political branches are attempting to reject these principles. To shift the principal constitutional mode in these countries from executive dominance to constitutional governance, the courts must play an enhanced role in checking the dominance of the political branches. This transformation of judicial culture in turn requires a reorientation of the judiciary's approach toward interpreting the Constitution. Developing a constitutional adjudication approach for the Malaysian Constitution in a manner true to its core principles and fundamental guarantees would be a profoundly significant step for the Malaysian judiciary in its journey toward constitutional redemption.