# 5

# Judicial Rhetoric and Constitutional Comparativism

## *Two Asian Case Studies*

*Yvonne Tew**

## I INTRODUCTION

Courts in fraught political systems face a daunting challenge in attempting to confront powerful political actors. How do courts that have historically been passive strengthen their institutional power?[1] This chapter explores how courts in some Asian contexts have employed strategic mechanisms to enhance their position and how these judicial innovations have migrated across Asian legal systems. It seeks to broaden the lens beyond accounts of judicial statecraft familiar to the Western canon and to shift the vantage point toward Asian courts.

This chapter offers an account of how apex courts in South Asia and Southeast Asia have displayed statecraft in aid of self-empowerment, using India, Pakistan, and Malaysia as examples. It considers how certain judicial mechanisms have migrated across borders in Asia and the extent to which these Asian courts can be said to play a role as intermediaries for inter-Asian migration of legal doctrines. Take, for example, the Indian Supreme Court's articulation of a basic structure doctrine in *Kesavananda Bharati v Kerala*,[2] which empowered judges to review constitutional amendments for unconstitutionality, an act of judicial assertiveness that has influenced other Asian courts not only in substance but also in form. The chapter delves into two case studies – Pakistan and Malaysia – to show how these two Asian national courts have delivered decisions that have sought to establish a doctrine for the judiciary to protect a non-derogable constitutional core.

Judicial mechanisms, such as the doctrine of unconstitutional constitutional amendments established by the Indian Supreme Court's jurisprudence, have been adapted and introduced by judges in Pakistan and Malaysia through various

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[1] This chapter draws on my broader project on judicial self-empowerment. See Yvonne Tew, 'Strategic Judicial Empowerment' (2024) 72(1) AJCL 170.

[2] *Kesavananda Bharati v Kerala*, AIR 1973 4 SC 1461 (India).



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mechanisms. Courts may issue a "maxi-minimalist" decision – as the Indian Supreme Court did in its *Kesavananda* moment – by employing maximalist reasoning that expands judicial power, while issuing a narrow ruling that minimizes political backlash.[3] Or a court may issue a "mini-maximalist" decision, which justifies the expansion of the judiciary's power formalistically as orthodox or conventional doctrine, even as it delivers a ruling of immediate consequence in terms of its constitutional and political impact.

This chapter considers a particular feature of these judicially self-empowering decisions: judicial rhetoric in crafting opinions that have popular salience, specifically the courts' engagement with constitutional comparativism. In this regard, it explores how the distinct ways in which the Malaysian Federal Court and Pakistan Supreme Court have approached foreign and comparative case law – in these instances, the Indian jurisprudence on the constitutional basic structure doctrine. Judicial references to foreign case law, oriented positively or negatively, can function as mechanisms of inter-Asian legal travel. The chapter concludes by reflecting on the use of constitutional comparativism and its relationship to a country's constitutional identity.

## II EMPOWERING COURTS

We often talk about *Marbury v Madison*, the United States (US) Supreme Court case that allegedly established the courts' power of judicial review, as a canonical example of a judiciary establishing its own power.[4] But the modern example of a judicially self-empowering decision that has been generative in the constitutional practice of numerous courts over the last half century can be found in Asia. The Indian Supreme Court in *Kesavananda Bharati v Kerala*, and the line of jurisprudence associated with this case established the notion that the "basic structure" of the constitution was beyond Parliament's power to amend, thus establishing a doctrine that empowered the judiciary with the power to review procedurally valid constitutional amendments. It is worth noting, though, that the Supreme Court left much of the challenged constitutional amendment intact in *Kesavananda*, even as the majority declared broad principles protecting a non-derogable basic structure of the constitution against that parliamentary intrusion. Thus, the Indian Supreme Court established the seeds for a powerful doctrinal tool that it would later employ

[3] For more on maxi-minimalism and mini-maximalism as mechanisms of judicial statecraft, see Tew (n 1) Pt III(A)–(B).

[4] *Marbury v Madison*, 5 U.S. 137 (1803). Much has been written about Chief Justice John Marshall's tactical maneuver to establish the US Supreme Court's judicial review authority. In the decision in *Marbury*, Chief Justice Marshall established the Court's power of judicial review, while denying any remedy against the government and thus protecting the court from political repercussions.

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in future cases to invalidate constitutional amendments,[5] while avoiding immediate political confrontation.

The Indian Supreme Court's decision in *Kesavananda Bharati v Kerala* is a classic illustration of what I have described elsewhere as "maxi-minimalism."[6] Courts asserting authority from a fragile position sometimes seek to insulate themselves from immediate political backlash by rendering broad, expansive reasoning that expands judicial power, although it ultimately results in a narrow holding that avoids provoking the governing political power. By issuing a remedy with minimal consequences for the case at hand, a court mitigates the direct impact of its assertion of power and the threat of political attack. In the process of issuing such decisions, judges use maximalist reasoning to set the foundation for legal mechanisms that they can draw on in the future to assert expansive judicial power.

Or a court may take a different tack. Judges may issue a *mini*-maximalist opinion that minimizes their judicial assertion of power, formalistically justifying the decision as orthodox or conventional doctrine, while delivering a ruling of major constitutional and political consequence.[7]

A notable pattern across many courts in Asia (and elsewhere) has been that of judges employing a *mini*-maximalist approach in a demonstrably consequential case, which draws on an earlier *maxi*-minimalist decision in which it had established the doctrinal foundation for the judicial assertion of power that is later relied on as precedent. We see this, for example, in how the Indian Supreme Court incrementally developed the constitutional basic structure doctrine through a series of maxi-minimalist decisions that avoided direct political confrontation, which were followed by cases in which the Court eventually wielded the doctrine to its full effect. While the Indian Supreme Court initially articulated the idea of limitations on Parliament's power to amend the Constitution in the 1967 case of *Golaknath* and then in the 1973 case of *Kesavananda*, the Court nevertheless upheld the constitutional amendments in both of those cases.[8] It would only be in the later cases of *Indira Nehru Gandhi v Raj Narain*, in 1975, and *Minerva Mills v Union of India*, in 1980, that the Indian Supreme Court would draw on the basic structure doctrine it

[5] See, e.g., *Indira Nehru Gandhi v Shri Raj Narain*, AIR 1975 3 SC 2299 (India); *Minerva Mills v Union of India*, AIR 1981 1 SC 1789 (India); *Supreme Court Advocates on Record Ass'n v Union of India*, (2015) 4 SCC (India). It is worth noting that *Kesavananda* potentially exceeds the scope of *Marbury* in that the authority assumed by the Indian Supreme Court extends significantly beyond the judicial review power of the Supreme Court of the United States. *Kesavananda* empowered the Indian Court with the extraordinary ability to review even procedurally valid constitutional amendments that the judiciary deems incompatible with the Constitution's basic structure.

[6] See Tew (n 1) Pt III(A).

[7] Ibid Pt II(C) for an example of mini-maximalism as exhibited by the UK Supreme Court in its decision on the prorogation of Parliament.

[8] See *Golaknath v State of Punjab*, 1967 AIR 1643 (India); *Kesavananda* (n 2).

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had established earlier to actually invalidate the challenged constitutional amendments at issue.[9]

## III TWO CASE STUDIES IN ASIA

How have the judicial mechanisms in the basic structure jurisprudence traveled across Asia to other jurisdictions? This part tells the story of how two apex courts in Southeast Asia and South Asia have employed strategic judicial decisions in service of strengthening judicial power amidst fraught political contexts. Judges in Pakistan and Malaysia have delivered decisions that planted the seeds for a doctrine allowing the court to protect fundamental features of the constitution from legislative amendment, yet these courts minimized the immediate impact of these decisions by leaving the challenged amendments intact and by issuing narrow remedies.

### A. *Pakistan*

In Pakistan, a country that has regularly fluctuated between military rule and civilian government, the judiciary's position has often been precarious. The Supreme Court of Pakistan has often taken a deferential attitude toward the governing regime, validating actions taken by the military or civilian powers.[10] While there have been periods during which the Supreme Court has attempted to take steps toward strengthening its institutional position,[11] at other times, the Court has also retreated in the face of governing power. In a case decided under the General Musharraf's military rule, for example, the Court dismissed the notion of judicially enforceable limitations based on the constitution's basic structure, stating that the "remedy lay in the political not the judicial process."[12]

Judicial appointments have been a fault line of tension between the executive and judiciary in Pakistan. General Musharraf's removal of the chief justice and sixty superior court judges in 2007 instigated a lawyers' movement and a nationwide protest march in 2009.[13] Following Musharraf's replacement by a coalition government, with Iftikhar Chaudhry restored as the chief justice, the Supreme Court subsequently declared Musharraf's 2007 state of emergency illegal and invalidated the appointments of judges made by Musharraf during that period.[14]

[9] *Indira Nehru Gandhi* (n 5).
[10] See Mooen H Cheema, 'Two Steps Forward One Step Back: The Non-Linear Expansion of Judicial Power in Pakistan' (2018) 16(2) *Int J Const Law* 503, 505.
[11] See Yasser Kureshi, *Seeking Supremacy* (CUP 2022) 153–219.
[12] *Pakistan Lawyers Forum v Fed'n of Pakistan*, (2005) PLD (SC) 719, [56]–[57] (Pakistan) (upholding the Seventeenth Amendment).
[13] Osama Siddique, 'Judicialization of Politics: The Supreme Court after the Lawyers' Movement' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism* (1st edn, Cambridge University Press 2015) 159–70.
[14] *Justice Hasnat Ahmed Khan v Fed'n of Pakistan*, (2011) PLD (SC) 680 (Pakistan).

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In 2010, the Chaudhry court considered a challenge to the Eighteenth Amendment introducing a judicial appointments process requiring nominations to be put forward by a Judicial Commission and vetted by a Parliamentary Committee, which was not required to provide reasons for rejecting the Commission's nominees.[15] The Court issued an interim order recommending that Parliament make specific changes to the appointments process, including increasing the number of judges on the Judicial Commission and empowering the Commission to overrule the decision of the Parliamentary Committee.[16]

The following year, Parliament incorporated most of the judiciary's proposed changes by passing the Nineteenth Amendment, which increased judicial representation on the Commission and required the Parliamentary Committee to provide reasons for rejecting judicial nominees put forward by the Judicial Commission.[17] In 2011,[18] the Court upheld the Nineteenth Amendment in form, but not in substance, by ruling that the Parliament Committee's reasons for refusing a nomination put forward by the Judicial Commission were reviewable.[19]

Then came the Pakistan Supreme Court's landmark decision in the 2015 case of *District Bar Association v Federation of Pakistan* (*Rawalpindi*).[20] The case involved a challenge to the Eighteenth Amendment on the judicial appointments process as well as to the Twenty First Amendment, which authorized terrorist suspects to be tried by military court martials.

In this decision, a majority of the Supreme Court of Pakistan expressly recognized substantive limits on Parliament's amending power.[21] Thirteen out of seventeen justices agreed that the judiciary could review the substance of constitutional amendments to protect the Constitution's core, endorsing the court's power to strike down constitutional amendments passed by Parliament. According to the plurality opinion joined by eight justices, Pakistan's Constitution contains "salient features," including democracy, a parliamentary form of government, and the independence of the judiciary, and it was for the Court to review constitutional amendments "to determine whether any of the Salient Features of the Constitution has been repealed, abrogated, or substantively altered."[22] Five other justices also held that

[15] *Nadeem Ahmed v Fed'n of Pakistan*, (2010) PLD (SC) 1165 (Pakistan).

[16] Ibid [10], [13], [14], [17]. See Sadaf Aziz, *The Constitution of Pakistan: A Contextual Analysis* (1st edn, Bloomsbury Publishing 2017) 148 (noting that "while the committee structure still stands, the balance has tipped toward the judicial branch in terms of effective power").

[17] See Constitution (Nineteenth Amendment) Act, 2010 §4 (Pakistan).

[18] *Munir Hussain Bhatti v Fed'n of Pakistan*, (2011) PLD (SC) 407, [22], [24]–[26], [32], [59].

[19] See Po Jen Yap and Rehan Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia' (2021) 19(1) Int J Const Law 127.

[20] *District Bar Association v Fed'n of Pakistan*, (2015) PLD (SC) 401 (hereinafter *Rawalpindi*).

[21] See Ibid (Saeed J, joined by Jamali, Muslim, Bandial, Osmany, Ahmed, Alam, Baqar JJ); see also *Rawalpindi* (n 20) (Khawaja, joined by Isa, Ejaz Afzal Khan, Chaudhry, and Dost Muhammad Khan).

[22] Ibid [180(d)] (Saeed J, joined by Jamali, Muslim, Bandial, Osmany, Ahmed, Alam, Baqar JJ).

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the Court had the power to determine the legality of constitutional amendments, although they located the basis for judicially enforceable limits on Parliament's power in the Constitution and its preamble.[23] Thus, a clear majority on the Supreme Court explicitly held that the judiciary could strike down procedurally valid constitutional amendments passed by Parliament.

Still, despite laying out a broad power to declare unconstitutional constitutional amendments, the Supreme Court refrained from directly exercising that power. Indeed, it did not seek to invalidate either of the two challenged constitutional amendments.[24] The amendment providing for military court trials was upheld as a proportionate response to terrorist threats.[25] The Supreme Court also left intact the Eighteenth Amendment on the judicial appointments process in its current form – that is, as amended by the Nineteenth Amendment in line with the Court's interpretation in previous precedent – where "the power to initiate and the primacy of decisiveness with regard to the final outcome of the process must vest in the Chief Justices and the Members of the Judiciary."[26]

Even so, the *Rawalpindi* plurality opinion sounded a warning note for the government. If the provision "was to be amended or reinterpreted, compromising either of the two limbs of the test mentioned above," it warned, "it may not be possible to hold that the provisions so amended or interpreted are not in conflict with the Independence of the Judiciary, which is a Salient Feature of the Constitution."[27]

The Supreme Court of Pakistan's decision laid the framework for establishing an expansive judicial power to review constitutional amendments as unconstitutional. At the same time, the narrow ruling in *Rawalpindi* left the constitutional amendments intact, avoiding immediate political or public backlash.

### B. *Malaysia*

We see another illustration of judicial statecraft at play in the Malaysian Federal Court. For six decades of the country's history, Malaysia, like the neighboring state of Singapore, operated as a dominant-party political system. Since Malaysia's independence in 1957, the country had been governed by a single ruling coalition, until it lost to the opposition coalition in an unprecedented election outcome in 2018. After the new government alliance was dismantled in a political kerfuffle in 2020, Malaysia's political landscape has remained volatile. Once an

[23] See Ibid [40]–[41], [51]–[55] (Khawaja J). The other four justices were Justices Isa, Ejaz Afzal Khan, Chaudhry, and Dost Muhammad Khan.
[24] Ibid.
[25] Ibid [178] (Saeed J).
[26] Ibid [104]. See *Munir Hussain Bhatti* (n 18).
[27] Ibid [104].

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exemplar of a dominant-party system, Malaysia is now better characterized as a fragile democracy.[28]

For many decades, the Malaysian judiciary employed a highly passive, rigidly formalistic approach marked by extensive deference to the consolidated political branches.[29] Courts in "Asian nonliberal democracies," like Malaysia, Singaporean scholar Thio Li-ann has observed, play "a relatively marginal role in constitutional politics" and "do not play a primary role in shaping constitutional understandings."[30]

The Malaysia Federal Court's approach shifted, however, in a number of assertive judicial decisions delivered in 2017 and 2018.[31] In a sequence of landmark cases, the Malaysian apex court carved out a power for courts to nullify constitutional amendments that would undermine the constitution's foundational structure. Through this carefully staged process, the Malaysian Federal Court sought to establish the power to review unconstitutional constitutional amendments in a fraught political context.

The 2017 decision in *Semenyih Jaya* appeared to be a seemingly prosaic case over land acquisition compensation.[32] The dispute, on its face, involved a provision in the Land Acquisition Act that enabled lay assessors, sitting with a High Court judge, to determine the amount of compensation for land acquisition. Dissatisfied landowners challenged the statute's provision allowing lay assessors to make a conclusive determination on land compensation, arguing that this infringed the constitutional judicial power vested in the courts under Article 121(1). The challenge thus brought into play the clause in Article 121(1) of Malaysia's Federal Constitution regarding the judicial power – long the site of tension between the judiciary and the government.

Some history is in order: In 1988, the Malaysian Parliament, under the administration of then Prime Minister Mahathir Mohamad, had amended Article 121(1) to remove the provision that "the judicial power . . . shall be vested" in the courts. The clause was amended to state that the courts "shall have such jurisdiction and powers as may be conferred by or under federal law." The year 1988 also saw the highly controversial removal of the head of the judiciary and five other Supreme Court justices by the Mahathir administration, widely viewed as a moment of judicial crisis in Malaysia.

[28] See Yvonne Tew, 'Malaysia' in David Law, Alex Schwartz and Holning Lau (eds), *The Oxford Handbook of Constitutional Law* (OUP 2023) https://doi.org/10.1093/oxfordhb/9780198825463.013.9.

[29] See Yvonne Tew, 'On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics' (2016) 25 Wash Int'l L J 674, 681–91.

[30] See, e.g., Li-Ann Thio, 'Soft Constitutional Law in Nonliberal Asian Constitutional Democracies' (2010) 8 Int'l J Const L 766, 767; see alsoPo Jen Yap, *Courts and Democracies in Asia* (1st edn, Cambridge University Press 2017) 2 (observing that in jurisdictions such as Malaysia, 'where a dominant political party has remained in power since independence,' courts are 'at a fringes of the entity's political life').

[31] For an in-depth discussion of these cases, see Yvonne Tew, *Constitutional Statecraft in Asian Courts* (OUP 2020).

[32] *Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561.

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For decades after the legislature's aggressive move to cull judicial power by amending the Constitution's judicial power provision, Malaysian courts took on a subservient position toward the political branches. In the 2007 case of *Kok Wah Kuan*, for example, the Federal Court affirmed that the scope of judicial power "depends on what federal law provides," ruling that the amended Article 121(1) meant that the courts' powers and jurisdictions were indeed subject to federal law.[33]

The Malaysian Federal Court's *Semenyih Jaya* decision was a remarkable about-turn, marking a robust assertion of judicial power. In a unanimous decision, the Federal Court struck down a land acquisition statutory provision as unconstitutional – the first time in twenty years it had struck down a federal statute – for infringing the judicial power and separation of powers. The Federal Court renounced the 1988 constitutional amendment in uncategorical terms, declaring that "the judicial power of the court resides in the Judiciary and no other as is explicit in [Article] 121(1) of the Constitution."[34] Malaysia's apex court embraced the notion of the basic structure doctrine as inherent to the Malaysian Constitution, explicitly stating that "Parliament does not have power to amend the Federal Constitution to the effect of undermining the features" of the doctrine of separation of powers and the independence of the judiciary.[35]

Still, it is worth noting that the Malaysian Federal Court did not expressly invalidate the 1988 constitutional amendment; instead, it interpretively nullified the amendment so that the amended provision had no effect on the judicial power of the courts. In short, as a matter of constitutional interpretation, the Federal Court effectively returned Article 121(1) to the position it had before 1988.

Another curious feature of the *Semenyih Jaya* decision lies in its remedy: The Malaysian Federal Court provided a detailed set of procedural guidelines to replace the statutory provision that it invalidated, but stated that its decision would only have prospective effect.[36] Thus, even as it issued a maxi-minimalist ruling that mitigated the immediate impact of its decision and helped insulate the court from any immediate political ramifications, the Malaysian apex court embedded the seeds for a broad doctrine of judicial authority over fundamental constitutional features.

The following year, in 2018, the Malaysian Federal Court built on the foundations it had laid earlier to further entrench the doctrine of protecting the constitution's basic structure. Unlike *Semenyih Jaya*, *Indira Gandhi* was a blockbuster case. This time, the judiciary asserted itself in one of the most highly charged area of Malaysian law and politics: the authority of civil courts vis-à-vis religious courts.

The challenge in the case was brought by Indira Gandhi, a mother of three children; unknown to her, her ex-husband had converted to Islam and then

[33] *Kok Wah Kuan v Public Prosecutor* [2008] 5 MLJ [11].
[34] Ibid [86].
[35] Ibid [76].
[36] Ibid [126].

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officially converted all their children to Islam and obtained custody orders from the Sharia courts. At stake was another constitutional provision that had been inserted along with the 1988 amendments to the Article 121(1) judicial power provision. Article 121(1A) provides that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Sharia courts." For many years, the civil courts had relied on Article 121(1A) to justify their extensive deference of jurisdiction to the Sharia courts, even in cases with religious freedom implications, vastly expanding the reach of the religious courts.[37]

The Malaysian Federal Court in *Indira Gandhi* – in another unanimous decision written by Justice Zainun Ali, the author of the *Semenyih* judgment – relied on the basic structure doctrine it had articulated in its earlier decision to nullify the Article 121(1A) constitutional amendment on the basis that the amendment undermined the civil courts' power of judicial review.[38] The Court quashed the children's conversion certificates, ruling that the Malaysian Constitution's equal protection guarantee requires that both parents consent to changing their children's religion.

More broadly, and significantly for the judiciary's own institutional position, the Federal Court held that the civil courts have jurisdiction over constitutional matters even when questions of Islamic law are involved.[39] Affirming the basic structure doctrine, the Federal Court declared that 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."[40]

On display here is the Malaysian Court's careful endeavor building on the foundations it had laid earlier in *Semenyih Jaya* in order to assert its judicial power in *Indira Gandhi*, this time with a highly charged issue at stake. The Federal Court laid the foundation for the basic structure doctrine in its 2017 *Semenyih Jaya* judgment, which the Court would then cite as precedent in its decision nullifying the constitutional amendment a year later in *Indira Gandhi*. In a multistage sequence of a *maxi*-minimalist decision followed by a *mini*-maximalist one, the once-passive Malaysian court established and expanded a basic structure doctrine empowering the judiciary to protect the Constitution's core from legislative intrusion.

## IV JUDICIAL RHETORIC AND THE USE OF CONSTITUTIONAL COMPARATIVISM AMONG ASIAN COURTS

Courts in Pakistan and Malaysia have long operated in challenging political systems with dominant regimes under which the judiciary has been thought of

[37] See Yvonne Tew, 'Stealth Theocracy' (2018) 58 Va J Int'l L 31, 50–58.
[38] *Indira Gandhi v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 (FC) (hereinafter *Indira Gandhi* (FC)).
[39] Ibid [104].
[40] Ibid [48].

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as a passive institution. Yet these two apex courts rendered decisions that displayed statecraft in strengthening judicial power.[41] What kinds of mechanisms have these Asian courts employed in rendering these decisions that helped expand their institutional power?[42] What features do these judgments share and in what aspects are they distinct?

I want to focus here on a particular mechanism that judges tend to employ in issuing self-empowering decisions: judicial rhetoric in crafting opinions that have popular salience – in particular, judicial engagement with constitutional comparativism in these Asian courts. Have these judiciaries sought to engage with the jurisprudence generated by other courts in Asia? How have these Asian courts used citations of foreign case law, especially when seeking to assert high-stakes judgments?

We begin with the Indian Supreme Court's decision in *Kesavananda Bharati*, the epicenter of jurisprudence in Asia on the doctrine of a constitutional basic structure.[43] Both the apex courts of Pakistan and Malaysia referred to *Kesavananda* in their judgments establishing judicial review of unconstitutional constitutional amendments. What is striking is the distinct manner in which the Pakistan Supreme Court and the Malaysian Federal Court treated the Indian Supreme Court's jurisprudence on unconstitutional constitutional amendments.

Consider the Malaysian Federal Court's 2017 and 2018 decisions in *Semenyih Jaya* and *Indira Gandhi*. In both cases, the Federal Court referred to the Indian Supreme Court's jurisprudence on the basic structure doctrine to endorse the basic structure doctrine for the Malaysian context. In *Semenyih Jaya*, the Malaysian Federal Court declared that: "The principles laid down in *Kesavananda Bharati v State of Kerala* were reviewed and affirmed by the Supreme Court in *Indira Nehru Gandhi v Shri Raj Narain*. The Supreme Court emphasized the sanctity of the doctrine of separation of powers and the exclusivity of judicial power."[44] It then cited the

[41] Scholars have also explored strategic maneuvers by other Asian courts. In East Asia, Wen-Chen Chang has shown how the constitutional courts of Korea and Taiwan have strategically responded to highly politically charged cases by creating "win–win" situations for all parties, using the literal interpretive techniques, adopting self-empowering legal doctrines, and delivering single-voice decisions. See Wen-Chen Chang, 'Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences' (2010) 8 Int J Const Law 885.

[42] It is significant to note, though, that while many of these judicial maneuvers focus on the court acting as an institution, particular individual judges may have an impact on a judiciary's broader agenda. For work on judges that have had a unique impact on the constitutional trajectory of their jurisdiction, see generally Rehan Abeyratne and Iddo Porat (eds), *Towering Judges: A Comparative Study of Constitutional Judges* (1st edn, Cambridge University Press 2021). Whether a court's long-term strategy of self-empowerment survives after such towering judicial personalities step down may depend on the nature of the institution, particularly the degree to which the bench is cohesive or fragmented, as well as the external political climate. See also Kureshi (n 11) 153–219 (discussing the Pakistani Supreme Court's confrontational relationship with the military in seeking to play a more expansive political role).

[43] *See* Part I above.

[44] *Semenyih Jaya* (n 32) [87].

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*Kesavananda* majority's opinion (with emphasis added, for good measure) that "*it is not permissible for the legislature to encroach upon the judicial sphere*."[45] The Malaysian court concluded with a forceful proclamation of judicial power: "The Judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers. This is essentially the basis upon which rests the edifice of judicial power."[46]

A year later, in its 2018 judgment in *Indira Gandhi*, the Malaysian Federal Court in its unanimous opinion cited its own decision in *Semenyih Jaya* as precedent, as well as comparative case law from numerous jurisdictions.[47] The judgment written by Justice Zainun Ali also cited *Kesavananda* as precedent for it being "well settled that features of the basic structure cannot be abrogated or removed by a constitutional amendment."[48] According to the Court, the judiciary is the "ultimate arbiter of the lawfulness of state action" and the power of the civil courts is a "natural and necessary corollary" of the rule of law and constitutional supremacy.[49] In addition to the Indian case law, Justice Zainun Ali drew on cases from other common law jurisdictions, including Canada,[50] Singapore,[51] the United Kingdom,[52] and New Zealand,[53] as well as the Judicial Committee of the Privy Council in relation to Ceylon,[54] to support the conclusion: "That judicial power is vested exclusively in the Judiciary is implicit in the very structure of a Westminster model constitution itself . . ."[55] The Court's judgment then relies on "the landmark case of *Kesavananda Bharati* [in which] the Supreme Court of Indian found the power of judicial review to be indispensable in a Constitution that is federal in character" to declare that "the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution."[56] Thus, "the power of judicial review is essential to the constitutional role of courts and cannot be abrogated or altered by Parliament by way of a constitutional amendment."[57]

It is especially noteworthy that the Malaysian Federal Court in *Indira Gandhi* cites to foreign cases in seeking to establish the basic structure doctrine as part of Malaysian constitutional jurisprudence given that the Malaysian courts have

[45] Ibid (emphasis in original).
[46] Ibid [88]–[89].
[47] Ibid [42], [48]–[49].
[48] *Indira Gandhi* (FC) (n 38) [39].
[49] Ibid [33].
[50] Ibid [29]–[31], [34], [38].
[51] Ibid [32], [37], [39]–[41].
[52] Ibid [35]–[36], [50].
[53] Ibid [41].
[54] Ibid [44].
[55] Ibid [44].
[56] Ibid [48]. See also [39].
[57] Ibid [48].

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traditionally been far less receptive – even hostile – to constitutional comparisons outside of the "four walls" of the Malaysian Constitution.[58] Indeed, the Malaysian Court of Appeal's majority opinion in *Indira Gandhi*, delivered in 2015, had forcefully rebuked the lower High Court for considering Malaysia's commitments under international law. According to the Court of Appeal's decision, which was overturned by the Federal Court's decision three years later, 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."[59] The Federal Court's judgment is striking for its explicit and extensive discussion of foreign and comparative sources.

Compare, on the other hand, the Pakistan Supreme Court's *Rawalpindi* decision. Here, the Pakistani judiciary rejected the idea that its power to review unconstitutional constitutional amendments owed anything to the Indian Supreme Court's basic structure doctrine jurisprudence. Justice Sheikh Azmat Saeed, in the plurality opinion joined by eight justices, warned that:

> Though wisdom may not recognize any national borders, yet it may not be safe to rely too much on the Constitutional Jurisprudence of other Countries, especially as Countries practicing in generic terms, the same Legal System and having a written Constitutions, when confronted with the question of implied restrictions on power to amend the Constitution have come to diametrically opposite conclusions.[60]

Noting that "India, Belize and Bangladesh have accepted and enforced the doctrine, while Sri Lanka, Malaysia and Singapore have rejected the same," Justice Saeed stated that "we must primarily draw from our own Constitutional history and Jurisprudence to answer the questions that we are currently confronted with."[61] The plurality opinion concluded therefore that the Pakistan Supreme Court's power to review unconstitutional constitutional amendments was drawn from the Pakistan Constitution's own "salient features."[62]

Justice Jawad Khawaja's separate opinion was forceful in its dismissal of the Indian "basic structure doctrine," calling it a project that "took root in an alien soil under a distinctly different constitution."[63] Observing that "the Indian preamble does not

[58] *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] 29 MLJ 355 (noting that '[t]he 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'). On the 'four walls' approach in Malaysian constitutional adjudication, see generally Tew (n 31) 46–49.

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

[60] *Rawalpindi* (n 20) [25] (Saeed J).

[61] *Rawalpindi* (n 20) [25] (Saeed J).

[62] Ibid [180 (a)–(b)] (Saeed J).

[63] Ibid [51] (Khawaja J).

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contain language comparable to or nearly as explicit as that of our Constitution," Justice Khawaja emphasized that "[i]n particular, it is important to note that the structural elements of our Constitution and the representative – fiduciary relationship does not find expression in the Indian preamble, nor do we find any commands similar to the express directives from the People which are the hallmark of our Constitution."[64] Thus, "these are very significant differences between the Indian and Pakistani Constitutions which point to inadequate textual support for the basic structure theory in India and which highlight the opposite in Pakistan."[65]

Like its neighboring counterparts in India and Bangladesh,[66] the Pakistan Supreme Court asserted a power to protect core features of the constitution from alteration when confronted with amendments that sought to intrude on the judiciary's institutional turf.[67] Judges on the Pakistan court, though, took pains to underscore how the notion of implicit unamendability was distinct from the Indian "basic structure" doctrine and emphasized the autochthony of the Pakistani Constitution's "salient features" doctrine.[68]

What purpose might constitutional comparativism serve in light of the approaches of the Malaysian and Pakistan courts in the two case studies discussed above? Both apex courts cross-cite to foreign case law – most prominently, in this context, to the Indian Supreme Court's decisions on the basic structure – but in different ways and for what appears to be distinct purposes. The Malaysian Federal Court endorsed the Indian Supreme Court's jurisprudence as well as cases from other Westminster model systems, not as binding case law, but as a helpful comparative source in its own decisions establishing the basic structure doctrine as part of Malaysia's constitutional structure.[69] The Pakistani Supreme Court in *Rawalpindi* also engaged with *Kesavananda*, but the judges rejected any notion that the Indian case law on the basic structure doctrine was applicable to Pakistan, emphasizing the differences between the Indian and Pakistani Constitutions.[70]

The differences in the judicial rhetoric of the Malaysian and Pakistan apex court opinions might point to the role of constitutional identity in adjudication.[71] Judicial

[64] Ibid [71] (Khawaja J).
[65] Ibid [71] (Khawaja J).
[66] See, e.g., *Kesavananda* (n 2); *Anwar Hussain Chowdhury v Bangladesh*, 41 DLR 1989 App Div 165 (Bangladesh).
[67] See Yap and Abeyratne (n 19).
[68] *Rawalpindi* (n 20) [51] (Khawaja J), [180(a)–(b)] (Saeed J).
[69] The Malaysian Federal Court's approach to the Indian basic structure case law in this instance might be characterized as in line with a model of constitutional engagement with transnational sources. See Vicki Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 Harv L Rev 109, 114 (describing engagement as an approach in which "transnational sources are seen as interlocutors, offering a way of testing one's own traditions and possibilities by examining them in the reflection of others").
[70] *Rawalpindi* (n 20) [71] (Khawaja J); see also *Rawalpindi* (n 20) [25] (Saeed J).
[71] On constitutional identity, see generally Gary Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) ch 4, 186; Robert Toniatti, 'Sovereignty Lost, Constitutional Identity

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appropriation of comparative legal sources, as Gary Jacobsohn observes, "can become part of a judicial strategy to reinforce critical components in the home country's constitutional identity."[72] In describing the use of Indian precedent by the Sri Lankan judiciary, Jacobsohn argues that "constitutional borrowing can be unambiguously opportunistic without being unprincipled," in that "[t]he choices made on the Sri Lankan Court – to borrow and not to borrow – were consistent with the larger judicial effort to secure the constitutional moorings upon which the identity of the Sri Lankan state was tethered."[73]

For the Malaysian Federal Court in *Semenyih Jaya* and *Indira Gandhi*, references to the foreign case law of respected common law counterparts were used in service of strengthening the legitimacy of the Malaysian court's own decision in establishing a doctrine with implications for the judiciary's role that had not previously gained traction.[74] Malaysian courts have looked to the Indian Supreme Court's decisions in other areas; as Deepa Das Acevado observes in this volume, Malaysian appellate courts explicitly looked to the Indian religious freedom jurisprudence in articulating their own version of an essential religious practices doctrine.[75] More broadly, Justice Zainun Ali's judgment in *Indira Gandhi* is significant in how it marshalled judicial engagement with comparative sources in a rhetorically effective manner by locating the Malaysian constitutional system within the broader context of shared principles of judicial power and constitutional supremacy that it views as foundational to Westminster model systems.[76]

In contrast, given the baggage of history between India and Pakistan, it is perhaps unsurprising that the judges on Pakistan's Supreme Court emphatically appealed to local constitutional values in the form of the "salient features" of their own Constitution. The Pakistani judges' insistence on autochthonous account of constitutional unamendability reveals mindfulness of the salience of constitutional

Regained' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) 49, 63, 67; Leonard F.M. Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6(3) Utrecht L Rev 36, 42–44; Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) 41(2) Brook J Int'l L 491.

[72] Jacobsohn (n 71) ch 4, 186.

[73] Ibid ch 4, 187.

[74] See Kwai Hang Ng and Brynna Jacobson, 'How Global Is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore' (2017) 12(2) AJCL 209, 232 (discussing how foreign cases are sometimes 'cited to bolster the legitimacy of a judge's reasoning as well as to provide new ideas or experiences of other more established jurisdictions' so that it 'becomes an institutionalized mechanism for judges to import new ideas and contents into the domestic law').

[75] Deepa Das Acevedo, 'An Inter-Asian Approach to Religion-State Relations?' ch 6 this volume. But see Guari Pillai, 'Reproductive Rights: A South-Asian Re-Imagination' ch 7 this volume.

[76] Shukri Shahizam, 'Mediating Contingency: Indira Gandhi' (International Constitutional Law Society 2024 Annual Conference, Madrid, 8 July 2024).

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narrative in popular discourse. In *Rawalpindi*, Pakistan's Supreme Court affirmed the judiciary's authority to invalidate amendments that violate core constitutional features that are entirely indigenous and local to Pakistan.

## V CONCLUSION

These two case studies from Pakistan and Malaysia show the migration of a doctrine empowering judges to review constitutional amendments for unconstitutionality, famously articulated by the Indian Supreme Court. There is something to be said for these examples illustrating inter-Asian judicial discourse in the form of references to the jurisprudence of a more established Asian court that has successfully managed to develop a judicial power that more fragile courts seek to build, but these examples also highlight the limitations of a static framework for Inter-Asian Law. Judicial engagement with constitutional comparativism, for both the Pakistan and Malaysian courts, employed in distinct ways, ultimately appears to be used in service of building a locally based narrative of their constitution's own identity.

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