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A REVIEW OF THE MALAYSIAN JURISPRUDENCE OF CONSTITUTIONAL INTERPRETATION

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ABSTRACT

This article is a preliminary review of the prevailing approaches of constitutional interpretation applied in the notable judgments by the Malaysian Apex court. The application of various constitutional interpretive approaches by the Malaysian judiciary varies according to various theories and canons of interpretation. For the purpose of this review, a qualitative method is employed through doctrinal analysis and case studies. It is discovered that the application of the various approaches does not always correspond to the philosophy underlying them. Such inconsistency in the understanding of the approaches and their application can cause distortion in the jurisprudence of interpreting the Constitution. This article concludes by offering practical insights regarding Malaysian jurisprudence in constitutional interpretation. It is hoped that this brief comparative narrative will be advantageous as a preliminary discourse to encourage further research on the topic.

Keywords: Malaysian Constitutional Jurisprudence, Comparative Constitutional Interpretation, Interpretive Approaches.

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SOROTAN MENGENAI JURISPRUDENS PENTAFSIRAN PERLEMBAGAAN DI MALAYSIA

ABSTRAK

Makalah ini memberi sorotan awal tentang pendekatan pentafsiran Perlembagaan yang lazim digunakan dalam penghakiman-penghakiman penting oleh Mahkamah Tertinggi di Malaysia. Pemakaian pendekatan pentafisran perlembagaan yang pelbagai oleh badan kehakiman Malaysia berbeza-beza mengikut teori dan kaedah pentafsiran yang pelbagai. Bagi tujuan sorotan ini, kaedah kualitatif digunapakai melalui analisa doktrinal dan kajian kes. Didapati pemakaian pelbagai pendekatan tersebut tidaklah selalunya bertepatan dengan falsafah yang mendasari pendekatan-pendekatan tersebut. Ketidakselarasan dalam kefahaman tentang pendekatan-pendekatan tersebut dan pemakaiannya boleh menyebabkan kecelaruan dalam jurisprudens pentafsiran Perlembagaan. Makalah ini diakhiri dengan pencerapan yang praktikal mengenai jurisprudens pentafsiran Perlembagaan. Adalah menjadi harapan agar penerangan ringkas yang bersifat perbandingan ini memberi manfaat sebagai wacana awalan bagi menggalakkan kajian lanjut mengenai topik ini.

Kata Kunci: Jurisprudens Perlembagaan Malaysia, Pentafsiran Perlembagaan Perbandingan, Pendekatan Pentafsiran.

INTRODUCTION

The Malaysian Constitution was drafted based on the Westminster model of parliamentary democracy alongside constitutional monarchy based on the sovereignty of the Rulers.[1] The English common law exerted a strong influence on the court's interpretation of law in the newly independent Malaya. The courts also drew on precedents from other Commonwealth countries such as India and Australia, thus adhering to the common law doctrines of separation of powers, rule of law and constitutional supremacy. The courts, reinforced by Privy Council decisions, were entrusted to interpret the law and employ the common law as modified according to local circumstances.

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1 Y.M Tunku Abdul Rahman Putra, "Opening Speech of Y.M Tunku Abdul Rahman Putra," in *Reflections on the Malaysian Constitution* (Penang, Malaysia: Aliran Kesedaran Negara, 1987), 18.

In the decades following Merdeka, constitutional cases have become more complex. While citizens have become more exposed to global liberal values and demands for individual rights and freedoms, common law has become less authoritative as a reservoir of values. The demands on rights and freedom today represent a budding of American libertarianism or implicit rejection of any command theory.[2] As a result, there is growth in the number of cases in which the courts have made reference to the judgments by the Supreme Court of the United States (hereinafter referred to as the "U.S Supreme Court cases") which are seen to be justified considering that both Malaysia and the United States have a written constitution.[3] It was also suggested that judges in the United States have contributed more to legal constitutional developments than their British counterparts.[4] The special characteristics peculiar to judge-made law that has long been a practice may lead to an impression that decisions are arbitrarily made and tainted by value judgments, given that a single doctrine may be subject to various interpretations by various parties.[5] In this respect, we draw upon the famous words of the late Tan Sri Harun M Hashim, formerly a Supreme Court Judge and Professor of Law, "Judges should not be seen to be making political decisions".[6] Thus remains the case for comparative studies between the Malaysian and the American on constitutional interpretive approaches.

While it is laudable that the Malaysian judiciary is welcoming more of foreign precedents in view of developing its constitutional jurisprudence, there are also concerns that these precedents may have been articulated without following the relevant discourse of

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2 See Mahadev Shankar, Malaysian Jurisprudence and American Precedents, paper presented at the *National Seminar on the United States and Malaysia: The Socio-Cultural Experiences*", Malaysian Association for American Studies (IMAAS) Malacca Village Resort, Malacca, June 26-28, 1987

3 In some instances, the Malaysian judiciary has shown openness to the reception of the United States Supreme Court casessee *RovinJoty a/l Kodeeswaran v. Lembaga Pencegahan Jenayah* [2021] 2 MLJ 788

4 supra3, see Chapter on *Role of the Judiciary,* Tommy Thomas, 81

5 See Antonin Scalia, A Matter of Interpretation: Federal Court and the Law, (Princeton N.J: Princeton University Press,1997)41-47.

6 Tan Sri Datuk Harun Mahmud Hashim, Zuraidah Omar Ed. The Benchmark (Kuala Lumpur, Peninsula Digital Sdn. Bhd., 2001) 7

constitutional interpretation. Reference has been made to such cases without developing them doctrinally in accordance with the underlying jurisprudence from which they were originally understood. The interpretive discipline must be properly grounded.[7] In today's age especially, the constitutional text can be seen to be susceptible to indefinitely with many interpretations and words given meanings they cannot bear.[8] At the very least, this is a perversion of language in the interests of any legal or constitutional theory at the expense of constitutional values.[9] It follows naturally that there needs to be a more methodical and transparent approach to better achieve coherence in interpreting the Constitution.

In Malaysia, it is common to find the interpretive approaches explained in a compartmentalised manner under separate topics on various theories.[10] Constitutional supremacy, separation of power, rule of law and judicial review are concepts often intertwined with conceptions of freedom and equality.[11] Discussions on the principal interpretive approaches employed by the courts with an emphasis on the underlying philosophical foundation of the court's approaches appear to be limited.[12] Such discussions, if at all available, have been mostly confined within discourses on statutory interpretation rather than their application within a constitutional context.[13] Pertinently this

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7 Scalia, 41-47

8 ibid

9 See *Datuk Harun Idris v Public Prosecutor* [1977] 2 MLJ 155

10 See Zulqarnain Lukman 2010, Fundamental Liberties in Malaysia, A Constitutional Frameworkhttp://studentrepo.iium.edu.my/handle/123456789/1526, accessed on 26 August 2022
Kho, Feng Ming. May 8, 2018. Reading 'Rights' Rightly: The Role of Judges in Constitutional Interpretation SSRN: https://ssrn.com/abstract=3175362 or http://dx.doi.org/10.2139/ssrn.3175362 accessed on 30 August 2022,
Jack Tsen-Ta Lee, Interpreting Bills of Rights: The Value of a Comparative Approach, https://academic.oup.com.icon.article/5/1/2122/722504, accessed on 1 October 2022

11 ibid

12 ibid

13 Noor 'Ashikin Hamid and Rusniah Ahmad, Khong Mei Yan, "Judicial Interpretation: A Conceptual Analysis, Statutory Interpretation in

article offers to complement the existing Malaysian legal literature on constitutional interpretation[14] so it may further shed some lights on its proper application within a constitutional context, particularly within the Malaysian judiciary. Through a qualitative method and based on data obtained from doctrinal and case analysis, this article will take a step back to capture a broader view of the Malaysian court's jurisprudence of the constitutional interpretive approaches by presenting a brief review of some of the notable judgments by the Malaysian apex court.[15] It is hoped that this article will be a precursory to deeper scholarly works on constitutional interpretive approaches, toward achieving a more coherent understanding of the core constitutional values, particularly in the Malaysian context.

CONSTITUTIONAL INTERPRETATIVE APPROACHES APPLIED BY THE MALAYSIAN JUDICIARY

It is established that Malaysian judges adhere significantly to the common law tradition modified to local circumstances.[16] However, for

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Malaysia." *Proceedings of International Conference on Public Policy and Social Science, UiTM Melaka Malaysia, November 2012* https://www.academia.edu/10349750/Statutory_Interpretation_in_Malaysia,accessed on 28 August 2022

14 Ahmad Ibrahim, "Interpreting the Constitution: Some General Principles", in *The Constitution of Malaysia Further Perspectives and Developments, Essays in Honor of Tun Mohammed Suffian*, ed. F.A Trindade & H.P Lee, 1986.
Farid Sufian Shuaib, "The Courts and Approaches to Constitutional Interpretation", *International Islamic University (IIUM) Law Journal*, Vol. 8, No. 2 (2000).
Shad Saleem Faruqi, "Constitutional Interpretation in A Globalized World" (13th Malaysian Law Conference2005).
"The Dynamics of Constitutional Interpretation", YouTube, posted by LexisNexis Southeast Asia, July 18, 2017. YouTube.https://www.youtube.com/watch?v=a00hs4O5X84, accessed on 25 July 2022
Yvonne Tew. *Constitutional Statecraft in Asian Courts,*(United Kingdom:Oxford University Press, 2020)

15 For the purpose of this research, Apex courts mean the Supreme court and the Federal court of Malaysia

16 R.H.Hickling,"The Historical Background to the Malaysian Constitution." In *Reflections on the Malaysian Constitution, Persatuan*

the purpose of this article, the appraisal of the judicial approach by the Malaysian judiciary shall be based on the approaches popularly discussed by the US constitutional scholars for reasons mentioned earlier, ranging from originalism to living constitutionalism. In the following discussion, there will be indications that originalism, textualism, literalism, strict constructionism and formalist structuralism may converge in principle. It will also be indicated that living constitutionalism is generally categorised as a form of non-originalism. Those two main theories, *i.e.* originalism and living constitutionalism, are often applied together with other interpretive approaches. These approaches are often described based on canons of interpretation, such as the four walls approach, the *sui generis*, literal reading, harmonious reading, liberal and generous interpretation, or based on sources referred to in interpreting the Constitution such as historical facts, tradition and moral values.

Originalism

Not all constitutional scholars have reached a consensus on the meaning of originalism.[17] Scholars and jurists described as being "originalists" would seek the aid of historical materials to ascertain the original intent to understand how the framers would interpret the meaning of the Constitution or how the reasoning of the framers would apply in deciding a case.[18] Some other scholars would go back to the original understanding which is the meaning that a reasonable person would have understood at the time of ratification of the Constitution.[19] In the absence of a clear language, constitutional meaning is discovered through a process of historical research of sources contemporary to the constitutional text such as records of Constitutional Convention and even dictionaries contemporary at the time of the founding.[20] However,

Aliran Kesedaran Negara. (Penang: Virgo Printing and Packaging 1987) 21.

17 Brandon J.Murill,2018. *Modes of Constitutional Interpretation*, https://sgp.fas.org/crs/misc/R45129.pdf

18 Thomas E.Baker, "Constitutional Theory in a Nutshell."*William & Mary Bill of Rights Journal*,Vol. 13 No. 1 (2004):96.

19 Antonin Scalia, *A Matter of Interpretation: Federal Court and the Law*, (Princeton N.J: Princeton University Press,1997)44-45.

20 See Gerard J.Clark, "An Introduction to Constitutional Interpretation." *Suffolk University Law Review*(2001): 48, Antonin Scalia,"The Lesser

it is generally agreed that the Constitution's text is to be given a meaning as understood by the general public at that time. The task of judges and interpreters is to ascertain this original meaning.[21]

It was observed that this approach has much in common with textualism but not identical.[22] Unlike textualism, this original public meaning approach does not rely solely on the text but draws upon the original public meaning of the text as a broader guide to interpretation. It is, however, generally believed that textualism and original intention can be categorised under the banner of originalism because appeals to intention often run together with appeals to meanings.[23]

Some textualist judges who are also originalists, after having looked at the text, would consult other potential sources of meaning to resolve ambiguities or to answer fundamental questions of constitutional law which are not addressed in the text or allow for consideration of contemporary values to the extent that they have become incorporated in the modern understanding of phrases in the Constitution.[24] This is described as a plural use of textualism in combination with other interpretive approaches which is distinguishable from a strict textualist or constructionist approach.[25] It is believed that this is the best approach to restrain judges from rendering decisions based on political inclinations.[26] It also restrains judges from freelancing or imposing their own subjective policy preferences under the pretext of interpreting the Constitution.[27]

Originalist judges who employ the literalist approach have been described as strict textualists, strict constructionists or strict

Evil."*Chicago Law Review* (1989): 57, 849,852 .

21 supra15, Murill

22 Supra 21, Baker

23 Walter Sinnott Armstrong and Susan J.Brison, *Contemporary Perspectives on Constitutional Interpretation*,(New York: Routledge, 1993) 9.

24 Erwin Chemerinsky, *Constitutional Law*. 4th Edition, (Massachusetts: Aspen Publishing, 2013.)16.

25 see Murill

26 Alexander Tsesis, "Footholds of Constitutional Interpretation."*Texas Law Review* Vol. 91 (2013): 1656.

27 ibid, 73

legalists. They usually describe their interpretive approach as being clause bound and based exclusively on a specific clause. This approach can clearly be perceived in cases relating to the 1969 Proclamation of Emergency such as *Johnson Tan Han Seng v. Public Prosecutor,*[28] *Public Prosecutor* v. *Khong Theng Khen & Anor* and *Teng Cheng Poh v. Public Prosecutor*.[29] In *Theresa Lim Chin Chin v. IGP,*[30] Salleh Abas ruled that if the law is clear, the court has a duty to declare what the law is. By this approach, the law, *i.e.* section 16 of the Internal Security Act 1960 [*Act 82*] and clause 151(3) of the Federal Constitution read together, is understood to mean that "the court will not be in a position to review the fairness of the decision-making process by the police and the Minister because of lack of evidence".[31]

This approach also limits the court's consideration of materials presented before it. This is because "the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision."[32]The court therefore avoided trespassing into the domains of the legislature or the executive. Similarly, Tun Suffian's dissenting judgment in *Dato' Menteri Othman Baginda*[33] illustrates a literalist view in his ruling where he viewed that there has to be a clear language to confer jurisdiction to the *Dewan*[34] and oust the jurisdiction of the court. In this case, there are no clear words to say that the court cannot act as a court of appellate level and therefore the court should refuse to legislate to that effect.

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28 [1977] 2 MLJ 66

29 [1976] 2 MLJ 166

30 [1988] 1 MLJ 294

31 F.A.Trindade, and H.P.Lee, "Suffian's Contribution to Malaysian Constitutional Law."In *The Constitution of Malaysia, Further Perspectives and Developments, Essays in Honour of Tun Mohamed Suffian,* 2nd Edition, (Petaling Jaya: Fajar Bakti, 1988) 202.

32 [1988] 1 MLJ 293per Salleh Abas LP

33 [1981]1 MLJ 29

34 "*Dewan*" means "*Dewan Keadilan dan Undang*" as provided by Article XVI of the State Constitution which was established, among others, to advise on questions relating to Malay Custom in any part of the State.

In *CTEB v. Ketua Pengarah Pendaftaran Negara*[35] the majority, following *Loh Kooi Choon*,[36] ruled that, based on the ordinary meaning of the clear wordings of the Federal Constitution, the Legitimacy Act cannot be a competent legal instrument to confer citizenship status. The court obviously was against supplementing interpretation with other parliamentary legislations or any international instrument. The majority adopted a strict view against any attempt to insert new words into the Constitution or rewrite its provisions.

Living constitutionalism

Living constitutionalism or the living document approach has been described by contemporary scholars in a variety of ways.[37] It is an approach that sees a constitution as an evolving, living entity which is capable of evolving in response to new conditions,[38] thereby adapting to new circumstances without undergoing any formal amendment. It is "an adaptive document that responds to changing social and economic conditions through altered judicial interpretations of its central textual provisions."[39] It was also suggested that "living constitutionalism" may not be well-defined except by way of contrast with originalism.[40] That being the case, arguably this approach may support a variety of other

35 [2021] 4 MLJ 236

36 [1977] 2 MLJ 187

37 Just like originalism, there are various forms of living constitution namely constitutional pluralism, Common Law constitutionalism, moral readings, super-legislature and popular constitutionalism.*see* David A. Strauss,"Foreword: Does the Constitution Mean What It Says?" 129 *Harvard Law Review* 1 (2015)4–5; *see also*. David A.Strauss, The Living Constitution, (Oxford University Press: 2010) 43–45. *See* Philip Bobbitt, Constitutional Interpretation (1991), 12–13.It is also sometimes described as judicial pragmatism or evolutionism. seeLouis E. Wolcher, 2005-2006. "A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom", 13 *Va. J. Soc. Policy & L.* 239 :267,Ronald Dworkin, *Freedom's Law: The Moral Reading of The American Constitution* (1996) 2–3.

38 *supra* 32, Wolcher, 267
see Lawrence B. Solum. "Originalism Versus Living Constitutionalism."*Northwestern University Law Review*, Vol.113 No.6 (2019):1259.

40 ibid, 1259

approaches which are independent from the text as the main reference such as the pragmatist approach, the balancing approach and the moral approach.

This approach was applied in the landmark decisions of certain other common law jurisdictions, which projected its reasonings through the jurisprudence on equal protection, freedom of expression, due process and the like, which has also evolved in modern western democracies as constitutional cases. Under this approach, the scope of constitutional right is defined largely by judicial perceptions of current social mores,[41] incorporating contemporary values and attitudes into the judicial 'understanding' of the Constitution".[42] It accepts the value of judge-made doctrine with an extended interpretive arena to include broader historical events such as informal practices, usages and political culture. The emphasis is on resolving contemporary issues with contemporary constitutional understandings by relying on "past authoritative interpretations by courts and relevant historical changes in the broader political culture" in support of the view that the Constitution must be able to adapt to current needs and attitudes that have changed since the original drafting.[43] In other words, the Constitution does not have one fixed meaning but is a dynamic document, the meaning of which can change over time.[44] Unlike originalism which is united by the ideas of fixedness and constraint, living constitutionalism is empowered by the idea of constitutional change.

Such an approach could be seen in *Phang Chin Hock v. Public Prosecutor,*[45] in which the court described the Constitution as a living document intended to be a workable instrument that is also reviewable from time to time. In *Badan Peguam Malaysia v. Kerajaan Malaysia,*[46] a fair, liberal and progressive construction was favoured in support of

41 ibid
42 supra *33,* Solum
43 supra14, Baker, 98
44 supra36
45 [1980] 1 MLJ 70
46 [2008] 2 MLJ 285|

interpreting the Federal Constitution as a living document so that its true objects must be promoted.[47]

Similarly, the same approach could be seen in the following two cases. The dissenting judgement in *Maria Chin*[48] included the right to travel abroad within the scope of 'personal liberty' in Article 5(1) of the Constitution. The prismatic and purposive approach, which purportedly is more adaptive towards realities of life was also preferred, considering that the Constitution is a living and organic document. In *CTEB v. Ketua Pengarah Pendaftaran Negara,*[49] it was emphasised in the dissenting judgment that the Constitution has to be read in a "broad, liberal and expansive sense" because the Constitution, which is a living and organic document, is constantly being expounded and developed. The dissenting judge described constitutional issues as 'living' or organic matters that are constantly evolving. Based on this argument, interpretation of the Constitution must foster, develop and enrich the system of parliamentary democracy that is contained in the Constitution as supreme law. Due consideration to the progress of the nation's needs and the all-important component of pragmatism was emphasised in interpreting the Constitution.[50] It was also indicated in the judgment that the prismatic and pragmatic approaches are best in supporting the theory of interpreting the Constitution as a living document.[51]

Structuralism

Separation of powers, federalism and the relationship between the government and the people are all theories that are developed from a constitutional structure in most constitutional governments.[52] In giving meanings to the Constitution, adherence to a constitutional structure is supported by an approach known as structuralism. Structural reasoning can be further divided into formalism and functionalism. The debate

47 ibid, per Zulkefli Makinuddin
48 [2021] 1 MLJ 750
49 [2021] 4 MLJ 236

50 ibid, per Nallini Pathmanathan dissenting
51 ibid
52 Murill, p.17

usually revolves around comparing which approach demonstrates greater fidelity to the Constitution, which approach best provides the original meaning of the Constitution and which approach best protects liberty in cases involving proper allocation of power between the branches of the federal government comprising of federal government and the states, government institutions, or citizens and government.[53]

Formalists focus on close adherence to the structural division prescribed by the Constitution in which federal power may be shared, allocated or distributed.[54] Functionalists are more flexible and emphasise the core functions of each of the branches and address the issue of whether an overlap of these functions defeats the equilibrium that the framers sought to maintain.[55] While the formalists adhere to the original meanings, functionalists use a balancing approach that weighs competing governmental interests as one of its principal methodologies by considering the practical consequences of allocating power to either branch of the federal government, which formalists would avoid.[56] It is believed that, though not necessarily expressly stated in the Constitution, these principal structural ideas of the Constitution are inherent in the design and function of the Constitution. Therefore, it is impossible to avoid relying on, and making structural arguments in, the course of constitutional interpretation.[57] This approach is believed to be an approach which contemplates the entire text of the Constitution instead of considering just a particular part thereof, and compared to the application of textualist approach alone, produces clearer justifications for decisions requiring interpretation of ambiguous provisions.[58]

Looking at the Malaysian cases through the lens of structuralism, the doctrine of separation of powers is discussed in

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53 John Manning, "Separation of Powers as Ordinary Interpretation." *Harvard Law Review* (2011)1942-44, 1950-52, 1958-60. Peter L. Strauss,"Formal and Functional Approaches to Separation of Powers Questions- A Foolish Inconsistency?"*Cornell Law Review* (1987) 488, 489.

54 supra 47, Manning 1950-52

55 ibid

56 Murill, p.18

57 Baker, 99

58 Bobbit, 74, Murill, 20

several leading Malaysian cases, demonstrating different judicial attitudes on the subject. In *Lim Kit Siang v. Dato Seri Dr Mahathir Mohamed*[59] the court applied an approach that resembles the description of formalist structuralism.[60] The court reiterated the role of the court as a final arbiter and mentioned that in doing so, it was performing a constitutional function.[61] However, the decision cautioned that the court ought not to legislate under the guise of exercising its judicial powers and functions or create a right for a person to contravene any law.[62] It serves as the guardian of the Constitution within the terms and structure of the Constitution itself. In *Johnson Tan Han Seng v. Public Prosecutor,*[63] the doctrine of separation of powers was upheld in favour of the executive in relation to a proclamation of emergency. The courts were reluctant to interfere, guided by the position in England and India. In *Koperal Zainal Mohd. Ali & Ors v. Selvi Narayan & Anor,*[64] the court ruled that, given the clear constitutional provision, it is the Parliament that will cure the alleged incongruity of law and not the court.

Similarly, in *Latifah Mat Zin v. Rosmawati Sharibun & Anor,*[65] the court clarified, in cases relating to jurisdictional conflicts between the civil and Shariah courts, jurisdiction cannot be implied merely on the basis that jurisdiction over a subject matter was not provided for the other. The court was of the opinion that it was clearly mentioned in Article 121(2) of the Constitution that there has to be a federal law conferring jurisdiction. In the absence of such law, the court restrained

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59 [1987] 1 MLJ 383

60 Note that some arguments in cases of strict constructionist approach may overlap with formalist structuralist approach. The only difference is that in the former approach, arguments are still based on the text of the Constitution while in the latter case, arguments are based on the various understanding of the doctrines relating to the relationship of the arms of the government such as separation of power or federalism, which are not written in the Federal Constitution.

61 see *Lim Kit Siang*

62 supra 54,per Raja Azlan Shah

63 [1977] 2 MLJ 66

64 **[**2021] 3 MLRA 424

65 [2007] 5 CLJ 253

itself to make or amend any law and acknowledged the function of the legislature to remedy any inadequacy in the law.

The court in the case of *Tun Datuk Haji Mohamed Adnan Robert v. Tun Datu Haji Mustapha bin Datu Harun*[66] stood firm with the role of the court as the ultimate interpreter of the Constitution even where a litigant sought the protection of political rights. The doctrine of pith and substance was applied in *Mamat bin Daud* [67] in addressing "colourable legislation". The court intervened on the ground that Parliament had encroached the power of the state legislature by enacting the impugned penal provision.

In *Rovin Joty,*[68] the court in addressing the constitutionality and validity of the impugned provision, relied on the principle of presumption of constitutionality and applied a broad and practical approach. The court was also guided by the historical background of the drafting of Article 121 of the Constitution and the provisions on preventive detention to understand the origin and principles underlying the respective provisions.

Similarly, in *Dato' Seri Anwar Ibrahim v. Public Prosecutor*,[69] the court applied the presumption of constitutionality principle but resorted to textual approach by referring to the shoulder notes to aid the understanding of the intent behind Article 149 of the Constitution. In *Azmi Sharom v. Public Prosecutor,*[70] the court refrained from addressing the issue of determining the reasonableness of the Sedition Act 1948 as it was a matter strictly within the discretion of the legislature. The court supported its reasoning with the purport and intention of the drafters which is to provide for the continuance of all existing laws including the impugned Act.

The court in *Zaidi Kanapiah v. ASP Khairul Fairoz bin Rodzwan and other cases*[71] and *JRI Resources Sdn. Bhd. v. Kuwait*

66 [1987] 1 MLJ 471
67 [1988] 1 MLJ 119
68 [2021] 2 MLJ 822
69 [2021] 6 MLRA
70 [2015] 6 MLJ 751
71 [2021] 3 MLJ 759 see per Hasnah Hashim 76

Finance House (M) Bhd.[72] expounded the doctrine of separation of powers in such a way that it is undeniable that there is a delicate demarcation between the three arms of the government but they are inevitably overlapping. In as much as parliamentary democracy requires a blending of those arms, it cannot be rigidly separated. Separation of power is therefore not absolute. In articulating issues relating to fundamental liberties, the court in *Ling Wah Press (M) Sdn Bhd &Ors v. Tan Sri Dato Vincent Tan Chee Yioun*[73] acknowledged that freedom of speech is not absolute in the context of Malaysia. Article 10 of the Constitution, while guaranteeing the right to freedom of speech and expression of every citizen, imposes restrictions by authorising Parliament to enact laws to provide against defamation and to protect the right to reputation of every person.

It could be observed that the functionalist approach was often undertaken by dissenting judgments in cases where the majority applied the formalist approach. The court in *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise*[74] ruled that the court has the power to interfere not as an appellate court. The court further stated that legal power has legal limits and that discretion cannot be free from legal restraints. This landmark decision clarified and reinforced the role of the judiciary as a check and balance to the executive, ensuring that State powers are exercised within conferred limits. The dissenting judgment in *Maria Chin* articulated the same concept in principle, with emphasis on adherence to the Rule of Law. In *Rovin Joty*, it was indicated by the dissenting judge that one of the ways to preserve the doctrine of separation of powers is to interpret "judicial power" in Articles 4 and 121 of the Constitution harmoniously.

The Four Walls Approach

The Four Walls approach advocates for the Constitution to be interpreted using its own jurisprudence and less reliance on foreign cases. The court illustrates this point in the case of *The Government of the State of Kelantan v. The Government of the Federation of Malaya*

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72 [2019] 3 MLJ 561 see per Azahar Mohamad 63
73 [2000] 4 MLJ 77
74 [1979] 1 MLJ 135

and Tunku Abdul Rahman Putra Al-Haj,[75] where the court explained that the Federal Constitution is predominantly interpreted within its own four walls and not in the light of the analogies drawn from other countries such as Great Britain, the United States of America or Australia. Similarly in the case of *Loh Kooi Choon,*[76] the court quoted Frankfurter J. who said, "The ultimate touch stone of constitutionality is the Constitution itself and not any general principle outside it". The court also emphasised that each country frames its constitution according to its genius and for the good of its own society.[77] Likewise, in *Zaidi Kanapiah*,[78] the court stated that even though reference to foreign doctrine or jurisprudence is permissible whenever relevant, they are not binding.[79]

The same approach was emphasised in *Public Prosecutor v. Pung Chen Choon,*[80] where the court cautioned that foreign cases are of little relevance and need not be discussed. This part of the judgment was later followed in *Letitia Bosman v. Public Prosecutor*.[81] On the issue of constitutionality of the mandatory death penalty the court applied the four walls approach and the presumption of constitutionality. The court therefore ruled that Parliament is the rightful branch to decide on policy and not the judiciary.[82] The court in *Public Prosecutor v. Kok Wah Kuan*[83] explained that separation of powers in Malaysia is not definite nor absolute and Malaysia's conception of the said doctrine presents features that do not comply strictly with the doctrine as it was understood under the common law system.[84] Constitutional supremacy and fidelity to the constitutional text still prevail to the effect that a provision of a constitution cannot be struck down on the ground that it contravenes a certain doctrine or else it would be akin to doctrinal supremacy. The checks and balance

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75 [1963] 1 MLRH 160
76 [1977] 2 MLJ 187
77 see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544 551
78 [2021] 3 MLJ 759
79 supra65, para 208
80 [1994] 1 MLJ 566
81 [2020] 5 MLJ 383
82 ibid
83 [2008]1 MLJ 1
84 ibid

operate when the judiciary enforces what has been made law and approved by the legislature.[85]

The Liberal Approach

The liberal approach is often described as one of the special rules in interpreting a constitution. Under this approach, a constitutional provision is to be interpreted broadly, generously, less rigid and not pedantic.[86] It is an approach to elongate and expand the meanings of the words or provisions touching on rights and freedoms.[87] It is also argued that judges have to be pragmatic rather than dogmatic to adapt to the changing needs and that the interpretive task is unavoidably creative because legal words do not have self-evident meaning.[88] It is for judges to give life and meaning to the cold letter of the law and to determine the contemporary, core constitutional values that deserve protection.[89] The Constitution should also be subjected to a "morally charged, constructive and right-based interpretation".[90] The judge should decide independently of historical limitations and reject plain view, literal approach and the original intention of the law-maker approach.[91] This approach is very much akin to living constitutionalism which has been popularly discussed by American constitutional scholars.

While this approach has been ingrained in classic cases such as *Dato' Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus*[92] by judges who are more inclined towards judicial restraint, it is also popular among judges who are more willing to exercise judicial activism.[93] In the case of *Dato' Menteri Othman*

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85 ibid

86 See *Dato' Menteri Othman Baginda& Anor v. Dato' Ombi Syed Alwi bin Syed Idrus*[1981] 1 MLJ 29

87 Per *Lord Wilberforce in Minister of Home Affairs v Fisher* [1979] 3 All ER 21, Bindra, 1291,

88 supra*9,* Faruqi

89 ibid

90 ibid

91 supra *9,* Faruqi

92 [1981] 1 MLJ 29

93 For further discussion on judicial activism and judicial restraint, refer to page 22

Baginda, which emerged as a landmark case for constitutional interpretation, the then Lord President Raja Azlan Shah elaborated that the Constitution is a *sui generis* and should be interpreted broadly, in light of an ambulatory approach.[94] In the case of *JRI Resources,*[95] the majority ruled that judicial power is not to be delimited in a narrow or pedantic manner to the effect that it extends to all incidental matters necessary to make it effective. In defining judicial power, the majority believed that it would be more appropriate to define it by way of description or by examining the characteristics and attributes rather than confining it to a precise formula. In *Letitia* and *Iki Putra,*[96] the court reiterated the liberal interpretation of the legislative entries by emphasising the cardinal rule that the word "with respect to" in Article 74 of the Constitution is to be interpreted with "extensive amplitude". The court also imposed a constitutional limit by virtue of the preclusion clause upon the wide interpretation of "precepts of Islam" and ruled that the preclusion clause 'except in regard to matters included in the Federal List' to be read harmoniously with the state list.[97]

Harmonious Interpretation

Harmonious interpretation is one of the important canons of construction in as much as drafters do not contradict themselves.[98] Meanings which are conformed to common usage are generally favourable without departing from the literal meaning and simultaneously best harmonised with the nature and objects, scope and design of the constitution.[99]

One of the most authoritative cases that illustrates the importance of the harmonious interpretation is *Phang Chin Hock*, in which the court emphasised that the rule of harmonious construction

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94 see per Raja Azlan Shah "….a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — "with less rigidity and more generosity than other Acts" (see *Minister of Home Affairs v Fisher [1979] 3 All ER 21*.

95 supra, 66

96 [2021] 2 MLJ 323

97 see supra 106, para 46 and 75

98 Antonin Scaliaand Bryan Garner, "Harmonious-Reading Canon." *Reading Law:The Interpretation of Legal Texts.*(Thomson West: 2012).

99 *87,* Scalia and Garner

must be applied to give effect to Articles 4 and 159 of the Constitution and acknowledged the power of Parliament to amend the Constitution even if the constitutional amendment is inconsistent with the Constitution. Cases such as *Ketua Polis Negara v. Abdul Ghani Haroon*,[100] followed the same approach where the court stressed that Article 5(2) of the Constitution should be interpreted and applied according to the wording of the Constitution as a whole and in *Danaharta Urus Sdn. Bhd.v. Kekatong Sdn Bhd.,*[101] the court eschewed the meaning that leads to absurdity and applied harmonious construction based on the assumption that there is no conflict between different parts of the Constitution. This judgment is supported by the reasoning in *Loh Kooi Choon* which was based on the notion that the Constitution as a supreme law is unchangeable by ordinary ways, different from ordinary law and therefore cannot be inconsistent with itself.

Likewise, in *Fathul Bari bin Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors,*[102] the court adopted the decision that gave the widest meaning to legislative entries, entrusting the court to reconcile and read harmoniously. In *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v. Dato' Seri Dr Zambry bin Abdul Kadir,*[103] the court is more inclined to the organic theory in the interpretation of the Constitution in which all provisions are not considered alone, and collectively they effectuate the great purpose of the instrument. Similarly, in *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara, Malaysia & Anor*,[104] the court was against literal interpretation to avoid undesirable consequences. The court also stated that the construction of a provision should not be done in isolation and should be consistent with the smooth working of the system. Overall, the court was quite consistent in applying a harmonious construction and respecting the Shariah court's jurisdiction in cases involving purported civil-Shariah jurisdictional conflicts.[105]

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100 [2001] 4 MLJ 11
101 [2004] 2 MLJ 257
102 [2012] 4 MLJ 281
103 [2010] 2 MLJ 285
104 [1999] 2 MLJ 241
105 see *SukmaDarmawan, Soon Singh A/L Bikar Singh v Pertubuhan*

HISTORICAL, TRADITIONAL APPROACH AND ARGUMENTS BASED ON CUSTOM AND NATIONAL IDENTITY

Historical facts, custom, national identity and tradition are often consulted to determine the original understanding and meaning of the Constitution.[106] Such resources are popular recourse among originalists and non-originalists alike. For originalists, the abovementioned resources are significant in the quest for the original meaning of the constitutional text. Courts have often considered historical practices or traditions particularly when the text does not provide a clear answer.[107]

Such an approach could be seen in *Dato' Menteri Othman Baginda*, in which Tun Salleh Abas dealt with the issue pertaining to the appointment of *Undang* in light of historical approach. Accordingly, he ruled that the Dewan was the rightful forum to resolve the dispute since it is the embodiment of traditional elements and values which are preserved by the Constitution.[108]

In *Faridah Begum bte Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah,*[109] the court, in the absence of any express provision to confer the right to a foreign citizen to sue the Yang di-Pertuan Agong, ruled that the presumption of continuity of the rulers' privilege, sovereignty, prerogative and legal immunity prevails. This ruling was made considering that historically, before Independence, the Malay Rulers have always enjoyed sovereign immunity from legal proceedings.

Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 1 MLJ 489, *Dalip Kaur v.Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam& Anor* [1992] 1 MLJ 1 and *Mohamed Habibullah b Mahmood v Faridahbte Dato Talib* [1992] 2 MLJ 793

106 Baker, 76

107 Murill, 21

108 The traditional elements as listed by Tun Salleh Abas are the Sultanate or Rulership, the Islamic religion, the Malay language and Malay privileges

109 [1996] 1 MLJ 617

The court in *Merdeka University Berhad v. Government of Malaysia,*[110] ruled that a university falls within the definition of public authority in Article 160(2) of the Constitution and thereby caught within the scope of Article 152 of the Constitution. The court supported its reasoning with the history of language provisions which indicated that Bahasa Melayu was intended for official purposes. *Meor Atiqulrahman bin Ishak &Ors v. Fatimah bte Sihi & Ors,*[111] also resorted to historical aid in articulating the issue of jurisdictional conflicts.[112] In the same way in *Iki Putra*, it was ruled that constitutional provisions are to be interpreted in light of historical records during the drafting stage while acknowledging that the Constitution was designed with central bias. In *Letitia Bosman*, the court decided based on the historical background of sentencing function, that the discretion to determine the measure of punishment is not an integral part of the judicial power but an integral part of the legislative function.[113]

Salleh Abas LP in *Dato' Menteri Othman Baginda*, reiterated the traditional elements in upholding the non-justiciability of succession of ruler. The court's approach in addressing the issue of succession of rulers in light of the traditional elements resonates with the historical approach wherein substantial reliance is placed on the traditional elements which are peculiar to Malaysia. The court in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*[114] also distinguished the local cases with the Indian cases. In *Datuk Haji Harun Idris v. Public Prosecutor,*[115] the court cautioned against reliance on Indian cases due to the differences between the Malaysian and Indian constitutions based on their respective national identities and historical backgrounds.

Arguments Based on Moral Reasoning or Value-Based Approach

110 [1982] 2 MLJ 243
111 [2006] 4 MLJ 605
112 Per Tun Hamid, para 45
113 supra76
114 [1969] 2 MLJ 129
115 [1977] 2 MLJ 155

Values are originally derived from natural justice. The value-based approach articulates the question of whether "contemporary community values" morally condemn a certain practice as a general matter.[116] It is believed that the origin of the idea of natural justice can be traced back to the time of Aristotle.[117] It was developed as natural law, gradually stripped off its dependence upon ecclesiastical interpretation and went through the *Renaissance*.[118] Presently, this approach is used interchangeably with moral reasonings or moral readings.[119] Some constitutional provisions make reference to terms which are infused with certain moral aspects or ideals.[120] Arguments based on morals often focus on the limits of government authority over the individual.[121] Moral values are rooted in tradition and often exert compelling influence upon constitutional interpretation in many ways direct and subtle. Sometimes judges would consider national identity or a tradition that is deeply rooted in a nation's history from which the most cherished values, morals and culture are passed down.[122] This is where reliance on national identity can be closely related to the moral reasoning approach.[123]

Moral values help judges determine whether to base their decisions on interpretations of meanings or intentions or on precedents and are also used by judges to determine the meanings, intentions or precedents in a particular case. Judges consult moral values when meanings, intentions and precedents fail to produce interpretations which are satisfactory or determinate. Moral values are often relied upon in support of decisions involving unenumerated rights. Arguably these values are assumed to be less objectionable only when they have been accepted by many people for a long time.[124]

Judges employing moral reasoning are often pragmatists who take into account possible practical outcomes of particular

116 Wolcher, 269.
117 ibid,429
118 ibid,438-439
119 Baker, 89
120 Bobbit, 142, Murill, 14
121 Bobbit,162
122 Murill, 16
123 ibid, 16
124 Sinnott, Armstrong, 18

interpretations of the Constitution by weighing and balancing those consequences against other interpretations, or the future costs and benefits of an interpretation to society or the political branches.[125] They attempt to produce results that are "good" for the present and the future by selecting the interpretation that may lead to the perceived best outcome,[126] with no obligation to particularly adhere to text, precedent or to the original meaning of the constitution. They also tend to look to other disciplines as a way of giving objective content to their decisions. However, even if a pragmatist judge made reference to those sources, his adherence to those sources is treated as a means rather than the end of the process of interpretation.[127] A pragmatist interpretation may sometimes overlap with interpretation based on the balancing approach. The balancing approach is based on identification, valuation and comparison of competing interests.[128] Under this approach, the court will balance two conflicting constitutional values by either balancing an individual's right against a group or an individual liberty against government power.[129]

Some writers claimed that based on the Westminster constitutional model, the fundamental rules of natural justice were invoked as an interpretive aid in Singapore,[130] and by extension to Malaysia, as can be seen in *Ong Ah Chuan v. Public Prosecutor*.[131] The meaning of "law" in the fundamental liberties provision was held to embody "fundamental rules of natural justice". In the dissenting judgment in *Kok Wah Kwan*, the dissenting judge was of the view that

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125 Richard A. Posner, *Cardozo: A Study in Reputation*.(London: University of Chicago Press, 1990)28;Richard A. Posner,*The Problems of Jurisprudence.*(London: Harvard University Press, 1990)31.

126 Paul Brest, *Processes of Constitutional Decision Making: Cases and Materials.*(United States: Aspen Publishers, 2006) 54-55.

127 Wolcher, 272

128 Alexander Aleinikoff, "Constitutional Law in the Age of Balancing."*The Yale Law Journal*, Vol.96, No.5 (1987)945.

129 See *Assa Singh v Menteri Besar Johore* [1969] 2 MLJ 30,*Ooi Ah Pua v. Officer in Charge of Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 and *Dato Seri Anwar Ibrahim v. PP* [2021] 6 MLRA

130 Kevin Tan "Interpreting the Westminster Model Constitution."*Constitutional Interpretation in Singapore, Theory and Practice*. Edited by Jaclyn Neo.(New York: Routledge, 2017)61.

131 [1981] 1 MLJ 64

when the law leads to an unjust result or involves public interest, it is the role of a judge to consider moral aspects or public policy to ensure justice is done.[132] It was also suggested that judges have a wide discretion in determining when and to what extent natural justice can be applied. In *Nivesh Nair a/l Mohan v. Dato Abdul Razak bin Musa &Ors,*[133] the court indicated that natural justice was part of the basic structure doctrine.[134]

Purposivism

Under this approach, the Constitution is not an end in itself but a means to some higher ends. It seeks to identify and implement the basic and profound purposes of our system of government.[135] A purposive interpretation is said to begin with the awareness that interpretation is about identifying the legal meaning of a text along the spectrum of its semantic meaning which sets the limit of interpretation. The text shall not be given a meaning that its language cannot bear. Criteria for determining the legal meaning of the text within its semantic boundaries are created by a "system of interpretation" established by purposive interpretation.[136] A system of interpretation is proper only if it projects itself onto the normative text, clarifying it so that the text acquires a single, unique legal meaning.[137] The purpose of the text is derived from the context of the text based on those criteria.[138] Purposivism is often parallel with rules against absurdity.

The following cases considered the purposive interpretation. An example is the case of *Teoh Eng Huat v. Kathi Pasir Mas & Anor*,[139] where the court found a cause to depart from the literal interpretation

132 Per Richard Malanjum, 360
133 [2021] 5 MLJ 320
134 See *Kesavananda v The State of Kerala* [1973] SCR Supp 1, 4
135 Baker, 99
136 Sari Bashi, trans., *Purposive Interpretation in Law*, (New Jersey: Princeton University Press, 2005) 219.
137 ibid
138 ibid,xiii
139 [1986] 2 MLJ 228

and instead applied a purposive approach with reference to the intention of the drafters. In *Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia & Ors and Other Appeals,*[140] the court chose an approach that did not defeat the purpose of Article 5 of the Constitution. The Court in *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Bin Shaik Natar & Ors*[141] preferred subject matter approach which is more consistent with purposive approach and supportive of implied and inherent jurisdiction of the Shariah court. In *Kamariah Ali v. Kelantan,*[142] the court's ruling that conversion out of Islam cannot be invoked by a Muslim as a right serves as a protective measure against abuse of fundamental rights guaranteed by the Constitution. The rule against absurdity was also applied in *Faridah Begum* in which the court recognised wide-ranging consequences that would take effect if it enabled a foreign citizen to sue a Ruler. It would be absurd as it would amount to dismantling the concept of sovereignty in the international law and would open a floodgate of litigation by foreigners against Rulers. Likewise, in the case of *Badan Peguam Malaysia v. Kerajaan Malaysia*[143] in defining the word "advocate" the dissenting judges viewed that it would be absurd if the word "advocate" is given the meaning that an advocate need only be admitted and enrolled but need not be active in practice.

In some cases, the purposive approach may have been understood as the antithesis of the textual approach altogether.[144] If it is to be rightly understood from what has been originally intended by this approach, it should not have to be in conflict with the textual approach and the meaning given to the language should be within the semantic boundaries of the terms in question unless there is an absurdity.[145]

Pluralism

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140 [2003] 1 MLJ 321
141 [2003] 3 MLJ 705
142 [2005] 1 MLJ 197
143 [2008] 2 MLJ 285
144 see *Susie Teoh, Indira Gandhi*
145 Aharon Barak, p.219, see also Keith E Whittington, *Constitutional Interpretation*, p.59

Some views consider pluralism in constitutional interpretation as the assimilation into constitutional arguments of common law forms of reasoning.[146] It is believed that a multifaceted approach to understand the Constitution is appropriate because the Constitution is a complex document comprising many clauses, each of varying degrees of generality and ambiguity.[147] Therefore, it is claimed to be the best candidate for a general theory that gives meaning to the Constitution as a whole as it recognises all of the single method theories as justifiable to the extent that they are based on an established source of law.[148] In fact it was suggested that no court or justice ever claimed allegiance to only one for the various modes of constitutional interpretation are tools of the trade in constitutional decision making.[149]

Arguably, a hybrid theory called "living originalism" is also described as a pluralist approach.[150] It is an associated theory of interpretation and construction, the method of text and principle which has the characteristics of both originalism and living constitutionalism which requires fidelity to the original meaning of the Constitution and to the principles that underlie the text.[151] Contentiously, living originalism is claimed to eliminate the opposition between originalism and living constitution.[152] The debate on the validity of this approach is beyond the scope of this article.[153]

Pluralism in approach can be seen in *Loh Kooi Choon*, where the court treated the Constitution as a living document while interpreting the Constitution within the four walls and limiting it to the

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146 Griffin, "Pluralism in Constitutional Interpretation", 72 *Texas Law Review* (1993): 1762, Bobbit, p .5

147 ibid,1756

148 ibid,1761

149 Gerard J. Clark, "An Introduction to Constitutional Interpretation."34, *Suffolk University Law Review* (2002): 485

150 Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, *Northwestern University Law Review*, Vo.113, Issue 6, (2019), 1243

151 see Jack M. Balkin, *Living Originalism*, 1st. Ed, (United States:Harvard University Press,(2011)

152 see Balkin, 31

153 see Balkin, 4

constitutional text.[154] Further, the dissenting judges in *Ketua Polis Negara v. Ghani Haroon* looked at the intention and the whole structure of the constitution as a whole and favoured a wholesome, wider and more generous interpretation of citizenship. It was also argued that the provisions on citizenship deserve a harmonious, humanising and all-pervading approach. Contextual and prismatic approaches were also employed in as much as the Constitution being an organic instrument. In exercising its judicial activism and articulating the rights-based and principle-based approach, the court in *Bato Bagi* promoted a pragmatic, purposive approach and a liberal fashion of interpretation. The court also argued in tandem with national identity. In *Iki Putra*, the court applied broad interpretation aided by historical approach and also the pith and substance test. In *Indira Gandhi*, the majority interpreted Article 121(1) from a historical and philosophical context. A purposive approach was also adopted in this case while some judicial precedents were not followed. In *Dato' Seri Anwar Ibrahim*, the dissenting judges revisited the intention of the drafters and invoke the basic structure doctrine while upholding constitutional supremacy. In *Maria Chin*, the dissenting judge applied the prismatic approach and purposive approach aided by historical arguments. It also appears that the dissenting judges were bound by the judicial precedents from the trilogy of cases on the point of reception of the basic structure doctrine.[155]

JUDICIAL ATTITUDES

Judicial attitudes describe judges' conduct in asserting judicial power, which is judicial activism and judicial restraint. The following discussion illustrates the possibility of correlation between the various interpretive approaches with judges' practices in articulating the court's interpretive role.

Judicial activism

[154] Jack Tsen-Ta Lee, "Interpreting Bills of Rights: The Value of a Comparative Approach,"*International Journal of Constitutional Law*, Vol.5 122-152 (2007): 126.

[155] [2021] 3 MLRA per Nallini Pathmanathan, 845

Judicial activism in the context of constitutional interpretation is preeminently demonstrated in cases of judicial review or a decision in which a judge willingly decides constitutional issues and invalidates legislative or executive actions. Activist judges are judges who enforce their creative views instead of deferring to other branches of government or earlier court decisions.[156] It is observed that most activist judges would apply broad, liberal, prismatic, and purposive approach in interpreting the Constitution. Judicial activism, or attempts thereof, are especially found among dissenting judgments. *Stephen Kalong Ningkan v. Government of Malaysia*[157] was among the earliest cases to have a dissenting opinion demonstrating judicial activism with long grounds of judgment addressing issues on the role of courts, justiciability and judicial supremacy. In *Kok Wah Kuan* the dissenting judge promoted creativity in making decisions to the effect of crystalising what was already inherent.[158] In *Lee Kwan Woh v. Public Prosecutor,*[159] the majority decided that interpretation of provisions relating to fundamental liberties must be made in light of humanising and all-pervading provision of Article 8 of the Constitution and in a generous and prismatic fashion.[160] Prismatic approach and generous interpretation were reiterated in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor*.[161] The court in *Bato Bagi* introduced a rights-based and principle-based approach and defined life as not mere existence but extended the scope to the quality of life and integral aspects.[162] The court also reiterated the fundamental purpose of the constitutional provision which is to safeguard the textual as well as implicit rights.

The most striking examples of judicial activism can be seen in the string of cases that advocated a relatively new doctrine known as basic structure. According to this doctrine, "there are certain features in the Constitution that constitute its basic fabric".[163] This doctrine is claimed to have been inspired by a German philosopher, but largely

156 "Judicial Activism," https://www.britannica.com/topic/judicial-activsim, accessed on 20 October 2022
157 [1968] 2 MLJ 238
158 Per Richard Malanjum at para 10(vii)
159 [2009] 5 MLJ 301
160 Per Gopal Sri Ram at para 12
161 [2010] 2 MLJ 333
162 Per Richard Malanjum at para 44
163 *Kesavananda v The State of Kerala* [1973] SCR Supp 1, 4

applied in India and had gained currency in Malaysia and Singapore in recent years through a number of cases. After attempts of invoking it in *Loh Kooi Choon* and *Phang Chin Hock* were unfruitful, it resurfaced in *Sivarasa Rasiah* and continues to thrive in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Anor*[164] in 2017. In 2018, the case of *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals*[165] made headlines when the court based the whole judgment on this doctrine and expressly declared that the principles of the separation of powers, the rule of law and the protection of minorities are part of the basic structure of the Constitution and therefore cannot be removed. The court lauded a principle articulated by a Canadian case[166] in which interpretation was done based on historical and philosophical context. A purposive approach was also adopted in this case while certain important judicial precedents were disregarded. In the following year, the court in *Alma Nudo Atenza v. Public Prosecutor*[167] continued to apply a prismatic approach even though the Constitution does not specifically explicate the doctrine of basic structure. The doctrine signifies that any law enacted is open to scrutiny for clear cut violation of the Federal Constitution and also for violation of the doctrines or principles that constitute the constitutional foundation.[168] In *Dato' Seri Anwar Ibrahim*, while the majority declined to address the constitutional question, the dissenting judges revisited the intention of the drafters and invoked the basic structure doctrine and constitutional supremacy.[169] Similarly, in *Jabatan Pendaftaran Negara & Ors v. A Child & Ors*,[170] the dissenting judge, applying the basic structure doctrine, stated that the doctrine does not condone application of Islamic law.[171] In *Maria Chin*, the basic structure doctrine was addressed extensively by the dissenting panels while the majority was steadfast in adhering to the precedents upholding constitutional supremacy. Applying the prismatic approach and purposive reading,

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164 [2017] 3 MLJ 561
165 [2018] 1 MLJ 545
166 Supreme Court of Canada in *Reference re Senate Reform* [2014] 1 SCR 704; [2014] SCC 32 at paras 25-26
167 [2019] 4 MLJ 1 para 20-37
168 supra 150 at para 73
169 [2021] 6 MLRA see para 4,7,8 and 23
170 [2020] 2 MLJ 277 at para 87
171 ibid

the dissenting judges extended the meaning of right to life using the natural justice arguments which can find support from many Indian cases.

Judicial restraint

Judicial restraint is often related to the court's deference to the power of other branches of the government where appropriate. Judges who observe the principles of judicial restraint are often seen as conservative judges. Most judgments that illustrate the characteristics of formalist structuralist approach[172] could also be representative of cases where courts exercised judicial restraint.[173] This approach could be seen in a few instances where the court refused to address certain issues that had become academic or irrelevant or a non-issue such as *Phang Chin Hock* and *Loh Kooi Choon*. In these two cases the court refrained to discuss the basic structure doctrine as it was a non-issue. The following cases adopted the same approach such as in *Teng Chang Khim v. Badrul Hisham bin Abdullah & Anor,*[174] the court did not address the prayer as the parties did not proceed with the declaration sought. In *Bato Bagi & 6 Others v. Government of Sarawak,*[175] the majority upheld the Court of Appeal's decision to refrain from discussing the constitutional issue as it was also not raised in *Tan Sri Musa Bin Haji Aman v. Tun Datuk Seri Panglima Haji Juhar Haji Mahiruddin & Anor,*[176] where the court exercised judicial restraint when it laid down two rules in exercising jurisdiction on constitutional construction, which are firstly to not anticipate a question of constitutional law in advance and secondly to not formulate a rule of constitutional law broader than it required.[177] Similarly in *Jabatan Pendaftaran Negara & Ors v. A Child & Ors*,[178] the majority refused to deal with issues pertaining to jurisdiction as it was a non-issue.

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172 see explanation under "Structuralism", 9
173 See *Johnson Tan Hang Seng*, *Koperal Zainal* under "Structuralism" 10
174 [2017] 5 MLJ 567
175 [2011] MLJU 699
176 [2020] 12 MLJ 121
177 Per Zawawi, para 54
178 [2020] 2 MLJ 277

CONCLUSION

Normatively the Malaysian judiciary upholds constitutional supremacy[179] and is deferential to the doctrine of separation of powers but varies in its interpretive approach. In each reasoning, it is observed that some approaches were applied to support another approach or to justify a certain aim of a certain constitutional theory. To illustrate, judicial activism is often ascribed to judges who are more likely to apply a living constitutionalist approach aided by a broad interpretation, a harmonious reading or a pragmatic approach, to support a certain doctrinal approach. On the other hand, conservative judges often prefer self-restraint and subscribe to the originalist approach by applying literal approach or historical arguments in the quest for original meaning of a constitutional provision.[180]

However, the various canons of interpretation such as literal reading, broad interpretation, generous interpretation, purposive interpretation and harmonious construction or other source-based approach such as historical and traditional approaches, arguments based on national identity, moral reasoning, doctrines and philosophies, may overlap as common currency among originalists and non-originalists.[181] It means that, while these different approaches can be grouped together based on their characteristics or their compatibility with each other, it may not necessarily be the case in all instances. For example, the court in cases involving judicial review of emergency powers adopted the pragmatic approach to steer the court away from

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179 In 1976, the court in *Ah Thian* v. Government of Malaysia [1976] 1 LNS 3 upheld the doctrine of constitutional supremacy and declared that parliamentary sovereignty is not applicable in Malaysia. In *Yang di-Pertua Dewan Rakyat & Ors v.Gobind Singh Deo* [2016] 6 MLJ 812case, the court reiterated that in Malaysia, the Constitution is supreme and not Parliament and emphasized that it would be erroneous for our courts to adopt the position in England without recognizing the essential distinction in the constitutional systems of the United Kingdom and Malaysia.

180 Baker,108.

181 Interestingly there are instances where two different views from the same bench which utilized the same approach but produced contrasting interpretation. This can be seen in *Maria Chin*, where both the majority and the dissenting judges consulted the legislative history to aid their interpretations of Article 121(1).

any possible conflict with the executive branch of the government, by preferring a literal approach in interpreting the constitutional provisions.[182] There are also judgments where the court, while having demonstrated its creativity, applied the conservative approach.[183] Based on these observations, there appears to be the growth of a pluralistic approach in Malaysian constitutional jurisprudence. This can be viewed either as the emergence of a Malaysian version of a hybrid theory or simply a paradox.

From the above observations, it is clear that uniformity of approaches does not guarantee coherence in legal reasoning. Coherence means a state of affairs free from inconsistency, which is logically structured and does not suffer from internal contradiction.[184] There has to be a consensus on at least the fundamental constitutional principles to establish a common ground or a reliable benchmark.[185] When there is a common ground, there will be uniformity at least at a foundational level.[186] For this reason, coherence is described as a special virtue of interpretation in legal reasoning.[187] It was suggested that coherence can be achieved through semantic inquiry.[188] If the various interpretive approaches are anchored on common ground, it will be more likely that their applications will produce a harmonious result.

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182 supra 27, Lee and Trindade, 204.

183 see *Rovin Joty Kodeeswaran,* per NalliniPathmanathan.

184 Julie Dickson,"Interpretation and Coherence in Legal Reasoning,"*Stanford Encyclopedia of Philosophy* (2008):The Role of Coherence in Legal Reasoning. https://plato.stanford.edu/archives/fall2008/entries/legal-reas-interpret/#3, accessed on 25 October 2022

185 ibid

186 John McGarry, "The Possibility and Value of Coherence,"*Liverpool Law Review* Vol 34,(2013): 18.

187 supra 169, Dickson

188 Alasdair Macintyre, *Whose Justice? Which Rationality?* (Indiana: University of Notre Dame Press, 1988), 371. Further discussions on semantic canons can be found in many writings on originalism and purposivism, see Antonin Scalia, *Reading Law* and Aharon Barak, *Purposive Interpretation.*