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THE POSSIBILITY OF ORIGINALISM IN MALAYSIA

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ABSTRACT

This paper highlights the feasibility of originalism as a constitutional interpretive approach in Malaysia. A doctrinal method through case analysis along with comparative method is applied in this paper. Originalism finds its strength in stability of language through fidelity of the text. This is pertinent in increasing the possibility of coherence and mitigating arbitrariness amidst the contemporary challenges arising from rapid change of values. Through illustration of cases, this paper suggests that originalism may have been applied in the past. This paper also proposes some supporting measures to optimize the effectiveness of originalism in interpreting the Federal Constitution by the Malaysian Judiciary. The author concludes that originalism has a place in Malaysia and in fact, serves a very important role to preserve the country's traditional values and traditional elements through fidelity to the text.

Keywords: Originalism; Textualism; Traditional Elements

INTRODUCTION

Originalism may be a relatively new term in Malaysia. It is one of the main constitutional interpretive approaches that often becomes the subject of debate against the "living constitution approach" in the United States of America ('USA'). Originalism emphasizes on fidelity to the language of the Constitution, which is the hallmark of a written constitution. For this reason, it becomes relevant in the Malaysian context given the common feature between the USA and Malaysia in having a written constitution. Originalism, if correctly understood, is aspiring because it illustrates how the originalist judges have been steadfast in preserving the meaning of words amidst the emergence of various other evolutionary approaches that seek to promote greater personal liberties without clear guiding principles (Scalia, 2018). This paper seeks to clarify some misconceptions about originalism while highlighting the advantages of adopting originalism as a constitutional interpretive approach and its feasibility in Malaysia. Though there are some scholarly works done on originalism from the Asian perspective, they are very scarce in the context of Malaysia (Thio, 2010; Tew, 2013). At the end of the discussion, this paper suggests some supportive measures and reforms to enhance its applicability and effectiveness in our local context.

AN OVERVIEW OF ORIGINALISM

The hallmark of originalism is the fidelity to the constitutional text by ascertaining the

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original meaning of the text. Though there may be no consensus reached among the constitutional scholars about originalism (Maggs & Smith, 2015), scholars unite on what originalism seeks to prevent. It is aimed at keeping the judges from freelancing and imposing their own subjective policy preferences under the pretext of interpreting the Constitution. It is also believed to be the best method to serve those aims (Baker, 2004). As opposed to judges who practice judicial activism or other non-originalist approaches, originalist judges are restrained from rendering decisions based on political inclinations (Tsesis, 2013). As Robert Bork, a prominent originalist observed, judicial restraint requires judges to "stick close to the text and history, and their fair implications" (Bork, 1971; Tsesis, 2013). It is often regarded as conservative (Baker, 2004) and is claimed to be the only legitimate basis for constitutional decision making (Bork, 1986; Tsesis, 2013). Raoul Berger observed that "originalism justifies itself by the falseness of the beliefs that oppose it.". He also observed that, while non-originalists keep changing theories due to little consensus among activists about a proper theory of interpretation, originalists have been quite consistent with their theory (Berger, 1990). Bork even highlighted that, if there are constitutional interpretive approaches other than originalism, chances are that they will end in "constitutional nihilism" or at least imposing the judge's personal values on everybody (Bork, 1985). Whittington claimed that even though some other methods may produce a preferred outcome, they are only "serving as political ideologies" and not as methods of legal interpretation (Whittington, 1999).

Originalists, however, have different opinions about references in ascertaining the meaning of text. Some scholars consider historical materials to ascertain the original intent to understand how the Framers would subjectively interpret the meaning of the Constitution while some would employ an objective approach to trace the original understanding, that is the meaning a reasonable person would have understood at the time it was ratified. The discovery of constitutional meaning is done through a process of historical inquiry of sources contemporary to the constitutional text (Clark, 2000) such as lexicons and treatises contemporary to the time of the founding and records of Constitutional Conventions (Scalia, 1989).

Most classic originalists insisted that intention of the text should be understood objectively based only on what the words suggest. They describe this version of originalism as textualist originalism which they believe to be the correct understanding of originalism on the logic that a law, in order to function as law, has to have a fixed or settled meaning until it is formally amended or discarded. It makes sense to gather such meaning based on what was understood by the public at the time of the founding that has not changed over time because the meaning will be "objectively identifiable" as opposed to a subjective view in the mind of the Framers (Scalia, 2018). Objectively identifiable meanings render the text to have a meaning independent and separate from the interpreter's personal preferences and predilections.

Some strong advocates of textualist originalism made a brilliant initiative to compile and collect some rules and valid canons from the classic examples scattered over decades by prominent classic jurists and judges who could not be more methodical in their legal interpretation (Scalia & Graner, 2012). These rules and canons were compiled in order to assist in understanding the text. To name a few they are semantic canons, syntactic canons and contextual canons. Semantic canons focus on the meaning of words while syntactic canons focus on usage of words (Scalia, 2018). The most commonly used semantic

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canons are, among others, ordinary meaning canon by which words must be given their ordinary meanings, fixed meaning canon whereby words must be given the meaning they had when the text was adopted, and general terms canon, whereby general terms are to be given their general meaning (Scalia & Graner, 2012). Some other semantic canons are negative implication canon, mandatory canon, gender or number canon, unintelligibility canon and presumption of non-exclusive as inclusive canon. Whereas syntactic canons look at grammar, last antecedent, provisos and punctuations. Contextual canons include whole text canon, consistent usage, harmonious reading, *generalia specialibus non derogant* (general specific canon), irreconcilability to the effect of giving no effect, *noscitur a sociis* (associated words canon), *ejusdem generis* (only the same general kind or class), titles or heading canon, interpretive direction canon, and absurdity doctrine. Justice Antonin Scalia, another prominent originalist, comprehensively proposed some guide to ensure the right application of originalism by highlighting some misconceptions regarding originalism and responded to them. His responses are laid down in the following section.

Some other non-originalist approach may seem appealing because of their open-endedness and capacity for redefinition over time (Sunstein, 1993). As such, the temptation of judicial activism becomes inevitable. To give an example, in Obergefell v. Hodges (2015), the protection of the Due Process Clause was invoked based on the claim that the petitioners were deprived of liberty to enter into a same sex marriage. Allowing the claim, the majority, among others, recognized that the understanding of marriage have changed and this change becomes a characteristic of a nation where new dimensions of freedom become apparent to new generations brought before the court. Largely, when judicial activism is allowed without any guiding principle, an interpretation that comes out of it becomes vulnerable to a relativistic interpretation that opens doors to arbitrariness. With the rise of competitive unguided principles of interpretive methods and uncontrolled judicial activism, finality of judgement will also be difficult to achieve. By applying originalism, there will be a better chance to mitigate the danger that may be posed by judicial activism which claims, as observed by a modern scholar, to be keeping pace with ideas that have gained acceptance in the society (Faruqi, 2018). The originalist approach by the dissenting judge in Obergefell highlights how detrimental to the democratic process it is to have the definition of marriage enshrined or redefined by some unelected judges.

While constitutional interpretation becomes more challenging due to the rapid development of law and the society's ever changing expectation, originalism offers many advantages. Its emphasis on textualism will provide greater certainty in the law, hence greater predictability in judgements and greater respect for the rule of law (Scalia & Graner, 2012). Reliance on objective meaning or reasonable meaning through a fair reading approach has been one of the hallmark of originalism. It seeks to limit judicial discretion (Scalia, 1989) . Though "the fair reading" approach does not promise to produce an absolute coherence, it will narrow the range of acceptable judicial decision making and acceptable argumentation. It can also help to curb and possibly even reverse the tendency of judges to imbue authoritative texts with their own policy preferences. At the same time, it discourages "legislative free-riding", whereby legal drafters idly assume that judges will save them from their blunders. Many academic writers also acknowledged that this method is the most prominent and currently the most influential branch of originalism that draws inspiration from the presumed original public meaning (Tsesis, 2013; Barnett,

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2013). The bottom line is, many of these interpretive goals can be achieved, even by diluted strain of textualism (Scalia & Graner, 2012). By limiting the power of judiciary to exercise its activism and by confining reference to just text, lexicons and treatises as the primary source it shows that textualist originalism are true to the principles of separation of power while maintaining constitutional supremacy.

MISCONCEPTIONS, CRITIQUES AND RESPONSES

Before it can be convinced that textualist originalism is the best approach to preserve the meaning of the Constitution in a way that best mitigates arbitrariness, it is important to first be clear about the version of originalism that is meant to be highlighted in this article and to caution against some false notions that are often associated with it. Today, due to countless variations of originalism that the differences among them become so stark, it is difficult to treat them as one coherent interpretive methodology (Colby & Smith, 2009). This becomes a window for opponents to criticize originalism which calls for objective meanings. It was argued that these variations have almost nothing in common with each other and have departed significantly in principle from the original originalism. The adoption of the same label of originalism despite the glaring differences has been alleged to have caused confusion. However, it is quite convincing that most of the above criticism flow from a flawed understanding of originalism in the real sense.

Some scholars view that originalism refers original intent derived from the intention of the Framers (Baker, 2004). As argued by Bork, to determine what those people wanted to convey through the text, the original intent of the people who drafted, proposed, adopted or ratified the Constitution should be consulted (Bork, 1984). This is possibly one of the reasons why originalism is often associated or interchanged with intentionalism. As a result, the meaning of constitutional text is sought based on what the legislators or Framers personally had in mind and their reasonings (Baker, 2004). On this basis, critiques often regard this approach as "dead hand of the past" and delegitimizing this approach as being profoundly antidemocratic (Baker, 2004). Critiques also insist that there is difficulty in establishing original meaning as the original meaning may not always be agreed upon, and possibly not even among people living at the time of ratification of the Constitution (Ely, 1980). They also argued that original meaning is of little use when the constitutional provisions is broadly worded and open to several meanings or when the constitution is silent on an issue. Arguably, some provisions such as constitutional rights that exists independent of the texts may require meaning outside of the text and historical sources from the time of the founding (Ely, 1980).

According to Scalia, this is a popular misconception that is built on the basis of a false notion that the purpose of interpretation is to discover intent (Scalia & Graner, 2012) and that original meaning refers to the intention of legislature. It was observed that it has been the habit of common law courts to refer to legislative intent as a method of interpretation. The reason was, back to the middle-ages when it was first introduced, judges and lawmakers were synonymous. By mid-1300's, the judges had been separated from the legislature. To the judges, legislation became a separate product of which they know nothing except for the words itself. From the wording alone, they infer its intention (Scalia & Graner, 2012) To search for intention is indeed problematic because there are multiple authors who may not have the same objects in mind. However, it was clarified that original meaning is to be derived from the meaning of the text itself and not the legislature's intent. It is the

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objective meaning that is sought for from the text and not the subjective view from the legislature. This is well supported by Lord Reid's statement that it is actually the meaning of the words used by Parliament and the true meaning of what they said that is sought rather than what they meant (Scalia & Graner, 2012). It was also reported that Judge Robert Keeton mentioned that it is for the objectively manifested meaning rather than somebody's unexpressed state of mind. Therefore, Scalia proposes that the objective meaning be made the sole criterion of interpretation. It follows that, in expressing rights and duties, it is highly recommended for drafters to use objective words (Scalia & Graner, 2012).

The other misconception is that intention of the legislature from the Parliamentary speeches and legislative debates are worthwhile aids in interpreting the constitution. This false notion on the authoritativeness of intention of the legislature leads to recognizing the legislative history as authoritative in constitutional interpretation. Possibly relying on this false notion, opponents question the adequacy of the historical materials and historical techniques in interpreting the Constitution. The unanimity of the Framers on an issue and who qualifies as Framers are also contentious (Baker, 2004). It follows that it is not possible to ascribe a collective conscience to a number of drafters who are not intellectually unified (Kaminski & Leffer, 1989; Tsesis, 2013). It is also said to have facilitated the Framers' change of views or political stands (Tsesis, 2013) to affect the nation's direction. The intentionalism aspect of originalism is also often associated with racism, chauvinism and social exclusion (Tsesis, 2013) as it was believed that the Constitution was ratified by the group of people who were not fairly representing all the groups of people in America. It was also argued that the Constitution should attribute sovereignty to the people rather than the Framers.

The response to this is that originalism mainly consults textualism. While it is acknowledged textualism and original intention may often times be categorized under the banner of originalism because appeals to intention often run together with appeals to meanings, the truth is that the original public meaning approach does not rely solely on the text. We may also find that sometimes discussions on originalism are exclusive of textualism and is focused mainly on the original intention. while it is acceptable that meaning is derived from intention, it is the intention of the law that is worthwhile and not the intention of the legislature. Legislative history is not authoritative in constitutional and statutory interpretation. It is the text itself that manifests the intention of the law, as Oliver Wendell Holmes wrote, "We do not inquire what the legislature meant, we ask only what the statute means." (Holmes, 1920). Alexander Hamilton was quoted to have said, "whatever may be the intention of the Framers, that intention should be sought for in the instrument itself." This can further be supported by Chief Justice John Marshall's stand on reference to the text that words must be understood in the sense "they are generally used by those for whom the instrument was intended" and neither to be restricted nor extended to what has been contemplated by its Framers. It was also quoted, in support of this argument that, John Madison clearly stated, "the debates and incidental decisions of the Convention can have no authoritative character." Therefore, he further argued that legislative history should supplement the traditional principles of interpretation rather than replacing them (Scalia & Graner, 2012). He also contended that legislative history, with its ambiguous nature greatly will increase the scope of manipulated interpretation. There is also concern that even specific statements of meanings may have been planted in the legislative history. This is

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done knowingly intending the inclusion of such statements to be written into the law by the court (Henry & Moore, 1960). Therefore, it is no less unfetteredly discretionary than a judicially overreaching activist judge's unexpressed or inadequately expressed legislative goals, however unfortunate they are, are inarguably the legislative intention as represented by the law. As John Locke indicated, legislative powers consist in the power to make laws instead of the power to make legislators. He also stressed that legislators enact laws and not their own views. The use of legislative history will therefore cause imbalance of the separation-of-powers.

Another false notion that contributes to another misconception is that originalism requires words to be strictly construed. It can be found in some scholarly works that originalism is being associated with strict textualism. Critiques also insist that it is quite impossible to discover with certainty the intention and ideas of the meanings of words of the people of a certain time, not to mention the language used almost two and a half centuries ago. A response to this is that this is not true as even the originalists do not accept strict literal meanings. This can be supported by the statement made by Frankfurter J that "literalness may strangle meaning". Therefore, according to Scalia, it is pejorative to associate a strict constructionist with originalism. Justice Joseph Story was also quoted to have said that it is reasonableness that is needed and not strictness. Originalism prescribes for words to be given reasonable meanings in view of inviting the people to revive mastery with language and grammar. The aim is to enable all human race to be united through language again. It is to be emphasized here that it is a fair and reasonable meaning that are intended rather than the "hyper-literal meaning" of each word. Scalia explained that the full body of a text contains implications that can alter the literal meaning of individual words. This reasoning supports the syntactic canons he incorporated into his understanding of originalism. Nevertheless, intriguingly, on complaints regarding uncertainty of language and its reference, he provided a guide for dictionary use. A comparative weighing of dictionaries is often necessary. The more advanced semantic analysis should always be more preferable (Scalia & Graner, 2012). In support of this, Lord Macmillan was quoted to have said that one of the chief functions of the courts is to act as "an animated and authoritative dictionary" (Macmillan, 1937).

Another misconception upon which have been relied upon by critiques is that lawyers and judges are not historians and therefore unqualified to perform historical inquiry that is required by originalism (Veeder, 1897; Radin, 1948; Pound, 1959; Murphy, 1978). It was clarified that reliance on history from the originalist point of view is actually historical semantics. Lawyers and judges are indeed expected to be historians. Max Radin said, if the task is not taken seriously, the lawyers will not cease to be historians but rather, will be bad historians (Veeder, 1897; Radin, 1948; Pound, 1959; Murphy, 1978). It is also observed that no history faculty would consider itself complete without legal experts and no law faculty would consider itself complete without its share of expert historians. This possibly illustrates the interdependent-ness and a legitimate expectation of the legal mind to possess some historian skill.

From the above explanation, it is clear now that the features of originalism that is worthwhile to be nominated as best practice is the textualist originalism which is restrained by text and that which has nothing to do with intentionalism or strict textualism or literalism. It seeks for an objective meaning of words which is the meaning of words as they were understood

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at the time of founding. Such meanings are compiled in lexicons and treatises through fair reading, backed by historical semantic, to arrive at a reasonable meaning. Semantic meaning can be found in scholarly lexicons and treatises. It does not include parliamentary debates or legislative history as they can be tainted with the subjective views of the legislature or policy makers. Textualist originalists also generally show deference to the other branches of government and true to the principle of separation of powers. While they appear to be rigid in interpreting the Constitution, they are flexible in allowing amendments to keep pace with the current needs.

THE POSSIBILITY OF ORIGINALISM IN MALAYSIA

Based on the above observation, the possibility of employing textualist originalism as a constitutional interpretive approach in Malaysia can be supported by various factors. Firstly, the traditional elements that became a strong defining feature that defines and shapes the Malaysian legal philosophy are not incompatible with the requirements of this approach. Secondly, since Malaysia practices a system which is true to the principle of limited government by which sovereignty of Rulers and power of the government are understood within the constitutional limits, this approach fits in naturally to reinforce such practice more methodically and systematically. Parliamentary Democracy and some other common law principles are also observed within the constitutional limits as Malaysia practices constitutional supremacy. These features are not foreign in textualist originalism. Thirdly, our long-established practices of traditional approach have recognized the text and separation of power in upholding constitutional supremacy. This section can also be understood to be presenting the similarities between the Malaysian traditional approaches and textualist originalism that establish a prima facie case to enhance the application of textualist originalism as a preferred constitutional interpretive approach in Malaysia. These factors or similarities, will be further discussed and illustrated as follows:

TRADITIONAL ELEMENTS

Tradition carries weight in originalism. For example, in case involving bigamy and abortion, an originalist judge made it clear that those rights are not liberty which are protected by the Constitution given that it has been a longstanding tradition of American society that permitted it to be legally prohibited (Roe v Wade (1973); Scalia, 2020). Liberty was defined based on what has been understood by the people at the time of ratification, which is also what was traditionally understood. Such meaning will be the same until it is amended. Though one might argue that with social change, the meaning will have to accommodate the change, such change cannot be accepted until recognized by an authoritative agent of change, which are the policy makers and the legislature. Courts are not agent of change while the judges are not elected members to represent the democratic rights of the people (Scalia, 2018).

In the Malaysian context, the traditional elements are the defining feature and identity which are pivotal in shaping the Malaysian legal philosophy. They are also clearly expressed in the Federal Constitution. Therefore, it is very important to choose a method that is most accommodative and protective of the traditional elements. The traditional elements, as we know, have been a strong anchor to defend our country's unique identity. They are the special status of Islam and the Malay language, the privileged status of the Malay Rulers and the special rights of the Malays and bumiputera. Its importance was highlighted by Salleh Abas LP in the case of Dato' Menteri Othman

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Baginda v Dato' Ombi Syed Alwi bin Syed Idrus (1981), where he mentioned that, "It is the embodiment of traditional elements and values which are kept alive by the Constitution.". These traditional elements are so deeply rooted in the original tradition of the Malay states. Accordingly, the language will inevitably reflect and embody the tradition. In Islam, a tradition has to be established in order to be recognized as '*urf* (custom) (Zarqa, 1967). Interestingly, because originalism recognizes original meanings, it can be argued that, in the context of Malaysia, understanding terms and concepts following the Islamic sources is considered as an understanding original meanings, given that the Malay *adat* has a strong root in the Islamic tradition.

For example, the original meaning as explained in the earlier section, should be based on the meaning employed when the Constitution was ratified which was understood fairly and reasonably. This means, the best references such as lexicons and treatises must be those which are scholarly and are representing the age in which the Constitution was ratified in order to find the right meaning. It is also important to note that in the Malaysian context, the English version of the Federal Constitution should remain as the authoritative version being the language it was first drafted and ratified. The meaning derived from the English lexicons should then be understood in harmony with the '*urf* (custom) or *adat* (convention) in Malaya at that time. Throughout the Malaysian legal history, '*urf* and *adat* has been recognized as authoritative in a judicial process (Yaacob, 1984). This is none other than taking into consideration the early practices, which also has a very strong backing in Islamic law which forms one of the traditional elements (Yaacob, 1984).

It is clear from the above explanation that language in the Malayan history was intertwined and inseparable. If a certain word or concept carries with them a certain value, such value has to be understood in accordance with the tradition from which it originated. For example, etymologically, the term "rights" or "*hak"* in the Malay language, has its origin in the Arabic language (Izutsu, 2002). Applying textualist originalism through historical semantic inquiry, *hak* signifies reality and truth and is related to the "proper place" (Al-Attas, 2014). It has an objective validity because it is based on the Truth which is derived from the Revelation. It is not corresponding to the Truth if it is used for something that is *batil* (false), such as right to commit sin. The local people at that the time of our founding do not understand *hak* as something that has an element of disobedience or sinful. Therefore, the meaning of *hak* cannot be restricted or extended to more than what it means, such as right to commit a crime. Unexpressed words or provisions cannot be interpreted to have existed unless the meaning is inherent in the expressed words. Such has been the case for other cases involving traditional elements as well. In the Malaysian context, historical documents and traditions from customary practices are often consulted in supporting the meaning and usage of words in the Constitution. This can be seen in Dato' Menteri Othman Baginda (1981), in which the court studied the customary practice in relation to the usage of the word *"Undang*" in the State Constitution before deciding whether it can fall under the definition of "Ruler" under Article 160 (2) of the Federal Constitution. Raja Azlan Shah, in emphasizing the reference to the tradition was in view of supporting the use of language, quoted Lord Wilberforce in Fisher who said, "Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.". Accordingly, he ruled that the Dewan is the rightful forum to resolve the dispute since it is the embodiment of traditional elements and values which are preserved by the Constitution. In Merdeka University v. Government of Malaysia (1982) a historical

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inquiry into the usage of the words "national language" was thoroughly done to prove the extent of their meaning. In Meor Atiqurrahman bin Ishak & Ors v Fatimah Sihi & Ors (2000), the learned High Court judge held that the provisions in the Federal Constitution have to be read together with traditional elements whose role and value was to manifest stability and harmony in the country. It can be said that this case echoes the history and character of the Federation and rightly established the relationship between the traditional elements and other provisions (Bari, 2000). However, the court has to also show, more methodically in its reasonings, how it deals with the restriction based on the wording of Article 11(5) of the Federal Constitution.

TEXTUALISM AS TRADITIONAL APPROACH

Another ground that makes a smooth landing for textualist originalism in Malaysia is the Malaysian luminary judges' great reliance on text and strong belief in constitutional supremacy through fidelity to the text of the Constitution. This means that all other principles such their great deference on other branches in the spirit of separation of power and their consideration of freedom and equality will be limited by the constitutional text. It has been observed that most reference on general principles for constitutional interpretation mentioned the importance of text. In Malaysia, though the Indian textbooks are more popular, they still share some common principles. For example, some of the principles mentioned in Bindra's guide to constitutional interpretation are similar to that which are recommended by the textualist originalists with the same goal of seeking to ensure coherence and stability.

Generally, in interpreting the Constitution, the Malaysian courts have shown great reliance on language and emphasized the importance of following the rules of construction. Raja Azlan Shah in Loh Kooi Choon v. Public Prosecutor (1980) emphasized on the use of settled rules of construction. In explaining the role of court, His Lordship quoted Lord MacNaghten in Vacher & Sons Ltd v London Society of Compositors (1913), that, "The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction…". In Dato' Menteri Othman Baginda (1981), Raja Azlan Shah quoted Lord Wilberforce who said "with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." (Minister of Home Affairs v Fisher (1979). In Danaharta Urus Sdn. Bhd. v. Kekatong Sdn. Bhd. (2004), 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. In Public Prosecutor v. Kok Wah Kuan (2008), the court defined the doctrine of separation of power as written by the Constitution. The Federal Constitution spells out the functions of the three democratic branches namely the executive, the legislature and the judiciary. The effect of this is that a provision cannot be struck down on the ground that it contravenes the doctrine or that it is not inconsistent with the Constitution. The doctrine is not definite nor absolute. It is limited by the Constitution. Therefore, while it is correct that judicial power still vests in the court, it has to be understood to exist to the extent imposed by law.

When the court is bound by the text of the Constitution, it is also often judicially restrained. In CTEB & Anor v. Ketua Pengarah Pendaftaran Negara Malaysia & Ors (2021), the court observed that it was clearly stated in the amendment of Article 121(1) of the Federal Constitution that

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power must be conferred by federal law. This means that the court's power of judicial review is statutory and therefore the courts can be restrained by federal law. The court could not entertain the challenge to the validity of the amendment. The constitutionality of the amendment, if ever challenged, is a different matter and should be left for the legislative body to discuss. As far as the present amendment is concerned, it has been approved with clear wordings in Koperal Zainal bin Mohd. Ali v. Selvi a/p Narayan & Anor (2021), that power must be conferred by federal law. It was also made clear in this case that given the clear constitutional provision, the alleged incongruity of the law must be cured by parliament and not the court. Otherwise, it would amount to "unwarranted transgression" into the legislative domain. These cases can also be illustrations of presumption of constitutionality as a result of deference to the legislature and separation of powers but to the extent expressed by the text.

Being judicially restrained due to fidelity to the text and deference to the principle of presumption of constitutionality are the marked features of textualist originalism. These features have been established practices by the Malaysian courts. Originalist textualism allows for a good balance between the judges' role and the Parliament as the best arbiter for public interest. While originalists advocate heavily on fidelity to text, they acknowledge the possibility of change in meanings provided it is done through a democratic process of amendment rather than arbitrary change of meaning. Throughout our constitutional history, it is trite, from the landmark cases, that Parliament is the best arbiter for public interest, not judges. Power to legislate conferred to Parliament was given due respect. It is only logical that the same Parliament is tasked to amend their own laws so it can upgrade their efficiency to make laws which are clear and coherent. In Mahisha Sulaiha Abdul Majeed v. Ketua Pengarah Pendaftaran & Ors. and Another Appeal (2022), the majority decision of the Court of Appeal held that the court cannot, in the name of progressive interpretation, empower itself to remedy the grievances by construing "father", which appears in Part II of the Second Schedule of the Federal Constitution, as "mother".

LEGITIMATE EXPECTATIONS

It is important to mention at the outset that, though originalism might not be a problem-free approach and not perfect, it is believed to be the best alternative to prevent arbitrariness. While acknowledging that every theory is open to abuse, it is believed that this approach is still the least vulnerable because meanings of words are limited by the scope of their usage based on objective meanings derived from reliable and authoritative scholarly lexicons and treatises contemporary in the age in which the law was drafted or ratified. This approach also promotes a more balanced understanding of the doctrine of separation of power that gives due regard to the functions of other democratic branches of government which are the executive and the legislative.

In some cases, where a text-bound interpretation may appear to have caused some injustice, it can be mitigated by some other administrative measures to counter a flawed provision. The court being the bulwark of justice has to be understood to mean that the court only does what is within their power to deal with a flawed provision. Judges cannot be doing everybody's part as the Court is not the sole body to remedy injustice caused by either failure of legislature to make laws or the executive having to enforce an unjust law. As Raja Azlan Shah said, the cure is with the "ballot box" (Shah, 2004).

Justice for a person may not necessarily be fought for through constitutional arguments. Justice can be sought from other

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remedies through other laws or other than legal means pending a formal amendment. There are instances where the court is not in the position to make good a bad law or fill up a lacuna in the law. In Koperal Zainal (2021), where the estate of the deceased claimed for exemplary damages, the judge was of the view that, without demeaning the constitutional rights or without condoning the acts of the deceased's custodian for the wrongful action, the court's hands are tied and it cannot give a violent interpretation to the clear words of the act. The court however suggested that punishment be meted out through other means, perhaps through claim for aggravated damages.

SUPPORTIVE MEASURES

To optimize the workability of this approach, there has to be some supportive measures as follows:

EXPERT OPINIONS

For optimum result of semantic historical inquiry, it is highly recommended that expert opinions are consulted to assist the court on the historical semantics of usage of words especially for technical terms which are vague or abstract terms so that a historical inquiry can be done properly to supplement the court in their textual analysis. The current practice is that expert opinions are employed for specialized areas such as Syariah matters and banking. It is very rare that an expert is summoned for a semantic historical view. In Meor Atiqurrahman bin Ishak & Ors. v. Fatimah Sihi & Ors (2000), the Federal Court ought to have summoned an expert on a semantic historical view concerning the phrase "practice of Islam" to arrive at a more accurate historical analysis but instead, the learned judge attempted to perform such historical inquiry on his own. In Rosliza Ibrahim v. Kerajaan Negeri Selangor and Anor (2021) in which conflict of jurisdiction between the Syariah and civil court was raised, the learned judge proposed that the civil court consults expert opinion by the Fatwa Committee. The reason given was because the courts are not sufficiently equipped to decide on the matter at hand. He further stated that while they are competent to adjudicate the matter and to rule on the foundational issue, it must not be without the assistance of Islamic jurists after consideration of Islamic law. From this case, it can be inferred that some judges are open and willing to hear from the experts. It is for those who are representing the parties to identify able scholars and experts to assist the court to arrive at a better decision.

COLLECTIVE ROLES

There has to be a collective role to ensure a standard application and coherent understanding of language. The court is not the sole body to ensure coherence in interpreting the law. Coherence of understanding of the meaning of words between agencies and individuals is vital. For example, drafting policies need to always be up-to-date and consistent with the language institutions especially in terms of usage of terminologies and clarity in expressing them. The original meaning of words and key principles should be restored through lexicons and treatises to ascertain right usage of words at every level of society. There has to also be a measure taken to ensure correct usage of words and to monitor and regulate evolution of meanings which is demanded by social changes. For example, the meaning of justice and equality has to be properly understood. It should not be changed until changed by a legitimate process and formally incorporated and updated into the lexicons. The Dewan Bahasa dan Pustaka (DBP), for example, a government body responsible for coordinating the usage of Malay language and its literature in Malaysia, is an authoritative source of reference for all official matters including the court.It plays a very important role in

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preserving and reviving the original meanings of words especially value-laden terms.

Translation of the English language into the Malay language and vice versa is also very important. It has to be done following the local context to ensure there is no mix up of worldviews that can result in confusion and error in understanding the original meaning of words. A mistranslation will result in injustice.

CONCLUSION

In summary, it is now clear that originalism is the most workable method in Malaysia though a more detailed illustration on the application of originalism in Malaysia can be devoted in further research. As argued in this Article, textualist originalism is the best version of originalism that can mitigate arbitrariness in constitutional interpretation.

Though originalism is almost unheard of in Malaysia, there is a possibility that its methods can be workable within our legal system based on all the arguments presented. There is also a possibility that it has been practised, though not fully fledged, but not labelled as originalism. It is hoped that we can develop a better practice of originalism with the emphasis on the language aspect of the Constitution, through a historical semantic inquiry to achieve a more coherent interpretation as argued before. It is important that this is done in order to guard against arbitrariness and preserve constitutional supremacy through it especially amidst the challenging times due to the rapid development of law and the society's ever changing expectation.

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CONFLICT OF INTEREST

No Conflict Of Interest.

AUTHORS' CONTRIBUTION

The second author presented the idea and wrote the article and the first author provided critical feedback and approved the article.

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