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SPECIAL ISSUE ARTICLE

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Reading Ely in Tokyo

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Abstract

John Hart Ely's theory of judicial review was centrally concerned with the role of courts in preserving democracy in the constitutional context of the United States. At first blush, then, the comparative turn toward Ely might strike a jarring note. This article contributes to the discourse on comparative political process theory, or comparative representation-reinforcing theory, by examining the judicial role in preserving democracy, as well as the role that courts can play in constructing and facilitating constitutional democracy, particularly in fragile democracies. It considers three illustrative examples: the United Kingdom Supreme Court decision overruling the prorogation of Parliament; the Malaysian Federal Court's development of a constitutional basic structure doctrine; and the Malawi Supreme Court's decision invalidating the outcome of a presidential election. It concludes with reflections on juristocracy and distrust, and the reach (and limits) of the endeavor to expand Ely's theory globally.

Keywords: comparative constitutional law; judicial empowerment; United Kingdom Supreme Court; Malawi, Malaysia

Introduction

John Hart Ely, it seems, has gone global.[1] Some forty years after the publication of *Democracy and Distrust*, an emerging wave of comparative constitutional scholarship has sought to expand Ely's theory of representation-reinforcing judicial review to

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[1]J Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, 1980) 1. An initial draft of this article was presented at The New Comparative Political Process Theory Symposium Workshop held at the University of Tokyo in April 2023. I thank the commentators and participants at the workshop in Tokyo for helpful comments and conversations.

constitutional democracies around the world.[2] From a comparative perspective, though, the turn toward Ely's work might, at first blush, strike a jarring note.

After all, John Hart Ely was an American.[3] Ely's theory of judicial review was, and continues to be, a major contribution to American constitutional theory not least because it is so distinctively American.[4] Ely's notion of judicial review was specifically tailored to a particular constitution – a process-oriented United States Constitution; it was born out of the jurisprudence of the Warren Court and in response to a particular political, social and cultural setting. Why then, a comparativist might ask, are we reading Ely in Tokyo?[5]

The reason to read Ely in Tokyo – or in Colombia,[6] Europe,[7] Israel,[8] or South Africa,[9] as some comparative constitutional scholars argue—is that Ely's work can be adapted to fit a global context. Scholars advancing a neo-Elyian school of thought have explicitly sought to expand Ely's ideas outside the United States.[10] This new wave of scholarship on comparative political process theory, or comparative representation-reinforcement theory,[11] seeks to update Ely's theory to cover different types of political process failures and the types of judicial review that might be responsive to these failures, which extend beyond those that Ely identified.

One wonders what Ely – whose own work was 'self-consciously parochial'[12] – would have made of it all.[13] Ely's 'process-oriented system of review' was centrally concerned with the role of United States courts in preserving democracy.[14] It did not address, for instance, the judicial role in democracy building or democracy transition, even in the

[2]See, e.g., S Gardbaum, 'Comparative Political Process Theory' (2020) 18 *International Journal of Constitutional Law* 1429; Replies to Stephen Gardbaum, 'Political Process Review: Beyond Distrust' (2020) 18 *International Journal of Constitutional Law* 1458; R Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, Oxford, UK, 2023); R Dixon and M Hailbronner, 'Ely in the World: The Global Legacy of Democracy and Distrust Forty Years on' (2021) 19 *International Journal of Constitutional Law* 427; Symposium, 'Ely in the World, The Global Legacy of Democracy and Distrust Forty Years on' (2021) 19 *International Journal of Constitutional Law* 427; M José Cepeda Espinosa and D Landau, 'A Broad Read of Ely: Political Process Theory for Fragile Democracies' (2021) 19 *International Journal of Constitutional Law* 548.

[3]Compare K Lane Scheppele 'Jack Balkin is an American' (2013) 25 *Yale Journal of Law & the Humanities* 23.

[4]See (n 3) 23. Kim Lane Scheppele made this observation about Jack Balkin's theory of living originalism.

[5]Hat tip to Azar Nafisi, *Reading Lolita in Tehran: A Memoir in Books* (Random House, New York, 2008). As noted above (n 1), an earlier draft of this article was prepared for a symposium on comparative political process theory held at the University of Tokyo in April 2023.

[6]See Espinosa and Landau (n 2).

[7]See M Hailbronner and L Kujus, 'Comparative Political Process Theory in the European Court of Human Rights' (work in-progress presented at The New Comparative Political Process Theory Symposium, University of Tokyo, 24–25 April 2023).

[8]See S Gardbaum, 'Comparative Political Process Theory II' (2024) *Global Constitutionalism* 1.

[9]See J Fowkes, 'A hole where Ely could be: Democracy and trust in South Africa' (2021) 19 *International Journal of Constitutional Law* 476; J Fowkes, 'Transformative Political Process Theory' (2024) *Global Constitutionalism, First View* 1.

[10]See Gardbaum (n 2). See also the other contributions to this symposium issue.

[11]See R Dixon, Symposium Introduction, 'Courts and Comparative Representation-Reinforcement Theory' (2025) *Global Constitutionalism* (forthcoming).

[12]See Gardbaum (n 2) 1430.

[13]See, e.g., B Tiojanco, 'John Hart Ely Would Disown All of Us, His Intellectual Heirs (or Maybe Not)' (2024) *Global Constitutionalism*, *First View* 1.

[14]See (n 1) 136.

United States, much less elsewhere. Nor did it consider how fragile courts in weak democratic systems might seek to assert judicial review.

This article considers the role that courts play, and how that judicial role might vary, across different settings.[15] Courts in emerging democracies have asserted broad powers geared toward protecting democracy as well as constructing democratic constitutionalism and facilitating democratic transitions. The challenge, though, for courts without a history of established authority is how these courts can assert such authority, especially in the face of dominant political actors?[16]

For fragile courts seeking to enhance their role in constitutional governance, strengthening institutional authority requires judicial statecraft. As I have explored in greater detail elsewhere,[17] courts in fragile political systems can strategically employ mechanisms to strengthen their institutional position. Courts can play a representation-reinforcing role, no doubt, but the degree to which that role is modest or constraining is highly dependent on context.

This article draws on three examples from the United Kingdom, Malaysia, and Malawi to show how courts across diverse settings have employed tools of judicial statecraft to enhance the court's institutional power.[18] These case studies are meant to be illustrative, not exhaustive, examples of instances in which apex courts in settings traditionally dominated by legislative or executive supremacy have sought to enhance their institutional authority.

Consider first the United Kingdom Supreme Court decision in *R (Miller) v. The Prime Minister* (*Miller II*) overruling the five-week prorogation of Parliament by Prime Minister Boris Johnson's government in the lead-up to Brexit.[19] The United Kingdom Supreme Court's *Miller II* judgment illustrates the use of *mini-maximalism*, in which formalistic, narrow reasoning is employed to present a highly consequential decision as thoroughly orthodox.

Next, the Malaysian apex court provides an example of a court negotiating a political context historically dominated by a single ruling coalition. In recent years, the Malaysian Federal Court has delivered a sequence of decisions establishing a basic structure doctrine to protect a non-derogable constitutional core against legislative intrusion. The Malaysian Federal Court's decisions are *maxi-minimalist* in character, in which a broad, expansive reading of judicial power is combined with a narrow, non-confrontational ruling that minimizes or avoids confrontation with powerful political actors.

A third case study comes from Malawi, where the judiciary played a key role in facilitating political regime change and a democratic transition. In May 2020, the Malawi Supreme Court delivered a decision that nullified the outcome of a presidential election that had been riddled with irregularities. The Court ordered fresh elections, held a few months later in 2020, which ultimately resulted in the incumbent president being ousted from power and a change in governing regime.

[15]This paper draws in part from my broader project on judicial self-empowerment, Y Tew, 'Strategic Judicial Empowerment,' (2024) 72(1) *American Journal of Comparative Law* 170.

[16]See generally Y Tew, *Constitutional Statecraft in Asian Courts* (Oxford University Press, 2020).

[17]See (n 15).

[18]See (n 15) 195–218.

[19]R (on the application of Miller) v The Prime Minister, Cherry v Advocate Gen for Scotland [2019] UKSC 41 [hereinafter *Miller II*].

The paper concludes with some reflections on juristocracy and distrust. The notion of judicial strategy toward self-empowerment is often viewed with skepticism or even suspicion. Yet in a fragile democracy, judicial statecraft is essential for courts seeking to enhance their institutional authority, which may in turn aid efforts to protect or construct constitutional democracy.

Judicial Statecraft and Judicial Empowerment: Three Case Studies

The U.K Supreme Court and the Prorogation of Parliament

In the tumultuous months leading up to the United Kingdom's expected exit from the European Union, on 28 August 2019, Prime Minister Boris Johnson announced that he had advised Her Majesty the Queen to prorogue Parliament for five weeks, beginning on the 9th of September[20] – an unprecedented amount of time for Parliament to be suspended.

On the 24th of September, 2019, in the case of *Miller II*, the United Kingdom Supreme Court unanimously ruled that Boris Johnson's advice to the Queen to prorogue Parliament was justiciable and unlawful.[21] All eleven justices on the bench in *Miller II* decided that the judiciary could review the scope of the prorogation power, dismissing the argument that the prorogation was a non-justiciable political question outside the court's sphere.[22] An unlimited power to prorogue Parliament would prevent Parliament from 'exercising its legislative authority,[23] and from carrying out its 'constitutional functions' of holding the executive accountable.[24]

The United Kingdom Supreme Court then held that the Prime Minister's advice to the Queen to prorogue Parliament was unlawful. According to the Court, the advice had an 'extreme effect upon the fundamentals of our democracy' and required 'reasonable justification.'[25] In the 'exceptional' circumstances surrounding the looming Brexit deadline,[26] the Court concluded that the Government had failed to present 'any reason – let alone a good reason' for advising the Queen to suspend Parliament for five weeks.[27] The Court thus declared the prorogation 'unlawful, null, and of no effect.'[28]

The impact of the *Miller II* decision was undeniably consequential. The United Kingdom Supreme Court's decision immediately rendered Parliament no longer suspended. The day after the Court's decision, Parliament resumed sitting.[29]

The United Kingdom Supreme Court's 2019 decision invalidating the prorogation of Parliament has been discussed by others as an example of the reach of Ely's theory

[20]'Parliament suspension sparks furious backlash,' *BBC News*, 29 Aug 2019, available at <https://www.bbc.com/news/uk-politics-49504526>.

[21]*Miller II*.

[22]*Miller II* [28], [35].

[23]*Miller II* [45].

[24]*Miller II* [48], [46].

[25]*Miller II* [58].

[26]*Miller II* [57].

[27]*Miller II* [61].

[28]*Miller II* [69].

[29]B Britton, 'Lawmakers return to Parliament after court rules against Boris Johnson's prorogation,' *CNN*, 25 Sept 2019, available at <https://www.cnn.com/2019/09/25/uk/mps-return-to-parliament-gbr-intl/index.html>.

regarding judicial intervention aimed at protecting the political process.[30] I want to focus here on a particular aspect of the *Miller II* decision: the statecraft exhibited by the Court in rendering this unprecedented decision.

'Although the United Kingdom does not have a single document entitled "The Constitution,"' said Lady Hale and Lord Reed, jointly giving the judgment of a unanimous Supreme Court, 'it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice,' which 'includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles.'[31] The Supreme Court's judgment expressly asserted the authority of the courts to enforce the United Kingdom's constitution: 'In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.'[32]

The Court's assertion of its role has drawn comparisons to the U.S. Supreme Court's decision in *Marbury v. Madison*,[33] as well as the Indian Supreme Court's articulation of a constitutional basic structure doctrine.[34] It's worth pausing here to note that *Marbury* is typically thought of as a classic illustration of statecraft in which Chief Justice Marshall employed expansive reasoning establishing the U.S. Supreme Court's power of judicial review power in a decision that ultimately resulted in a narrow ruling that had minimal consequences for the case at hand. That approach – which I term *maxi-minimalism* – is a strategy that has been adopted by courts globally in seeking to strengthen their institutional position, as I discuss in the next section.

The United Kingdom Supreme Court's *Miller II* decision, on the other hand, illustrates an *inverse* mechanism of judicial statecraft, which I call *mini-maximalism.*[35] The United Kingdom Court couched its opinion in minimalist reasoning that presented itself as entirely orthodox doctrine, even as it delivered a highly consequential ruling of major political and constitutional impact. Following the court's decision, which was widely viewed as momentous and unprecedented,[36] scholars and practitioners debated trenchantly over its constitutional orthodoxy.[37]

[30]See (n 2) Gardbaum 1437–38. See also S Murray, 'Neo-Elyian theory, therapeutic jurisprudence and the constitutional judgment' *Global Constitutionalism Special Issue (2025).*

[31]*Miller II* [39].

[32]*Miller II* [39].

[33]Marbury v Madison, 5 U.S. 137, 177 (1803). See, e.g., S Shirazi, 'The U.K.'s Marbury v Madison: The Prorogation Case and How Courts Can Protect Democracy,' (2019) *Illinois Law Review Online* 108.

[34]See, e.g., EF Delaney, 'The UK's Basic Structure Doctrine: Miller II and Judicial Power in Comparative Perspective' (2022) *Notre Dame Journal of International & Comparative Law* 22; A Deb, A Constitution of Principles: From Miller to Minerva Mills, *UK Constitutional Law Association*, 1 Oct 2019, available at <https://ukconstitutionallaw.org/2019/10/01/anurag-deb-a-constitution-of-principles-from-miller-to-minerva-mills/>.

[35]See (n 15) 219–22 for a discussion on mini-maximalism as a judicial strategy.

[36]See, e.g., T Poole, 'Understanding what makes "Miller and Cherry" the most significant judicial statement on the constitution in over 200 years,' *Prospect*, 25 Sept 2019, available at <https://www.prospectmagazine.co.uk/politics/understanding-what-makes-miller-2-the-most-significant-judicial-statement-on-the-constitution-in-over-200-years>. See also M Landler, 'Britain's Supreme Court Is Thrust Into Center of Brexit Debate,' *N.Y. Times*, 18 Sept 2019, available at <https://www.nytimes.com/2019/09/18/world/europe/britain-supreme-court-proroguing-parliament.html>.

[37]See, e.g., J Finnis, 'The unconstitutionality of the Supreme Court's prorogation judgment,' *The Policy Exchange*, 28 Sept 2019, available at <https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-

The Supreme Court's judgment, though, portrayed the judiciary's intervention as wholly orthodox, based on well-established precedent and principles.[38] The Court held that the matter was justiciable because it was merely reviewing the scope – rather than the exercise – of the prerogative power, and its decision was framed as protecting traditional principles of parliamentary supremacy.[39] The outcome in *Miller II* was presented as an unremarkable application of a power that the judiciary had long possessed.[40]

The language used in the Supreme Court's *Miller II* relatively short opinion was notably clear, concise, and compelling.[41] Lady Hale, reading the judgment on live television, described what the Court's decision meant in simple, straightforward terms: when the Royal Commissioners entered Parliament for the prorogation ceremony on 9 September 2019, as she put it, it was 'as if the Commissioners had walked into Parliament with a blank piece of paper.'[42] The Court's opinion was framed in a manner that appeared aimed not only at the parties to the litigation but to reach a broader public.

Judicial statecraft is also evident in the Supreme Court's framing of the narrative in its *Miller II* judgment, which portrays the judiciary as a protector of the traditional bedrock of parliamentary supremacy and Britain's constitutional democracy. The Court's judgment presents the judiciary at the vanguard of protecting the legislature from an overbearing executive.[43] Its rhetoric presents a historic lineage for the judiciary's role in this regard: 'Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers' by the executive.[44] The Supreme Court's opinion displayed judicial modesty by emphasizing that sovereignty lies with the legislature, while simultaneously presenting a narrative of the judiciary valiantly protecting Parliament's supremacy from an aggressive executive.

What emerges from the *Miller II* opinion is a United Kingdom Supreme Court that did not hesitate, on its own account, to assert judicial review in defense of democracy. As Cambridge public law professor Mark Elliott observes, the Supreme Court's prorogation decision 'paint[s] a picture of a supreme court judiciary that is prepared to serve as a guardian of constitutional principle in a way and to an extent that previous generations of apex court judges in the United Kingdom were not.'[45]

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supreme-courts-prorogation-judgment/>; S Spadijer, 'Miller No. 2: Orthodoxy as Heresy, Heresy as Orthodoxy,' *UK Constitutional Law Association*, 7 Oct 2019, available at <https://ukconstitutionallaw.org/2019/10/07/steven-spadijer-miller-no-2-orthodoxy-as-hersey-hersey-as-orthodoxy/>; EF Delaney (n 34).

[38] A McHarg, 'The Supreme Court's Prorogation Judgement: Guardian of The Constitution or Architect of The Constitution?' (2020) 24 *Edinburgh Law Review* 88, 94.

[39] *Miller II* [35]–[36], [41], [52]–[55].

[40] See A McHarg, 'The Art of Judicial Disguise,' *Judicial Power Project*, 30 Sept 2019, available at <https://judicialpowerproject.org.uk/aileen-mcharg-the-art-of-judicial-disguise/> (observing that the Court 'cleverly presented its conclusion as the unproblematic consequence of centuries-old constitutional precedents.').

[41] See (n 40) for a description of the opinion as 'crystal clear' and a 'model of clarity'; O Bowcott, B Quinn & S Carrell, 'Johnson's suspension of parliament unlawful, supreme court rules,' *The Guardian*, 24 Sept 2019, available at <https://www.theguardian.com/law/2019/sep/24/boris-johnsons-suspension-of-parliament-unlawful-supreme-court-rules-prorogue >(characterizing the judgment as 'unusually forthright').

[42] *Miller II* [69].

[43] *Miller II* [42]–[45].

[44] *Miller II* 41.

[45] O Bowcott, 'After 10 years, the supreme court is confident in its role,' *The Guardian*, 26 Sept 2019, available at <https://www.theguardian.com/law/2019/sep/26/after-10-years-the-supreme-court-is-confident-in-its-role> (quoting Cambridge law professor Mark Elliott). See also B Hale, President of the U.K. Sup. Ct.,

Malaysia: In Defense of Core Constitutional Structures

Courts can play a key role not only in preserving but also in constructing constitutional democracy. Such judicial endeavors are particularly fraught, however, in weak polities that have historically been controlled by an authoritarian government, as I have written elsewhere.[46] When courts in fragile constitutional democracies seek to assert themselves, they must do so judiciously.[47] Judiciaries in these contexts may employ mechanisms of statecraft to strengthen institutional power in anticipation of future confrontations with powerful political branches.

Malaysia provides an exemplar of a historically dominant party system that has, more recently, become a deeply fragile democracy. Governed for six decades without interruption since the country's independence in 1957 by a single ruling coalition, Malaysia had long been considered an archetypical dominant political party system – much like its neighbor Singapore.[48] In recent times, though, Malaysia's political landscape has been thrown into flux. For the time in the nation's history, the Barisan Nasional government lost a national election in 2018, resulting in the opposition Pakatan Harapan alliance taking over the federal government. That story of apparent democratic triumph crumbled in February 2020, however, when party switching by several Members of Parliament led to the Pakatan Harapan alliance fracturing and losing control of the federal government. Since 2020, Malaysia has undergone the collapse of two successive coalition governments, the appointment of three prime ministers, and a snap general election that has resulted in an uneasy alliance forming a coalition government.

The judiciary traditionally has taken a pliant stance amidst the quasi-authoritarian politics that had marked the Malaysian political landscape for decades.[49] Judicial review had long been exceedingly non-interventionist and rigidly formalist, with constitutional adjudication confined – to use Ely's phrase – 'within the four corners of the document.'[50] In recent years, though, Malaysian adjudication displayed a shift away, in a number of key constitutional cases, toward greater judicial assertiveness in upholding judicial power and constitutional supremacy.

In a sequence of decisions delivered between 2017 to 2020, the Malaysian Federal Court sought to establish a constitutional basic structure doctrine protecting core features of the constitution from amendment. How? Malaysia's highest court sought to issue maximalist opinions with broad reasoning expanding judicial power, although ultimately delivering a narrow ruling that minimized the impact of the immediate decision.

This judicial strategy, which I call *maxi-minimalism*, aids a fragile court in delaying or avoiding immediate public or political assaults, while building up institutional strength for possible future confrontations with the political branches.[51]

'Should the Law Lords have left the House of Lords?,' *Address Before the Michael Ryle Memorial Lecture 2018*, 14 Nov 2018 (describing the Supreme Court as looking 'more and more like a constitutional court').

[46] See generally (n 16); see also (n 15) Introduction.

[47] See (n 15) Introduction & Pt II(B).

[48] Singapore has been governed by one political party, the People's Action Party, since its independence.

[49] See PJ Yap, *Courts and Democracies in Asia* (Cambridge University Press, Cambridge, 2017) 2.

[50] See (n 11) 1. See Y Tew, 'On the Uneven Road to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics' (2016) 25 *Washington International Law Journal* 674.

[51] See (n 15) 218–19. See also R Dixon and S Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) 4 *Wisconsin Law Review* 685, 694.

Begin with the 2017 case of *Semenyih Jaya*,[52] in which the Malaysian Federal Court unanimously struck down a land acquisition statutory provision as unconstitutional. This was the first time in twenty years that the apex court had invalidated a federal statute. Even more notable, though, was the Federal Court's forceful articulation that the judiciary is empowered to enforce the Constitution's fundamental core against legislative alteration. The Federal Court directly addressed a constitutional amendment that had altered the judicial power provision in Article 121(1) of the Malaysian Federal Constitution.

In 1988, the Malaysian government – led by then Prime Minister Mahathir Mohamad, who had publicly voiced his dissatisfaction with the judiciary for several of its rulings against the government – had amended Article 121(1) to remove the provision that 'the judicial power…shall be vested' in the courts so that the text now states that the courts 'shall have such jurisdiction and powers as may be conferred by or under federal law.' Shortly after, in what has come to be known as the 1988 constitutional crisis, the head of the judiciary and two other Supreme Court justices were removed from their posts.[53] For decades following the political aggression against the judiciary in the 1980s, the Malaysian judiciary took a generally anemic approach toward the political branches.[54]

The *Semenyih Jaya* Federal Court addressed the 1988 constitutional amendment that had removed the text vesting of judicial power in the courts, 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.'[55] The unanimous judgment, written by Justice Zainun Ali, declared that 'Parliament does not have power to amend the Federal Constitution to the effect of undermining the features' of the separation of powers and the independence of the judiciary, which the Court described as 'critical' and 'sacrosanct' to the constitutional framework.[56]

While the Malaysian Federal Court did not expressly invalidate the 1988 constitutional amendment, it nevertheless made clear that the amendment would be interpreted to have no effect on the judicial power of the courts. The remedy it issued is also worth noting:[57] the opinion set out a detailed set of procedural guidelines for replacing the invalidated statutory provision, but ultimately ruled that the decision would only have prospective effect.[58] To wit, the Malaysian court issued a *maxi-minimalist* decision that insulated itself from precipitating political retaliation, yet at the same time laying the foundation for establishing a basic structure doctrine applicable to Malaysia's constitutional framework.

Less than one year later, in January 2018, the Federal Court issued another landmark decision in *Indira Gandhi*.[59] This case involved an explosive issue in Malaysian

[52]Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat [2017] 3 *Malayan Law Journal* 561 [hereinafter *Semenyih Jaya*].

[53]See HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (2nd edn, Oxford University Press, Oxford, 2017).

[54]See Kok Wah Kuan v Public Prosecutor [2008] 5 *Malayan Law Journal* 1, in which the Federal Court affirmed that the scope of judicial power 'depends on what federal law provides' and thus that the amended Article 121(1) meant that the courts' powers and jurisdictions were indeed subject to the legislature.

[55]*Semenyih Jaya* [86].

[56]*Semenyih Jaya* [76], [90].

[57]See generally R Dixon and PJ Yap, 'Responsive Judicial Remedies' *Global Constitutionalism Special Issue* (2025).

[58]*Semenyih Jaya* [126].

[59]Indira Gandhi v Pengarah Jabatan Agama Islam Perak [2018] 1 *Malayan Law Journal* 545 [hereinafter *Indira Gandhi*].

constitutionalism and politics: law and religion. Indira Gandhi was a Hindu mother of three who had married her ex-husband under civil (non-religious) law. Without her knowledge or consent, her ex-husband had converted to Islam and then unilaterally obtained conversion certificates and custody orders for their three children from the Sharia court. As a non-Muslim, Indira Gandhi was unable to access the religious Sharia courts to contest these conversion or custody orders.

The *Indira Gandhi* case involved another constitutional amendment to the Article 121 judicial power provision, which had been passed alongside the 1988 constitutional amendment (the one that the court had addressed just the year before in *Semenyih Jaya*). As part of the 1988 constitutional amendments, Article 121(1A) had been inserted in the Constitution to state that the civil courts 'shall have no jurisdiction in respect of any matter within the jurisdiction of the Sharia courts.'[60] For years, Malaysian civil courts had avoided resolving many contentious religious freedom issues, such as those involving converts out of Islam, instead extensively deferring jurisdiction to the religious courts.[61]

In another unanimous decision – again authored by Justice Zainun Ali writing for the Court – the Malaysian Federal Court drew on the constitutional basic structure principles it had established in *Semenyih Jaya* to nullify the Article 121(1A) provision, holding that the amendment had no effect on the civil courts' power of judicial review. It ruled that the civil courts have jurisdiction over all constitutional matters, even when questions of Islamic law are involved.[62] The Federal Court declared that the powers of judicial review and constitutional interpretation are 'part of the basic structure of the constitution,' which 'cannot be abrogated from the civil courts or conferred upon the Syariah Courts, whether by constitutional amendment, Act of Parliament or state legislation.'[63]

The Malaysian Court thus built on the foundations it had carefully laid earlier in *Semenyih Jaya* to issue another assertive decision in *Indira Gandhi*, this time with a highly charged issue at stake. Prior to these decisions, the basic structure doctrine had not been part of Malaysian constitutional jurisprudence.[64] Indeed, a number of supreme court decisions issued decades earlier had openly dismissed a doctrine of implied restrictions on the power of constitutional amendment.[65]

In its 2017 and 2018 decisions, the Federal Court articulated principles for the basic structure doctrine, first in its *Semenyih Jaya* decision, which the Court would later cite as precedent in its *Indira Gandhi* judgment, which nullified the constitutional amendment relating to the religious authority of the Sharia courts. The Court affirmed these decisions in the 2019 case of *Alma Nudo*, in which a full nine-member bench of the Federal Court unanimously affirmed that the 'courts can prevent Parliament from destroying the 'basic structure' of the [Federal Constitution].'[66]

It's worth noting the manner in which timing forms part of a court's statecraft. The two strategies – maxi-minimalism and mini-maximalism – may be used successfully in

[60]Fed. Const. (Malay.), art 121(1A).

[61]See Y Tew, 'Stealth Theocracy' (2018) 58 *Virginia Journal of International Law* 31, 50–58. Civil courts in this regard refer to the federal appellate courts in Malaysia's legal system.

[62]*Indira Gandhi* [104].

[63]*Indira Gandhi* [48].

[64]See (n 16) 53–57.

[65]See, e.g., Government of the State of Kelantan v Government of the Federation of Malaya [1963] *Malayan Law Journal* 355; Loh Kooi Choon v Government of Malaysia [1977] 2 *Malayan Law Journal* 187; Phang Chin Hock v Public Prosecutor [1980] 1 *Malayan Law Journal* 70.

[66]Alma Nudo Atenza v Public Prosecutor [2019] 4 *Malayan Law Journal* 1, [73].

sequence. A notable pattern that emerges from other courts across the globe is that of judges employing a *maxi*-minimalist decision to lay the doctrinal groundwork, which later allows a court in a subsequent *mini*-maximalist decision to portray its decision as simply adhering to precedent.[67]

We see this temporal sequence, too, in the Malaysian apex court's multi-stage approach in the 2017 decision of *Semenyih Jaya* followed by the *Indira Gandhi* decision in 2018. Through a process that began with a *maxi*-minimalist decision laying the seeds for a basic structure doctrine, followed by a more assertive *mini*-maximalist decision that affirmed the earlier precedent, the Malaysian apex court sought to establish a doctrinal tool empowering the judiciary to take on a robust role in constructing as well as protecting core constitutional principles.

Malawi: Judicial Nullification of a Presidential Election

Over the twentieth and early twenty-first centuries, courts worldwide have increasingly played a major role in dealing with core political controversies that define whole polities.[68] Judicial intervention can also play a role in facilitating democratic transition and regime change.

Consider the Malawi judiciary's decision in 2020 that invalidated the outcome of a presidential election and ordered fresh elections.[69] In 2019, Malawi's incumbent president Peter Mutharika had been declared the winner of a contested national election.[70] That presidential election – widely called the 'Tipp-Ex' election – had been beset with electoral irregularities, such as the widespread use of Tipp-Ex correction fluid on voter tally sheets. Public protests ensued for several months after the electoral commission refused to call for another vote. Opposition parties brought a petition for constitutional review to a panel of High Court judges, which invalidated the election results.[71]

In a unanimous decision delivered in May 2020, Malawi's Supreme Court upheld the High Court's ruling, annulling the results of the presidential election. Citing 'numerous irregularities' that 'seriously undermined the credibility, integrity and fairness' of the electoral process,[72] the Supreme Court ordered new elections to be held. It also ruled that a candidate must obtain more than half of the votes cast – rather than a mere plurality – to win the presidency.[73]

[67]See, e.g., the development of the basic structure doctrine by the Indian Supreme Court in Golaknath v State of Punjab, AIR 1967 SC 1643, Kesavananda Bharati v Kerala, AIR 1973 SC 1461, and the later Indira Nehru Gandhi v Raj Narain, AIR 1975 SC 2299 and Minerva Mills v India, AIR 1980 SC 1789. See also (n 15) at 219–222.

[68]See R Hirschl, 'Judicialization of Politics', in Robert E Goodwin (ed), *The Oxford Handbook of Political Science* (Oxford University Press, New York, 2009) 253–74.

[69]See (n 15) 201–207. Mutharika v Chilima (Constitutional Appeal No. 1 of 2020) [2020] MWSC 1 (Malawi) [hereinafter *Mutharika*].

[70]Gregory Gondwe, 'Opposition wins historic rerun of Malawi's presidential election in historic first,' *Associated Press*, 27 June 2020, available at <https://apnews.com/3453811a0e1e2cdc3124decfd334e858>.

[71]Chilima et al. v Mutharika (Constitutional Reference No. 1 of 2019) [2020] MWHC (High Ct. of Malawi).

[72]*Mutharika* 117.

[73]*Mutharika* 117. See Constitution, 1994, § 80(2) (Malawi), stating '[t]he President shall be elected by a majority of the electorate through direct, universal and equal suffrage.'

Within weeks of the Malawi Supreme Court's decision, a fresh presidential election was held in June 2020. The opposition leader won with a decisive vote tally of 59%.[74] The court-overturned election led to an incumbent leader being ousted from power – an unprecedented outcome for the region, which garnered global attention.[75]

The Malawi Supreme Court showed itself prepared to intervene in a 'decidedly inhospitable' political setting. As Samuel Issacharoff observes, '[f]or a court in a country with such weak institutions as Malawi to engage presidential power is nothing short of astonishing.'[76] Ran Hirschl has used the term 'judicialization of politics' to describe the 'reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies.'[77] It's worth noting, though, that while Hirschl argues that the judicialization of politics 'takes place when supported, either tacitly or explicitly, by powerful political stakeholders,' the Malawi judiciary's intervention did not come on the backs of being supported by other influential political stakeholders.[78] To the contrary, the judges deciding this election dispute were demonstrably under immense pressure from the incumbent regime. Indeed, in the aftermath of the Supreme Court's decision, just before the fresh presidential elections, the incumbent Mutharika government attempted to force the country's chief justice to step down.[79]

Judicial statecraft in cultivating public support may be of especial importance when a court is asserting itself against the dominant political power at the time. It's worth noting that the broadcasts from the Malawi court hearings were aired live on radio, keenly followed by the public for months.[80] In February 2020, millions of Malawians listened as the High Court's decision was read out live on radio in English and Chichewa in a ten-hour long session.[81] Soon after, the Supreme Court affirmed the High Court's decision.

The style and rhetoric of a judicial opinion can carry powerful force and public salience. The Malawi Supreme Court judgment reflects a public facing sensibility in which the judiciary rhetorically presented itself in service of democratic values. The Court

[74]'Second time lucky: Malawi's re-run election is a victory for democracy,' *The Economist*, 4 July 2020, available at <https://www.economist.com/middle-east-and-africa/2020/07/04/malawis-re-run-election-is-a-victory-for-democracy >.

[75]See, e.g., 'Admiration Nation: Which is The Economist's country of the year?,' *The Economist*, 22 Dec 2020, available at <https://www.economist.com/leaders/2020/12/19/which-is-the-economists-country-of-the-year?> (naming Malawi as The Economist's 'country of the year' for 'reviving democracy in an authoritarian region').

[76]S Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty* (Oxford University Press, New York, 2023) 128.

[77]See (n 68) 253.

[78]R Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721, 727.

[79]See, e.g., C Pensulo, 'Forced retirement of Malawi's chief justice before June election blocked,' *The Guardian*, 16 June 2020, available at <https://www.theguardian.com/global-development/2020/jun/16/forced-retirement-of-malawis-chief-justice-before-june-election-blocked>. Protests from civil society groups and the legal profession helped block Malawi's government from removing the chief justice.

[80]P Jegwa, 'Malawi election: Court orders new vote after May 2019 result annulled,' *BBC News*, 3 Feb 2020, available at <https://www.bbc.com/news/world-africa-51324241> (describing how 'four radio stations broadcast[ed] the sessions live and on public transport passengers sometimes demanded that the radio be switched on so they could follow what was happening').

[81]J Burke and C Pensulo, 'Malawi court annuls 2019 election results and calls for new ballot,' *The Guardian*, 3 Feb 2020, available at <https://www.theguardian.com/world/2020/feb/03/malawi-court-annuls-2019-election-results-calls-new-ballot>.

portrayed itself as aligned with the people, presenting the ruling as affirming the people's fundamental expression of their democracy. '[E]lections are perhaps the most visible, eventful and concrete expression of democracy in a democratic society,'[82] wrote the Chief Justice for a unanimous court, 'It should not be for the courts to decide elections; it is the electorate that should do so.'[83] The Court advanced its role as upholding the will of the people: '[T]he duty of the courts is to strive, in the public interest, to sustain that which the people have expressed as their will.'[84]

In annulling the results of the 2019 presidential election, which had prompted mass protests for a year, the Malawi Supreme Court emphasized its decision as protecting the 'sanctity' of the popular will. It referred only in passing to its own judicial intervention as a means of ensuring the 'supremacy of the constitution' and affirming 'democratic values.'[85]

The constitutional narrative that the Supreme Court presented was grounded in the particular values of Malawi's constitution as well as in a global discourse. The Court based its understanding of electoral integrity in 'the underlying and fundamental principle' of Malawi's Constitution that 'all legal and political authority of the State derives from the people,' emphasizing that the 'Constitution specifically accorded our people the right to participate in the political agenda.'[86] At the same time, it also sought to locate its approach in protecting the electoral process as in line with the jurisprudence of other courts in the region, including Kenya, Uganda, and Zambia.[87]

The Malawi Supreme Court's decision on the outcome of a presidential election was crafted in terms of reinforcing democratic representation and the political process. This assertion of judicial authority helped facilitate democratic transition by enabling political competition in a context where such conditions did not yet exist.[88]

Concluding Reflections: Juristocracy and Distrust

Judicial statecraft plays an important role in courts' endeavors to strengthen their institutional position, especially when confronted with powerful political actors. In some contexts, judicial assertiveness can be marshalled to protect democratic processes against executive abuse. In others, judicial intercession can play a role in constructing constitutionalism or in facilitating democratic transition.[89]

The notion of judicial self-empowerment is sometimes viewed with skepticism. This phenomenon might be seen as a piece with a global trend toward 'juristocracy,' where policy-making authority is transferred from majority arenas to professional policy-making bodies to insulate the preferences of hegemonic elites.[90] And, of course, over

[82] *Mutharika* [31].
[83] *Mutharika* [32]–[33].
[84] *Mutharika* [33].
[85] *Mutharika* [33].
[86] *Mutharika* [5]–[6].
[87] *Mutharika* [85]–[88].
[88] See (n 76) 127.
[89] Beyond the case studies discussed in this paper, examples of courts assuming the mantle of democracy protection can be found in other contexts globally. See (n 76) 122–29.
[90] See R Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge, Massachusetts, 2007) 16.

time, there is a risk that courts themselves may succumb to authoritarian power and become active agents of abusive constitutional change.[91]

Yet, empowered courts are not necessarily always a cause for distrust, particularly in countries where the underpinnings of democratic constitutionalism are fragile. Courts can play a key role in protecting and building constitutional democracy as well as in constructing democratic transitions. The success of these efforts may hinge, in some contexts, on a more enhanced judicial role than Ely's theory originally envisaged.

[91]R Dixon and D Landau, 'Abusive Judicial Review' (2020) 53 *U.C. Davis Law Review* 1313.

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