

THE JUDICIAL PHILOSOPHY OF THE MALAYSIAN
COURTS IN CONSTITUTIONAL INTERPRETATION:
TOWARDS A COHERENT APPROACH

BY

FARIZA MILAQURSHIAH MAHMUD

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Ahmad Ibrahim Kulliyyah of Laws
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ABSTRACT

Discussion on the foundations of constitutionalism and the values underlying the constitutional provisions has been nuanced with great diversity across multitudes of jurisdictions. Accordingly, works on the defining aspects of constitutional interpretation have become sparse. As such, identifying a coherent jurisprudence for constitutionalism remains elusive in legal philosophy, let alone for constitutional interpretation. The Malaysian judicial philosophy is not spared from this phenomenon. In fact, the Malaysian court judgements demonstrate towards the rising trend of incoherence. In view of this reality and challenge, in search of best practices, it becomes even more daunting to objectively compare principles of constitutional interpretation in Malaysia from across the globe. This thesis seeks to fill the void on this subject, particularly in the context of the Malaysian constitutional interpretation, by examining the defining aspects in interpreting a constitution from which general principles that best promote coherence can be developed. Based on this foundation, this thesis evaluates coherence in the judicial philosophy of the Malaysian courts in interpreting the constitutional provisions, particularly on the defining aspects of constitutional interpretation. This evaluation is significant in order to identify the root cause, which is most crucial in any effort to propose a sound solution. This is done based on doctrinal method through library-based research by analysing Malaysian Federal Court judgments to reflect on the trends in constitutional interpretation to identify the approaches commonly applied in Malaysia, and further unearth the constitutional jurisprudence underlying a particular approach in a judgment. Noting that approaches for different areas of constitutional issues differ from each other, the reasons for the differences will be further examined in this thesis in relation to its coherence. Ultimately, this thesis proves that coherence in judicial philosophy is primarily shaped by the defining aspects, which are the language aspect and the worldview aspect, from which key concepts or fundamental principles of interpreting constitutions are formed and upon which various interpretive methods are anchored. Thus, in the effort to strive towards coherence, this thesis proposes to revive the established principles based on such defining aspects to withstand this challenging era due to the rapid development of law and the society's ever-changing expectation.

خلاصة البحث

المناقشة حول أسس الدستورية والقيم التي تقوم عليها الأحكام الدستورية تتسم بالدقة وتنوع بشكل كبير عبر العديد من الولايات القضائية. وبناءً على ذلك، أصبحت الأعمال المتعلقة بالجوانب المحددة لتفسير الدستور نادرة. وعليه، فإن تحديد فقه دستوري متماسك لا يزال بعيد المنال في الفلسفة القانونية، ناهيك عن تفسير الدستور. والفلسفة القضائية الماليزية ليست بمنأى عن هذه الظاهرة. في الواقع، تظهر الأحكام القضائية الماليزية اتجاهًا متزايدًا نحو عدم الاتساق. وفي ضوء هذا الواقع والتحدي، بحثًا عن أفضل الممارسات، يصبح الأمر أكثر صعوبة في المقارنة الموضوعية بين مبادئ التفسير الدستوري في ماليزيا وجميع أنحاء العالم. يقترح هذا البحث سد الثغرات في هذا الموضوع خاصة في سياق التفسير الدستوري الماليزي. يسعى هذا البحث إلى دراسة الجوانب المحددة في تفسير الدستور والتي يمكن من خلالها وضع المبادئ العامة التي تعزز التماسك على أفضل وجه يمكن تطويرها. واستنادًا إلى هذا الأساس، يقيم هذا البحث الاتساق في الفلسفة القضائية للمحاكم الماليزية في تفسير الأحكام الدستورية، لا سيما فيما يتعلق بالجوانب المحددة لتفسير الدستور. فإن هذا التقييم مهم لتحديد السبب الجذري، وهو الأكثر أهمية في أي جهد يهدف إلى اقتراح حل سليم. ويتم ذلك استنادًا إلى المنهج الفقهي من خلال البحث المكتبي، وتحليل أحكام المحكمة الفيدرالية الماليزية للتفكير في اتجاهات التفسير الدستوري لتحديد المناهج المطبقة عادة في ماليزيا، وكذلك الكشف عن الفقه الدستوري الكامن وراء نهج معين في الحكم مع ملاحظة أن المنهجية المتبعة في مختلف مجالات القضايا الدستورية تختلف عن بعضها بعضًا، وسيتم دراسة أسباب الاختلافات في هذه الأطروحة وسيتم البحث عما يتعلق بتماسكها. في النهاية، أثبتت هذه الأطروحة أن الاتساق في الفلسفة القضائية يتشكل بشكل أساسي من خلال الجوانب المحددة، وهي الجانب اللغوي وجانب الرؤية العالمية، والتي تتشكل منها المفاهيم الأساسية أو المبادئ الجوهرية لتفسير الدساتير، والتي تركز عليها مختلف الأساليب التفسيرية. وبالتالي، في سعينا لتحقيق الاتساق، تقترح هذه الأطروحة إحياء المبادئ الراسخة بناءً على هذه الجوانب المحددة لمواجهة هذا العصر التحدي بسبب التطور السريع للقانون وتوقعات المجتمع المتغيرة باستمرار.

APPROVAL PAGE

The thesis of Fariza Milaqrshiah Mahmud has been approved by the following:



Farid Sufian Shuaib
Supervisor

Mohd. Iqbal Abdul Wahab
Co-Supervisor

Noor Shuhadawati Mohd Amin
Co-Supervisor

Nurhafilah Musa
Internal Examiner

Shamrahayu Ab Aziz
External Examiner

Azhar Mohd Ibrahim
Chairman

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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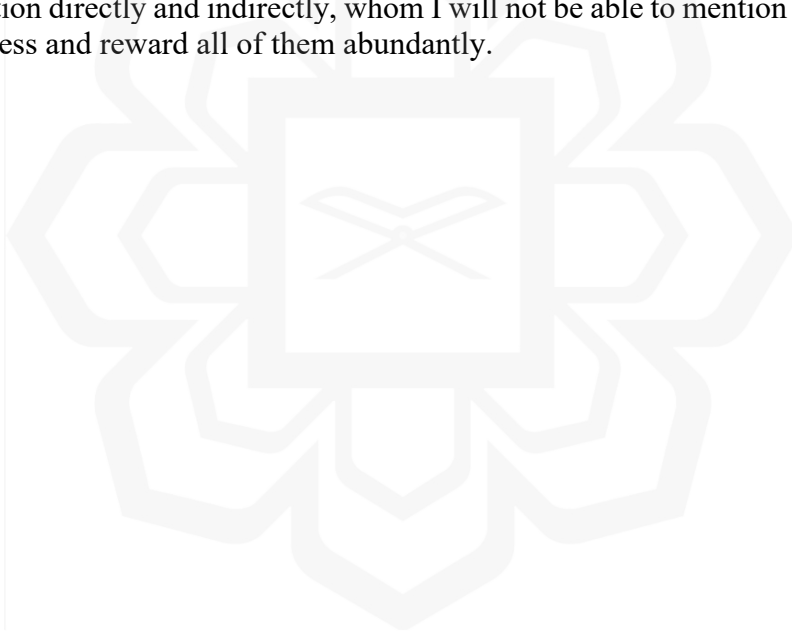
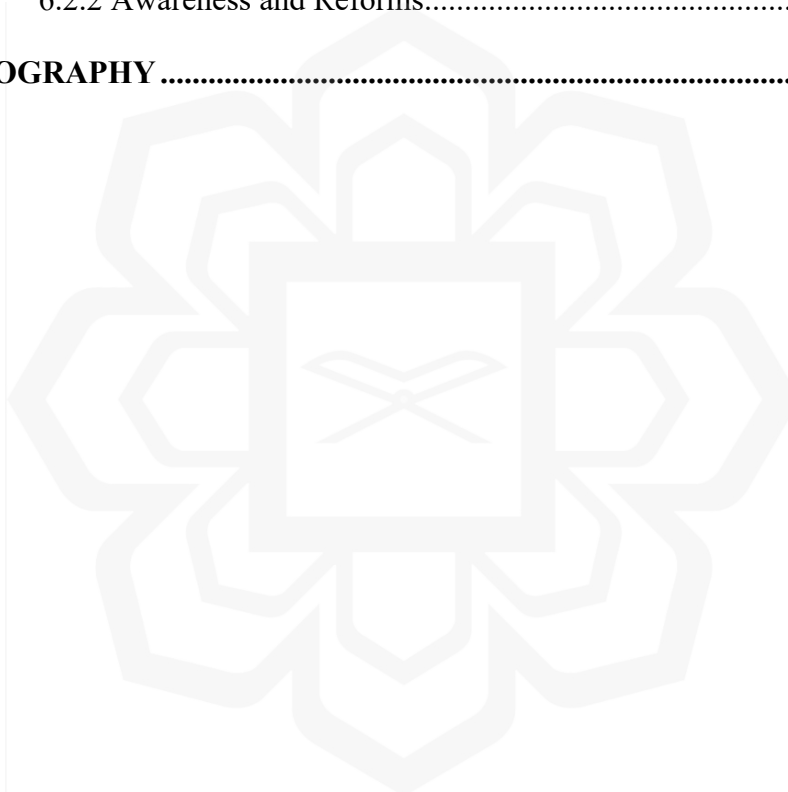


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CHAPTER ONE

INTRODUCTION

BACKGROUND OF THE STUDY

Among the earliest guide to constitutional interpretation laid down by a non-English judge in our country was the case of *Dato' Menteri Othman Baginda v. Dato' Ombi Syed Alwi*,¹ in which the then Lord President His Highness Raja Azlan Shah asserted that the provisions of the Constitution must be construed broadly and not in a pedantic way. This guide, however was not always followed by courts in subsequent cases. The courts have been taking various constitutional interpretive approaches for a variety of reasons they think fit for each case. The various approaches taken are expected to enrich the development of constitutional interpretation in Malaysia if they originate from the same philosophy. However, if the variability of constitutional interpretive approaches is a result of a mixed worldview or applied in an incoherent manner, there is an urgent need to scrutinize and monitor the trend of constitutional approaches by the courts to ensure a healthy development of constitutional interpretation in Malaysia.

The popular approaches of constitutional interpretations are textual or literal interpretation, original intent approach and living constitution approach. While the various interpretation methods are generally promoting towards dispensing justice, there has to be a certain framework and general principles that works best for a country. Such framework and general principles must take into consideration the history and tradition that defines a country's identity. They do not necessarily have to be confined

¹ [1981] 1 MLJ 29.

to a particular approach. Most importantly, it is the worldview that controls the selection of sources and methods and the interpretation of values.²

Today, people are more aware of their constitutional rights and positions with easy access to information especially through social media. As a result, court judgments are the new battlefield. With the current trend that is tilting towards judicial overreaching and introduction of some new doctrines to the effect of overruling the established rules of interpretation, the written words of the Federal Constitution are no longer the parameters.

It is only logical that the constitutional interpretation in Malaysia follows the Malaysian common law that recognizes only certain values in the English tradition which does not run contrary to our country's traditional elements and ethical standards. A glimpse of the various approaches can be seen from strings of cases such as the harmonious approach, the four walls approach³ and the basic structure doctrine ("the BSD").⁴ Major areas often involved discussion on rule of law and separation of power,⁵ fundamental liberties and equality⁶ and the jurisdictional conflict between Syariah-civil and federal-state.⁷

There has been concern that constitutional interpretation, particularly in Malaysia, has not been coherent.⁸ It has been stated that, there is a need for coherent approaches so that, among others, it can be replicated in other cases and more

² This observation is made based on Cardozo's view that a judge sees the world through the eyes of his times which results in justification of his selection of methods. see Cardozo, *The Nature of Judicial Process*, (London: Yale University Press, 1921), 124-125.

³ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ.

⁴ *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and Anor* [2017] 5 CLJ 526.

⁵ *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

⁶ *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333.

⁷ *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585.

⁸ See Björn Dressel, "Politics and the Federal Court of Malaysia, 1960–2018: An Empirical Investigation", *Asian Journal of Law and Society*, vol. 9, no. 1 (2020): 1-32. Yvonne Tew, "On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics", *Washington International Law Journal*, vol. 25, no. 3 (2016): 673

importantly, to fulfil the expectation of the public that is to witness the judiciary discharging their role as interpreter of the Constitution by adopting a transparent, recognizable, coherent and consistent principles of interpretation.⁹ Most importantly, lack of coherence in judgments may result in loss of confidence in the judiciary.¹⁰ There is a theory, propounded by McCormick, which ascribes considerable importance to the place of general principles in legal argumentation. From this theory, it is indicated that it is timely to discuss the fundamental principles that can form a basic guide for constitutional interpretation so that coherence can be achieved.¹¹

The first step to address the problem of incoherence is to reflect on the trends in constitutional interpretation to identify the approaches commonly applied in Malaysia and further to unearth the constitutional jurisprudence underlying a particular approach in a judgment from which values and principles could be extracted. The values and principles that a particular philosophy seeks to uphold and foster would then be a resourceful guide to measure the uniformity and coherence of the application of universal values in judgments.

This thesis will evaluate the judicial trend of the Malaysian courts involving constitutional cases to extract the judicial philosophy in interpreting the constitutional provisions from which coherence can be measured. Evaluation will be made by observing, from the Malaysian Federal Court judgments, how interpretive method started changing or fluctuating. The big question that drove this inquiry and study is, “Did the Malaysian Judiciary ever subscribe to a particular judicial philosophy or have been consistent in following a certain judicial philosophy?”. To answer this question

⁹ Farid Sufian Shuaib, “The Courts and Approaches to Constitutional Interpretation”, *International Islamic University (IIUM) Law Journal*, vol. 8, no. 2 (2000): 151

¹⁰ *Ibid.*

¹¹ Neil MacCormick, “Coherence in Legal Reasoning” in *Legal Reasoning and Legal Theory*, (Oxford: Clarendon Press, 1978), 154.

and the research questions following it, cases involving constitutional interpretation particularly from post Merdeka to date are analysed to discover the development of judicial philosophy of the courts in Malaysia to understand the trend and direction towards which the Malaysian Judiciary is heading. By understanding its direction and inclination, judgments can be further introspected for future developments and be a good guide for future reasonings with strong grounding based on proper philosophical groundings. Assessment is also made in view of identifying contributing internal and external factors and deducing patterns of reasoning if they match any descriptions of any legal-philosophical theories. An analysis of written judgments is a clear way to measure and analyse the development of the Malaysian constitutional jurisprudence and its legal thought particularly on key terms and concepts. The evaluation will then be helpful in identifying the root cause which is most crucial in any effort to propose a sound solution.

The Malaysian Federal court cases are taken as samples to illustrate the trend of the application of the interpretive theories and address issues of incoherence, if any, in the trend. It is important to also mention here that even though we will be striving to achieve coherence in constitutional interpretation, the result is not guaranteed to be perfect for there are other factors which are not within the limits of the act of interpretation. At the very least we are looking at mitigating arbitrariness and justification in a more coherent manner.¹² Ultimately, in our effort to strive towards coherence, this thesis looks forward to reviving the established rules that has groundings in the defining aspects of constitutional interpretation which are going to be discussed in Chapter 2.

¹² See explanation of coherence in Chapter 2.

1.1 STATEMENT OF PROBLEM

There is no clear guide or criterion for constitutional interpretation upon which general principles can be formulated to ensure coherence.¹³ It is also important to note that differences in interpretive approaches or plurality of methods are not necessarily a show of incoherence. Incoherence in judicial approaches reflect an unsteady development of the Malaysian constitutional jurisprudence and unsystematic judicial philosophy. An unsteady development of constitutional development will produce a mixed-up precedence that will not be helpful for the country's judicial contribution for both the local and international jurisdiction. In a lot of discourses, although incoherence has been identified, it has not been analysed and addressed accurately.¹⁴ This leads to solutions that might not be fitting in the context of Malaysia. Such incoherence has to be addressed by formulating general principles and criterion in order to encourage predictability and transparency in the court judgments. This is necessary to protect the finality of decisions and clarity in the law for the purpose of future reference in view of developing the Malaysian constitutional jurisprudence. Therefore, it becomes an academic obligation to further develop this discussion with philosophical groundings so that it can be an eye opener to treat the root cause at a deeper level to better inform the judicial and legal fraternity and scholarship on this subject.

The point of a written constitution is so that there is objectivity and clarity on what is the supreme law of a country. Incoherence in grounds of judgments will prevent

¹³ Coherence here refers to a state free from inconsistency, logically structured and does not suffer from internal contradiction, see <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perram/perram-j-20161118> accessed on 22 August 2023. For a more detailed explanation on coherence please refer to section 2.2.4.3 in Chapter 2.

¹⁴ Jaclyn Neo, "A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia", *Asian Journal of Comparative Law*, vol. 15, no. 1 (2020): 69-94.; Yvonne Tew, *Constitutional Statecraft in Asian Courts*, United Kingdom: Oxford University Press, 2020), Björn Dressel, "Politics and the Federal Court of Malaysia, 1960–2018: An Empirical Investigation", *Asian Journal of Law and Society*, vol. 9, no. 1 (2020): 1-32.

such objectivity and clarity. Without coherence, it will be difficult to gauge a clear worldview and will open doors for open ended interpretations. If left unchecked, there will be more arbitrariness in constitutional interpretation where rights will be recognized and identified along ideological lines of the courts. As a result, interested parties will be confused as to what is the clear intent of the Federal Constitution. The courts are the final bastions of justice who are duty bound to ensure that the clarity and objectivity of our written constitution is never compromised by any ideological or political inclination.

1.2 HYPOTHESIS

The hypothesis of this study is that incoherence is caused by absence of proper worldview and incorrect use of language or breach of language rules. Accordingly, the Malaysian judicial philosophy is therefore incoherent because it is devoid of a proper worldview that does not succumb into relativistic interpretation of words and values. The sub-hypotheses are as follows:

- (a) incoherence has to be addressed by formulating general principles and criterion based on a proper worldview;
- (b) employing constitutional interpretive methods which depart from language rules runs the risk of distorting language and cannot be said to be coherent or guided by a proper worldview; and
- (c) a worldview that is grounded on a firm foundation will be a guide to a correct application of interpretive method thereby ensuing coherence in judicial decisions.

1.3 SIGNIFICANCE OF THE STUDY

This thesis—

- (a) is resourceful as it educates the public on how coherence can be measured and how different worldviews influence the court judgments and their implications;
- (b) is a pioneering work of comprehensive evaluation of coherence on the judicial trend in constitutional interpretation from which a certain framework or judicial philosophy in the Malaysian courts can be analysed for further reflection and introspection;
- (c) identifies the features of a proper framework so that it can be a lens through which all areas of constitutional issues will be resolved impartially and in the best interest of all parties;
- (d) enriches the scholarly works on constitutional interpretation in Malaysia as a topic of its own as a complementary and comparative work to the existing literature in relation to its outcome; and
- (e) encompasses a more balanced discussion backed by philosophical groundings.

1.4 RESEARCH QUESTIONS

- (a) What are the defining aspects in interpreting a constitution?
- (b) How are the constitutional interpretive methods correlated to the defining aspects?
- (c) Why is there incoherence in constitutional interpretation in the Malaysian context?

- (d) What are the general principles of constitutional interpretation to promote coherence and mitigate arbitrariness?

1.5 OBJECTIVE OF THE STUDY

- (a) To identify the defining aspects in interpreting a constitution;
- (b) To examine the methods of constitutional interpretation and their co-relation with the defining aspects;
- (c) To identify the root cause of incoherence in constitutional interpretation in the Malaysian context;
- (d) To suggest general principles that best promote coherence and mitigate arbitrariness.

1.6 SCOPE/ LIMITATION

The trend of constitutional interpretation in Malaysia will be deliberated within the following scope:

- (a) Analysis of cases will be based on the Federal Court judgments accessible from the mostly cited landmark cases from 1960's to 2023 on definition of terms and conceptions from constitutional text;
- (b) Analysis is made based on compliance with the defining aspects in order to evaluate coherence in applying and understanding the proper usage of constitutional interpretive methods;

This research is subject to the following limitations due to constraint of time and space:

- (a) Analysis of judgments does not involve profiling of individual judges;

- (b) This research will not cover further illustration on the applicability and constraints of the suggested method

Despite the above limitations, it is hoped that the findings provide a helpful guide to unfold the related issues and achieve the objectives of the research.

1.7 LITERATURE REVIEW

1.7.1 Judicial Philosophy and Trend of Constitutional Interpretation in Malaysia

From the research on trends of constitutional interpretation in Malaysia, it is observed that there are very few literatures and studies articulating the approaches to constitutional interpretation that are analysed from the legal-philosophical aspect. The earliest work found in relation to the trend of constitutional interpretation in Malaysia could be traced back to 1978 where the late Tan Sri Professor Ahmad Ibrahim compiled some landmark cases to illustrate how in the earlier times after independence, the courts are more inclined towards the English tradition in which the sovereignty of Parliament is a paramount consideration thereby leading to the tendency to uphold the executive orders and acts of legislature in question.¹⁵ Later, the trend had gradually headed towards realizing the Court's role as arbiter in holding the balance between individuals and the State and to strike down any "naked arbitrary power". Nevertheless, he alluded that the English cases were still preferred to the Indian cases as the courts find our country more in common with England than India. This work is undoubtedly a remarkable piece in the year it was published. Unfortunately, much of the discussion have been overtaken by events owing to the rapid constitutional development up to the present day.

¹⁵ Ahmad Ibrahim, "Interpreting the Constitution: Some General Principles" in *The Constitution of Malaysia Further Perspectives and Developments*, edited by F.A. Trindade and H.P. Lee (place of publication: publisher, 1986), 18.

Lee and Trindade observed that especially in the early years of the first twenty eight years of the Malaysian Constitution, particularly in the area of constitutional law, the judiciary in Malaysia have tended to rely quite heavily on the decisions of the Supreme Court of India.¹⁶ Tun Suffian, the former Lord President, had cautioned the Malaysian judges against a blind acceptance of decisions from other countries and reminded that we should decide our case in the light of our own constitution as our condition may not necessarily be the same as in other countries.¹⁷ The authors regard this as a hint from the then Lord President, that there is a limit to reference to cases of other jurisdictions. Further, in relating this essay with Tun Suffian's legacy of a strong judiciary, the authors remarked that Tun Suffian's essay entitled "The Judiciary – During the First Twenty Years of Independence" had illustrated the many ways in which the strength of the judiciary is dependent upon the Lord President, who holds the highest judicial office in Malaysia. It follows that the strength of and respect for the Constitution is heavily dependent on the strength and independence of the Judiciary. Accordingly, Tun Suffian's judicial approach, whose experience was fundamental as he was directly involved in the drafting of the Constitution, would be a good benchmark to represent the Malaysian Judiciary during his Lordship. It can be surmised based on this writing that overall, Tun Suffian had been reluctant to deviate from the traditional approach, at the same time, pragmatic in adhering to the letter and the spirit of the Constitution which he once described as "a workable and living Constitution". Moreover, a short tenure of the late Lord President Tun Suffian has left behind a rich legacy of landmark decisions which formed an indelible impact on the country's legal landscape. Buang had compiled

¹⁶ H.P. Lee and F.A. Trindade, "Tun Suffian's Contribution to Malaysian Constitutional Law" in *The Constitution of Malaysia Further Perspectives and Developments: Essays in Honor of Tun Mohammed Suffian*, edited by F.A. Trindade and H.P. Lee (London, Oxford University Press, 1986), 190.

¹⁷ Ibid.

and captured the essence of Tun's contributions and described Tun as a conservative and a pro-government judge while recognizing the judicial limits.¹⁸ Though Buang's writing focuses on only Tun's judgments, this work might still be relevant as Tun's literary style would arguably represent the trend during his tenure as the then Lord President.

By the same token, the legacy of Tun Suffian's successor, His Royal Highness Sultan Azlan Shah whose authoritative principles have defined and shaped our understanding of modern Malaysian constitutional law also left a tremendous influence on the development of constitutional interpretation during his tenure and remained impactful on the successive generation of the judiciary. Sinnadurai described His Royal Highness as a judge who exhibited a positivistic judicial attitude towards the Constitution. His Royal Highness modified the application of the relevant English law to suit local conditions, thus able to create and develop a corpus of Malaysian legal principles during its infancy.¹⁹ He pointed out that His Royal Highness' judgments on administrative law are widely acknowledged to have been instrumental in a trend which he describes as a "seismic shift of the Malaysian administrative law towards a more liberal and progressive view post-independence". This new development, according to him, render governmental and administrative action subject to checks through judicial review by the courts.²⁰

Jain made a general remark that the "Malaysian court by and large adopts a strict positivist and literal approach to the Constitution."²¹ It has restrictively interpreted the

¹⁸ Salleh Buang, *In the Service of Law, Simplicity and Greatness*, (Kuala Lumpur: University of Malaya Publications, 2007), 45.

¹⁹ Visu Sinnadurai, *A Perspective of HRH Sultan Azlan Shah's Contribution to the Development of Malaysian Law*, (Kuala Lumpur: RNS Publications, 2014), 81-122

²⁰ Ibid.

²¹ M.P. Jain, *The Courts and the Constitution*, 135

fundamental rights provisions and it has taken a restrictive view of the judicial function in relation to the interpretation of the Constitution. As a result, the fundamental rights clause in the Malaysian Constitution do not constitute any effective restraint on the legislative or executive power. The Malaysian Apex Court has been pessimistic towards the foreign liberal approaches to constitutional interpretation. He described that the courts do not make law but only interprets the same. As of 1987, there can be found occasions where the courts adopted liberal attitude but very rare. He proposed that it is for the courts to evolve the norms of constitutional interpretation and called for the courts to exhibit creativity of a high order and to promote some preferred basic values in the society.

Shuaib provides an appraisal and highlights inconsistencies in constitutional interpretation in Malaysia, leaving some room for further research. As of the year 2000, he observed that the court in the past had not been consistent with the approaches such as the broad approach, the intentionalist approach and the literalists of the conservative approach who believed to be bound by judicial restraint.²² He alluded there are even instances where the same court passed two different set of judgements which might appear to be contradicting. A brief introductory remark on textualism and originalism and the importance of having a coherent approach were also presented. In his final remark, he suggested that judges should formulate clear and coherent principles in exercising the power and duty bestowed upon them.²³ This article is a continuation of the previous work by Professor Ahmad Ibrahim and serves as a catalyst to a further research in view of a more serious effort to map out in detail the discrepancies and

²² Farid Sufian Shuaib, 3.

²³ Ibid.

inconsistencies in the methods of constitutional interpretation to meet the demanding need of restoring justice in interpreting the Constitution.

Faruqi gave a glimpse of the approaches in Malaysia; which is the literal approach or the strict constructionist approach and the liberal approach or also known as the legal realist or the activists' approach which he recommended.²⁴ He stressed that the Constitution should be interpreted dynamically because the Constitution is not made merely for the generation that then existed but for posterity. He also emphasized that interpretation should be right based and principle based. He then highlighted some flaws in the Malaysian practice, among others, failure to realize constitutional supremacy, reliance on English philosophy of legal positivism, reliance on separation of power to refuse judicial review, gradations amongst human rights, preference for English precedents over US and India, unreviewable discretionary powers and treating the constitutional law as *sui generis*.

Thio indicated that Malaysia and Singapore have long operated "beyond the four walls" as the transnational sources are used selectively. She also observed that in interpreting fundamental rights provisions, the Privy Council articulated a pro-individual approach that has been subsequently affirmed in Malaysia and Singapore at least in formal terms, if not applied in practice. Nevertheless, it is also observed that certain judges have embraced a prismatic approach towards constitutional rights which represents a departure parliamentary supremacy practice.²⁵

The then Chief Justice Tun Ahmad Fairuz bin Sheikh Abdul Halim, in his lecture on the "Recent Developments in Malaysia's Constitutional Law", began to trace back

²⁴ <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/constitutional-interpretation-in-a-globalised-world> (accessed 27 January 2022)

²⁵ See Thio Li Ann, "Beyond the Four Walls in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore", *Columbia Journal of Asian Law*, vol. [Volume Number], no. [Issue Number] (2006): 428-518.

to 1988 constitutional amendments primarily as a lot of its impact has manifested ever since.²⁶ He narrated that despite the 1988 amendment, which was made to end the jurisdictional conflict between the civil and Syariah court, the conflict continues. As of 2006, he observed that the Federal Court appears to support both the view that the said amendment has effectively removed from the High Courts their judicial power and the view which states that the judicial power is inherent and hence preserved, thus prolonging the confusion. He also observed that another notable development under the fundamental rights is the preference to liberal approach in, interpreting Article 5, to implement the true intention of the framers of the Constitution. In conclusion, he acknowledged that our written Constitution must be viewed by a judicial arbiter as a living document but he cautioned that amendments should only be made to meet the needs of current circumstances and for the betterment of human life.²⁷

Das reviewed the basic law approach to constitutionalism in Malaysia after fifty years from independence.²⁸ He made an evaluation whether the Federal Constitution continues to be the bedrock document or the *grundnorm* for the continued progress of the country. The discussion is very much anchored on the watershed event of the May 13 1969 racial riot and the 1988 judicial crisis. The rest of the discussion flows on the illustration of the effects of Islamization on the court decisions involving both Muslims and non-Muslim litigants. He observed that there was a corresponding decline in the principles of secularism which he regarded as one of the guarantees in the founding documents of the Malaysian Constitution.

²⁶ YAA Tun Dato' Sri Ahmad Fairuz Bin Dato' Sheikh Abdul Halim, "Recent Developments in Malaysia Constitutional Law" (public lecture, 19th Singapore Law Review Lecture, Singapore, March 13, 2006).

²⁷ Ibid.

²⁸ Cyrus Das, "The Basic Law Approach to Constitutionalism: Malaysian Experience Fifty Years On", *Asia Pacific Law Review*, vol. 15, no. 2 (2007): 219-233.

Former Chief Justice, Tun Ariffin Zakaria, in perusing the judicial attitudes towards Malaysian common law post 1956 revealed that the judges at the time took considerable care to ensure that “national ideals” were met and that the common law was only to be applied to the extent that local conditions and customs allowed for such incorporation.²⁹ While acknowledging the fact that considerable quantity of judgments placed reliance on the English common law, he assured that the Malaysian judiciary has departed somewhat from Western based spirit of the English common law and adopted reliefs that are suited to the local conditions and needs of the nation.³⁰ He observed that the modern judges in Malaysia no longer follow blindly the dictates of the English courts but have been well exposed to diverse choices of jurisprudence from Singapore, Australia, New Zealand, Canada, South Africa and to a lesser extent, the United States to choose the legal rationale that best suits Malaysia. This to him would contribute to the richness of the Malaysian jurisprudence.³¹ Overall, the above development is seen as sign of an extensive progress of the Malaysian common law.

Tew observes that the Malaysian courts’ journey toward constitutional redemption has, so far, been uneven, at best. She proposes that in order for the Malaysian judiciary to restore its position as a co-equal branch of government, it will need to take firmer steps to assert its commitment to constitutional supremacy and its willingness to protect the fundamental liberties guaranteed by the Constitution.³² In her other work³³, she illustrated the application of the originalist approach in Asia and claimed that in the wake of growing Islamization in Malaysia, the Islamists have

²⁹ Ariffin Zakaria, “Judicial Attitude Towards Common Law Post 1956”, *Journal of the Malaysian Judiciary*, vol. [Volume Number], July (2016): 135

³⁰ Ibid.

³¹ Ibid.

³² Yvonne Tew, “On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics”, *Washington International Law Journal*, vol. 25, no. 3 (2016): 673.

³³ Yvonne Tew, “Comparative Originalism in Constitutional Interpretation in Asia”, *Singapore Academy of Law Journal*, vol. 29, special issue (2017): 719

employed the “historicist rhetoric” to expand the scope of Islam in the Constitution. In response, the group she identified as the secularists have sought to defend the secular foundation of the Malaysian Constitution and also resort to constitutional history but advocate a purposive and liberal approach to interpreting the constitutional provisions on fundamental liberties in view of implementing the true intention of the framers of the Constitution. She surmised that the originalist discourse in Malaysia is characterized by a focus on the intent of the framers and the constitution-making process history rather than the textual meaning. Both opposing sides battles over whether constitutional history supports their particular originalist interpretation.³⁴

Choo promotes the theories of originalism, as an alternative source for judicial interpretation of the Malaysian Constitution, which focuses on the intended meaning of the framers of the Constitution.³⁵ Quoting Goldford,³⁶ he mentions that it is the only way to ensure that the Constitution will not be made a blank paper by construction. He stresses that courts must seek original meaning when interpreting the constitution to uphold the “social agreement” and keep the society within the path that was intended by our forefathers so as to give the constitutional provisions their precise meanings.³⁷

Ram illustrated the dynamics of constitutional interpretation in Malaysia and how the approach evolved from literal approach to the BSD. He disagreed with the Federal Court in applying the literal approach and pointed out the mistakes one by one,

³⁴ Yvonne Tew, “Malaysia’s Invisible Constitution” in *The Invisible Constitution in Comparative Perspective*, edited by Rosalind Dixon (Cambridge: Cambridge University Press, 2018), 376.

³⁵ Choo Kah Sing, “Judicial Interpretation of the Federal Constitution: An Originalism Perspective”, *Journal of the Malaysian Judiciary*, July (2017): 135

³⁶ Dennis J. Goldford, *The American Constitution and the Debate Over Originalism*, (Cambridge: Cambridge University Press, 2005), 9.

³⁷ Choo, 4.

contrasting it with and defending the basic structure doctrine. He applauded the fact that the courts had begun to acknowledge the new challenges and recognize the BSD.³⁸

Echoing the BSD, Mohd. Hishamuddin Yunus, retired Court of Appeal Judge, highlighted that with the BSD, the constitutional framework and its essential features may be maintained and the three arms of the government kept within their constitutional limits.³⁹ While promoting the BSD, he wrote his observation on the gradual change of the judicial attitude from the literal approach to applying the BSD. The recent cases which uphold the BSD, he regarded as have successfully put an end to the disturbing development of the constitutional amendment that removed the judicial powers of the courts. He celebrated the cases on point for having restored the judicial powers which are crucial as effective check and balance on the legislative and the executive while restoring independence to the judiciary.

In 2018, Faruqi made a general comment of the highs and lows of judicial conduct and recounted some important constitutional developments within a span of 30 years from the time of judicial crisis in 1988.⁴⁰ He listed some unsatisfactory aspects, despite acknowledging the constitutional safeguards, owing to some internal attitudes among the executives, loyalty factors, and a generally legalist, literalist and formalist approach to the interpretation of the glaring generalities of the constitutional provisions. He then mentioned that in terms of activism, the general trend of the Malaysian Judiciary is towards a literal interpretation of subjective and wide powers.

³⁸ [2017] 4 MLJ i, <https://advance-lexis-com.ezlib.iium.edu.my/document?crd=5db1df30-5bac-4ef4-a2f4-860a1df1ef5e&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials-my%2Furn%3AcontentItem%3A5RHW-9901-JNY7-X0X7-00000-00&pdsourcgroupingtype=&pdicsfeatureid=1521734&pdcontentcomponentid=235220&pdmfid=1522468&pdisurlapi=true> (accessed 27 January 2023)

³⁹ Mohd Hishamudin Yunus, "The Malaysian Constitution and the Basic Structure Doctrine", *Legal Herald LHAG*, November, 2018, 3.

⁴⁰ Shad Saleem Faruqi, "Thirtieth Anniversary of the 1988 Judicial Crisis: Lessons About the Importance of Judicial Independence and Impartiality" (paper presentation, Raja Aziz Addruse Memorial Lecture, Kuala Lumpur, August 15, 2018).

Constitutional review, he observed, was so rare that our country appears to have de facto parliamentary supremacy and “judicial commitment to the basic charter and to human rights” is not a significant feature in the Malaysian constitutional jurisprudence”. However, he was of the view that as of 2018, there have been more cases where judges interpreted creatively.⁴¹ He stressed that judicial activism reflects judicial independence. Under the umbrella of judicial activism, he applauded and promoted BSD, prismatic interpretation of rights and restrictive interpretation of limitations. In his other work in the same year, he mentioned briefly the constitutional guidance on interpretation. He also noted that there is no explicit and overarching provision in the Constitution that specifies any single theory or principle by which the Constitution is to be interpreted. He also highlighted that, while the choice of theories or principle is political or philosophical in nature, some important guidelines can be found in the Federal Constitution itself, which he listed briefly.⁴²

In the same boat, the present Chief Justice The Right Honourable Tun Tengku Maimun Tuan Mat explained her views in her speech as to why the BSD is so fundamentally necessary in Malaysia, specifically within the context of the doctrine of separation of powers.⁴³ She also emphasized on the role of the court to protect the legitimate interest of the subjects of the state by upholding the BSD within which is housed the doctrine of separation of power. The BSD to her is simply a restatement of the principle of constitutionalism upon which a constitution is based. She stressed that

⁴¹ Ibid.

⁴² Shad Saleem Faruqi, “Judicial Activism and Constitutional Supremacy” (speech, Lincoln’s Inn, March 22, 2018), see Articles 4(1), 162(6), 128(1) on jurisdiction of court to invalidate pre Merdeka laws that violates the Constitution, Article 160(2) which provides the interpretation clause, the Eleventh Schedule on Interpretation and General Clauses Ordinance 1948, Article 3(4), Article 75, the Second Schedule part III sections 17-22 which provide rules of interpretation for citizenship cases and ouster clauses such as 4(2), 150(8) and Part III of Second Schedule, section 2.

⁴³ The Right Honourable Chief Justice of Malaysia Tan Sri Dato’ Seri Utama Tengku Maimun binti Tuan Mat, “The Importance of Constitutional Structure & Institutions” (special address, The Law Asia Constitutional and Rule of Law Conference 2019, Petaling Jaya, October 5, 2019).

in the context of public institutions, the role of constitutionalism is to ensure the judiciary performs a constitutional function in guarding the constitution, engaging in statutory construction and judicial review.

On the application of the BSD in Malaysia, Sebli highlighted that the underlying philosophy behind the doctrine is that Parliament can amend the Constitution but cannot destroy its basic structure.⁴⁴ He acknowledged that the doctrine is vague and there is no explicit exposition of what constitutes basic structure. He also pointed out that it is debatable whether the doctrine has been correctly applied in the recent cases of which are regarded as the landmark cases of the reception of the BSD, which then sparks the possibility that the allegedly overruled judgements remain as good law.⁴⁵ He however concluded that although the acceptance of the doctrine may arguably be obiter, the Federal court had made it clear that the doctrine has at the moment settled in Malaysia.

A recent empirical study by Dressel seeks to investigate judicialization of politics in the Malaysian courts and to confirm the claims of incoherence in constitutional interpretation throughout the year 1960-2018 based on selected high profile cases.⁴⁶ He observes that traditionally the judiciary exhibited a pattern of legal formalism, reinforced by common law system. Results of the study illustrates judicial restraint, deference to the administering government and decline in number of dissents. This result of the analysis also suggests that the judiciary becomes less inclined to vote against the government because of the 1988 judicial crisis confirms politicization of the Federal Court and regression of its independence. The dynamics of court attitudes might be influenced by personal attributes, interaction within the bench, party politics such as

⁴⁴ Abdul Rahman Sebli, "Basic Structure of the Constitution", *Journal of the Malaysian Judiciary*, July, 2020, 55.

⁴⁵ Ibid, 80.

⁴⁶ Dressel, 3.

loyalty to the appointing Prime Minister or to the Chief Justice acting on behalf of the executive to deliver verdicts in favour of the government. This study is described as the first empirical account of Federal Court justices in high profile political cases and a useful foundation for continuing a further and thorough evaluation of the judiciary. Author have masterfully used his skills to analyse the trend of court and from the analysis, deduced reasons of the incoherence in trend. However, this study is not a jurisprudential discussion that evaluates in detail the various interpretational methods and legal theories applied by the courts.

Neo commented that the majority view, in a case which the proponents of the BSD described as damaging to the rule of law, were based on the textualist view that reads the amendment as having substantive effect in removing the vesting of judicial power and thereby subordinating judicial power to legislative determination. According to her, the majority took the view that the unwritten norms that underlie the Federal Constitution may have influenced the framers of the Constitution but are not part of the Constitution unless they have been specifically incorporated into the text.⁴⁷ She proposed that the scope of amendments should be interpreted narrowly by reference to those norms in order to preserve judicial power and independence, towards a more contextual approach to unconstitutional constitutional amendments. She provided an important observation but is only limited in relation to the evaluation on the reception of the BSD in Malaysia.

Tew's latest work on Constitutional Statecraft in Asian Courts⁴⁸ has been described as politically informed and quite an achievement after Lee's various works

⁴⁷ See Neo, A Contextual Approach..., 69-94.

⁴⁸ See generally Tew, Constitutional Statecraft in Asian Courts..., 89.

on Constitutional development.⁴⁹ Generally, her work is considered a major contribution in the area of Constitutional jurisprudence for the Asian region as her work describes and connects the Asian cases to innovative constitutional theories. Prior to her recent work, constitutional theorization was based on discourses in the United Kingdom and the United States. However, the dominant feature of Tew's articulation of constitutional interpretation appears to be what she calls "judicial empowerment" because her main goal is to clarify and fortify strategic judicial empowerment. Therefore, emphasis was less focused on the key concepts of constitutional interpretation.

Whilst there have been some writings that articulate from the traditionalist perspective which in the present time mostly regarded as, to borrow from Tew, "historicist rhetoric" or the Religion of the Federation perspective, this view⁵⁰ does not concern itself with constitutional interpretation methods as a standalone. However, they will be helpful references to understand the backdrop of the traditional view when articulating the subject in the Malaysian context. For example, in a writing or discourse on textualism is to be done in depth, the traditionalist view will be relevant for the discussion of constitutional framework in the context of Malaysia.

⁴⁹ See H.P. Lee, "The Malaysian Constitution after 50 Years: Retrospective, Prospective and Comparative Perspectives", *Australian Journal of Asian Law*, vol. 9, no. 2 (2008): 307-320.; Lee, H.P., and Harding, A.J., "Constitutional Landmarks and Constitutional Signposts: Some Reflections on the First Fifty Years" in *Constitutional Landmarks in Malaysia: The First 50 Years 1957-2007*, edited by H.P. Lee and A.J. Harding (Petaling Jaya: Lexis Nexis, 2007), Lee, H.P., "Constitutional Developments in Malaysia in the First Decades of the Twenty-First Century" in *A Nation at a Crossroads: Constitutionalism in Asia in the Early Twenty-First Century* (1st ed.), edited by A.H.Y. Chen (Cambridge: Cambridge University Press, 2014), 244-269.

⁵⁰ See Abdul Aziz Bari, *Islam Dalam Perlembagaan Malaysia*, (Petaling Jaya: Intel Multimedia and Publication, 2005). Shamrahayu Abd Aziz, *Islam Dalam Perlembagaan*, (Kuala Lumpur: IKIM Press, 2018).

It is also worthy of mentioning that a recently developed theory by Wan Ahmad Fauzi in his works⁵¹ which is built upon the indigenous elements of a country called “*prinsip kedaulatan watan*” (indigenous sovereignty principle). He suggested that the Constitution should be understood through the lens of “*jurisprudens watan*” or “watanic jurisprudence”. Though he did not discuss specifically the interpretive methods, he laid down some important principles in aiding the understanding the Malaysian Constitution that could be further developed and integrated into the topic of constitutional interpretation.

In 2022, Sabaruddin, Faruqi, Saw and Low acknowledged that in most occasions, an approach that is highly deferential to the executive has prevailed.⁵² They also observed that the Malaysian trend has moved from literal and conservative approach to liberal, activist, holistic and prismatic approach. They pointed out that judicial activism has been exercised by individual judges but not at the institutional level.

It can be concluded from the above readings, that there is a departure from a traditionalist perspective in the recent trend. Most writings of the 1980’s-1990’s were more deferential to the legacy of the luminaries of the judiciary of that time. In the last few years, the trend had moved towards a tunnel vision, which appeared to be driven by a need to explore or test the true position of one country’s self-identity which is related to the status of Islam and the application of the Islamic law that is linked to the judicial independence. Contemporary writings which are aligned to the recent trends have been more critical of the traditional methods and purport to be more progressive

⁵¹ Wan Ahmad Fauzi Wan Husain, *Jurisprudens Watan Perlembagaan Persekutuan: Teks, Konteks dan Isu-Isu*, (Selangor: Abad Sinergi Sdn. Bhd., 2018), Wan Ahmad Fauzi Wan Husain, *Kedaulatan Raja-Raja Melayu: Jurisprudens, Governan & Prinsip Perlembagaan Persekutuan*, (Selangor: Abad Sinergi Sdn. Bhd., 2018).

⁵² Sabaruddin, Faruqi, Saw, and Low, “Judicial Activism”, *Unpublished Article*, (n.d.): 1.

and mostly revolves around the debate of Islamic versus secular country, judicializing religion and judicial turf wars between the civil and Syariah courts, whether directly or indirectly. Apparently, the recent works have so far given much exaltation on the political development in the country, rather than the underlying jurisprudential aspect that emanates from the Malaysian legal history and its historiography to explain such trends. What is more needed is a proper scholarly discussion on approaches and how they are applied or understood in a coherent manner. It is hoped that this thesis will be able to fill such gaps in the literature.

1.7.2 Key Concepts, Fundamental Principles, General Guidelines or General Rules of Constitutional Interpretation

On the key concepts or fundamental principles of interpreting constitutions upon which the various interpretive methods are anchored, various writings have described them using various terms, with a view to develop standard guidelines with the effect of maintaining predictability and coherence. Unlike statutory interpretation, works on key concepts or fundamental principles of constitutional interpretation are extremely rare and are not easily available under the discussions of constitutional interpretation.

On general theories, the views of interpretation of earlier scholars which can best be described as the classic views such as Madison, Holmes, Story, Groves and Bindra are more oriented towards logic and semantics.⁵³ Most of them acknowledged that due to the special nature of a constitution as being the fundamental law, special rules apply for its interpretation.⁵⁴ They formulated rules of interpretation which are more focused

⁵³ M.N. Rao, Amita Dhanda, *N.S. Bindra's Interpretation of Statutes*, (Nagpur: Lexis Nexis, 2007),. Harry E. Groves, *Comparative Constitutional Law: Cases and Materials*, (Dobbs and Ferry: Oceana Publications, 1963), Sir Fortunatus Dwarrris, and Platt Potter, *General Treatise of Statute: Their Rules of Construction, and the Proper Boundaries of Legislation and of Judicial Interpretation*, (N.Y.: William Gould and Sons, 1871).

⁵⁴ M.N Rao, Dhanda. Groves, 7.

on the text. Most of them are in agreement that if the meaning is clear, the literal meaning is to be admitted⁵⁵ but where doubtful, the meaning is fairly triable by its consequence. Intention of the parties to the instrument is paramount.⁵⁶ Story was quoted to have mentioned that the sense of the terms and the intention of the parties which can be gathered from the words, the context⁵⁷, the subject matter, the effects and consequences, the reason and spirit of the law or the causes leading to its enactment are often the best exponents of the words and limit their application.⁵⁸

Generally, according to Groves every word must be given its true and legitimate meaning and it is improper to refrain from giving effect to its meaning. Words should not be taken out of context and the provisions should not be considered in isolation. He also quoted Justice Holmes that it should not be too literal but must be one of liberalism because the machinery of the government would not work if it were “not allowed a little play in its joints”.⁵⁹ Groves further explained that constitutional rights should not be nullified or evaded without regard to the fundamental aim and object of the instrument

⁵⁵ Madison, according to Balkin would admit the meaning regardless to its consequences, while Dwarris and Potter gave an exception in cases where there is absurdity, the meaning has to be evaded.

⁵⁶ See Rao, Dhanda. Dwarris, Potter, 657.

⁵⁷ According to Justice Story as reported by Potter, we must resort to the context and shape the particular meaning to make it fit that of the connecting words and agree with the subject matter. Not to construe the same word in the same sense wherever it occurs in the same instrument. It does not follow either logically or grammatically that because a word is found in one connection in the constitution, with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs. The same words have not necessarily the same meaning attached to them when found in different parts of the same instrument. Their meaning is controlled by the context. *See Dwarris, Potter, 657.*

⁵⁸ Also relevant are the situation of the country at the time and antecedent to the time of its adoption, the then existing institutions and the existents and operations of the state governments, the powers and workings of the old confederation and all other circumstances with a tendency to produce or obstruct its formation and ratification are matters to be given the most careful consideration. Nature and object of the particular powers, duties and rights, with the aids of contemporary history with reservations, and to give to the words their operations and force consistent with their legitimate meaning as may fairly secure and attain the ends proposed. *Dwarris, Potter, 657.*

⁵⁹ Justice Marshall supports this view and stated that it must not be forgotten that it is the constitution that we are expounding, he acknowledged the inability of the framers to conceive of the multiplicity of situations to which the constitution would need to be applied or to encompass them in anything but a code of enormous proximity had they tried. *See Groves.*

and the principles of which it is based. If ambiguous, it should be presumed to be in accordance with the acknowledged principles of justice and liberty.

Based on Bindra's work⁶⁰, liberal interpretation is justified because the Constitution is meant to be a durable instrument through ages without frequent revision, serving the needs of its time yet accommodating the need of the changing conditions of the future.⁶¹ It is the framework of the body policy, main source of all its strength and power from which all arms of government and authority derive their sustenance. Therefore, it has to be interpreted liberally and not pedantically as if it were a living organism capable of growth and development.⁶²

The latest work which is regarded as a great event for this subject took place from the American legal culture by the late supreme court judge, Justice Antonin Scalia, coauthored with a preeminent lexicographer of this contemporary time, Bryan A Garner.⁶³ This work displays a great effort on compiling classic and established canons which are scattered in various law reports throughout centuries. Sadly, this work is underrated as a guide to the fundamental principles of interpreting the Constitution and often misunderstood as representing only a certain method of interpretation i.e. textualism. Incidentally, Scalia is a profound proponent of textualist originalism, a method which will be specially highlighted as best practice in this thesis.

On the rules of interpretation, the above classic views seem to be drawn through logical deductions from the nature and object of the instrument. Rules were created so that there will be fixed standards to measure the powers, limits, prohibitions of the

⁶⁰ See generally Rao, Dhanda, 1262.

⁶¹ Ibid.

⁶² Rao, Dhanda, 1262.

⁶³ Antonin Scalia, Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, (USA: Thomson, 1st ed., 2012).

Constitution, guard its obligations and enforce its securities of rights and liberties.⁶⁴ It then follows that rules to be drawn from the nature of the instrument is to construe it as a frame or fundamental law of the government ordained and established by the people of the nation according to their own free pleasure and sovereign will⁶⁵ for the purpose of instituting a national government to be invested with supreme authority to provide for their common defense, to promote their general welfare and to secure themselves and their posterity the blessings of civil liberty.⁶⁶ Balkin quoted Madison that an interpretation that destroys the very characteristic of a government cannot be just.⁶⁷

Constitutions are instruments of practical nature, founded on and designed for common use and fitted for common understandings. Made and adopted by the people, it is expected for the people to read them with the help of common sense with no presumption of having any complex meaning or any extraordinary extension.⁶⁸ It is meant to be understood by voters, words and phrases used in their normal and ordinary sense as distinguished from technical meaning. It follows that the simplest and most sensible meaning and most obvious interpretation is to be taken and there should not be a conflict between a constitution and common sense.⁶⁹ Promotion of public welfare is another important consideration because it is founded by the people for their own benefit and protection, for the preservation of their rights, and property, liberty and posterity.⁷⁰

More deductions through logic from the nature and objects of the instrument can be seen as Potter explained that meanings which are conformed to common usage are

⁶⁴ Dwarris, Potter, 655.

⁶⁵ Ibid., 658.

⁶⁶ Dwarris, Potter, 656.

⁶⁷ J.M. Balkin, "Arguing About the Constitutional Topics in Constitutional Interpretation", *Yale Law School, Public Law Research Paper*, (2018):145.

⁶⁸ Dwarris, Potter, 656.

⁶⁹ Rao, Dhanda, 1262.

⁷⁰ Dwarris, Potter, 656.

generally favorable without departing from the literal meaning simultaneously best harmonizes with the nature and objects, scope and design of the constitution.⁷¹ It was also recommended to apply reasonable means that would give efficacy and force as a government rather than that which will impair its operations and render it useless.

In the modern literature, from the work of Lipkin, it is apparent that truth is one of the values that formed the key concepts or fundamental principles. He explained that truth is the central philosophical concept explaining why we adhere to particular constitutional values. In order to validate a particular constitutional conclusion, it must follow from a constitutional principle truly contained in the Constitution or the values underlying the Constitution. He observed that few constitutional scholars talk about constitutional or legal truth. They speak of good interpretations or what the framers meant by a constitutional provision.⁷² However some distinguished legal theorists still insist that truth is a useful legal notion.⁷³ He also remarked that constitutional theorists that held on tight with truth assume that any given power, liberty, or right is either in the Constitution or it is not. To comply with truth, they do not have to adhere to any specific form of method.⁷⁴

It is interesting to note that Bobbit's famous theory of modalities are also build upon truth. He defines modality as the way in which a form of expression is characterized as true. He laid down six modalities to characterize legal propositions as true from a constitutional point of view namely historical, textual, structural, doctrinal,

⁷¹ Ibid.

⁷² See Robert Bork, *The Tempting of America: Seduction of the Law*, (New York: The Free Press, 1990), 143-60.

⁷³ See Ronald Dworkin, *A Matter of Principle*, (United States: Harvard University Press, 1985), 225.; Moore, *Do We Have an Unwritten Constitution?*, (63 S. Cal. L. Rev., 1989), 107-138.

⁷⁴ Lipkin illustrated that Dworkin adheres to neither, and yet still believes, as does Robert Bork, that only certain rights are truly in the Constitution. See generally Dworkin, at 363-73; Bork at 161-70, 178-85. Both Dworkin and Bork, therefore, share the same fundamental presupposition about constitutional truth, with their difference arising out of how to explicate this presupposition

ethical and prudential.⁷⁵ According to him, each of the forms of argument can be used to construct an ideology, a set of political and practical commitments whose values are internally consistent and can be distinguished, externally, from competing ideologies.

Tsesis added to Bobbit's list ideological purposes as pointed out by Tushnet⁷⁶ and natural law as mentioned by Levinson⁷⁷. Tsesis described Bobbit's theories of modalities of United States jurisprudence as being one of the footholds of constitutional interpretations.⁷⁸ Bartrum applauded Bobbitt's theory of modalities and views that he has contributed an immense service in the realm of constitutional law and frees us from the regressions and circularity that persist in the effort to justify a correct interpretive methods by reference to some external foundation of constitutional truth.⁷⁹ Balkin too, was in approval of the idea of modalities and listed eleven namely text, structure, purpose, consequence, precedence, political convection, custom, natural law, national ethos, political tradition and honoured authority which he does not mean to limit as exhaustive. Breyer's six tools to interpret a constitution somewhat overlap with Bobbit's and Balkin's list. The first four being those who are agreed upon by the originalists, which are, text, tradition, history and precedent.⁸⁰ As a pragmatist and a living constitutionalist, he added two more which are purpose and consequence, which he places greater emphasis upon⁸¹.

⁷⁵ Phillip Bobbit, *Constitutional Interpretation*, (Cambridge, USA: Blackwell, 1991), 12.

⁷⁶ Alexander Tsesis, "Maxim Constitutionalism: Liberal Equality for the Common Good", *Loyola University Chicago School of Law Research Paper*, vol. 92, no. 2013-003 (2013): 1595., see also Mark Tushnet, "Constitution-Making: An Introduction", *Texas Law Review*, vol. 91, no. 3 (2013): 1983.

⁷⁷ Tsesis, 1594, Levinson stated that natural law might serve as a seventh modality.

⁷⁸ Ibid, 1597-1599. Other footholds described by Tsesis are judicial protection of participation in democratic governance as mentioned by Ely, moral principles about political decency, concept of justice in a "society of citizens both equal and free" and the principle of "equal concern and respect" by Dworkin, and popular demand by Balkin.

⁷⁹ Ian Bartrum, "Constitutional Value Judgments and Interpretive Theory Choice", *Florida State University Law Review*, vol. 40, no. 2 (2013): 302.

⁸⁰ Stephen G. Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, (U.S.: Books, 2005)

⁸¹ <https://www.amacad.org/sites/default/files/media/document/2018-12/Active%20Liberty-Interpreting%20Our%20Democratic.pdf>

<https://www.brookings.edu/wp-content/uploads/2012/04/20051017Breyer.pdf> (accessed 13 June 2021)

Tsesis commented that Bobbit's methodology does not contain underlying constitutional purpose for determining whether reliance on them is purely formalistic or substantively valid. The modalities are more of "instrumental rhetorical devices" that can be used by political ideologies rather than the means of determining compliance with the underlying constitutional purposes.⁸² While Bobbit's ethic is just one of the values, Tsesis suggests that it be made the core value of the Constitution.⁸³ He further expounded his theory that constitutional interpretation should be guided by a normative maxim which is to secure equal rights for the common good. This normative maxim, according to him, is the underlying purpose of representative constitutionalism, informed by values the people adopted, sets the rubrics of public conduct, requiring federal and state actors to develop, enforce and abide by socially beneficial policies that safeguard fundamental rights on an equal basis and mandates the proper scope of sovereign authority by setting and ordering its priorities.

Bartrum highlighted Kuhn's claim that underlying value judgements determine our theory choices. This claim, according to Bartrum, reminds us that from Kuhn's prescription, Bartrum developed focusing on the essential purposes ascribed to the Constitution within the U.S democratic structure and identified four constitutional values which he describes as those texts apart from the Constitution itself which feature most centrally in our interpretive practice.⁸⁴ They are also known as the "constitutional canon" by various scholars which are namely constraint, flexibility, representation and identity.⁸⁵

⁸² Tsesis, 1683.

⁸³ Ibid., 1679.

⁸⁴ Tsesis, 264.

⁸⁵ Ibid., 273-282.

Baker noticed that constitutional interpretation methods are based on three continuums.⁸⁶ Firstly, text versus text and beyond text such as historical understanding or philosophical principles from political philosophy. The second continuum is fixed time versus changing and evolving meaning and the third continuum is set of rules versus aspiration and values. He also categorized them based on the standard sources namely text, original understanding, history, tradition, structure, precedent or doctrine and philosophy or moral reasoning.⁸⁷ He also mentioned neutral principles as one of the sources but highlighted what constitutes neutral principles has been questioned since the 1950s. He mentioned that the content of the canon for constitutional interpretation which is the sources that provide constitutional meaning depends somewhat on the interpretive issue and varies from one interpreter to another.⁸⁸ The methods are textualist, originalists, doctrinalists, developmentalists, philosophes, structuralists, purposivists, balancers and false dichotomies. He considered the methods as meta theory in which he proves that how one interprets a constitution is more of an art than science. He then further broke them down into liberal theory, conservative, feminist, critical race and postmodern and the list is not exhaustive.

Fallon discovered some criteria that a constitutional theory ought to satisfy upon which there is some implicit agreement among the constitutional theorists which are firstly to maintain the rule of law, secondly to preserve fair opportunity for political democracy and thirdly to protect a morally and politically acceptable set of substantive

⁸⁶ Thomas E. Baker, "Constitutional Theory in a Nutshell", *William & Mary Bill of Rights Journal*, vol. 13, no. 1 (2004): 57.

⁸⁷ Baker, 68.

⁸⁸ J.M Balkin, and Stanford Levinson, "Canons of Constitutional Law", Yale Law School Legal Scholarship Repository, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1259&context=fss_papers> (accessed 1 July 2021).

rights⁸⁹. He also reminded that while it is important to choose a theory which best promote these goals, assessment of who the judges and justices are likely to be are equally important. He observed that there are various categories of constitutional theory namely text-based theories and practice-based theories and substantive and formal or methodological theories. Substantive theories such as those theories that promote natural law or liberalism seek to identify values to be advanced through constitutional adjudication while formal or methodological theories prescribe methodologies to be used in constitutional adjudication but do not purport to identify substantive values by which outcomes should be tested.⁹⁰

Similarly, Millard observes that it is generally accepted that people who believe in fundamental values, such as democracy, the rule of law or human rights, should also have confidence in a written constitution or in a constitutional court. The first school of thought rests in classical formalism, which perceives the constitution as a text that binds all authorities which are constituted by it. The second category draws on the idea that the strong values in which we believe are more important than the text of a constitution, and that, using reason, judges, can decide what constitutes a good constitution as our highest norm.⁹¹

Clark describes the modes of constitutional interpretation as tools of the trade in constitutional decision making which no court or justice ever claimed allegiance to only one.⁹² According to him, the variety of interpretive modes have been developed by the Court is by individual justices. There is no definitive list and the categorization differs

⁸⁹ Richard Fallon, "How to Choose a Constitutional Theory", *California Law Review*, vol. 87, no. 3 (1999): 538.

⁹⁰ Fallon, 538; Robert Bork; Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, (Princeton, N.J.: Princeton University Press, 1997), 38-47.

⁹¹ Éric Millar, "Constitutional Interpretation as Norm Creation: Legal Concept," *Volgograd State University*, vol. 16, no. 4 (2017): 8-16. <<https://halshs.archives-ouvertes.fr/halshs-01854579/document>>.

⁹² Gerard J. Clark, "An Introduction to Constitutional Interpretation", *Suffolk University Law Review*, via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=282717 (accessed on 5 July 2021)

from one commentator to another.⁹³ Just like Fallon and Millard, he noticed the two divisions of constitutional interpretive theories, one of them being value-based. The first four modes claim more or less direct relationship with the document and may be called originalist, namely text, intent of the framers, structure and doctrine modes. The three others are based on a set of values that are discovered in the Constitution by implication at best namely natural law, solicitude of the unfortunate and super-rationalism. Other modes he mentioned includes republicanism, formalism, law and economic analysis, realism, consequentialism, pragmatism, instrumentalism and functionalism.⁹⁴

In setting out approach to evaluate theories of constitutional interpretation, Griffin⁹⁵ pointed out that the scholarly debates over theories of constitutional interpretation have not been concerned with general theories but merely appears to be a contest of single method theories such as originalism, textualism or fundamental rights to be declared the most justified theory. He proposed that an examination of nineteenth century theories, such as Story's treatise, is the most illustrative of a general theory of constitutional interpretation as constitutional theorists at that time were devoted to understanding the whole constitution rather than a few selected clauses. According to Griffin, Story sets out guiding principles of interpretation, which are applicable to any part of the text, such as to look at clear meaning of the text, intention of the framers and legal precedents. Griffin considers Story's theories to be pluralistic and opined that those theories would magnify the pluralistic orientation toward constitutional interpretation. He finally concluded that the "pluralistic theory of interpretation" is the most fitting to be made a general theory. By pluralistic theories he meant multiple

⁹³ Balkin and Levinson, 89; Bobbit, 76; Dworkin, 74; Tushnet, 77.

⁹⁴ Clark, 485-510.

⁹⁵ Stephen M. Griffin, "Pluralism in Constitutional Interpretation", *Texas Law Review*, vol. 72, no.1 (1994): 1753.

legitimate methods of interpreting the constitution. He has highlighted an important observation but there has to be more comprehensive research to further explain general theories as he himself suggested.⁹⁶ He claimed that the works of Bobbitt, Post, Fallon and Sunstein have all reflected pluralistic orientation⁹⁷.

Interestingly, different from most writings, Sherry had a different view about the area upon which common ground in relation to constitutional interpretation is to be discovered. She traced it back to constitutional doctrine and suggested to focus on the essential elements of sound constitutional doctrine as an abstract matter. With this suggestion, despite not being able to identify standards to evaluate outcomes or approaches, she was hoping to at least specify the minimum requirements for sound doctrine and evaluate the supreme courts at some basic level. Those minimum requirements are the four pillars which she claims as the building blocks of the rule of law which have been adhered to by lawyers and judges since the Constitution was adopted. Those pillars are legal analysis, judicial craftsmanship, constitutional aspiration and human understanding.⁹⁸

1.7.3 Methods of Constitutional Interpretation

From the discussion in 1.8.2, it is observed that the limited available amount of discussion on key concepts or fundamental principles of constitutional interpretation are often overlapping or intertwined with the methods or theories of constitutional interpretation. This can be seen from the modern scholarly writings in which the topic indicates the importance of the fundamental principles but in essence the discussion is

⁹⁶ See Potter, 1769; Griffin, 1755.

⁹⁷ Griffin, 1755.

⁹⁸ Suzanna Sherry, "The Four Pillars of Constitutional Doctrine", *Cardozo Law Review*, vol. 32, no. 3 (2011): 971.

merely discussing approaches and methods. This either indicates that the idea of fundamental principles is confused with methods or is understood to be the same. Clarks for example, has described that the modes of constitutional interpretation itself is the tool of trade of a constitutional interpretation.⁹⁹ While reviewing the above sources to identify values underlying the methods of constitutional interpretation, we have already learnt the main theories of constitutional interpretation. Below are some additional literatures which attempt to categorize constitutional interpretive methods.

Apparently the most popularly discussed are originalism and living constitution which are often portrayed as the main dichotomy in the American Constitutional theory in the past five decades.¹⁰⁰

Wolcher made a noteworthy observation that in America and Britain, most constitutional theorists have been emphasizing more of the contents of their respective constitutions and especially in Britain, have been paying less attention to the methods employed to derive the contents of the constitutional text. Apart from that, he observed that there has been no discussion on the philosophical aspects of judges' interpretive methods. He attempted to fill this gap by describing the philosophical aspects of the principal methods and by developing the important distinction between the interpretation and the reception of a constitutional text. He listed the US interpretation namely strict textualism, originalism, non-originalism and positive methods of non-textualist and non-originalist which is further divided to evolutionism, moral readings of the Constitution and judicial pragmatism. While in the United Kingdom, he described that constitutional interpretation is fraught with obscurity because there is no codified

⁹⁹ See Clark, 93.

¹⁰⁰ See L.B. Solum, "Originalism and Constitutional Construction", *Georgetown Law Faculty Publications and Other Works*, via <<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3248&context=facpub>>. (accessed on 26 March 2020)

Constitution and because the task of determining judicial methods of constitutional interpretation has always been superseded by a certain theoretical observation with the principle of parliamentary sovereignty what that principle means for establishing the contents of the Constitution.¹⁰¹

While cataloguing the methods of constitutional interpretation, we will notice that various scholars have different ways of categorizing those methods. Thomson noted the various theories of constitutional interpretation that have been canvassed by Australian and American scholars.¹⁰² He divided the methods into different categories namely legalism, historical analysis or original intention, substantive theory-based method, process and participation-based method and role of court-based method.¹⁰³ Legalism supports literalism, strict construction, adherence to the text, technical analysis of rights, duties and powers and to promote abstract logical reasoning to the exclusion of social, political and other value considerations. He also stated that the above-mentioned are not exhaustive and suggested other categories that can be advanced such as neutral principle-based theories, reasoned elaboration and structural relationships between and within governments. He reminded that there is no one theory that can stand alone.

Havel introduces a construct of constitutional interpretation which he calls “forensic constitutional interpretation” that relies explicitly upon common law methodology through which, according to him, coherence and endurance can be acquired. He divided constitutional interpretation into two categories. The first category

¹⁰¹ L.E. Wolcher, “A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom”, *Virginia Journal on Social Policy & Law*, vol. 13, October 2006: 239.

¹⁰² James A. Thomson, “Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes”, *Melbourne University Law Review*, vol. 13, no. 5 (1982): 603.

¹⁰³ *Ibid.*, 603-611.

being the methodological prescriptivist theories and the second being the substantive prescriptivism. There are four theories under the first category namely textualism, structuralism, intra-textualism and originalism. He further divided originalism into proto-originalism and neo-originalism. He then divided the second category into vaulting ambition and restraining ambition or “Sunstein’s Prescriptivist Minimalism”. Under the category of “vaulting ambition” are “Dworkin’s moral principles” and “Posner’s New Pragmatism”.¹⁰⁴

Strauss categorized the constitutional interpretation based on what he identified as “puzzling aspects of the practices under the common law system” namely the text, the framers’ specific intention, the preferred position of some provisions, the priority of doctrine over text, and the prevalence and importance of non-textual amendments. Then he explained that common law constitutional interpretation has two components. The first component is the rational traditionalism which are derived from the authoritative tradition which sees the law as the command of a sovereign. The second component is conventionalism which emphasizes the role of constitutional provisions in reducing unproductive controversy by specifying readymade solutions.¹⁰⁵

Kelso¹⁰⁶ explained that before interpreting a constitution, a judge must decide what role the various sources of meaning will play. There are four main sources of meaning which are contemporaneous source of meaning, subsequent juridical events, non-interpretive considerations and individual bias. The contemporaneous sources are text, structure and history. Subsequent juridical events are referring to judicial

¹⁰⁴ See Brian F. Havel, “Forensic Constitutional Interpretation”, *William & Mary Law Review*, vol. 41, no. 1 (2000): 1247.

¹⁰⁵ David Strauss, “Common Law Constitutional Interpretation”, *University of Chicago Law Review*, vol. 63, no. 2 (1996): 877.

¹⁰⁶ R. Randall Kelso, “Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History”, *Valparaiso University Law Review*, vol. 25, no. 1 (1994): 121-233.

precedents and legislative or executive practice. He stated that in the American history, there are four main styles constitutional interpretation that have predominated at different times namely natural law, formalism, Holmesian and instrumentalism. He further expounded the various ways judges might balance those main sources of meaning in constitutional interpretation and illustrated how those sources are balanced based on the four different styles of constitutional interpretation. He also discussed the elements of each style and how each style approaches basic issues faced in the American constitutional history¹⁰⁷.

Sinnot Armstrong and Brison¹⁰⁸ emphasized that in order to understand constitutional interpretation, it is important to address the nature and purpose of constitutional interpretation in general. They stated that constitutional interpretations can best be understood by looking at its goal and function and be based on many different kinds of reasons which are meanings, intentions, precedents and moral values. Methods and theories drawn from such fields as literary theory, philosophy, political science, and economics have been used to illuminate constitutional interpretation, giving rise to interdisciplinary study.¹⁰⁹

Stewart is of the view that because constitutional law deals with the human condition in changing times, constitutional interpretation cannot be limited by a rigid set of legal rules, or one or even a short list of fundamental rules or principles. The process of constitutional interpretation cannot be perceived as the mathematical formula to which there is one workable answer which is at once comprehensive, concrete and finite. Nor should the Constitution be interpreted freely without regard to the limits and

¹⁰⁷ Kelso, 121-233.

¹⁰⁸ Walter Sinnott Armstrong and Susan J. Brison, *Contemporary Perspectives on Constitutional Interpretation*, (New York: Routledge, 1993), 1-25.

¹⁰⁹ Armstrong, 2-3.

values fairly imputable to the document or its organizing principles. Constitutional interpretation is a delicate balancing process of many values and interests, which is best accomplished by blending a variety of interpretive techniques and methods.¹¹⁰ Apparently her view is representing a view that is against a particular constitutional theory but to be against theories is also a theory of its own.

1.7.4 Islamic Perspective of Constitutional Interpretation

From the Islamic perspective, in relation to constitutional interpretation in countries with Islamic constitutions¹¹¹ literatures have shown very few references made to key concepts or fundamental principles of interpretations. Similar to the gap in the western literature on the foundations of constitutional interpretation, reference to the key concepts or fundamental principles are only apparent in the discussion relating to the substantive subject of Islamic constitutional law. Works on Islamic constitutionalism are also limited as the concept of constitutionalism has no readily identifiable equivalent in the Arabic language¹¹² and therefore does not entail a discussion under the Islamic forum, or since the Islamic constitutions are referring directly to the Islamic sources such as the Quran and sunnah, the subject matter is discussed under the subject of *ijtihad* and *usul al-fiqh* which is more focused on *fiqh*, or due to the sensitivity of comparing the interpretation of the divine sources with a man-made document.¹¹³ It could also possibly be that the sources are only mostly available in non-English language.

¹¹⁰ Shannon Stewart, "The Art of Constitutional Interpretation", *Journal of Contemporary Law*, vol. 17, no. 3 (1991): 98.

¹¹¹ Countries with Constitutions that clearly state that the Quran and Sunnah is the supreme

¹¹² Raja Bahlul, "Islamic Perspectives on Constitutionalism", via <https://www.juragentium.org/topics/islam/law/en/bahlul.htm>. (accessed on 7 February 2021)

¹¹³ Asifa Quraishi, "Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition and Reason in Islamic and American Jurisprudence", *Cardozo Law Review*, vol. 28, no. 1036 (2006): 67.

The availability of discussions on the jurisprudence of Islamic legal rulings or *usul al-fiqh* and *ijtihad* is a non-issue as they are vast¹¹⁴. They would best serve the objects when the subject of Islamic constitutionalism is given its proper understanding. Similarly, a plethora of works can be found ranging from the Islamic political thought to Islamic constitutionalism.¹¹⁵ The fundamental values and precepts of Islamic constitutionalism can easily be harvested from the variety of sources. There are however close to none on constitutional interpretation which integrate those values with interpretive theories in the contemporary context.

Quraishi pioneers the discussion of comparative constitutional interpretation between the Constitution and the Quran but not Islamic Constitutional interpretive methods as a topic of its own. Nevertheless, it is brave how she draws comparison between the two traditions which are often perceived as heaven and earth. She identified several types of interpretive methods which appear prominent in both Islamic and American jurisprudence and that have dominated jurisprudential debates, for example, literalism or textualist from amongst the American Scholars are comparable to the Zahiris and Shafi'is from among the Islamic scholars.¹¹⁶ While the historical understanding originalists are comparable to the Malikis of the Medinan school and the purposivists of the living constitution theory approach to Al-Ghazali.¹¹⁷ She was very careful in presenting her analysis and clarified that the categories do not match up

¹¹⁴ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (Usul al-fiqh)*, (Islamabad: The Other Press, 2000), [page number].

¹¹⁵ To name a few, A.H. Kamali, *Political Philosophy in Islam: Muslim Constitutionalism, Book III*, (Karachi: Iqbal Academy Pakistan, 1971); Abul Ala Maudoodi, *The Nature and Contents of Islamic Constitution*, (Karachi: Jamaat-e-Islami Publications, 1955); Dr. Muhammad Hamidullah, *The First Written Constitution*, (Lahore: Sh. Muhammad Ashraf Publishers, 1975); Sayyid Abul A'la Maududi, *The Islamic Law and Constitution*, (Lahore: Islamic Publications, 1960); Kemal A. Faruki, *The Evolution of Islamic Constitutional Theory and Practice From 610 to 1926*, (Karachi: National Publishing House Ltd, 1971).

¹¹⁶ See Landes, 67.

¹¹⁷ Ibid.

exactly as having exact counterparts in each culture. Instead, her comparison on interpretive methods is referring to the scholar's way of thinking and not the scholars *in personam*. It is interesting to note that one of the similarities between the two traditions how both have been attacked as a vehicle for the subjective arbitrary opinions of its jurists and defended as the best methods of achieving textual fidelity. She has done a good job in illustrating the interaction between the supreme text and the human agency, each method is proving the challenge of how can human agents faithfully interpret and apply the text without inappropriately imposing their own personal opinions upon the law.¹¹⁸ However, much as the similarities are very attractive for further theorization, there is a high risk that it might cause greater confusion due to lack of a fair evaluation given to the differences of worldview between the two traditions. To date, she remains as the pioneer in this topic. Her brave attempt will be a catalyst for a further inquiry into the subject of constitutional interpretation from the Islamic perspective.

From the above review, it is clear that there is no consensus on the constituents of constitutional interpretation. Even the discussion on foundation of constitutionalism and the values underlying the constitutional provisions is nuanced with great diversity across the multitudes of jurisdictions. As such, identifying a coherent jurisprudence for constitutionalism and constitutional interpretation remains elusive in legal philosophy. In view of this reality and challenge, it becomes even more daunting to objectively compare principles of constitutional interpretation in Malaysia with such principles in other countries. This writing proposes to address a lack of writing on this subject particularly in the context of the Malaysian constitutional interpretation.

¹¹⁸ Landes, 119.

1.8 RESEARCH METHODOLOGY

This thesis is based on doctrinal method. Doctrinal research has been dominant in the realm of research in the legal field for over centuries. As described by Hutchinson and Duncan, the doctrinal method lies at the basis of the common law¹¹⁹ and has remained as prominent legal research method all over the world to date.¹²⁰ It is normally a two part process which involves locating the sources of the law and then interpreting and analysing the text.

This research will therefore be a library-based research by studying and analysing the primary and secondary sources. The primary sources which is the main references for analysing the trends of courts are the Federal Constitution, judicial opinions and case laws. Other primary sources include statutes, speeches, lectures and international conventions. The forementioned sources will be analysed to evaluate the trends of the Malaysian courts in interpreting the Federal Constitution. The rest of the discussion will mostly refer to secondary sources including textbooks, periodicals, legal journals, law review articles, legislative history documents, newspapers, internet sources and other compilations to explore constitutional doctrines, their interpretive methods and practices related to elements of constitutional government such as separation of powers, constitutional duties and fundamental rights. The forementioned secondary sources are also heavily relied upon for preliminary discussions on foundational principles and history relevant to the present research.

To support the above doctrinal method, interviews are conducted to explore further the thoughts and experiences of lawyers, academicians and judges, in the area of constitutional interpretation. Respondents were chosen from amongst those who are

¹¹⁹ Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research", *Deakin Law Review*, vol. 17, no. 1 (2012): 85.

¹²⁰ Hutchinson and Duncan, 100.

mostly and directly involved in constitutional interpretation issues and are often consulted for the subject because of their positions. The accessibility to the unique thought and deliberative processes of the well balanced candidates, especially appellate judges sitting in panels, is a priceless opportunity to reveal that domain, in a more candid setting. Their views undoubtedly would have significant implications to predict and to shape the development of the Malaysian judicial philosophy particularly in the area of constitutional jurisprudence.

1.9 CHAPTERIZATION

The first chapter shall be an introductory chapter containing the background, research questions, research objectives, literature reviews, research scope and methodology, as well as the contribution and significance of this thesis.

The second chapter will lay the foundation of the thesis in which it will discuss the earliest constitutional interpretation methods with special highlights on the role of courts, coherence and its importance, and most importantly, the identifying of key aspects in interpreting the Constitution.

The third chapter will discuss the various methods of constitutional interpretation, their underlying jurisprudence, how they evolved, their characteristics, framework, pros and cons. This chapter will also examine how evolution of constitutionalism and ideology impacted the courts approach in constitutional interpretation.

The fourth chapter will explore the Malaysian jurisprudence and trends of courts' approaches based on cases analysed. The chapter begins with some historiographical accounts of the Malaysian legal system which will be explored to appreciate the lens through which the Malaysian Constitution has been interpreted.

Chapter Five will evaluate the coherence of what has been discussed in Chapter Four and unpack issues relating to constitutional interpretation from which certain jurisprudence and framework can be deduced. The evaluation and findings on Chapter Five will be made based on the foundations laid in Chapter Two.

This thesis will be concluded in Chapter Six along with some recommendations based on best practices and possible solutions.



CHAPTER TWO

THE DEFINING ASPECTS OF CONSTITUTIONAL INTERPRETATION IN THE WESTERN AND ISLAMIC TRADITION

2.1 INTRODUCTION

This Chapter is the foundation of the thesis which highlights the defining aspects and the their nexus with coherence and also explains the modern constitutional interpretation and their problems. It begins by laying an overview of constitutional interpretation from both the Western and Islamic tradition while introducing constitutional interpretation within the scope of a written constitution in the framework of constitutionalism theories. The discussion is followed by highlights on the fundamental and defining aspects of constitutional interpretation from the perspective of coherence that are often left unnoticed. These aspects are significant as they have a bearing on the various constitutional interpretive approaches that will be presented in Chapter 3. Also clarified in this chapter are the importance of worldview and how they influence the rest of the other aspects through their projection of meanings of the key terms and key concepts and their formulation of various philosophical legal doctrines. In this Chapter, reference will be made to ancient theories on constitutionalism which are believed to have a bearing on the earlier Western Constitutionalism. A brief examination on the topic from the Islamic perspective is also presented to understand its theoretical and practical aspects in the Islamic tradition.

2.2 WESTERN DISCOURSE ON CONSTITUTIONALISM AND CONSTITUTIONAL INTERPRETATION

2.2.1 The Idea of a Constitution

A constitution is the source of all other positive laws and a fundamental law in that it establishes the standard of legality by which all subsequent laws are measured,¹ from which the principle of constitutionality is derived. A written constitution is like a trust agreement that specifies the powers of trustees. Constitutions are written to reduce the discretion of the parties, which is to create a limited government.² In the words of Thomas Jefferson, a written constitution serves as constitutional constraints to bind the mischief of the government.³ It becomes a legal device with “exact, enduring and compulsory language in a document” to protect the rights of man and to limit the powers of the government and to control the conduct of government officials.⁴ It also embodies the arrangement of offices by “dividing the whole sovereignty of government into units vested with a certain power and authority depending on their place and purpose within the whole.”. It is “a basic charter of government whose practical meaning arises from the continual adaptation of its enduring text and principles to the conditions and challenges facing each generation.”⁵ It is also described as new model of effective governance ad democratic rule,⁶ generally intended to have a specific and legally binding effects on citizen’s rights and on political processes such as elections and

¹ Mortimer Adler, and William Gorman, “The Great Ideas, A Syntopicon of Great Books of the Western World,” in *Encyclopedia Britannica Inc.* (Chicago: Britannica, 1952).

² Phillip Bobbit, *Constitutional Interpretation*, (USA: Blackwell, 1991), 12.

³ Thomas Jefferson, “Kentucky Draft Resolutions 1798”, <<https://oll.libertyfund.org/page/1798-kentucky-resolutions-jefferson-s-draft>> (accessed on 17 August 2023).

⁴ Perry Patterson, “The Evolution of Constitutionalism”, 427.

⁵ Goodwin Liu, S Pamela S. Karlan, Christopher H. Schroeder, “Keeping faith with the constitution” in *American Constitution Society for Law and Policy* (United States, 2009), 7.

⁶ Ibid.

legislative procedure.⁷ It can be surmised from all of the description of a written constitution that it is a fundamental law that binds citizen and the government and, in its own language, embodies a set of norms, rules, principles, substantive rights or values, creating, structuring and possibly defining the limits of, government power or authority.

2.2.2 The Principle of Constitutionality and the Idea of a Limited Government

Among the contributions of Rome to constitutionalism was the doctrine of limited government and the principle of checks and balance.⁸ Cicero, the greatest lawyer of the ancient world was an exponent of the doctrine of Natural Law. He would not hesitate to challenge the validity of the Roman Statutes which in his opinion had violated natural law.⁹ This concept of limited government is based on the doctrine of higher law founded on the doctrine of natural law. This higher law that protects the rights of man against statute laws and furnished the foundations of the American and French Revolutions and modern democracy.

The principle of constitutionality is necessary in order to understand the familiar distinction between government by law and government by men. However, it is important to acknowledge that it is difficult to conceive government by laws without men to make and administer them.¹⁰ This gives rise to the idea of limited government where according to John Locke, all the power possessed by the government ought to be

⁷ Andrew Harding, “The Fundamentals of Constitutional Courts,” via <https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf> (accessed 2 March 2023)

⁸ Patterson, 429.

⁹ Ibid., 432.

¹⁰ As was clearly expressed by James Madison, one of the founders of the United States Constitution, “...*In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*”. see The Federalist No. 51

exercised by established and promulgated laws, not to be arbitrary or at pleasure, but only for the good of the society. Similarly, constitutionalism is the idea often associated with the ideas of Locke and the founders of the American republic that government can and should be legally limited in its powers. Its authority or legitimacy depends on its observing these limitations.¹¹ The essence of constitutionalism is the idea that government should be legally limited in its powers, and that its authority depends on its observation of these limitations.¹² Echoing this notion also are the words of Lord Acton, “Absolute power corrupts absolutely”.

Therefore, in a constitutional government, men are not sovereigns but office holders, having only a share of the sovereignty who rule through the juridical power vested in the office they hold. Such power is created and limited by the law of the constitution which defines the various offices of government namely the executive, the legislature and the judiciary.¹³

2.2.3 Constitutional Interpretation

It is against the backdrop of the idea of a constitution and constitutionalism as described above that a written constitution seeks to be interpreted, that varies according to various constitutional theories. There have been no determinate definitions of constitutional interpretation. Whittington observed that constitutional interpretation has been central to contemporary theorizing about the Constitution and judicial review.¹⁴ He describes it as the translation of the constitutional text into the specifically useful formulas within

¹¹ <https://plato.stanford.edu/ENTRIES/constitutionalism/#:~:text=Constitutionalism%20in%20this%20richer%20sense,on%20its%20observing%20these%20limitations.https://plato.stanford.edu/ENTRIES/constitutionalism/#:~:text=Constitutionalism%20in%20this%20richer%20sense,on%20its%20observing%20these%20limitations..>

¹² <https://www.britannica.com/topic/constitution-politics-and-law>

¹³ Adler, 236-237.

¹⁴ Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, (Kansas: Lawrence University Press, 1999), 2.

which a given fact situation can be fit.¹⁵ According to Tsesis, it can be understood as derived from a constitutional theory that offers the methods of unpacking the text, understanding its relation to society, determining the role of the three branches of government and developing a consistent and predictable interpretation.¹⁶

It is also important to note that there are some views that differentiate constitutional interpretation from constitutional construction. Constitutional interpretation represents a search for meaning already in the text in that it is a “process of discovering the meaning of the constitutional text”.¹⁷ If the connection between the discovery and the original text is too tenuous, they can no longer be maintained as interpretations of the original. While constitutional interpretation is characteristically the legalistic interpretation of the constitutional text and limited in respect of its role in elaborating the meaning of the constitution, constitutional construction is essentially creative, political and cannot be captured by purely legal forms.¹⁸ In constitutional construction, the “imaginative vision” of politics is employed rather than the “discerning wit” of judicial judgment. Some writers view constitutional construction as complementary to constitutional interpretation. According to this view, constitutional interpretation is described as the activity that discerns the meaning and understood as communicative content conveyed by linguistic meaning of the constitutional text in context. While constitutional construction refers to the activity that determines the legal effect, including the decision of constitutional cases and the specification of constitutional doctrines, given to the constitutional text.¹⁹ Some scholars are of the view

¹⁵ Whittington, 6.

¹⁶ Tsesis, Foothold, 1594. Tsesis, A., “Footholds of Constitutional Interpretation”, *Texas Law Review*, vol. 91, no. 7. (2013): 1594.

¹⁷ Whittington, 6.

¹⁸ *Ibid.*, 5.

¹⁹ Lawrence B. Solum, “Originalism and Constitutional Construction”, *Georgetown Law Faculty Publications and Other Works*, vol. 22. no. 7. (2013): 487.

that it is pointless to differentiate interpretation and construction as they often overlap and therefore becomes irrelevant.²⁰ For the purpose of this research, it can be said that we follow this view which does not differentiate constitutional interpretation and constitutional construction.

By and large, most scholars agree that constitutional interpretive methods are necessary to justify courts' decision in constitutional cases. It follows that, coherence plays a role as important as it is in any legal justification or legal reasoning so that there is no arbitrary in interpreting the Constitution. Discussion on its nature and definition coherence can be found in the following subsection. In Chapter 3, coherence will be discussed from the perspective of modern jurisprudence.

2.2.4 The Defining Aspects of Constitutional Interpretation

From the perspective of coherence, the defining aspects in constitutional interpretation which are the most fundamental are derived based on the very basic component of the activity of interpreting the Constitution, which involves the interpreter and the Constitution itself.²¹

This first defining aspect worldview. It is related to the first component, the interpreter, particularly, the judge. A judge's conviction to philosophical legal or judicial theories is defined by his worldview. As described by a scholar, "...the acts of understanding and expression necessarily entail strong personal elements."²² Constitutional interpretation is not a process which is value neutral. It contains implicit

²⁰ See Antonin Scalia, *A Matter of Interpretation*, 7.

²¹ The explanation of the relation between legal philosophical theories, judicial philosophies and interpretive approaches in Chapter 3, illustration of cases in Chapter 4 further substantiates the identified defining aspects.

²² Fiss, "Objectivity and Interpretation", 742.

judgments of value and importance.²³ This is how worldview affects language and its interpretation.²⁴ From here emerges the second defining aspect which is the language of the Constitution. This second defining aspect is related to the constitutional text which was mentioned earlier as the second component of the activity of constitutional interpretation. As Schauer argued, the touchstone of constitutional interpretation has to be the rules of language, which is even more true in the case of written constitutions.²⁵ John Hart Ely asserted that the text constitutes the best evidence of the drafters' intent.²⁶ A diagram to assist with the formulation of the defining aspect is as follows:

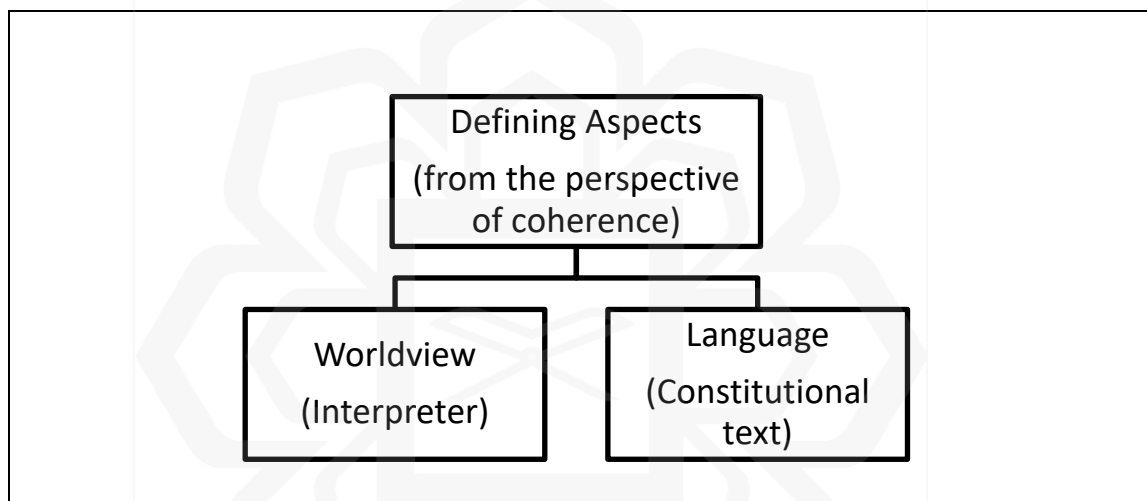


Figure 1.0 The Defining Aspects

The subsequent section will explain the defining aspects together with the emphasis on the importance of coherence at the end of the section. The point of coherence must be understood in relation with the two defining aspects which are worldview and language.

²³ Schauer, F., "Constitutional Language", *UCLA Law Review*, vol. 29, no. 877. (1982): 818.

²⁴ Ibid., to address this weakness of language Schauer suggested the possibility of reliance on fixed history or original intent.

²⁵ Schauer, 811.

²⁶ John Hart Ely, *Democracy and Distrust* (USA: Harvard University Press, 1980), 16.

2.2.4.1 The Role of Worldview

The term “worldview”, which was introduced by Immanuel Kant, originates from the German word *Weltanschauung* which means “a way of looking at the world”.²⁷ According to Kant, human reason is by nature architectonic.²⁸ It is an “architectonic”²⁹ network of ideas, conception, beliefs and aspirations in which all that make it up are organized in a coherent manner, but not necessarily in a systematically interconnected network which is called “system”³⁰ in the philosophical sense.³¹ It follows that no one can evaluate any question or a problem without first assuming any particular worldview.

As Cardozo describes, “A judge, like any other human being, is a child of his times, and, like any other human being, sees the world through the eyes of his times.”. It means that the judge’s decisions will be informed by principles which, in the words of Justice Holmes, he “cannot help believing, simply because he cannot see the world in any other way.”. The judge in most of his decisions, is merely “stating an experience as to which there is no choice.”³² Cardozo’s statement above also helps to illustrate Naugle’s observation that reason is grounded in worldview and so are interpretation.³³ Human reasoning and interpreting processes are influenced in significant ways by worldview considerations. In the task of interpretation, the meaning of texts are always determined on the basis of various pre-understandings or pre-existing knowledge. Interpretations are, Naugle claims, substantially subjective because of the influence of

²⁷ This term was also used by other German philosophers like Hegel, Kierkegaard and Nietzsche. See David K. Naugle, *Worldview: The History of a Concept* (USA: Wm. B. Eerdmans Publishing, 2002), 55-67.

²⁸ Immanuel Kant, *Critique of Pure Reason*, Translated by Norman Kemp (New York: St Martin’s Press, 1965), 429.

²⁹ “Architectonic” means the art of constructing systems.

³⁰ “System” according to Kant is understood to mean the unity of the manifold modes of knowledge under one idea

³¹ Alparslan Acikgenc, “A Concept of Philosophy in the Quranic Context”, *The American Journal of Islamic Social Sciences*, vol. 11 no. 2 (1994): 170-4.

³² Cardozo, *The Nature of The Judicial Process*, (New York: Dover Publication 1921), 124-125.

³³ Naugle, 310.

the interpreter's assumptions.³⁴ As a result, there are efforts to design scientific methods of explication that circumvents a problem and guarantees objective interpretive results.

A worldview is also manifested through philosophical legal theories. Therefore, it is important to understand the worldview that underlie each theory because through the worldview, the matrix in which an important idea first arose could be observed or an ideological association could be traced.³⁵ This is relevant because a court's judgment often reflects a judicial philosophy which is often shaped by legal philosophical theories that have influence over constitutional meanings and choices of methods of constitutional interpretation.³⁶ It therefore helps significantly to understand the philosophical legal theory before identifying a judge's judicial philosophy in a case so that the moral and ethical dimensions of a decision could be better appreciated.³⁷ Another important role of worldview is the necessity to have a proper worldview as a framework in analysing a judicial process. The task of analysing a judicial process requires a careful procedure because it produces "transmissible knowledge". It is therefore suggested that judicial making requires more than "mere assertion, plausibility or opinion" as a framework for decision.³⁸ Worldview, in this context, is a framework as it shapes the philosophical legal theories that will justify the preference of constitutional interpretative approaches.

³⁴ Naugle, 311.

³⁵ Albert M. Wolters, *On the Idea of Worldview and its Relation to Philosophy*, (Canada: Institute for Christian Studies Institutional Repositories 1983), 14.

³⁶ Gerald R. Ferrera, Mystica Alexander, "Judicial Philosophy or Mere Co-Incidence", *Richmond Journal of Law*, vol. 14. no. 561 (2011): 3.

³⁷ Ibid.

³⁸ Sidney Ulmer, "Scientific Method and the Judicial Process", *The American Behavioral Scientist*, vol. 7, no. 4, (1963): 38. see also Sydney Ulmer, "The Influence of the Chief Justice in the Decision Process of the Supreme Court", *Walter F. Murphy and C. Herman Pritchett (eds.), Courts, Judges and Politics*, (1961): 497-508; Sidney Ulmer, "Quantitative Analysis of Judicial Processes, Some Practical and Theoretical Applications", *Law and Contemporary Problems*, vol. 28. no.1. (1963): 164-84.

Among the philosophical legal theories that are most often discussed are Natural law, Legal Positivism, Utilitarianism and Legal Realism.³⁹ By and large, the philosophical legal theories have gone through evolution and very much influenced by the secular worldview. An exhaustive review of various theories is beyond the scope of this thesis. However, they will be briefly explained here to the extent sufficient to give a brief overview before illustrating their connection with the interpretive approaches in Chapter 3.

(a) Natural Law

Natural law in its early formulation, was described by Aristotle as “just by nature” where he sees natural justice as valid everywhere with the same force and not “by people’s thinking this or that” which refers to positive law.⁴⁰ Various theories were developed based on arguments over its meaning until Thomas Aquinas came up with a proposition that the eternal law of divine reason is known to us in part not only by revelation, but by human reason. To Aquinas, Natural law is “nothing else than the participation of the eternal law in the rational creature.”⁴¹ It follows from this theory, that humans are able to formulate the preservation of one’s own good, the fulfilment on “those inclinations which nature has taught to all animals”, and the pursuit of the knowledge of God.⁴² Man-made laws must, to Aquinas, conform to the law of nature and if it is in conflict with the law of nature, it is a mere perversion of law and thus ceases to be a law.⁴³

³⁹ Ferrer and Alexander, 565-579.

⁴⁰ <https://www.britannica.com/topic/natural-law>

⁴¹ Ibid.

⁴² Ibid.

⁴³ Patterson, 431

Natural law was not presented in opposition to or distinct from legal positivism. Instead, it was later used by Enlightenment and the Modern Era Philosophers such as Kant, Grotius, Hobbes, Locke, Rousseau as promulgations of the natural order. Natural Law was used to infuse ethical concepts into legal analysis.⁴⁴ It was also used by Greeks and Romans as an objective standard that measured civil laws such as “due process of law” and “equality”. Therefore, it is believed that these terms were not defined because they are inherent in the reasoning process based on human’s natural desire for justice.⁴⁵

Locke’s and Grotius’ version of Natural law in the seventeenth century which was reinforced by Newton of the eighteenth century was said to have extended its influence to America when it influenced the authors of the American Declaration of Independence.⁴⁶ The American legal fraternity viewed knowledge of natural law as the foundation of a legal education and regarded the common law and the English constitution as derived from natural law. In fact, the contract theory of the state, inherent in the doctrine of natural law, became one of the basic concepts of American Constitutionalism and natural rights were made national rights. It was in this spirit that the document was submitted to the people to realize the nature of such fundamental law as “a superior statute” emanating from the people themselves and not from a legislative body. Natural law was being made into constitutional law in the newly founded American Constitution with a strong belief of its supremacy.⁴⁷ One of the founders of the American Constitution, Alexander Hamilton, made a beautiful remark about the sacred rights of mankind, that they “*are written as a sunbeam, in its whole volume of*

⁴⁴ Ferrer and Alexander, 567

⁴⁵ Ibid.

⁴⁶ <https://www.britannica.com/topic/natural-law>

⁴⁷ Patterson, 449.

human nature, by the hand of Divinity itself, and can never be erased or obscured by mortal power."⁴⁸

Natural law was a great influence until the rise of Kant's categorical imperatives and Bentham's utilitarianism which were said to have weakened the belief that nature could be the source of moral and legal norms.⁴⁹

(b) Positivism

Positivism is one of the many products of secularism which has a great influence on the idea and definition of values through the framework of philosophical empiricism⁵⁰ which becomes the epistemological framework and methodology for the social sciences.⁵¹ It began with scientific revolution and asserts that metaphysics is mere illusion. They acknowledge only empirical and inductive methods as proper method of science and claim that the universe could only be understood by means of scientific laws. The major belief of legal positivism is the unity of science which maintains that the methods of natural science constitute the only legitimate methods for use in the social science.⁵² It displaces metaphysical foundation and value and places a great reliance on empirical and sensory observation.⁵³

⁴⁸ James Wilson of Pennsylvania, a prominent lawyer of the revolutionary period described natural law as "a true law, conformable to nature, diffused among men, unchangeable, eternal. By its commands, it calls men to duty; by its prohibitions, it deters them from vice. To diminish, to alter, much more to abolish this law, is a vain attempt.....It is the same eternal and immutable law, given at all times and to all nations; For God who is its author and promulgator, is always the sole master and sovereign of mankind."

⁴⁹ <https://plato.stanford.edu/entries/natural-law-theories/>

⁵⁰ Achinstein, *The Legacy of Logical Positivism*, (Baltimore: John Hopkins Press, 1969), *The Alienation of Reason: A History of Positivist Thought*, (Garden City, NY: Double Day, 1969), 57.

⁵¹ B. Latour, S. Woolgar, *The Construction of Scientific Facts*, 72.

⁵² Roslan Jelani, "Conceptualization of Modern Leadership within Al-Attas' Framework of *Adab*" (Ph.D. thesis, CASIS, Universiti Teknologi Malaysia, 2022), 44.

⁵³ See Muhammad Muslehuddin, *Philosophy of Islamic Law and the Orientalists*, (Lahore: Islamic Publications, 1994), 34. and Dagobert D. Runes, *Dictionary of Philosophy* (New Jersey: Adam & Co., 1979), 273.

According to another theory of positivism, which is logical positivism or also known as logical empiricism, nothing except the rational ground is believable. It bases all knowledge on observable facts, logical construction and linguistic analysis.⁵⁴ The aim is towards superiority of humanity with everything confined to sensory observation. An example of logical positivist approach towards language is that they do not explain the meaning of the word “meaning” in its present usage, but merely propose a new usage. They hinge upon an unusual definition of the word “meaning” which must be taken as a postulate and cannot be proved.⁵⁵ They would then deny a definition and say that the rules of ethics are significant. As observed by Glanville Williams, it turns out that their empirical criterion is itself by its own rule meaningless.⁵⁶

The influence of positivism can be seen in its advocates’ view in their various newly developed theories. To name a few, Bentham, Austin and Hart did not perceive law to have been derived from moral principles and did not recognize the conceptual link between law and morality. The concept of rights and duties, for example, are not seen as moral entities under the legal positivism and utilitarianism theory.⁵⁷ Austin’s theory is considered useful in critical legal thinking as a reminder that law is dependent on a combination of utilitarian rights, duties and obligations which are subject to empirical analysis rather than depending wholly on a system of morality. Under Hume’s understanding of legal positivism, the truth of value judgments, at least in morals, is not ascertainable unlike the truth of empirical facts.⁵⁸ Bentham, in determining the

⁵⁴ Paolo Parrini, Wesley C. Salmon, and Merilee H. Salmon, *Logical Empiricism: Historical and Contemporary Perspectives*, (Pittsburgh: University of Pittsburgh Press, 2003). 87.

⁵⁵ Glanville Williams, “Language and the Law”, 182

⁵⁶ Ibid.

⁵⁷ Jeremy Bentham, *Of Law in General*, ed. H.L.A. Hart, (London: The Athlone Press, University of London, 1970), 18.

⁵⁸ M.D.A Freeman, *Lloyd’s Introduction to Jurisprudence*, 226.

soundness or the unsoundness of any law, put a great deal of reliance on human's conscience on pain and pleasure.

2.2.4.2 The Role of Language

Schauer observed that lack of attention from the perspective of the philosophy of language in countries with written constitutions is rather surprising.⁵⁹ Examining the words of the Constitution as a discussion of its own receives very little attention in the literature.⁶⁰ The words of the Constitution are often ignored. Instead, moral philosophy, history and public policy are seen as higher theories in constitutional inquiries.⁶¹ As Alexander Hamilton has famously said, “Whatever may have been the intention of the Framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. Nothing is more common than for laws to express, more or less than was intended. Arguments drawn from extrinsic circumstances, regarding the intention of the convention which is the true meaning, must be rejected.”. In the same vein, James Madison drew a sharp distinction between the true meaning of the Constitution and whatever that might have been the opinions entertained in forming the constitution.⁶² This means, the important part of interpreting a constitution is what the language of the constitution conveys, which is the true meaning that matters.

Though it is acknowledged that such theories are important to address the gaps, silences, vague language, loopholes and open texture, the words of the Constitution

⁵⁹ Schauer, 242.

⁶⁰ Ibid., 798.

⁶¹ Ibid.

⁶² On the importance of language, see Scalia, *Scalia Speaks*, 185 where he also quoted Alexander Hamilton.

should be examined closely and regarded as constitutional language.⁶³ Theories of constitutional language are needed as much as theories of constitutional law. Schauer highlighted the importance of constitutional language which acts as a significant restraint on constitutional decision.⁶⁴ Had the specific intention of the drafters been able to be ascertained, there will not be a need for constitutional language. However, no amount of looking into the mind of the framers or “constructing fictionalized intentions at various level of abstraction” can render the text less authoritative.⁶⁵ A text can have purpose without reference to the psychological condition of the author. In other words, text is always the starting point and to some extent, the finishing point as well.

In the case of ambiguous constitutional text, the constitutional language can be intertwined with moral theory in the sense that the constitutional text is viewed as a raw material from which general moral or political theory of the Constitution are constructed.⁶⁶

A clearer illustration on how some methods are mostly focused on the rules of language can be found in Chapter 3. For example, how most textualists and some originalist gave much emphasis in meanings and are true to the words of the constitutional provisions are shown in Chapter 3 when describing the originalist textualist method. Their fidelity to original meanings of words extends to the statutory legislations which are constitutionally challenged and to the abstract concepts such as justice, equality and freedom. They are also generally opposed to the idea of relative interpretation of meanings which rejects all absolute values and accepts as ultimate

⁶³ Schauer, 798.

⁶⁴ Ibid., 799.

⁶⁵ Schauer, 810.

⁶⁶ This theory, according to Schauer, is implicit in the works of John Hart Ely and in some parts of Ronald Dworkin’s writings.

measure only that which is in accordance with desire.⁶⁷ Therefore, any attempts to change meanings and apply the new meaning under the guise of fidelity to the text are not considered as the original textualist or original originalist.

2.2.4.2.1 Rules of Interpretation and Semantic Analysis

For language to be preserved and to achieve a sound interpretation, it is important that the rules of language be observed. To draw up rules of sound interpretation of words becomes significant especially in understanding laws and agreements. It is also trite, according to natural law that words are to be taken in their own proper and accepted sense. In other words, “common usage is the arbiter, the law and the norm of speech.”⁶⁸ Terms of art are to be explained in accordance with the definitions of the experts in each art. This is important in order to follow the interpretation of the law which agrees with the spirit of enacting the law and reject that which is inconsistent with it. When the sole reason for the law ceases to exist, the law also ceases and if there is more than one reason for the law the whole law doesn’t exist if only one reason ceases to exist. If words have more than one possible meaning, a favourable option should be prioritized which is an interpretation which protects equality in the position of both parties or if it seeks the common interest, promotes peace. It would be undesirable if an interpretation is favouring one party or cause detriment to another. A favourable expression is to be interpreted more broadly and invidious more strictly.⁶⁹ Those are examples of rules of interpretation which are naturally corresponding with natural law and justice. Therefore,

⁶⁷ See further discussion on relativism at 2.4.1(a) under relativism.

⁶⁸ Pufendorf, S, *On the Duty of Man and Citizen According to Natural Law*, Translated by M. Silverthorne (Montreal: McGill University, 1991), 108.

⁶⁹ Pufendorf, 108-110.

supposedly adherence to these basic rules will most likely produce a result closer to justice.

2.2.4.2.2 Key terms and key concepts

Language can only serve its function as the chief medium of thought if there is a general measure of agreement upon the meaning of words. Therefore, it is not desirable to give a word a new meaning so different from its traditional meaning.⁷⁰ Accordingly, it is important to understand the origin and etymology of key terms and key concepts before they can be interpreted. The following key terms and key concepts are often deliberated in the course of constitutional debates in terms of their usage, application and relation with other constitutional issues. A lot of other terms and constitutional issues are rooted to or derived from these key terms.

(a) Justice

The earlier theories on which the current Western understanding of the concept of justice is based were developed in ancient Greece and Rome. There seems to be two different views on justice. The first view believes that justice is natural and that the ultimate measure of justice is the natural principle of justice binding all men at all times.⁷¹ The concept of nature of justice was then fundamental and closely related to nature of man and it refers to the psychology of the soul. According to Aristotle, justice entails duties which are obligations to act in a certain way for the welfare of others.⁷² Aquinas views justice as a source of duty.⁷³ Duty was understood as having been

⁷⁰ Glanville Williams, "Language and the Law IV", 144.

⁷¹ Adler, 850.

⁷² Ibid., 359.

⁷³ Ibid., 360.

derived from the command of God or the state.⁷⁴ The second view sees justice as political. Proponents of the second view maintains that only the individual who is subject to the government can be judged just or unjust and that the ultimate measure of justice according to this view is man-made law.

Accordingly, based on the debates among the earlier scholars, the modern scholars observed that justice is either something political or something natural, which is a dichotomy they have been facing in the conception of justice.⁷⁵

Those who take the position that justice is natural believe that justice precedes the state in time naturally. To them, the origin of politics and society is a consequent of natural law of which justice is an integral part. Accordingly, the ultimate standard of justice is to be found in natural law and discoverable by reason alone. Natural law is also believed to be the higher kind of law whose rules are universally valid and has a causal relation to all phenomena that constitute the physical world, the world of sense and sensible experience.⁷⁶

On the other hand, those who take the position that justice is political believe that justice is subsequent to the state. It then follows logically that the determination of what is just and unjust is relative entirely to the constitution of the state and dependent upon its power and consequent upon its laws, that the institution of the state emerged in human history as a result of a transition of man from a “state of nature” in which there is no justice and injustice for there to be such a thing as natural justice. An example is Hobbes’ theory of justice which emphasize that law and justice are product of the

⁷⁴ See discussion under “Duty”.

⁷⁵ This is an example of dualism in understanding the concept of justice. Dualism is one of the characteristics of secularism as discussed at the end of this Chapter.

⁷⁶ Adler, 360.

legislative will. This means, there is no justice if there is no legislative will and government enforcement.⁷⁷

(b) Duties

Duties refers to human actions in conformity with the commands of law on the ground of obligation.⁷⁸ According to the ancient view,⁷⁹ duties are described as something derived from the command of God or of the State in which either case, in the form of law enforced by the sanctions of a superior power. It follows that citizen has duties to the State and the religious man to God in which obedience to such law or command can only happen by those who recognize the authority of the law or the right of the Divine Lawmaker to command. Duties also exists amongst fellow men, when understood without reference to law or the divine command, in contracts or promises made to discharge certain obligations. In this case, duties are derived from the man's own virtues, which are described by Locke as "the highest perfection of human nature".

The above view presents some difficulties as it requires an honest and just man to acknowledge such obligation. Socrates's conception of the "just man" then becomes relevant in which he described as a person "who does what he ought to do because it is just and because justice is essential to the very life and health of the soul."⁸⁰ To Aristotle, only justice entails duties, not other virtues such as courage and temperance. While justice refers to the good of another or to the common good, temperance and courage without justice only concern the individual's well-being. Aquinas echoed the view of

⁷⁷ Gerald J. Postema, *Bentham and the Common Law Tradition*, 69.

⁷⁸ Pufendorf, 17.

⁷⁹ As being put forth by Locke who refers to the Christian and the Hobbist, see 358 Adler, Vol I.

⁸⁰ Adler, 359.

Aristotle where he viewed that Justice alone of all the virtues, implies the notion of duty.” Clearly, justice lies at the root of duty.

(c) Rights

The concept of rights was not very much discussed independently by the ancient scholars. They were neither found in the works of the Greek scholars nor were even listed in the classic book of Great Ideas.⁸¹ The only discussion of right prior to it being elevated as a concept was simply in the context of it as “the right action” or “the right thing to do”.⁸² If at all discussed during the classical period, it was referring to Aristotle’s usage of “*dikaion*” to indicate a “rightly ordered” society, a condition of a correct structure of human relationships. A Roman jurist uses the term “right” in describing justice to mean rendering each of his right or what is due to him.⁸³ Apparently the earlier concept of right was very much associated with natural rights and “correctness”.

Hobbes described, in a context derived from the conception of natural freedom, that the natural right of every man is the liberty to use his own power for the preservation of his own life through his own judgement and reason he deemed most appropriate.⁸⁴ Maine observed that right is a concept belonging to the modern world in which a clear and consistent meaning was given for the first time by the searching analysis of Bentham and Austin.⁸⁵ Bentham places great importance on “liberty-rights” and rejects natural rights.⁸⁶ Most claims of rights in contemporary jurisprudence are thus associated

⁸¹ Adler, 359.

⁸² H.L.A. Hart, *Essays on Bentham, Studies in Jurisprudence and Political Theory*, 163.

⁸³ <https://plato.stanford.edu/entries/natural-law-theories/>

⁸⁴ Adler, 993.

⁸⁵ HLA Hart, *Essays on Bentham* 163; *Early Law and Custom* 1891, 365-366.

⁸⁶ *Ibid.*, 16.

with some entitlement to privileges and freedom on the ground of liberty. They impose duties and responsibilities on their duty bearers and focus on protection, status and benefit for the right holders.

(d) Liberty

There were many discussions on the idea of liberty or freedom throughout history. Generally, in the ancient Greek civilization, Plato and Aristotle did not recognize liberty as the primary measure of the goodness of the government. Justice to them was more important. Liberty is used interchangeably with two other terms which are “freedom” and “independence”. It is also often associated with law, justice and equality, which can give it a different meaning, depending on its association with such other terms.⁸⁷ Its meanings and problems are differently raised in different areas such as theology, jurisprudence, ethics and history.⁸⁸

Liberty has been popularly discussed in the context of civil liberty. In the earlier civilizations, the fundamental doctrines of civil liberty had some grounding in metaphysical elements and differed according to the conception of natural freedom on which they are based. Aristotle, for example, argued that freedom is understood as self-regulation rather than for license as taught by extreme democracies.⁸⁹ Locke was the first to build a system around liberty. He maintains that the line between liberty and license is drawn by the percepts of the natural law. According to him, men were created equal by God and endowed by Him with natural rights. Those words and those of a few other philosophers became the source of liberty which later was adopted by Thomas Jefferson thereby underpinning the American Declaration of Independence. Liberty was

⁸⁷ Adler, 991.

⁸⁸ Ibid.

⁸⁹ Frank, 41.

then an acceptance of the idea that there is a God-given inner life in each person which is worthy of preservation and protection and that a primary job of government is to preserve such inner life.⁹⁰

Liberty was also connected to the idea of virtue. Virtue was regarded as the discipline of free choice. Socrates was not agreeable with the spirit of democracy due to its insatiable desire for freedom. Augustine's view was that a man acts virtuously when he chooses to use freedom properly and he acts viciously when he misuses it. Therefore, Augustine said that the will is then truly free when a man is not the slave of vices and sins and the rule of reason does not annul the will's freedom.⁹¹ Hegel maintained that freedom is not freedom from law but "the recognition and adoption of such universal substantial objects as Rights and Law.". He stressed that all that matters in the relationship between liberty and law is whether the law is just and whether a man is virtuous. Spinoza related the concept of freedom with what causes human action which are passion and reason. A man is free when he is governed by reason and is said to be acting with adequate knowledge and in the light of truth. On the other hand, a man is in bondage when he chooses to be governed by passion and is regarded as having acted under the influence of inadequate ideas, in the shadow of error or ignorance.⁹²

⁹⁰ Wendell J. Brown "What Liberty Is", *American Bar Association Journal*, vol. 47, no. 3, (1961): 291-293.

⁹¹ St. Augustine (354-430 CE) was one of the most significant early Christian thinkers who adapted Greek classical thought into Christian teaching, creating a theological system that is still relevant today, Adler, 994.

⁹² Adler, 994-995.

(e) Equality

Before 18th century, human beings were considered unequal by nature. However, with the recognition of the principle of natural equality in the modern period beginning with the definition of natural law by Hobbes and Locke, the idea of equality has been considered as a constitutive feature of justice.⁹³ It was also observed that the fundamental idea of equal respect for all persons and of the equal worth or dignity of human beings has been accepted as a minimum standard of all major thoughts of modern Western political and moral culture.⁹⁴ It is therefore understood that the idea of equality differs based on the various understanding of natural justice and at a more general level, justice, which is discussed under “Justice” in this section.

2.2.4.3 The Role of Coherence

Coherence means unity of principle⁹⁵ or is also defined as a quality of forming a unified whole or quality of being logical or consistent a systematic or logical connection or consistency.⁹⁶ It is also described that the ultimate criterion of truth is the coherence of all its separate parts with one another and with experience. According to Ronald Dworkin, coherence as theory of law equals to integrity. In the sense of interpreting the law, it is speaking with one voice as integrity requires. It is also a value which is supposed to have special relevance in the legal realm, in terms of the role which it should play in guiding judges seeking to interpret the law correctly. It has also been noted that features of the law such as the doctrine of precedent, arguments from analogy,

⁹³ Michael A. Peter, “Editorial,” *Educational Philosophy and Theory*, Vol. 43, No 8 (2011): 793-796. via, <https://www.tandfonline.com/doi/pdf/10.1111/j.1469-5812.2011.00806.x>

⁹⁴ Stefan Gosepath, “The Global Scope of Justice”, *Metaphilosophy*, vol. 32, no. 1-2, (2001): 135-159.

⁹⁵ Kress, K., "Coherence" in *A Companion to Philosophy of Law and Legal Theory*, edited by Patterson, D. (Oxford: Blackwell, 1996), 786.

⁹⁶ see *Oxford Dictionary* and the *Merriam Webster*.

and the requirement that like cases be treated alike seem particularly apt to be illuminated through explanation of coherence. The idea of coherence as a special virtue of interpretation in legal reasoning plays an important role in the work of several major continental legal philosophers.⁹⁷ There is general agreement that the coherence in question must amount to more than logical consistency amongst propositions.⁹⁸ MacCormick views coherence in terms of unity of principle in a legal system. He also contends that the coherence of a set of legal norms consists in their being related either in virtue of being the realisation of some common value or values, or in virtue of fulfilling some common principle or principles. Raz also characterises coherence in law in terms of unity of principle.⁹⁹ In his view, the more unified the set of principles underlying those court decisions and legislative acts which make up the law, the more coherent law is. But the basis in which something has to unify is the problem area.

A further characterisation of the kind of coherence which is to be sought in legal reasoning may be found in Dworkin's work. Many writers regard Dworkin's account of integrity in adjudication as an example of a coherence account.¹⁰⁰ Although writings before Dworkin had fully developed his account of law as integrity, they are also viewed as offering a coherence account of adjudication. Raz disputes the idea that Dworkin's

⁹⁷ See e.g. Peczenik, A., *On Law and Reason*, Kluwer, Dordrecht, and Aarnio, *The Rational as Reasonable*, Alexy, R. and Peczenik, A., "The Concept of Coherence and Its Significance for Discursive Rationality", *Ratio Juris*, vol. 3, no. 87. (1990): 130–140; R. Alexy, *A Theory of Legal Argumentation*, (Oxford: Clarendon Press, 1989): 55.

⁹⁸ Kress, K., "Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions", *California Law Review*, vol. 72, no. 98. (1984): 369–402; N. MacCormick, "Coherence in Legal Justification", in *Theory of Legal Science* edited by A. Peczenik and et al. (Dordrecht: D. Reidel Publishing, 1984), 743. Marmor, A., *Interpretation and Legal Theory*, (Oxford: Clarendon Press, 1992), 345. Alexy, R. & Peczenik, A., "The Concept of Coherence and Its Significance for Discursive Rationality", *Ratio Juris*, vol. 3, no. 569, (1990): 130–47.

⁹⁹ Joseph Raz, "The Relevance of Coherence", in *Ethics in the Public Domain* edited by Raz, J. (Oxford: Clarendon Press, 1994), 5.

¹⁰⁰ see Hurley, S., *Natural Reasons*, (Oxford: Oxford University Press, 1989), 87. S. Hurley, "Coherence, Hypothetical Cases, and Precedent", *Oxford Journal of Legal Studies*, vol. 10, no. 34. (1990): 221–251; Marmor, A., *Interpretation and Legal Theory*, (Oxford: Clarendon Press, 1992), 45; Marmor, A., *Interpretation and Legal Theory*, revised 2nd edition, (Oxford: Hart Publishing, 2005), 6.

account of law should be understood as a coherence account. On this view, judges should try to realise the value of coherence in judicial decisions by interpreting the law as ‘speaking with one voice’, i.e. they should identify legal rights and duties on the basis that they were all created by a single author, the community personified.

The theory of coherence in general has gone through some evolution, which is not possible to be condensed in this research. For the purpose of our present discussion on constitutional interpretation, it is sufficient to note that the earlier theories of coherence are very much connected to coherence of truth. As the theory develops, as a result of secularization of worldview, the metaphysical aspect is no longer a concern for most modern scholars.

The early scholars who advocated for coherence were influenced by their reflections on metaphysical questions, supported by epistemological and semantic considerations as the foundation of the coherence theory.¹⁰¹ For example, it was argued that a coherence theory of justification leads to a coherence theory of truth.¹⁰² A coherence theory of truth states that the truth of any true proposition consists in its coherence with some specified set of propositions. However, since this argument rests upon the claim that coherence with a set of beliefs is the test of truth, it faces criticism. Among the usual criticism was that it is an infallible test of truth on the ground that there is no guarantee that a perfectly coherent set of beliefs matches objective reality.

In the modern discourse, there were many attempts to categorized and define coherence. It is claimed that coherence has many versions. In an ordinary sense, it denotes a state of affairs that is free from inconsistency, logically structured and does

¹⁰¹ <https://plato.stanford.edu/entries/truth-coherence/#Bib> (accessed on 22 August 2023)

¹⁰² B. Blanshard, *The Nature of Thought Ch. XXVI*, (London: George Allen and Unwin, 1797), 367.

not suffer from internal contradiction.¹⁰³ It is also commonly understood to mean consistency in applying a set of principles. Accordingly, most scholars consider consistency as a precondition of coherence.¹⁰⁴ It was agreed that the first version of coherence is coherence of a set of factual beliefs or also known as logical or narrative coherence and that the second type of coherence is coherence of a normative system or also known as normative coherence, such as the law.¹⁰⁵ The third is coherence of the world around us. Coherence of the world is prior to both. It is a feature of our existence as understanding beings and rests on our need to see ourselves as rational, morally sensitive people.¹⁰⁶ Some scholars acknowledge that coherence has an intimate connection with truth, as it was observed, when the aspect of coherence as an explication of truth is neglected, there will be difficulties especially in justifying its application to moral theory.¹⁰⁷

2.3 ISLAMIC PERSPECTIVE

The Islamic perspective is also examined based on the Islamic scholarly discussion on the important conceptions in relation to the idea of constitution and to find out if there are shared ideas between the ancient western conception and the Islamic tradition. At the end of this section, just as was done in the previous section, the defining aspects will be explained together with the emphasis on the importance of coherence. It will be even more apparent from the Islamic perspective, that point of coherence must be understood in relation with the two defining aspects which are worldview and language.

¹⁰³ <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perram/perram-j-20161118> accessed on 22 August 2023

¹⁰⁴ Alexy, Roberts and Aleksander Peczenik, "The Concept of Coherence and Its Significance for Discursive Rationality", *Ratio Juris*, vol. 3, no. 50. (1990): 130–147.

¹⁰⁵ Ibid.

¹⁰⁶ Balkin, *Understanding Legal Understanding: The Subject and the Problem of Legal Coherence*, 11.

¹⁰⁷ Marmor, 49.

Works concerning the Islamic Constitution are concentrated on the conception of *khilafah* and *imamah* and statehood.¹⁰⁸ Scholarly discussions distinctively on constitutional and administrative law are very limited, let alone on interpreting the constitutional text. It appears that the discipline of constitutional law in Islam is less developed compared to other branches of Islamic law due to misconceptions revolving around the Islamic concept of state in general and constitutional law in particular.¹⁰⁹ Elements that constitute a state in Islam are those which are universally recognized but the Muslim scholars have added another element which is submission to the requirements of the religion of Islam (*tahkim al-Islam*) or also known as *siyadah al-shariah* (supremacy of *Shari'ah*).¹¹⁰ This, however, has often been misinterpreted as akin to a theocratic system of government as understood in the Western thought. According to the Western thought, the theocratic system is inimical to a democracy in that the state is completely controlled by God and that the involvement of the people in government and their freedoms are denied.¹¹¹ In Islam, the supremacy of the *Syariah* entails commitment to justice, representative government, *syurā*, equality, liberty and accountability of the ruler. Therefore, absolutism, despotism and arbitrary rule as feared or understood by most orientalists are not acceptable.¹¹²

¹⁰⁸ Abdul Samat Musa, "Constitutional Law: An Overview of the Islamic Approach and Its Contemporary Relevance," in *Advances in Social Science, Education and Humanities Research, 1st International Conference on Indonesian Legal Studies (ICILS 2018)* organized by Atlantis Press, , August 2018), 29.

¹⁰⁹ Ibid., 27.

¹¹⁰ Yusuf al-Qaradawi, *Al-Siyāsah al-Shar'iyyah fī Daw' al-Nuṣūṣ al-Sharī'ah wa Maqāṣidihā*, , 17-18.; Sayyid Qutb, *Al-'Adālah al-Ijtīmā'īyyah*, 13.; Maududi, *Islamic Law and Constitution*, 75.; Tharwat Badawi, *Al-Nizām al-Siyāsī*, (Cairo: Dar al- Nahdah al Arabiyyah, 1986), 153-154.; Fathi al-Durayni, *Khaṣā'is al-Tashrī' fī al-Siyāsah wa al-Ḥukm*, 2nd Ed (Beirut: Muassasat al-Risalah, 1987), Rashid Al-Ghanushi , *Al-Ḥurriyyāt al-'Āmmah fī al-Dawlah al-Islāmiyyah*, (Beirut: Markaz Dirasat al-Wahdah al-Arabiyyah, 1993), 222.

¹¹¹ Musa, 28, this is an example of a dualistic view. Discussion on dualism can be found under the subtopic of Modern Constitutional Interpretation and Its Problems of this thesis.

¹¹² Muammar, 18.

2.3.1 The Idea of Constitutionalism in Islam

Generally, state, government and constitution are governed by the same principles that refer to the system of governance.¹¹³ Constitutional law (*al-fiqh al-dusturi*) in Islam is part of the founding and constituents of state and its legal system. It is built upon the close relationship between religion (*deen*) and state (*daulah*).¹¹⁴ Imam Al-Ghazali described the two as akin to twin sisters, religion being the foundation of human society and the ruler of the state is its preserver.¹¹⁵ This inseparable link is illustrated by the very creation of the Islamic State together with the written Madinah Constitution or also known as *Sahifah Madinah* which introduced the first constitutional government.¹¹⁶ This historic and unprecedented document is a practical example that manifests both substance and variable elements with flexible application. Due to the universality of the Islamic message, this Document can fit into any kinds of structures. Its design offers a great potential for the development of Islamic oriented constitutional law in Muslim countries.¹¹⁷ Therefore, the choice of a particular form of government structure is very much depending on the circumstances of a particular nation. Al-Ghazali also acknowledges the importance of constitutional law in Islam while indicating the superiority of the Constitution over the ruler, subject to the limitations prescribed by the *Shari'ah*.¹¹⁸

Islamic constitutionalism rests upon the principle that the state is bound to administer and uphold the *Shari'ah*. Islam prescribes the notion of limited government in that it rejects absolutism, despotism or any kind of arbitrary rule by a single individual

¹¹³ Musa, 30.

¹¹⁴ Musa, 27.

¹¹⁵ Haroon Khan Sherwani, *Early Muslim Political Thought and Administration*, 1st ed., (Dehli: Jayyed Press, 1942), 211.

¹¹⁶ Musa, 28, see also Muhammad Hamidullah, *The First Written Constitution in the World*, 2nd ed., (Lahore, Ashraf Press, 1975), 68.

¹¹⁷ Musa, 33.

¹¹⁸ Sherwani, 211.

or a group.¹¹⁹ All powers understood within the context of Islamic constitutionalism are bound to be utilized in the realization of public interest (*maslahah*). A ruler is to observe some obligations while governing the people to ensure that their interests are protected in accordance to the *Shari'ah* principles in the Quran and Sunnah which are fundamentally based on justice, mercy and wisdom.¹²⁰

It has been recognized that there is a possibility of influence of Islamic political thought on the Western political thought. The idea of constitution and constitutionalism in Islam which is largely built upon the concept of limited government (*hukumah muqayyadah*)¹²¹ preceded the modern idea of constitutionalism founded by John Locke who also believed that the government should be limited by law. Weeramantry contends that Locke had learnt about Arab's achievement through his teacher.¹²² Locke's ideas of social contract, sovereignty of the people and the supremacy of the legislature over the executive correspond to the notion of *bay'ah* (oath of allegiance, contract), *wakalah* (representation) and *shura* (mutual consultation) respectively. Likewise his idea of natural rights, *i.e.* life, property and liberty, was seen to have been adapted with some modification from al-Ghazzali's exposition of the five essential interests (*al-daruriyyat al-khamsah*) namely religion, life, intellect, property and progeny.¹²³ Locke based his constitutional theory on this conception of social contract by which each individual gave up his right and authorized the society to establish a common judge over him and his

¹¹⁹ Ibid.; Muammar, 18.

¹²⁰ Abū Dāwūd Sulaymān ibn al-Ash'ath, *Sunan Abū Dāwūd*,; Imām Aḥmad, *Musnad 'Abdullāh ibn 'Umar*, Cairo: al Zahra li al-I'lmal-arabi, 1987, Hadith No. 4439.

¹²¹ Mustafa Kamal Wasfi, *Al-Nizām al-Dustūrī fī al-Islām Muqāraran bi al-Nuẓum al-'Asriyya*, (Qahirah: Maktabah Wahbah, 1994),14.; see also Khalif Muammar A. Harris, "Supremacy of the Shari'ah (Siyadat al-Shari'ah) and It's Political Implications: An Analitical Study of the Notion of Constitutional Government in Islam," (unpublished Ph.D. Thesis, International Institute of Islamic Thought and Civilization (ISTAC), 2008), 155.

¹²² His teacher was Edward Pococke, Professor of Arabic Studies at Oxford. See Weeramantry, *Islamic Jurisprudence*, 105.

¹²³ Harris, 155,

fellows, which is necessary to better secure their natural rights. He argues that it is absurd to imagine men contracting to submit to an absolute, arbitrary power. It was observed that, in this sense, Locke's argument is similar to that of *al-Baqillani* and *Ibn Taymiyyah* who put emphasis on the contract (*bay'ah*) between the ruler and the ruled. His idea of inalienable rights is in line with the Quranic framework, the Universal Islamic Declaration of Human Rights (UIDHR) as does the idea of constraint upon the authorities and protection against official abuse of power. Based on the above, Robert Briffault rightly observed that there is a possibility of the idea of a democratic government, brotherhood, human rights that inspired the West and the American Constitution is from the Holy Quran.¹²⁴

There are also similarities between the thought of Thomas Jefferson and other founding Fathers of the American Constitution and some basic Islamic ideas.¹²⁵ Apart from that, many other western political thinkers of the fourteenth and sixteenth century such as Rousseau, Montesquieu were also directly or indirectly influenced by Muslim scholars.¹²⁶ Rousseau in his Social Contract even complimented Prophet Muhammad

¹²⁴ Robert Briffault's remark "*The ideals of freedom for all human beings, of human brotherhood, of the equality of all men before the law, of democratic Government by consultation and universal suffrage, the ideals that inspired the French Revolution and the Declaration of Rights, that guided the framing of the American Constitution and inflamed the struggle for independence in the Latin American countries were not inventions of the West. They find the ultimate inspiration and source in the Holy Quran. They are the quintessence of what the intelligentsia of Mediaeval Europe acquired from Islam over a period of centuries through the various channels of Muslim Spain, Sicily, the Crusades; and of the ideals propagated by the various societies that developed in Europe in the wake of the Crusades in imitation of the brotherhood association Islam.* see M.E Bari, "Human Rights in Islam with Special Reference to Women's Rights", *Dhaka University Series*, Vol.5, Pt F, No. 1 (1994): 1-12; Mashood A Baderin, "Human Rights Islamic Law: The Myth of Discord", *European Human Rights Law Review (E.H.R.L.R.)*, vol. 67. no. 2 (2005):166-167.

¹²⁵ On Islamic Influence on Democracy, see Azizah Al-Hibri, (1999), 492; Robert Briffault, *The Making of Humanity*, (Lahore: Islamic Book Foundation, 1980), 190-191.

¹²⁶ Khalif Muammar, 154.

(p.b.u.h) and was optimistic that under the Prophet's regime and the Caliphs that succeeded Him, the government was good and undivided.¹²⁷

Based on the above facts, it was contended that in actuality, the notion of constitutional government was introduced by Islam. The rule of law which corresponds with the notion of supremacy of the *Shari'ah* (*siyadat al-shari'ah*) has been identified as the central issue in a constitutional government. The focal point of Islamic constitutionalism is the subordination of both the state and the people to the general guidelines and the primordial values enshrined in the written Islamic Constitution.

As far as constitutional interpretation in Islam is concerned, the constitutional text is generally dealt with as legal rulings which is discussed under the topic of *usul al-fiqh* (Islamic legal rulings) or *ijtihad* and *maqasid al-shari'yyah*. For example, in Pakistan, constitutional interpretation applied the classical principles of legal interpretation, *maqasid* and the principles of *Shari'ah* which differentiate between norms that are unchangeable (*qat'ie*) and changeable (*ijtihadi*). Some norms are unchangeable because they are based on unequivocal revealed text and changeable (*ijtihadi*) because they are based on conjectural legal reasoning.¹²⁸ However, scholarly and academic writings on the *usul al-fiqh* principles which are specifically addressed to the application in the context of Islamic constitutional principles are not easily available.

Some contemporary researchers have identified several types of interpretive methods which appear prominent in both Islamic and American jurisprudence.¹²⁹ The first method is described as the "plain meaning literalism" practised by the "strict

¹²⁷ Rousseau states "Mahomet (Muhammad) had very sound opinions, taking care to give unity to his political system, and for as long as the form of his government endured under the caliphs who succeeded him, the government was undivided and to that extent, good." See Rousseau, *Social Contract Book IV*, (London: Penguin Book, 1968) 179.

¹²⁸ Ahmed Akgündüz, *Introduction to Islamic Law: Islamic Law in Theory and Practice*, (Rotterdam: IUR Press, 2010), 348.

¹²⁹ Landes, *Interpreting the Quran and the Constitution*, 67.

constructionists” from among the American constitutional judges and scholars who are akin to the *Zahiris* from among the Islamic scholars. The second method is the “historical understanding originalism” which are often employed by the American originalists who are very similar to the *Malikis* of the Medinan school in the Islamic tradition. The third group is represented by the American purposivists who apply the purposive approach or the living constitution approach. Under this approach, it is emphasized that the ultimate purpose of the Constitution is to promote and protect certain fundamental values. In the Islamic tradition, the purposivists are comparable to the proponents of *masalaha* such as Al-Tufi.¹³⁰

2.3.2 The Defining Aspects of Constitutional Interpretation in Islam

2.3.2.1 The Role of Worldview

As opposed to worldview as introduced by Kant through the term *Weltanschauung* which is limited to only sense perception, the Islamic worldview as explained by Al-Attas is that it is a “vision of reality and truth” encompassing also those of “al-ghayb” which are beyond reach of normal ordinary human perception. Islamic worldview encompasses both aspects of reality of existence seen as a continuum in which the *dunya* is crucially regarded as a preparation for the *akhirah* without implying to diminish the importance of the *dunya* aspect. The system of values are derived from revelation, confirmed by intellectual analysis and other sources of knowledge including intuition and scientific inquiry.¹³¹

¹³⁰ Landes, *Interpreting the Quran and the Constitution*, 67.

¹³¹ Syed Muhammad Naquib Al-Attas, “The Worldview of Islam: An Outline” in *Islam and the Challenges of Modernity*, edited by Sharifah Shifa al-Attas (Kuala Lumpur: ISTAC, 1996), 26.; see also Muddathir ‘Abd al-Rahim, “The Roots of Revolution in the Quran”, *Dirasat Ifriqiyya (Khartoum)*, no. 3 (1987): 9.

A worldview functions primarily as general schemes “to put our conception into a unified whole when we philosophize or construct a theory”.¹³² It is a perspective, from which an individual views everything and is formed naturally in a casual manner.¹³³ Psychology of a person, language, natural environment and social conditions are factors that can influence a person’s worldview while religion, cultural environment and education are the major ones.¹³⁴ Therefore, all human conducts are ultimately traceable to a worldview especially from the epistemological perspective because it is the only framework within which the human mind can fully operate to attain knowledge.¹³⁵

In the Islamic tradition, worldview is so important in which notions, ideas and beliefs are so interconnected that together they form a network of organized concepts. This network forms a coherent mental structure naturally.¹³⁶ Our mind cannot accept contradictions if it perceives them as contradictions. That is why the mind uses its inherent principle of contradiction, argumentation, association to form the impressions that it receives from the outside world into a coherent unity as a result of which arises a worldview. These methods are used by the mind naturally to acquire knowledge and simultaneously it forms a worldview from the kinds of knowledge we accept.¹³⁷

The worldview of Islam is characterized by an authenticity and finality that points to what is ultimate.¹³⁸ It projects a view of Reality and Truth that encompasses existence and life altogether into a perspective whose fundamental elements are

¹³² Alparslan Açıkgenç, *Islamic Science: Towards a Definition*, (Kuala Lumpur: International Institute of Islamic Thoughts and Civilization (ISTAC), 1996), 26.

¹³³ Ibid., 15.

¹³⁴ Ibid.

¹³⁵ Ibid, 8.

¹³⁶ Ibid., 13.

¹³⁷ These methods involve the logical principles such as the law of contradiction, the principle of identity, deductive, inductive and similar ways of argumentation discussed in logic.

¹³⁸ For a more detailed reference on the Worldview of Islam, see the most contemporary articulation by Syed Muhammad Naquib al-Attas, *Prolegomena to the Metaphysics of Islam: An Exposition of the Fundamental Elements of the Worldview of Islam*, (Kuala Lumpur: Penerbit UTM Press, 2014).

permanently established.¹³⁹ The fundamental elements serve as integrating principles that place all our systems of meanings and standards of life and values in coherent order as a unified system forming the worldview.¹⁴⁰ The Islamic worldview is like a structure that unites and allows dynamism which enables structures to function within a worldview.¹⁴¹ A structure is the largest unity within a worldview.¹⁴² These unities emerge in a coherent relationship with each other and form a total mental unity, which is the worldview itself. Each structure represents a doctrinal element which includes key concepts such as morality, law, religion etc. extension of key concepts from substructures.¹⁴³

It follows that, an interpretation, of values or of key terms, that does not contradict each other or to allow differences of opinion within the limits of those criteria is indeed an Islamic interpretation.¹⁴⁴ It is also important to note that, though change can happen and does happen within the Islamic worldview, the diversity never affected the character and the role of these fundamental elements so that what is projected as a worldview by the super system remains intact.¹⁴⁵

¹³⁹ The most salient ones are the nature of God, of revelation; the Quran, His creation, of man and the psychology of the human soul, of knowledge, of religion, of freedom, of values and virtues, of happiness, all of which together with the key terms and concepts that they unfold, have profound bearing upon. see Al-Attas, *Prolegomena to the Metaphysics of Islam*, 5.

¹⁴⁰ The conception of the nature of God that is derived from revelation is also established upon the foundations of reason and intuition, and in some cases upon empirical intuition, as a result of man's experience and consciousness of Him and of His creation. See Al-Attas, *Prolegomena*, 6.

¹⁴¹ For a more detailed exposition on Islamic worldview see Al-Attas, *Prolegomena*.

¹⁴² Açıkgöç, 21.

¹⁴³ Ibid, 24.

¹⁴⁴ Ibid, 6.; Al-Attas, *Prolegomena*, 37.

¹⁴⁵ Al-Attas, *Prolegomena*, 37.

2.3.2.2 The Role of Language

The role of language in the Islamic tradition is so deeply rooted with the concept and nature of man.¹⁴⁶ It is very profound especially, in legal interpretation, the area in which semantic analysis has always been the major method and practice by the traditional scholars of Islam.¹⁴⁷ Semantic analysis in the Islamic intellectual tradition places great emphasis on origin of language, which appears primarily in *uṣūl al-fiqh* references. The “revelationist” theory that describes language as originally revealed to man by God with God being the “namer” of things for mankind to use words correctly to imply fixedness of meanings, bears significant influence throughout the Islamic intellectual tradition.¹⁴⁸

Another important aspect of language in the Islamic intellectual tradition which presents the metaphysical and epistemological framework, is the conception of *ma'na*

¹⁴⁶ Man is already in the prior possession of a power of speech (*an-nutq*), the root of language “by which he is made able to formulate, articulate, identify and define the meanings intended by the names. Allah mentioned in the Quran that He taught man the names of all things (Al Baqarah: 30-31), the meaning by the names their essential characters that describe them and their orders of being, their meanings. Allah also taught him the science of *al-bayan* to enable him to discriminate, distinguish and clarify between ambiguous similarities and differences in the essential characters of created things. This degree of excellence of man’s act, based upon that science, describes justice. Man is a special creation whom Allah intended to be His *khalifah* on earth. (Ar-Rahman: 1-4) see Al-Attas, *On Justice and the Nature of Man; A Commentary on Surah An-Nisaa’ (4:58) and Surah Al-Mu’minun (23:12-14)*, (Selangor, Ta’dib International, 2015), 29. The science of *al-bayan* is meant for man to convey knowledge formulated and articulated in language adapted to the requirements of the case, and enlightened by intellectual clarity. The science of *al-bayan* includes the science of *balaghah* and *al-ma’ani*, but its proper purpose involves reasoning in discourse known as *al-Mantiq* i.e. logic, a science derived from the same root *nutq*, developed for the construction of arguments, the formulation of methods of disputation, the discovery of fallacies, the theory of classification and definition, the basic notion of syllogism, the conception of proof and demonstration, the general outlines of an intellectual method in the pursuit of Truth”.

¹⁴⁷ Weiss, George Bernard. “Language in orthodox Muslim Thought: A Study of “Wad’u al-Lughah” and Its Development” (unpublished Ph.D. thesis, Princeton University, 1966), The traditional scholars beginning from the companion of the Prophet (p.b.u.h), Ibn Abbas, followed by *al-Shafi’i*, al-Ghazali all the way to Ibn Khaldun and much later, Hamzah Fansuri in the 16th Century. see Salina Ahmad, “Al-Attas’ Conception of Language and His Utilization of Semantic Analysis,” (unpublished Ph.D. Thesis, Universiti Teknologi Malaysia, 2017), 16-19.

¹⁴⁸ Salina Ahmad, 16.

as there established a relationship between words and *ma'na*.¹⁴⁹ The conception of *ma'nā* is particularly discussed under grammar, lexicography and exegesis.¹⁵⁰

Undoubtedly, the role of language is recognized as the key factor to the correct understanding of the sources of Islamic law. The discipline of lexicology in Islam, which is very much intertwined with the early exegetic activity, developed out of the thematic vocabularies in Islam with specific meanings.¹⁵¹ The Quranic language through which God's message is revealed conforms with the rule of Arabic language.¹⁵² Under the method of *usul al-fiqh*, independent reasoning (*ijtihad*) and analogical reasoning (*qiyas*) are used as tools employed to interpret the divine text.¹⁵³ It was argued that only by grammatical investigation that a correct speech can be discerned from the incorrect one and only by way of reason a sound meaning be distinguished from the unsound.¹⁵⁴

¹⁴⁹ Al-Jurjani explained *al-ma'ani*, another word within the semantic field of *ma'na*, which means the mental form corresponding in dichotomy, the expressions outside the mind with the forms produced in the mind, when it is intended by expression, it is called *ma'na* and when it is the product of the expression, it is called *mafhum*. Muhammad A'la ibn Ali Al-Tahanawi (12 A.H) explained *lafz* and *ma'na* in his *Kashshaf Istilahat al-Funun* which covers the conceptions of *al-bayan*, *al-lafz* and *al-ma'na*. see Muhammad 'Alī al-Tahānawī, *Kashshāf Iṣṭilāḥāt al-Funūn wa al-'* (Lubnan: Maktabah Lubnān Nāshirūn, 1996), 349, 1410, 1600; see also Salina Ahmad, 18.

¹⁵⁰ Salina Ahmad, 17.

¹⁵¹ Ibid., 19. See also Kees Versteegh, "The Arabic Tradition," in *The Emergence of Semantics in Four Linguistic Traditions*, edited by Konrad Koerner (Amsterdam: John Benjamins Publishing Company, 1997), 232.

¹⁵² Ibid.

¹⁵³ Salina Ahmad, 21-22.

¹⁵⁴ This was argued by a judge and grammarian, Abu Sa'id Al-Sirafi, who is a luminary in the linguistic thought see Salina Ahmad, 22, see also Muhammad Gunaydin, "Al-Sirafi's Theory of 'Lingua-logical' Grammar: An Analytical Study of the Grammatical Work of Al-Sirafi (Sharḥ Kitāb Sībawayh) within the Context of A Discussion on Language and Logic in Medieval Islam" (Ph.D thesis, University of Pennsylvania, 2006), 57.

(a) Semantics and the Scientific Nature of Arabic Language

The Arabic language had been Islamized after Islam came and it became the language of Islam.¹⁵⁵ Its scientific nature can be observed through its methodology and the correct application of linguistic symbols which makes it a language upon which the Islamic sciences are based and by which its vision of reality and truth is projected in correct perspective.¹⁵⁶ Its scientific structure defines reality and truth as envisaged in the worldview of Islam.¹⁵⁷ This is proven by the mere fact that it is the language in which the Quran is revealed.¹⁵⁸ Its linguistic structure is established upon a fixed system of roots and its semantic structure is governed by a clearly defined system of semantic “fields” that determine the “conceptual structures” inherent in its vocabulary.

To maintain its “semantic permanence”, its words, meanings, grammar and prosody have been scientifically recorded.¹⁵⁹ It is not susceptible of semantic change brought about by variations of history and society, of relative and subjective interpretations. The science of interpretation in *tafsir* for instance, is based on the sacred text and *hadith* supported by the knowledge of the semantic fields that govern the conceptual structures of the established vocabularies from the Quran. These established vocabularies present the “Islamic vision of reality and truth” based on established

¹⁵⁵ Syed Muhammad Naquib Al-Attas, *Islam Dalam Sejarah dan Kebudayaan Melayu*, (Selangor: Penerbitan Universiti Kebangsaan Malaysia, 2022), 34.

¹⁵⁶ Scientific is defined as definitive which is definition in the sense of *had* and *rasm* of reality. *Had* means a precise or concise specification of the distinctive characteristic of a thing. *Rasm* means a description of the nature of a thing. This distinction shows that there are things we can define specifically to its precise, distinctive characteristic and there are things which we cannot. See Syed Muhammad Naquib Al-Attas, *The Concept of Education in Islam: A Framework for an Islamic Philosophy of Education*, (Kuala Lumpur: International Institute of Islamic Thought and Civilization, 1999), 1-16.

¹⁵⁷ For more details on the vision of reality and truth see Al-Attas, *Prolegomena*, 6.

¹⁵⁸ *Ghayra Zī 'iwajin* from Az-Zumar:28 means “without any crookedness”. The Quran is the fountain of true knowledge, the linguistic form through which that knowledge flows and by which it is made to flow must also be such of a nature that it too is not susceptible of crookedness. From the prolific, intellectually and scientifically momentous activity of recording authenticity of meaning and authoritative usage is a remarkable step to preserve it against corruption and decay and to preserve for posterity what could be preserved. See Al Attas, *Concept of Education*, 2-8.

¹⁵⁹ Recorded by the Muslim scholars and experts on *tafsir*, *hadith* and *athar*.

knowledge of the semantic fields as expressed in the Arabic language which are consistent with their applications and organizations in the Quran, the *hadith* and the *sunnah*.

A sound method demands correct application of the linguistic symbols pertaining to Arabic in the context of Islam.¹⁶⁰ The word must be correctly applied within the context of its semantic field, the field of meaning that governs its usage. A semantic field usually overlaps other such field so that the inherent conceptual structure is interrelated with other such structures as presented in the Islamic vocabulary which is governed by a worldview guided by the Quran.¹⁶¹

Language and thought are interconnected and dependent upon each other. Semantic confusion in the application of linguistic symbols brings about confusion and error in the interpretation of Islam itself and its worldview. This can be seen in the infusion of Greek thought and philosophical problems into the Muslim minds. Semantic confusion as a result of misapplication of key concepts in the Islamic vocabulary can affect our perception of the Islamic worldview.¹⁶²

(b) Key Terms and Key Concepts

Following the above explanation on importance of worldview and its impact on language, it is important to study the meanings of key terms and concepts that represents the Islamic worldview and governs the interpretation of the Islamic vision of reality and truth. The vocabulary derived from the Quran as mentioned are “Islamic basic vocabulary” which is composed of key terms and concepts meaningfully related to one

¹⁶⁰ Al-Attas, Concept of Education, 3.

¹⁶¹ Islamic vocabulary means to signify all the Arabic terms that are interrelated in meaningful pattern, projecting a worldview that is distinctly Quranic. Ibid, 8.

¹⁶² Ibid, 12.

another.¹⁶³ The Quranic concept of man's covenant with God which illustrates a covenant of an essential nature, is the root of all other Islamic concepts such as justice, knowledge, virtue and freedom in the framework of the state and of collective life.¹⁶⁴ With the spread of Islam, the languages of all Muslims, Arabic and non-Arabic¹⁶⁵ alike, have been infused with this basic vocabulary which forms the Islamic worldview. The Islamic basic vocabulary are deployed uniformly in all Muslim languages¹⁶⁶, reflecting the intellectual and spiritual unity of the Muslims throughout the world. They are permanently established elements together with the key concepts that they unfold, that act as integrating principles placing all our systems of meanings and standards of life and values in coherent order as a unified supersystem forming the worldview of Islam.

Having derived from the same conceptual and semantic network, the key terms and concepts should convey the same meaning.¹⁶⁷ There are several of them, but the most fundamental, especially in the context of this research because they are the original terms and sources of meaning from which others are derived.

(i) Justice (*'Adalah*)

Semantically, *'adl* denotes straightness, uprightness, balance, proportion, equality, equity and fairness.¹⁶⁸ According to Ibn Ashūr, to be just means to render to every person his dues.¹⁶⁹ Based on the Holy Quran, the origin and nature of justice is derived from one of the beautiful names of God *al-'Adl*, the Just. It signifies a quality of act that produces order. Relatedly, it also

¹⁶³ Al-Attas, *Prolegomena*, 30.

¹⁶⁴ Al-Attas, *On Justice*, 75.

¹⁶⁵ The non-Arabic language of the Muslim people have been Islamized just as the Arabic language was Islamized with the coming of Islam.

¹⁶⁶ The Muslim languages mean any language of a majority Muslim nation such as the Malay language and the Turkish language.

¹⁶⁷ Al-Attas, *Prolegomena*, 30.

¹⁶⁸ Ibn Manzūr, *Lisān Al-'Arab*, vol. 11, (Beirut: Dar Sadir, 1955), 430-434.

¹⁶⁹ Ibn 'Ashūr, *Tafsir wa al-Tanwīr*, (Tunis: Maison Sohnun, 1997), 245.

means harmonious condition of things being in their right or proper places.¹⁷⁰ Therefore, justice is both a quality of act and state of being. This makes it an integral part of a divine principle that applies equally to all created things from the beginning of Creation. Justice is also natural because it is an integral part of a Divine principle or law that regulates the uniformity and rationality that is apparent in the whole of nature.¹⁷¹

The most comprehensive exposition on the concept of justice is the one based on the following verse of *Surah An-Nisaa'* together with the nature of man¹⁷²:

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ
النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ
كَانَ سَمِيعًا بَصِيرًا (٥٨)

“Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.”¹⁷³

Justice has to be understood in the context of the above verse together with other key terms. There are four other key terms which were highlighted besides justice in the verse, namely *amr* (injunction), *amānah* (trust), *ahl* (the one to whom belong what is trusted) and *hakam* (rule). It shows the inseparable link between justice and the four other key terms for without the rest, justice cannot happen or be achieved.¹⁷⁴

¹⁷⁰ Al-Attas, Concept of Education, 20

¹⁷¹ Ibid.

¹⁷² Among the verses on nature of man are in Sūrah Al-Mu'minun:12-14, al Hijr:26-29.

¹⁷³ An-Nisā':58.

¹⁷⁴ *Amr* refers to the *shari'ah* and obligation in a state ruled by Muslims. Justice cannot materialize if the *Shari'ah* is not applied. It was therefore rightly emphasized that the *shari'ah* is the ultimate criterion of justice and not the other way around. It is also related to and based on wisdom, justice and mercy. *Amānah* is derived from its root, *amn* (security) that refers to peace and protection under just rule wherein law and order prevails and create the sense of peace and security. Next is *ahl* who are various keepers of trust, graded according to various levels of excellence and character and who possess moral integrity and

There are two aspects of justice.¹⁷⁵ It is important to note these two aspects to show that the understanding of the concept of justice in Islam is not caught within the framework of a dichotomous speculative theory or as something attributed to a vague and ambiguous nature.¹⁷⁶ Neither is it attributed to the State, a product of man's reason and freedom of choice that interferes with the nature's inclination. The first aspect of justice refers to justice as one of the constituent parts of the four virtues and civil in nature which are temperance, courage, wisdom and justice. It is civil in the sense that it is involved in the organization and the operations of all civil institutions and the state. Social justice concerned with equality and fairness as well as *ihsan* (excellence) in the conduct of various transactions and the determination of rights and liberties are examples of the civil aspects of justice. The second aspect of justice is justice as the whole of the virtues. This aspect of justice is the first principal, inherent in all being, which is natural justice. It is natural in that it is a complete virtue. Therefore, it becomes the ultimate standard by which political and social justice is meant to conform to and by which the accuracy of their conformity is judged. This ultimate standard applies to all human institutions and individuals for all time and precedes political and social justice. This understanding of the

authentic knowledge on the area of dispute. This element is very relevant especially in making decisions, aberrations due to intellectual deficiency may occur as a result of misplacement of trusts. Lastly, *hakama* which has its origin from the meaning underlying the word *hukm*, which refers to action according to the requirements of their true natures or the rule of order. *Hukm* also refers to science of jurisprudence derived from interpretation of the moral and legal principles based on the Quran and the Sunnah. Interestingly, *hakam* is prudential judgment or practical application of the moral and legal principles and divine sources according to requirements of justice. It is also from the word *hukm* that *hikmah* (wisdom) is connected to. For more detailed illustrations see Al-Attas, On Justice, 6-7.

¹⁷⁵ Based on Imam Al-Ghazali's idea of justice. A detailed exposition on this can be found in Al-Attas on Justice. See also <https://renovatio.zaytuna.edu/article/things-in-their-proper-places>.

¹⁷⁶ Dichotomous means subjecting the understanding of something based on dualism as have been previously discussed under the problems of modern western conception of interpretation.

concept of justice in Islam acknowledges both the civil and natural aspect of it as complementary just as the revelation and human reason are complementary.

Justice and Its Relationship with Morality (adab)

Justice described through its opposite such as deviation, corruption, imbalance, disproportion, inequality, discrimination, inequity and oppression are all conditions of lack of *adab* (morality).¹⁷⁷ This necessitates emphasis on the relationship of justice and *adab*. *Adab* is right action as opposed to erroneous action or knowledge of right place.¹⁷⁸ By exercising *adab* a person is in the condition of being in a proper place, which means the condition of justice.¹⁷⁹ With respect to society, it means the just order within a society.¹⁸⁰ To have *adab* is to possess knowledge that preserves man from errors of judgment and disgrace that can lead to injustice.¹⁸¹ This means, lack of *adab* leads to injustice.¹⁸² When there is loss of *adab* i.e. loss of capacity for discernment of the right and proper places of things, there will be consequences such as levelling of all to the same level, confusion of the order of nature as arranged according to their *maratib* and *darajat*, undermining of legitimate authority, in the inability to recognize and acknowledge right leadership in all spheres of life.¹⁸³ *Adab* is the spectacle

¹⁷⁷ Ibn Manzūr, 430-434.

¹⁷⁸ Al-Attas, Prolegomena, 141.

¹⁷⁹ The condition of being in the proper place is what is called justice and *adab* is that cognitive action by which we actualize the condition of being in the proper place. See Al-Attas, Prolegomena, 17.

¹⁸⁰ Al-Attas, Concept of Education, 23.

¹⁸¹ Ibid., 25.

¹⁸² Ibid., 27-34.

¹⁸³ Ibid., 35.

of justice as it is reflected by wisdom (*hikmah*).¹⁸⁴ If applied in interpretation, is done with the rules of refined conduct, behaviour and etiquette. The just man is he who effects *adab* unto his self, resulting in his being a good man.¹⁸⁵ Ultimately it can be seen that justice in Islam is described based on the degree of excellence in man as there is also intimate connection between justice and nature of man as individual.¹⁸⁶

Justice and Its Relationship with Equality

Points on equality are often raised in view of upholding justice. As can be seen from the definition of justice by *Ibn Manzūr*, justice also means equality. The inseparability of justice and equality is also suggested in the letter by *Abu Musa Al-Ash'ari*, a judge in *Kufah* in which he highlighted the basic principles of justice. It reads, “consider all people equal before you in your court and in your attention, so that the noble will not expect you to be partial [to him or her] and the humble will not despair (of receiving) justice from you.”¹⁸⁷ According to Sayyid Qutb, justice entails equality in that it is understood as “equality in opportunity and freedom of talents which works within the limits that do not come into conflict with the high ideals of life.” Following the conception of justice in Islam and the ontology and cosmology of things, it is only right to understand equality in accordance to hierarchical order in creation. Human order must be understood as arranged hierarchically and legitimately into various degrees of excellence based on

¹⁸⁴ Al-Attas, *Concept of Education*, 23.

¹⁸⁵ *Ibid.*, 24.

¹⁸⁶ Al-Attas, *On Justice and the Nature of Man*, 28.

¹⁸⁷ Ibn Khaldun, *Muqaddimat Ibn Khaldun*, ed. ‘Alī ‘Abd al-Wāhid Wāfi (Cairo: Dār al-Ma’ārif, 1957), 89.

the Quranic criteria of intelligence, knowledge and virtue.¹⁸⁸ To give an example, scholars and jurists cannot be treated as equal as the laymen. Therefore, they cannot have the same democratic rights as *ahl* whose opinion is consulted in decision-making.¹⁸⁹ In relation to justice understood in the context of *adab*, to level everything to the same level would amount to loss of *adab* which leads to injustice. Therefore, equality if understood to mean to level everything to the same level would lead to injustice.

Based on the above, it is clear that justice in Islam serves as the ultimate criterion for the internal ordering of the soul and the external regulation of relationships.¹⁹⁰ It permeates all human activities and consists of metaphysical, theological, ethical, judicial, social and political dimensions. It is also evident that, from the strong emphasis on the concept of justice in the Quran, the whole Islamic political system lies on the foundation of justice.¹⁹¹ Therefore, based on the above understanding, any interpretation of the constitutional provisions should not manifest conflict between the *Shari'ah* and the law which comes from human discretion.

(ii) Freedom (*ikhtiyar*)

Freedom in Islam comes from the word *ikhtiyar* which is an act, not a condition i.e., *hurriyyah* as understood in the western sense.¹⁹² It is the power and capacity to do justice to itself which refers to the exercise of its

¹⁸⁸ Al-Attas, *Concept of Education*, 27.

¹⁸⁹ *Ahl* as mentioned in the verse means the one to whom belong what is trusted.

¹⁹⁰ Khurram Murad, *Shari'ah: The Way of Justice*, (Leicester: The Islamic Foundation, 1981), 6.

¹⁹¹ See Ibn Ashur, *Tafsir al-Tahrir wa al Tanwir*, Vol. 13 Part 27, 238-40.; Ibn Khaldūn, *Al Muqaddimah*, 273.; Sayyid Qutb, *Al-'Adalah al-Ijtima'iyyah*, 76.

¹⁹² Al-Attas, *Prolegomena*, 33.

rule and supremacy and guidance and maintenance over the animal soul and body.¹⁹³ It presupposes the knowledge of good and evil virtues and vices.

This exercise of making a choice is made between two alternatives, the good or the bad. Only the exercise of that choice of what is good can be called a free choice, an act of freedom, an act of justice because *ikhtiyar* is bound in meaning with the word *khair* which means good. The choice meant is between good, better and best between the two alternatives in accordance with virtues that culminate justice to oneself. Thus, freedom is to act as one's real and true nature demands, that is one's truth and one's fitrah demands. A choice of what is bad between two alternative is not choice but injustice (*zulm*) and is grounded upon ignorance urged on by the instigation of the soul inclined toward blameworthy. In this sense, freedom also means being free of domination by the powers of the soul that incites to evil.¹⁹⁴

(iii) Rights (*Huquq*)

The concept of right is derived from the root word “*haq*” in its singular mode and “*huquq*” in its plural mode. In the context of fundamental rights, it refers to *hukm* (judgment) conforming with the reality or the real situation and duty and obligation that binds a man according to the requirement of Reality and Truth.¹⁹⁵ Interestingly, in Quranic terminology, *haq* is interchangeable with duty. It means that it is understood in connection with its other meanings which are referring to *haq* as Reality and Truth, and its

¹⁹³ Al-Attas, *Islam and Secularism*, 141.

¹⁹⁴ Al-Attas, *Prolegomena*, 33.

¹⁹⁵ *Ibid.*, 141.

inextricably linked with justice.¹⁹⁶ The opposite of *haq* is *batil* which means false, wrong and unjust.¹⁹⁷

(iv) Equality

In Islam, equality is interchangeable with justice, as elucidated under the discussion on justice and its relationship with (*adab*) morality.¹⁹⁸ It is important to remember that equality has to be understood subject to hierarchical order of things.

(c) Conception of Change, Progress and Development

Change, development and progress in Islamic worldview refers to the return to the original nature and religion which is the genuine Islam. The genuine Islam here means Islam as enunciated and practiced by the Holy Prophet and his Companions.¹⁹⁹ Therefore, the idea of the goal inherent in the concept of progress can only contain real meaning when it refers to something that is already clear and permanently established which is definite in nature.²⁰⁰ It means that change has to be in view of a definite direction that is aligned to a final purpose meant to be achieved in life. Conversely, if the direction or purpose is still vague and not final, it cannot possibly mean progress. Metaphorically in such condition, are those who grope in the dark who cannot be said to be progressing.²⁰¹

The test is that the change, or in our case meaning ascribed to things, are still rooted to key terms and key concepts. This is because the key terms and key concepts

¹⁹⁶ Al-Baqarah:42.

¹⁹⁷ Al-Isra':81.

¹⁹⁸ See discussion on Justice and Its Relationship with *Adab* (Morality).

¹⁹⁹ Al-Attas, Prolegomena, 76.

²⁰⁰ Permanently established as discussed under key terms and concept.

²⁰¹ Al-Attas, Prolegomena, 76; Al-Baqarah:17-20.

are fundamental elements which have profound bearing upon ideas about change, development and progress. From the perspective of Islamic worldview, social change cannot be accepted to justify semantic change because social change is caused by ignorance and error resulting from confusion in understanding. To approve social change as a reason for semantic change is to imply that the legitimacy of authority is vested in society to effect semantic change. Society cannot be accepted as authoritative to bring about changes because society in matters of knowledge has no authority.²⁰² The learned and the wise among Muslims (*ahl hal wal aqd*) must exercise constant vigilance in detecting erroneous usage in language which impinges upon semantic change especially in major key concepts.²⁰³

Change do occur within the ambit of the Islamic worldview in recognition of diversity and dynamism, but the character and role of these fundamental elements and the worldview structure have never been affected.²⁰⁴ There is measure of cognitive restraint, filtered opinions and only qualified people are consulted. Most importantly, there is no confusion of the key concepts that serves the fundamental elements of the worldview. This is how coherence is maintained despite the change that took place.

In relation to change and its effect on language, it has to be understood in the light of the proper places of things (*adab*) by which language reflects ontology. Introducing key concepts which are foreign to a language does not merely involve the translating of words. More profoundly, it involves the translating of symbolic forms belonging to a foreign worldview which are not compatible with the worldview projected by the language into which such concepts are introduced.²⁰⁵

²⁰² Al-Attas, Concept of Education, 37-38.

²⁰³ Ibid., 38. see explanation of *ahl hal wal aqd*, see surah Al-An'am:115-6 Ar-Rūm:6-7.

²⁰⁴ Al-Attas, Prolegomena, 37.

²⁰⁵ Ibid., 20.

It is to be highlighted here that Islam does not discourage language to develop, to unfold itself or to evolve with ideas. However, the Islamic basic vocabulary can only develop, and not severed, from its roots. It is also not proper for it to develop from “roots stunted in restriction” as narrowing of the scope of meaning is also a result of confusion and error in knowledge. In short, with the above understanding of change and progress in Islam, a change will not depart from the original state of truth.

2.3.2.3 The Role of Coherence²⁰⁶

In the worldview of Islam, we speak only of coherence and correspondence that is of the nature of Truth (*haq*). To achieve coherence and correspondence, the conditions of coincidence with the requirements of wisdom and justice must be satisfied.²⁰⁷ Such coherence and correspondence is between the intellectual act of judgment and external reality that is being perceived. Understood in connection with the concept of Reality and Truth, coherence refers to the Quranic system, while correspondence refer to proper places.²⁰⁸

A meaning (*ma'na*) can only be considered coherent when it conforms to the Truth. It is the recognition of the proper place of anything in a system which happens when there is clarity and proper understanding about the “relation a thing has with others in the system”.²⁰⁹ Truth in the context of right meaning is the suitability to reality of

²⁰⁶ Note that coherence is discussed in parallel with worldview and language because coherence is inherent in the Arabic language and by extension, to the Islamized languages as well.

²⁰⁷ *Haq* as “true” designates a judgment conforming with the external realities that arise as things out of the events or the process. See Al-Attas, Prolegomena, 129

²⁰⁸ *Haq* as “Real” describes the reality of existence as well as its modes and aspects which we understand as events and process. At the same time, *Haq* also refers to a judgment (*hukm*) conforming with the reality or the real situation and duty and obligation that binds a man according to the requirement of reality and truth. *Haq* as Truth is a property of the nature of things in as much as they conform with a suitability to the requirements of wisdom and justice, to the requirements of the condition of being in their right or proper places. See Al-Attas, Prolegomena, 134, 141

²⁰⁹ Ibid 123. see also Al-Attas, Concept of Education in Islam, 15.

judgement and that judgment is derived from wisdom (*hikmah*).²¹⁰ Such wisdom is attained through the knowledge²¹¹ given by God that enables the recipient to know the right place, to render correct judgment as to the right place of a thing or an object of knowledge.²¹² The proper place as denoted by the term *Haq* (Truth) signifies both Reality and Truth which denotes ontological condition and logical condition respectively.²¹³ It involves necessity for everything in the order of creation to be in that condition, which is to be in a proper place. To put something in its proper place, including to give proper meaning, certain order of terms of priority and posteriority must be followed. They are to be arranged in accordance with their positions and various levels and degrees which refers to *Haqīqah* (Reality). In short, Truth is not merely a correspondence of a statement or judgment to fact because that would make fact equivalent to Truth. Facts can be created by man and can be false and will not necessarily be in their proper places.²¹⁴

Another aspect of coherence is in relation to unity of ideas. Coherence in this sense is understood as the internal unity of ideas and mind revealed in intellectual and spiritual coherence that encompasses realms beyond communal and national boundaries. The coherence of this aspect depends upon the soundness and integrity of concepts connoted in language, the instrument of reason which influences the reasoning of its users. If the soundness and integrity of concepts in language is confused, then this is due a confusion in worldview caused by the corruption of knowledge.²¹⁵

²¹⁰ Ibid.

²¹¹ Knowledge here means knowledge as understood according to the Islamic worldview, as defined by Al-Attas in the *Prolegomena*, 134; The arrival in the soul of the meaning of a thing or the arrival of the soul at the meaning of a thing, with meaning referring to the right meaning, as determined by the Islamic vision of Reality and Truth as projected by the Quranic conceptual system.

²¹² The right meaning is determined by the Islamic vision of Reality and Truth as projected by the conceptual system based on the Quran. 131-134 see Al-Attas, *Concept of Education in Islam*, 18.

²¹³ *Haq* has several meanings, see Al-Attas, *Prolegomena*, 124-129. see also discussion under coherence

²¹⁴ Al-Attas, *Prolegomena*, 131.

²¹⁵ Ibid, 29.

2.4 MODERN CONSTITUTIONAL INTERPRETATION AND THEIR PROBLEMS

2.4.1 Secularization and Its Effects on Modern Constitutional Interpretation

A lot of conception adopted as models by Western civilization, including the constitutional interpretive methods, converge upon the theories of justice. These theories did not escape from the effects of secularization.²¹⁶ They were adapted and supplemented by relevant modifications derived from Christian and Muslim contributions of medieval philosophy and modern thoughts and became the fundamental principles upon which the nation states of the west build the foundation of their politics and society.²¹⁷ More debates on these subjects belongs to the area of political philosophy rather than the jurisprudential sphere of constitutional interpretation methods. Therefore, to discuss further would be beyond the scope of this thesis.²¹⁸

As a result of secularization, after the Scientific and Industrial Revolutions, the philosophical underpinnings of values have been particularly moulded by the significant methods of modern science such as empiricism, rationalism, positivism and pragmatism.²¹⁹ Consequently, the current notion of constitutional rights is very much emphasized on freedom, developed around values derived from the philosophy of humanism which includes some elements of positivism and pragmatism.²²⁰ Below are the foreign characteristics which originated from the secularized Western intellectual

²¹⁶ Secularization here refers to the philosophical and scientific process which necessarily involves the divesting of spiritual meaning from the world of nature, the denial of religious values and virtues from politics and human affairs and the relativization of all values in the human mind and conduct. See Al-Attas, *Islam and Secularism*, 6.

²¹⁷ Al-Attas, *On Justice*, 25.

²¹⁸ For details, see Chapter 1 in Al-Attas, *Islam and Secularism*.

²¹⁹ Roslan Jelani, 44.

²²⁰ Refer also to the development of western worldview where humanism became fused with positivism. Pragmatism concerns with the relationship of ideas and propositions to practical and observable consequences. By making sense of empirical experiences and neglecting metaphysics, it cultivates critical skepticism and emphasis of the primary of logic, where the truth is made to conform to fact.

tradition that had a significant influence on the modern constitutional interpretation, thus forming its common features:²²¹

(a) Relativism

Relativism has been acknowledged as weakening the ethical and moral perspective and determination by making all points of view acceptable.²²²

The phenomena of relativism was also described as dictatorship of relativism which rejects all absolute values and accepts as ultimate measure only that which is in accordance with their own desire.²²³ Their foundations were ever shifting due to the relativistic nature of their new interpretation. The new interpretation will be replaced by another and so will it be time and again to give way to the demands of social changes.²²⁴ In the age of scientific revolution, it was described by Einstein's claim that it is a condition in which there is no finality in the notions of reality based on scientific perception.²²⁵ This is because relativism is closely related to humanism in the sense that humanism values are primarily products of human preference derived merely from reason, among others, resulting in "ethical relativism". It is the view absolute values are denied and relative values are affirmed. Moral appraisals are essentially dependent upon the practices and norms accepted by a social group at a specific place and time.

²²¹ The dominant characteristics of the Western worldview and spirit are basically based on four main pillars, namely secularism, dualism, humanism, and tragedy; which pervade all aspects of Western life and thought, and through them, most of the realm of education. But for the purpose of this research, only 2 will be highlighted which are dualism and relativism which is a product of secularism, see Al Attas, *Islam and Secularism* Chapter 1 & 2. A further analysis on this characteristics will be presented in Chapter 5.

²²² Richard J. Bernstein, *Beyond Objectivism and Relativism*, (Philadelphia: University of Pennsylvania Press, 1983), 3-4.

²²³ https://www.vatican.va/gpII/documents/homily-pro-eligendo-pontifice_20050418_en.html (accessed 9 October 2023)

²²⁴ Al-Attas, *Islam and Secularism*, 5.

²²⁵ *Ibid.*

There is no point of view from which these codes can themselves be appraised and no absolute criteria by which they can be criticized.²²⁶

In a contemporary industrialized society, the rate of change and instability in values has increased, partly due to the dominance of pragmatism as a measure of value in society.²²⁷ Pragmatism which cultivates and thrives on critical scepticism becomes the only possible means to construct the concept of values.²²⁸ This is how relativism also affects the conception of change under the guise of development and progress.²²⁹ Judgments about moral values are considered as subjective views and expressions of personal bias. This understanding is imbued in the foundation of modernity, which is divorced entirely from religious considerations.²³⁰ The relativization of all values and of truth in the human mind and conduct is a manifestation of a secularized worldview in which problems lie.

As far as constitutional interpretation is concerned, when the society's well-being is defined by relativism in a material and hedonistic sense devoid of metaphysical content, values cannot adequately function, especially in understanding constitutional rights correctly. This is because relativism offers no limitations of truth.²³¹ In the United States for example, it is largely agreed on a list of meta values that are not exactly constitutional but nonetheless represent a widespread consensus about the moral and political foundations of the Constitution. The non-exhaustive meta values, that

²²⁶ Roslan Jelani, 33. see also The Oxford Guide to Philosophy, 800; John V. Canfield, *The Philosophy of Meaning, Knowledge and Value in the Twentieth Century*, (United States: Routledge, 1997), 188.

²²⁷ Roslan Jelani, 45.

²²⁸ see Canfield, 232-241.

²²⁹ Al-Attas, *Islam and Secularism*, 136.

²³⁰ Roslan Jelani, 33.

²³¹ Roslan Jelani, 2.

captures the most important elements of that consensus are freedom, equality, balance of powers, federalism, representative democracy and protecting individual rights against majoritarian abuse. These meta-values seem to provide the ultimate criteria for selecting the method of interpreting that judges should follow in interpreting the constitution and for criticizing or justifying the methods that they follow. The problem is that the meanings of these meta-values in their own right are hotly contested. This is manifested by the various camps of disagreements in constitutional interpretation.²³² Unfortunately there is no objective and binding “grund norm”, which settles once and for all what the foregoing meta values mean for the judicial practice in interpreting the Constitution”.²³³

(b) Dualism

Dualism can be described as a dualistic view in which the physical realm of nature including man himself is separated from its spiritual realm. It stresses the validity of physical and secular realm to the effect that the spiritual realm is completely ignored.²³⁴ As a result, rationalism becomes the knowledge structure of secular world view with naturalism as the world structure and individualism as the human and value structure. In the western civilization, dualism is most prominent in the discussion of ethics particularly in what is perceived as universal ethics.²³⁵ the fusion and amalgamation evolved produced a “characteristic dualism” in the worldview and values of Western

²³² Duncan Kennedy, “Form and Substance in Private Law Adjudication”, *Harvard Law Review*, vol. 89, no. 43 (1976): 1685- 1711.

²³³ *Grundnorm* is a German word translated as “basic norm” in English versions of Kelsen’s work that a norm belongs to a certain system follows simply from the fact that the validity of the norm can be traced back to the basic norm constituting this system. see M.P Golding, “Hans Kelsen in the Encyclopedia of Philosophy 328” (Paul Edwards, Ed.) (1967), 275.

²³⁴ Al-Attas, *Islam and Secularism* 128-32.; Al-Attas, *The Concept of Education*, 44.

²³⁵ Al-Attas, *Islam and Secularism*, 44.

culture and civilization. This dualism cannot be resolved into a harmonious unity because it is formed of conflicting ideas, values, cultures, beliefs, philosophies, dogmas and theologies. It formulates its vision of truth and reality upon cultural tradition reinforced by strictly philosophical premises based upon speculations. The speculations here pertain mainly to man's rational capacity alone²³⁶ upon which they formulate their evolutionary ethical and moral values to guide and order his life.²³⁷

The dichotomy in ethical and moral values is a result of the dualistic conception of nature that pervades the Western Worldview. Before the concept of evolution was introduced, the concept and nature of justice is fundamental and closely related to nature of man, which according to ancient Greek scholars, refers to the psychology of the soul. However, after secularization process, the idea of man is soul is no longer accepted due to the concept of dualism of soul and body which are now perceived as separate entities.²³⁸ The effect of dualism is the clash of conflicting elements and opposing values which prevents a harmonious unity in the ideas of values and other important beliefs.

In a nutshell, it can be said that relativism and dualism are antithesis to coherence. With the presence of any of the above features in interpreting the key concepts, coherence can never be achieved.

²³⁶ In the context of humanism, i.e. in the sense that life is centered upon man as physical entity and their rational capacity alone.

²³⁷ Al Attas was referring to dualism that can be traced its origin back to the age of Enlightenment, see Al-Attas, *Prolegomena*, 78, see also Wilhelm Windelband, "*A History of Philosophy, Greek, Roman and Medieval*", (New York: Forgotten Books, 2018) Vol. 1, 448, 556, 404-405.

²³⁸ The soul is now reduced to the mind, while the science of man is focused on reasoning faculty which is more on a physical aspect. This gradually led to the science of man being replaced by anthropology, and man is regarded as essentially a physical and not spiritual entity, see Al-Attas, *On Justice*, 26.

2.4.2 Effects of Secularization on Interpretation of Modern Islamic Key Terms

Secularization as a philosophical program promotes secular and materialistic value system which have their initial locus in mind after which translated into linguistic symbols and becomes manifest globally.²³⁹ In facing challenges accompanying change, progress and development, the relativistic and dualistic view is seen to be the most popular and practical coping mechanism. Unfortunately, it is affecting modern Islamic key terms and key concepts.

Many major key terms in Islamic basic vocabulary have experienced de-Islamization of language and have now been displaced. The meanings attributed to them present “a kind of regression towards non-Islamic worldviews”. Words conveying meanings which focus upon fundamental truths peculiar to Islam such as *‘ilm* (knowledge) and *‘adalah* (justice) have been tampered with. To give examples, *‘ilm* becomes restricted to jurisprudence or restricted forms of reason and sense experience, while *‘adalah* is understood to mean absolute equality or mere procedure such as the modern application of rule of law.²⁴⁰ The meanings are no longer authentic and authoritative as understood by authorities among the early Muslims. Certainly, these phenomena would create confusion and error in the Muslim minds and cause disruption of intellectual and spiritual unity among them. There is no unanimity in the use of a single term to denote important concepts.

²³⁹ For more explanation on secularization as a philosophical program see Al-Attas, Islam and Secularism.

²⁴⁰ Imam Al-Ghazali have earlier pointed out that confusion of Islamic sciences was caused by the restriction of original meanings of terms to meanings not intended by the Muslims during the earliest period of Islam. The five important terms which are *fiqh*, *ilm*, *tawhid*, *tadhkir* and *hikmah* that have earlier been regarded as what he called the praiseworthy science, and that have in his time been conceptually tampered with so as to acquire restricted and changed meanings making them blameworthy. To cite an example Fiqh originally was intended to mean religious insight and discernment which brings about piety (*taqwa*) in his time it was already restricted to mean jurisprudence.

It is argued therefore that secular humanism and its value system are fundamentally counter intuitive to the nature of man, thereby attributable to ambiguity and relativity of the idea of major values such as justice, equality and rights which have significant effects on the meanings and interpretation of other terms and concepts derived from them.

2.5 CONCLUSION

It is now clear that in both the Western and Islamic traditions, worldview plays an important role in understanding the underlying legal philosophical theories that lead to the interpretation of language, especially the definitions of key terms and concepts. Based on the exposition of the important aspects of constitutionalism and constitutional values, both the ancient philosophical view and the Islamic perspective share some common ideas which emphasize on the role of language. They also share ideas in relation to democratic values and that most key terms and key concepts related to those values converge upon theories of justice.

As philosophical legal theories develop, with the advent of scientific revolution, positivism become more influential as part of the secularization process. The western ideas on those virtues and values that were well grounded in the scholastic ancient views has become secularized through the influence of positivism which places great importance on human reasoning. The semantic structure of the western system has become immersed in empiricism and rationalism and severed from any element of a higher order. Words and virtues like justice and other democratic values are given meanings which are relative and detached from metaphysical elements. As a result, the modern philosophical and legal theories suffer no finality in judgments as any changes in the interpretation of key terms will affect the framework of previous interpretation

and demand new understanding. This process can go on and on for as long as their interpretations are based on relativism. Another characteristic inherent in the western tradition is dualism which is attributed to its secularized nature such as the dichotomy between the subjective and objective, revelation and human mind, transcendent and phenomenal. As a result, issues pertaining to meaning of important key terms and concepts failed to be resolved into a harmonious unity and a coherent understanding.

In the Islamic tradition, neither dualism nor relativity of value judgement arise as it is based on the Divine law as a source which is ascertainable to Muslims and pointing towards the same one vision of Reality and Truth. This vision is the foundation of the worldview in Islam which forms the feature of the Islamic worldview. All of these features are also embodied in its semantic structure which are based on the Quranic vocabulary system. It is this feature of the Islamic worldview that assures coherence and finality in judgments and interpretations. Failure to apply language correctly and to convey correct meaning leads to confusion that results in parroting the shifting slogans of modernity, effecting changes and restrictions in the meanings of key terms that reflect our system of values.²⁴¹ Constant vigilance must be exercised in detecting erroneous usage in language which impinges upon semantic change in major key concepts in order to prevent general confusion and error in the understanding of Islam and its worldview.

In conclusion, based on the above exposition, it is important that the defining aspects be understood as founding values and structural principles from which general principles in constitutional interpretation should be derived or formulated.

²⁴¹ Al-Attas, *Prolegomena*, 31.

CHAPTER THREE

CONSTITUTIONAL INTERPRETIVE APPROACHES AND PHILOSOPHICAL LEGAL THEORIES

3.1 INTRODUCTION

In this Chapter, various constitutional interpretive approaches will be examined as well as their connection with the philosophical legal theories discussed in Chapter 2 from which most constitutional interpretive theories are derived before constitutional interpretive approaches are formulated. The point of discussing these approaches and illustrating their connection with these theories is so that there can be a point of reference for the purpose of a comparative survey on the inception of the various constitutional interpretive approaches and the philosophical underpinnings of their inception and goals. From the brief overview of philosophical legal theories in Chapter 2, it can be established that those theories have a great influence on interpretation of key concepts which involves understanding of values. The interpretation of values therefore follows the respective philosophical legal theories which are representing the worldview of the respective philosophers or scholars.

3.2 CONSTITUTIONAL INTERPRETIVE APPROACHES

Constitutional interpretive approaches are methods employed in interpreting constitutions to aid the understanding of the constitutional provisions before they could be applied. Whittington observed that, while constitutional interpretation concerns primarily of constitutional law and judicial practice, interpretive approaches merely provide guidance for the judicial practice. However, often times there will be an

overlapping between the former and the latter. Debates over constitutional meaning turn into debates over the proper formulation rules.

3.2.1 The importance of Constitutional Interpretive Approaches

The function of interpretive theories is to shape the extent to which values are appropriate matters for judicial consideration in construing the constitutional meaning.¹

According to Balkin, constitutional interpretation is a process of legitimate change within an evolving constitutional order which requires an art of applying a fixed constitutional provision to changing circumstances.² However, without a methodology, a constitution cannot be properly applied to new cases. As Balkin observed, a constitution is a set of basic legal norms that do not change over time except through amendments, yet are successfully applied to new cases. Constitutional interpretive methods are therefore important in the sense that the choice of a particular method often significantly affects the substance of a particular interpretation. This can be illustrated by Whittington's observation that debates over a constitutional meaning will inevitably form part of the interpretive standard as a ground of justification.³ In other words, interpretive method serves to give reasoning to justify why a certain interpretive theory is better. This notion is also supported by MacCormick who views that, when a certain principle or theory is observed, it can be implied that such principle is regarded as having a positive value and thus having the kind of justificatory and explanatory relationship to particular decisions and rules upon which a legal reasoning is based.⁴

¹ Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, (Cambridge: Cambridge University Press, 2017), 1863.

² Balkin, 78.

³ Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, (Kansas: Lawrence University Press, 1999), 14.

⁴ MacCormick, 152.

Accordingly, as observed by Whittington, methods of interpretation require justifications which are distinct from the methods themselves.⁵ He emphasized that to deserve as a governing rule, such justifications must possess “a certain specificity in order to connect it to a given situation” and “must indicate a decision with a fair degree of certainty in order to provide answers to questions of legal authority”.⁶ The adoption of methods should be guided by the purpose of interpretation which are usually aimed at producing the most faithful interpretations of the constitutional text.⁷

It is important to understand at the outset that, it is not possible for a constitution to be interpreted without employing adequate interpretive theories which are coherent. According to Kirk, there are two fundamental questions that must be addressed before a theory can be applied. Firstly, in what sense are the words in the text to be understood? Secondly how is ambiguity or certainty resolved?⁸ Various categories have been formulated by scholars and researchers of constitutional interpretation but not all are taking into consideration these two important considerations.

3.2.2 The Evolution and Classification of Constitutional Interpretive Approaches

Constitutional interpretive approaches come in a variety of forms. However, they all seem to ascribe importance to a number of key factors namely textual or semantic meaning, history, intention and original understanding and moral theory. The roles played by each of these factors vary according to how a theorist conceives of a constitution and its role in limiting government power. They keep changing following

⁵ Whittington, Constitutional Interpretation, 3.

⁶ Whittington, 6.

⁷ Whittington, 3.

⁸ Kirk, 323

the pace of the development of philosophical legal theories which are prompted by social changes and demands.

The development of vast variety of constitutional interpretive theories has led to the classifying of such theories in the academic literature. Scholars either divide such theories into categories based on different criterion such as originalism and non-originalism⁹ or interpretivists and non-interpretivists.¹⁰ Some scholars classify methods based on the sources from which a particular theory would be referred to in order to seek constitutional meaning¹¹ while some would classify them into conservative versus liberal.¹² There are also scholars who place interpreters along three continuums based on their fundamental orientation and understanding of the Constitution and how they interpret the Constitution.¹³ Some others observe that the constitutional interpretation methods are very much related to the primary question of what a Constitution is. It could be the text and just the text, or it is the document and other sources of transcendent meaning gathered from sources beyond the text, or other formative documents comprising of political philosophy or philosophical theories.¹⁴

Wolcher made a noteworthy observation that in America and Britain, most constitutional theorists have been emphasizing more of the contents of their respective constitutions while paying less attention to the methods employed to derive the contents, especially in Britain. Apart from that, he observed that there has been no discussion on the philosophical aspects of judges' interpretive methods. He attempted to fill this gap by describing the philosophical aspects of the principal methods and by developing the

⁹ Kirk, 323

¹⁰ Whittington, 7.

¹¹ Baker, 8.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid., 94.

important distinction between the interpretation and the reception of a constitutional text. He listed the US interpretation namely strict textualism, originalism, non-originalism and positive methods of non-textualist and non-originalist which is further divided to evolutionism, moral readings of the Constitution and judicial pragmatism. Whereas in the United Kingdom, he described that constitutional interpretation is “fraught with obscurity” because there is no codified Constitution and because the task of determining judicial methods of constitutional interpretation has always been superseded by a certain theoretical observation with the principle of parliamentary sovereignty what that principle means for establishing the contents of the Constitution.¹⁵

While classifying the constitutional interpretive approaches, we will notice that various scholars have different ways of classifying those approaches. Fallon calls them typologies of constitutional arguments which are arguments from the text, arguments about the Framers’ intent, arguments of constitutional theory, arguments from precedent and value arguments.¹⁶ Thomson divided the methods into different categories namely legalism, historical analysis or original intention, substantive theory-based method, process and participation-based method and role of court-based method.¹⁷ Legalism supports literalism, strict construction, adherence to the text, technical analysis of rights, duties and powers and to promote abstract logical reasoning to the exclusion of social, political and other value considerations. He also stated that the above-mentioned are not exhaustive and suggested other categories that can be advanced such as neutral

¹⁵ L.E. Wolcher, “A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom”, *Virginia Journal on Social Policy & Law*, vol. 13, no. 7 (2005-2006): 239.

¹⁶ Mark Ortega Limits and Demands of Constitutional Interpretation, 54.

¹⁷ Ibid, 603-611. see also James A. Thomson, “Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes”, *Melbourne University Law Review*, vol. 13, no. 68 (1982): 659.

principle-based theories, reasoned elaboration and structural relationships between and within governments. He reminded that there is no one theory that can stand alone.

Havel introduces a construct of constitutional interpretation which he calls “forensic constitutional interpretation” that relies explicitly upon common law methodology through which, according to him, coherence and endurance can be acquired. He divided constitutional interpretation into two categories which are methodological prescriptivist theories and the substantive prescriptivism. There are four theories under the first category namely textualism, structuralism, intra-textualism and originalism. He further divided originalism into proto-originalism and neo-originalism. He then divided the second category into vaulting ambition and restraining ambition or “Sunstein’s Prescriptivist Minimalism”. Under the category of “vaulting ambition” are “Dworkin’s moral principles” and “Posner’s New Pragmatism”.¹⁸

Strauss categorized the constitutional interpretation based on what he identified as “puzzling aspects of the practices under the common law system” namely the text, the Framers’ specific intention, the preferred position of some provisions, the priority of doctrine over text, and the prevalence and importance of non-textual amendments. Then he explained that common law constitutional interpretation has two components. The first component is the rational traditionalism which are derived from the authoritative tradition which sees the law as the command of a sovereign. The second component is conventionalism which emphasizes the role of constitutional provisions in reducing unproductive controversy by specifying readymade solutions.¹⁹

¹⁸ See Brian F. Havel, “Forensic Constitutional Interpretation”, *William and Mary Law Review*, vol. 41, no. 76.(2000): 8.

¹⁹ David Strauss, “Common Law Constitutional Interpretation”, *University of Chicago Law Review*, vol. 63, no. 64. (1996): 877.

Kelso explained that before interpreting a constitution, a judge must decide what role the various sources of meaning will play. There are four main sources of meaning which are contemporaneous source of meaning, subsequent juridical events, non-interpretive considerations and individual bias. The contemporaneous sources are text, structure and history. Subsequent juridical events are referring to judicial precedents and legislative or executive practice. He stated that in the American history, there are four main styles constitutional interpretation that have predominated at different times namely natural law, formalism, Holmesian and instrumentalism. He further expounded the various ways judges might balance those main sources of meaning in constitutional interpretation and illustrated how those sources are balanced based on the four different styles of constitutional interpretation. He also discussed the elements of each style and how each style approaches basic issues faced in the American constitutional history.²⁰

Armstrong and Brison²¹ emphasized that in order to understand constitutional interpretation, it is important to address the nature and purpose of constitutional interpretation in general. They stated that constitutional interpretations can best be understood by looking at its goal and function and be based on many different kinds of reasons which are meanings, intentions, precedents and moral values. Methods and theories drawn from such fields as literary theory, philosophy, political science, and economics have been used to illuminate constitutional interpretation, giving rise to interdisciplinary study.²²

²⁰ R. Randall Kelso, "Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History", *Valparaiso University Law Review*, vol. 25, no. 1 (1994): 121-233.

²¹ Walter Sinnott Armstrong and Susan J. Brison, *Contemporary Perspectives on Constitutional Interpretation*, (New York: Routledge, 1993), 1-25.

²² *Ibid.*, 2-3.

Stewart is of the view that, because constitutional law deals with the human condition in changing times, constitutional interpretation cannot be limited by a rigid set of legal rules, or one or even a short list of fundamental rules or principles. The process of constitutional interpretation cannot be perceived as the mathematical formula to which there is one workable answer which is at once comprehensive, concrete and finite. Nor should the Constitution be interpreted freely without regard to the limits and values fairly imputable to the document or its organizing principles. Constitutional interpretation is a delicate balancing process of many values and interests, which is best accomplished by blending a variety of interpretive techniques and methods.²³ Apparently her view is representing a view that is against a particular constitutional theory but to be against theories is also a theory of its own.

Goldsworthy describes two main approaches in interpreting the constitution. Positivism and normativism. By ‘positivism’ he means, in this context, a conception of a constitution as a set of discrete written provisions, whose authority derives from their having been formally adopted or enacted. By ‘normativism’, he means a holistic conception of a constitution as more than the sum of its written provisions: as a normative structure whose provisions are, either explicitly or implicitly, based on deeper principles, and ultimately on abstract norms of political morality that are the deepest source of its authority.²⁴ On the extreme end of a legalist point of view, is literalism where the meanings are taken to be fixed by conventional word meanings and rules of grammar, independent of the intention of the drafters. Less extreme version is purposivism without overriding the words. If the purpose permits recognition of

²³ Shannon Stewart, “The Art of Constitutional Interpretation”, *Journal of Contemporary Law*, vol. 17, no. 87. (1991): 98.

²⁴ Jeffrey Goldsworthy, *Interpreting Constitutions: A Comparative Study*, (New York: Oxford University Press, 2006), 322.

implications, then it is moving towards normativist end of the spectrum where abstract formulation of purpose are preferred to the effect of stretching or compressing the meaning of words, supplemented or overridden or allowed to have independent normative force.²⁵

There have been discussions on the extent to which text, precedent and doctrine are based on objective norms, relative rights, original meanings and social sentiments. According to Sherry even if we are unlikely to reach a consensus about the right approach to constitutional interpretation, we can still find an important degree of common ground by focusing on the essential elements of sound constitutional doctrine as an abstract matter, identify standards to evaluate outcome or approaches, or if impossible, at the very least, by specifying the minimum requirements.²⁶ The four necessary pillars underlying a sound constitutional doctrine are legal analysis, judicial craftsmanship, constitutional aspiration and human understanding. These four pillars can also be used to evaluate the courts and identify the court's failures.²⁷

It is however, noteworthy to mention that generally, the debate among the US Supreme Court judges would revolve around originalism and living constitution. Debates between originalists and living constitutionalists are the most popular with abstract civil rights, such as due process, rights and freedoms, being the focal point over the past several decades in constitutional scholarship. They are often portrayed as the main dichotomy in the American Constitutional theory in the past five decades.

Meanwhile, based on Kommers' observation that the general philosophical values and historical traditions that inform the meaning of constitutions are a more

²⁵ Goldsworthy, 322.

²⁶ Suzanna Sherry, "The Four Pillars of Constitutional Doctrine", *Cardozo Law Review*, vol. 32, no. 3 (2011): 970.

²⁷ *Ibid.*, 985.

crucial explanations of variations in constitutional doctrine across national boundaries than any feature of governmental structure.²⁸ Therefore, in studying constitutional interpretive approaches, philosophical values and historical traditions are more important regardless of whatever feature of any government structure.

We will not have the space and time to elaborate here in detail the various ways the constitutional interpretation approaches were formulated. For the purpose of this Research, it would suffice to list down the commonly applied approaches and methods briefly without engaging in detail the debates amongst them. The point of highlighting the classification of constitutional interpretive approaches is to identify the common factors that can be gathered from the classification. These common factors are key factors that are important to be taken into consideration when interpreting the constitution. They will be useful and relevant in the discussion on the general principles of constitutional interpretation in the next section.

3.3 GENERAL PRINCIPLES OF CONSTITUTIONAL INTERPRETATION AND THE ROLE OF COHERENCE

According to McCormick, for the purpose of ensuring coherence, it is important to formulate general principles so that the generality and positive value can justify and explain the function in relation to the valid rules of a certain legal system.²⁹ He also stressed that, if there is doubt as to the positivity of the value attached to a certain principle, it is open to condemnation. In the modern legal context, coherence is regarded as an important requirement in legal reasoning. Relatedly, constitutional interpretation requires legal reasoning through its multitudes of interpretive methods. Therefore, it is

²⁸ Donald P. Kommers, "The Value of Comparative Constitutional Law", *John Marshall Journal of Practice and Procedure*, vol. 9, no. 43. (1976): 688.

²⁹ N. MacCormick, "Coherence in Legal Justification", in *Theory of Legal Science* edited by A. Peczenik and et al. (Dordrecht: D. Reidel Publishing, 1984), 153.

mostly understood as consistency of justification whereby it is the normative coherence that matters. McCormick describes coherence as the state in which various rules of developed legal system make sense in their entirety when taken together and are consistent with general norms.³⁰ To him, it is manifested when principles by which is used as guidance explain and justify any rules in question. Such principles are general norms which are regarded by a sound, sensible and just person for the guidance of affairs.³¹ To show that a specific rule can be incorporated under it is to show that it is a good rule to comply with. To regard a norm as a principle is to imply that it is both relatively general and of positive value. For example, reference to such norm or principle may be helpful in explaining how certain rules are to be understood when there is doubt as to their proper meanings in a given context. The requirement of coherence can also be said to function as delimiting the field within which judicial law making is legitimate.³²

Scholars differ in definition and requirements of coherence.³³ Balkin wrote that coherence is the principle of consistency of the principles and policies underlying the law. Joseph Raz suggested that coherence requires unity of principle from which a legal

³⁰ McCormick, 153.

³¹ Ibid., 152.

³² Ibid., 153.

³³ Apparently there is a struggle to find coherence or to set a standard of coherence. A scholar observed that coherence is not always to be achieved to the whole system of established law in a particular jurisdiction. It can also be achieved only to a group of legal standards and decisions constituting a branch of law which is viewed as more manageable than to achieve a global coherence. This is believed to be a more practical expectation for judgments made with limitation of knowledge and time. see Barbara Baum Levenbook, "The Role of Coherence in Legal Reasoning", *Law and Philosophy*, Vol. 3, No. 3 (1984): 371. For example, Balkin disagreed with Raz on the ground that the law seems to contain many different principles, policies and purposes and it is easy to say it is not coherent. See Raz, 295. Balkin proposed that it is enough just to have the law which employs and arbitrates in a consistent and principled manner. He is of the view that the law is coherent if we can view it as emanating or explainable by a set of consistent principles.

system emanates or at least a mutual interdependence of justificatory principles and policies.³⁴

As have been mentioned earlier, there have been no unanimity on any general principle for constitutional interpretation. However, it could perhaps be agreed upon that the text is the main element or the most fundamental aspect of a written constitution and that the general rule is that clear and unambiguous words are to be given their plain and ordinary meanings. However, there are no consensus as to whether certain words are clear enough to be given their plain meanings or whether the meanings are clear and unambiguous when applied to the facts of a case. In such case, it becomes justified to move away from the text, particularly by employing the ordinary meaning of words the text, to consulting other sources such as the history, the moral and the philosophical arguments in search of the spirit behind the text. It is therefore pertinent to understand that even the general principles are based on a judicial interpreter or a scholar's worldview that shapes their interpretations of values. Those claiming that there are changes in the meaning of words that used to be clear and but later became ambiguous are likely those whose beliefs are inclined towards relativism.

Not many textbooks or writers wrote about the general principles of constitutional interpretation. For the purpose of illustration under this section, the contemporary debate featuring Justice Antonin Scalia and Justice Breyer is a clear example of the representation of the originalist view and the non-originalist view respectively.

Scalia made it clear that constitutional interpretation is no different from statutory interpretation as both are dealing with language. Scalia laid down general

³⁴ Joseph Raz, "The Relevance of Coherence", *Boston University Law Review*, vol. 72, no. 75. (1992): 286.

principles of constitutional interpretation based on what he viewed as the fundamental aspects of a constitution as an instrument, which is the text or the letter of the Constitution itself. From the Republic, he quoted, “the very nature of the Constitution requires the judge to follow the letter of the law, otherwise the law might be explained to the prejudice of every citizen.”³⁵ He further quoted John Marshall who plainly spelt out that “the spirit of an instrument especially a constitution, is to be respected not less than its letter, the spirit is to be collected chiefly from its words.”³⁶ Inspired by Montesquieu, he stressed that plain words must evoke predictable meanings and should excite in everybody the same ideas.³⁷

It follows that from the importance of text highlighted by such prominent philosophers, Scalia pointed out that, based on Justice Story’s idea, the textual method means reasonable reading of the words and not strict construction. The words are to be taken in their natural and obvious sense and not unreasonably restricted or enlarged.³⁸ To Scalia, textualism refers to fair reading textualism in that textualists adhere to fair meaning and textualism does not mean hyper-literal meaning of each word in the text. The full body of the text contains implications that can alter the literal meaning of individual words.³⁹ For example, *ejusdem generis* narrows the literal meaning of tagalong general terms and literal meaning means absurdity taken to be error, Living constitution is not an exception to the rule that legal texts must be given the meaning they bore when adopted.⁴⁰ Blackstone made it very clear that original meaning was the

³⁵ Charles Montesquieu, *The Spirit of Laws*, (New York: Prometheus Books, 2002), 8.

³⁶ *Cohens v Virginia*, 19 US 4, (1821) 264, 383 per Marshall CJ, *McCulloch v Maryland*, 17 US 4 (1819), 316 421, Consistent with the letter and the spirit of the Constitution, *Sturges v Crowninshield*, 17 US 4 (1818), 122, 202, per Marshall.

³⁷ Montesquieu, 165.

³⁸ *Martin v Hunter’s Lessee*, 14 US 1 (1816), 304, 326, see Joseph Story, *Commentary on the US Constitution*, 300.

³⁹ See Antonin Scalia, *Reading Law*, Chapter 62.

⁴⁰ Scalia, paragraph 70.

governing standard.⁴¹ Open endedness is acceptable but not redefinition, amendable but not changing. It is not for judges to determine in abstract with no governing standard. Persuading five judges is easier than the assemblyman. Therefore, it is not a fair procedure if judges can amend the Constitution as they are unelected.

Apparently, Bindra takes the middle stance by which he listed the principles of interpreting a constitution but acknowledges living constitution. Perhaps this is a hybrid view or a living originalism. According to Bindra, the general principles or general rules are treated like a framework of the body policy from which springs all strength and power.⁴² He laid the general principles based on how he views the way a constitution should be treated which is, as a living organism which is capable of development and growth as it is built for the future and written to be understood by voters and a paramount law under which laws are to be made. It follows that its language is to be interpreted with broad and liberal spirit, not narrow and pedantic. This means that words and phrases are used in their normal and ordinary sense, distinguished from their technical meanings. Accordingly, the simplest and most obvious interpretation based on common sense is recommended as it is most likely what was meant by people during its adoption.⁴³ However, Bindra noted that notwithstanding the rule of broad interpretation, the constitutional language is not to be stretched, prevented or reduced to a nullity by reading into it a meaning it does not carry, in the interest of any legal or constitutional theory. This includes rejection of any obiter observation and discussion of problems not involved in a given case.⁴⁴ The Constitution should also not be construed with reference to motives or public policy or political wisdom that led

⁴¹ William Blackstone, *Commentaries on the Laws of England*, 4th Ed, (Oxford: Clarendon Press, 1770), 60.

⁴² Bindra, 1261.

⁴³ Ibid., 1262.

⁴⁴ Ibid., 1273.

government to pass law or issue an order. Neither should the Constitution be construed with reference to something which would commend itself to the courts' minds as being a principle of abstract justice. The interpretation cannot fluctuate according to the different values that different judges may have. Rather, it is the concept of the common good which ought to guide the court.⁴⁵ Most importantly, the court is not supposed to discard rules of interpretation to mitigate hardship or inquire into public policy.⁴⁶

Generally, there is no room for construction if the meaning is definite and apparent.⁴⁷ However, in cases where words are imprecise or have more than one reasonable meaning, most general principles are formulated based on the canons of construction.⁴⁸ The first resort in all cases according to Bindra is to the natural connotation of the words in the order of grammatical arrangement in which the framers have placed them. This means that the rules of language is part of the rule of interpretation. This is also manifested by Bindra's acknowledgement of intentionalism as a general principle where he observed that intention is to be gathered from the words. This can be seen from the contextual approaches that he listed such as in the case of a harmonious approach, he explained that there should be no conflict between different parts or other provisions and avoid that which leads to absurdity to ensure a harmonious working of the constitution. Another example is the when applying *noctiitor a sociis*, the words and sentences are compared to those with which it stands connected. The meaning is enlarged or restricted based on the object of the whole clause in which it is used.⁴⁹ Similarly, in applying the rule of analogous provision of other provisions, if undistinguishable in substance, it will be a reasonable inference that its framers

⁴⁵ *Tirupati Balaji Developers Pvt. Ltd. State of Bihar*, 5 SCC 1, 2004, Bindra, 1283.

⁴⁶ *Sardar Sarup Singh v State of Punjab* AIR 1959 SC, 860.

⁴⁷ Bindra, 1269.

⁴⁸ Ibid., 1266.

⁴⁹ Ibid., 1273.

intended that like provisions should receive like interpretation considering that commonwealth constitutions were drafted by representatives from several colonies.⁵⁰ As quoted by Bindra, “It is indeed an expansion of the canon of interpretation in question to consider the knowledge of those who framed the Constitution and their supposed preferences for this or that model which might have been in their minds. Their Lordships are not able to acquiesce in any such principle of interpretation.”. A constitution is to be considered as a whole which is to give effect to all of its provisions. This means that no portion of it should be treated as superfluous.⁵¹ If two provisions are in conflict, a construction that will reconcile the conflict must be preferred. The words must be taken in natural or obvious sense and not in a sense invariably restrained or enlarged.⁵² The courts are not at liberty to disregard the plain meaning of the words of a constitution in order to search for some other conjectured intent.⁵³ The duty of court is to have a recourse to the whole instrument to ascertain the true intent and meaning of any particular provision.⁵⁴ *Expressio Unius Est Exclusio Alterius* or negative implication canon, the expression of one thing in a constitution may necessarily involve the exclusion of other things not expressed. It also presupposes that if no exception made, no implied exclusion⁵⁵ every word must have due force and appropriate meaning.⁵⁶

Bindra listed the special rules on construction of constitution, apparently non exhaustive, as follows. The construction that is “most beneficial to the widest possible amplitude of its power” must be favoured. Nonetheless, strict and narrow construction

⁵⁰ *Web v Outrim*, AC 81 (1907), Bindra, 1275.

⁵¹ *Marbury Madison*, 5 US (1 Cranch) 137 (1803).

⁵² *Martin v Hunter*, 14, US 304 (1816).

⁵³ *McPherson v Blacker*, 146 US 1 36 L Ed 879.

⁵⁴ *Downes v Bidwell* 182 U.S 244 (1901).

⁵⁵ *Rhode Island v Massachusetts* 12 Pet 657 US 9 Ed 1233.

⁵⁶ *William v United States* 341 U.S. 97 (1951), Bindra, 1281.

on proviso and exclusionary clause should be preferred. A harmonious reading should also be favoured in interpreting provisions relating to divisions of powers and jurisdictions.⁵⁷ Next is *ut res magis valeat quam pareat* which means presumption of validity whereby the right to legislate is interpreted liberally and power to be given the widest amplitude but limited by words.⁵⁸ Bindra also cautioned that liberal interpretation⁵⁹ should not be crippled by narrow technicalities but embodying the working principles for practical government but not too literal. The liberal spirit is maintained but should not be used to eradicate or modify fundamental rights and progressive interpretation⁶⁰ should not vary according to popular opinion.⁶¹ Ultimately, the Constitution is seen as a declaration of the will of people which is liberal in favour of citizens and but strict on the provisos restricting the people's rights.⁶² Other special rules listed are related to adherence to some popular constitutional doctrines such as the doctrine of *stare decisis*, of implied, incidental and ancillary powers, of implied prohibition principle, of pith and substance, of no conflict between entries in the same list, and of colorable legislation.⁶³

It is observed that clearly, scholars who attempt to formulate general principles like Whittington, Bobbit or Bindra, cannot escape from having their inclination and preference indicated in their works whether consciously or unconsciously. Every approach has its semantic components and their extremities, whether moving towards conservative or liberal.

⁵⁷ Bindra, 1262.

⁵⁸ Ibid., 1288.

⁵⁹ Ibid., 1291, 1305.

⁶⁰ Ibid., 1307.

⁶¹ Ibid., 1312.

⁶² *Byars v United States*, 273 U.S. 28 (1927).

⁶³ Bindra, 1312, 1313, 1318, 1321, 1325, 1327 and 1341.

3.4 THE MAIN CONSTITUTIONAL INTERPRETIVE APPROACHES

(a) Originalism

Not all constitutional scholars have reached a consensus on what exactly defines originalism.⁶⁴ They come in many shapes and forms. Some originalists seek the original intent, the meaning the Framers personally and subjectively had in mind, how the Framers would reason about an issue decide a case.⁶⁵ Some others seek for original understanding which is the meaning that was understood by the general public, or a reasonable person⁶⁶, who lived at the time the Constitution was ratified. However, they generally agree that the Constitution's text had an "objectively identifiable" or public meaning at the time of the founding that has not changed over time, and the task of judges and interpreters is to construct this original meaning.⁶⁷ For them, the text has a meaning independent and apart from the interpreter's personal preferences and predilections. Some prominent originalists argued that in interpreting the Constitution, "one should look at the original intent of the people who drafted, proposed, adopted or ratified the Constitution to determine what those people wanted to convey through the text."⁶⁸ It was observed that this approach has much in common with textualism but not identical. 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.

⁶⁴ Gregory Maggs, Peter J. Smith, *Constitutional Law: A Contemporary Approach*, 6th ed. (Interactive Casebook Series), (United States: West Academic Publishing, 2015), 39.

⁶⁵ Baker, 96.

⁶⁶ Scalia, A Matter of Interpretation, 44-45

⁶⁷ Maggs, 39

⁶⁸ Ibid., see also Robert Bork, "Tradition and Morality in Constitutional Law: The Framers' Intentions", *The Francis Boyer Lectures on Public Policy*, vol. 10, no. 6. (1984): 17.

Some will refer to 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 which is going back to the original understanding, that refers to 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 research of sources contemporary to the constitutional text⁶⁹ such as records of Constitutional Convention⁷⁰ and even dictionaries in existence at the time of the founding and comparable provisions in state constitutions.⁷¹ It can be said that originalism is an exercise in historiography.⁷² We may also find that sometimes discussions on originalism is exclusive of textualism and is focused mainly on the original intention. It is, however, generally believed that textualism and original intention can be categorized under the banner of originalism because appeals to intention often run together with appeals to meanings.⁷³ This can be derived from the words of Robert Bork, one of the early originalists, that “the primary way to derive rights from the Constitution is ‘to take from the document rather specific values that text or history show the Framers actually to have intended and which are capable of being translated into principled rules.’”⁷⁴ The language of a constitutional provision is strong evidence of the intention behind it though it cannot be denied that sometimes intention and meaning can conflict.

⁶⁹ Gerard Clark, “An Introduction to Constitutional Interpretation”, *Suffolk University Law School Faculty Publications*, Paper 9, (2002): 48.

⁷⁰ Antonin Scalia, “The Lesser Evil”, *University of Cincinnati Law Review*, vol. 57, no. 65. (1989): 849-852.

⁷¹ *Ibid*, 573-619.

⁷² Baker, 73.

⁷³ For the purpose of this section and to avoid any further confusion, textualism and intentionalism will be discussed separately under their own headings.

⁷⁴ Armstrong et al., 9.

Proponents of originalism and most classic originalists would consider this as 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 is claimed to be the best method to keep judges from freelancing and imposing their own subjective policy preferences under the pretext of interpreting the Constitution.⁷⁵ It is generally known to restrain judges from rendering decisions based on political inclinations,⁷⁶ as opposed to judges who practice judicial activism. As stated by Bork, judicial restraint requires judges to “stick close to the text and history, and their fair implications”.⁷⁷ Many academic writers also acknowledged that this method is the most prominent and currently most influential branch of originalism that draws inspiration from the presumed original public meaning.⁷⁸ This approach seeks to limit judicial discretion, ensure more certainty and predictability in judgments.⁷⁹ It is often regarded as conservative⁸⁰ and is claimed to be the only legitimate basis for constitutional decision making.⁸¹ Raoul Berger puts it, “originalism justifies itself by the falseness of the beliefs that oppose it” because it has been a consistent theory of constitutional interpretation while non-originalists “parade as many theories as writers” and because there is little “consensus among activists about a theory of interpretation.”⁸² Bork even stresses that any form of constitutional interpretation other than originalism “must end

⁷⁵ Baker, 73.

⁷⁶ Alexander Tsesis, “Maxim Constitutionalism: Liberal Equality for the Common Good”, *Texas Law Review*, vol.91, no. 78. (2012-2013): 1656.

⁷⁷ Alexander Tsesis, 1656, see Robert H. Bork, “Neutral Principles and Some First Amendment Problems”, *Indiana Law Journal*, vol.1, no. 8 (1971): 47.

⁷⁸ Tsesis, 1660. see also Randy E. Barnett, “Restoring the Lost Constitution: The Presumption of Liberty”, 78.

⁷⁹ Scalia, Originalism 852, 862-64.

⁸⁰ Baker, 108.

⁸¹ Tsesis, 1656, see also Robert H. Bork, “The Constitution, Original Intent and Economic Rights”, *San Diego Law Review*, vol. 23, no. 98.(1986): 823.

⁸² Raoul Berger, “Original Intent”, *Indiana Law Journal*, vol. 66, no. 74.(1991): 723, 754–55 (arguing that a “great merit of originalism” is “that it is a ‘simple’ concept” and noting that, by contrast, “non-originalists . . . cannot unite on a single alternative but struggle in a welter of theories”).

in constitutional nihilism and the imposition of the judge's merely personal values on the rest of us.”⁸³ Bork mentions further that any constitutional interpretive theory other than one grounded in “original intention” amounted to nothing more than a “judicial power to revise the Constitution.”⁸⁴ 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.⁸⁵ According to Scalia, textualism will provide greater certainty in the law, hence greater predictability and greater respect for the rule of law.⁸⁶ 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. He also claimed that it can help curb and possibly even reverse the tendency of judges to imbue authoritative texts with their own policy preferences. Apart from that, it will also discourage legislative free-riding, whereby legal drafters idly assume that judges will save them from their blunders. He is convinced that many of these interpretive goals can be achieved, even by diluted strain of textualism.⁸⁷

Critiques of originalism often regard this approach as giving control to the “dead hands of the past” and legitimizing this approach as being profoundly antidemocratic.⁸⁸ Another challenge to originalists is the question of adequacy of the historical materials and historical techniques in interpreting the Constitution such as the unanimity of the Framers on an issue or whether any issues being left undebated by the Framers and most importantly the very basic question of who qualifies as Framers.⁸⁹ It was also stated that

⁸³ Robert Bork, “Styles in Constitutional Interpretation”, *South Texas Law Journal*, vol. 26, no. 8.(1985): 383-387.

⁸⁴ Berger, “Government by Judiciary: The Transformation Of The Fourteenth Amendment”, 364.

⁸⁵ Whittington, 3.

⁸⁶ See Preface in Scalia, *Reading Law*.

⁸⁷ *Ibid.*

⁸⁸ Baker, 73.

⁸⁹ *Ibid.*, 74.

the problem with originalism is that the Framers were not intellectually unified and it is therefore not possible to ascribe a collective conscience to a number of drafters who are dissimilar in their views.⁹⁰ Another concern is when originalism is said to have facilitated the Framers' change of views or political stands⁹¹ to affect the nation's direction. There is also 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.⁹² Opponents 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.⁹³

The intentionalism branch of originalism is also often associated with racism, chauvinism and social exclusion⁹⁴ as it was believed that the Constitution was ratified by the group of people who were not fairly representing the all groups of people in America. It was also argued against originalists that the Constitution should attribute sovereignty to the people rather than the Framers. On this note, the textualist understanding of originalism is more acceptable than the intentionalists' understanding as under the textualism approach, the Constitution is taken at their words of which would represent the views of a much greater number of people to determine

⁹⁰ The founding fathers of the American Constitution, Alexander Hamilton and Thomas Jefferson, was cited as an example where Hamilton preferred a strong national government while Jefferson advocated for local agronomic self-government. See Tsesis, 1657.

⁹¹ Tsesis, 1657.

⁹² Maggs & Smith, 40. Colby and Smith, "Living Originalism", *Duke Law Journal* vol. 59, no. 6. (2009): 239-307.

⁹³ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Massachusetts: Harvard University Press, 1980), 33-40.

⁹⁴ Tsesis, 1658.

constitutional intentions.⁹⁵ However, it was claimed that there will still be difficulty 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. It was also observed that contrary to the suggestion of its proponents who accept only originalism as the right approach, there are today countless variations of originalism, and the differences among them are sometimes so stark that it is difficult to treat them as one coherent interpretive methodology.⁹⁶ It was also argued that these variations have almost nothing in common with each other and have departed significantly in principle from the original originalism. The variations seems to be developed independently of the concept of original meaning without any clear framework. The self-conscious adoption of the same label of originalism despite the glaring differences has been alleged to have caused confusion.

Under the originalist approach as explained by Justice Antonin Scalia, or what he specifically described as textualist originalism, is that there are rules to assist in understanding the text such as semantic canons, syntactic canons and contextual canons. Semantic canons focus on the meaning of words while syntactic canons focus on usage of words. The most commonly used semantic canons are such as 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. 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,

⁹⁵ It was suggested by Keith Whittington and Michael McConnell that originalist judges must give effect to the will of the people living at the time of ratification.

⁹⁶ Colby and Smith, 245.

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* (same general kind or class), titles or heading canon, interpretive direction canon and absurdity doctrine.⁹⁷ Scalia comprehensively proposed some guide to ensure the right application of originalism by highlighting some misconceptions regarding originalism and responded to them.

Firstly, it is a false notion that words should be strictly construed. As Frankfurter J said, he quoted that “literalness may strangle meaning”.⁹⁸ Justice Joseph Story also said, he quoted, it is reasonableness that is needed and not strictness. Though textualism is the touchstone of originalism, Scalia explained that it is a fair meaning that was intended rather than the “hyperliteral meaning” of each word. He emphasized 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 version of originalism. Therefore, according to Scalia, it is pejorative to associate a strict constructionist with originalism.

The second misconception is that intention of the legislature from the Parliamentary speeches and legislative debates are worthwhile aids in interpreting the constitution. Though it is acceptable that meaning is derived from intention. It is intention of the law that is worthwhile and not the intention of the legislature. The false notion on the authoritativeness of intention of the legislature leads to recognizing the legislative history as authoritative in constitutional interpretation. Scalia explained that legislative history is not authoritative in constitutional and statutory interpretation. He quoted Alexander Hamilton who made this clear when he firmly expressed that

⁹⁷ Scalia, Reading Law, 8.

⁹⁸ Per Frankfurter J *Utah v Junk Co. Porter*, 328 US 39, 44 (1946).

“whatever may be the intention of the Framers, that intention should be sought for in the instrument itself.” This is further elaborated in Marshall CJ in 1827 that “words must be understood in that sense in which they are generally used by those for whom the instrument was intended, nor contemplated by its Framers.”. Scalia further quoted John Madison who 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.⁹⁹ He also contended that legislative history, with its ambiguous nature greatly will increase the scope of manipulated interpretation. Therefore, it is no less unfettered discretion than a judicially overreaching activist judge. unexpressed or inadequately expressed legislative goals, however unfortunate they are, are inarguably the legislative intention as represented by the law. He quoted John Locke who said that “legislative powers consist in the power to make laws, not to make legislators. Legislators enact laws and not their own views. The use of legislative history will cause imbalance of the separation-of-powers and another supporting argument against legislative history is that there is concern that even specific statements of meanings may have been planted in the legislative history. This is done knowingly intending the inclusion of such statements to be written into the law by the court.¹⁰⁰ Scalia observed that most hostile critics of originalism are typically those same people “rummage through” legislative history to figure out what the enactors intended.

Thirdly is the false notion that the purpose of interpretation is to discover intent.¹⁰¹ Originalism is often mistaken as intentionalism which is understood as derived

⁹⁹ Scalia, Reading Law, see False Notions no. 66.

¹⁰⁰ Samuel J. Henry and Thomas O. Moore, “A Decade of Legislative History in the Supreme Court: 1950-1959”, *Virginia Law Review*, vol. 46, no. 67.(1960): 1408-1437.

¹⁰¹ Lord Scarman 418 HL Official Rep. Col. 65 (9 March 1981), see Scalia, Reading Law, False Notion No. 67. “We are to be governed not by Parliament’s intention but by Parliaments’ enactments.”

from the legislative history. It is not. To search for intention is problematic because there are multiple authors who may not have the same objects in mind. Lord Reid stated that it is the meaning of the words used by parliament that we are seeking.¹⁰² It is the true meaning of what they said rather than what they meant. Judge Robert Keeton mentioned that it is for the objectively manifested meaning rather than somebody's unexpressed state of mind. Scalia observed that it has been the habit of common law court to refer to legislative intent because back to the middle ages when it was first introduced, the judges and lawmakers were synonymous. After mid 1300s, legislature 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 refer its intention.

Fourthly, the false notion that lawyers and judges are not historians, therefore unqualified to perform historical inquiry that is required by originalism.¹⁰³ Scalia rebutted this by explaining that what it meant by reliance on history from the originalist point of view is actually historical semantics. Lawyers and judges are expected to be historians. He quoted Radin who said if they don't take the task seriously, they will not cease to be historians but rather, they will be bad historians.¹⁰⁴ Scalia further 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.

¹⁰² Scalia, Reading Law, see False Notions 67

¹⁰³ In the case of constitutional provisions historical interpretation is often necessary, see Roscoe Pound, *Jurisprudence*, (United States: West Publishing Company, 1959) 491.; Scalia's Reading Law in False Notion No. 69.; Max Radin, *The Law and You*, (U.S: New American Library, 1948) 188-89.; Lord Bowen's quote in Van Vechten Veeder, "The Judicial Characteristics of the Late Lord Bowen", *Harvard Law Review*, vol. 10, no. 7. (1897): 351-365 where he averred "the only reasonable and the only satisfactory way of dealing with English law is to bring to bear upon it the historical method. "To allow the plain words of the Constitution to settle a controversy, judges must either become linguistic historians or adopt some version of the doctrine that the constitution's meaning changes over time..", see Murphy, 130-150.

¹⁰⁴ Radin, 188-189.

Scalia also highlighted the misconception that constitutions should be interpreted differently from statutes. The living constitutionalist appeal to this argument by using CJ Marshall's famous line, "It is the Constitution we are expounding". Scalia cautioned that this statement was taken out of context and it was not intended to suggest that the Constitution evolves. Instead, it means that the Constitution was meant to be perpetual and to endure for ages to come.¹⁰⁵

On complaints regarding uncertainty of language and its reference, he provides a guide for dictionary use. He quoted Lord Macmillan who said "one of the chief functions of our courts is to act as an animated and authoritative dictionary".¹⁰⁶ A comparative weighing of dictionaries is often necessary. The more advanced semantic analysis should always be more preferable.¹⁰⁷ In his defense for originalism, he cautioned that it is important to understand the difference between the amendability of the constitution and changing constitution.¹⁰⁸ It was also argued that the living constitution approach weakens amendability.¹⁰⁹ He further argued that the fact that the Constitution uses general terms, is not an indication that courts can change their meaning. The term living constitution may have been misleading in the sense that they promise flexibility and openness to change. But in actual fact, flexibility and change should be done through a ballot box and a legislature. He also explained that stare decisis is acceptable so long as it does not condone error in a precedent and it is not a situation where a contrary disposition is necessary to be dictated using a proper textual interpretation.¹¹⁰

¹⁰⁵ Scalia, Reading Law, see False Notion no. 70

¹⁰⁶ Lord Macmillan, *Law and Other Things*, (Cambridge: Cambridge University Press. 1938), 163.

¹⁰⁷ Scalia, Reading Law, see Appendix A, A Note on the Use of Dictionaries.

¹⁰⁸ Scalia, Reading Law, 70.

¹⁰⁹ William Van Alstyne, "Clashing Visions of a Living Constitutions: of Opportunists and Obligationists", *Cato Supreme Court Review*, vol. 13, no. 9-99 (2011): 20.

¹¹⁰ Scalia, Reading Law, see Afterword.

(b) Non- Originalism

“Living constitutionalism” or the living document approach is described by various contemporary scholars in a variety of ways. It is an approach that sees a constitution as an evolving, living entity which, by its very nature, is capable of changing or evolve over time in response to new conditions,¹¹¹ adapts to new circumstances without being formally amended, or ¹¹² “an adaptive document that responds to changing social and economic conditions through altered judicial interpretations of its central textual provisions.”.¹¹³ It is also sometimes described as judicial pragmatism or evolutionalism.¹¹⁴

Along with this theory come different theories regarding the nature and limits of legitimate constitutional interpretation. This theory stresses the extent to which constitutional interpretation resembles the kind of reasoning that takes place in other areas of the law pertaining to common law legal systems that emerged in incremental manner over many decades such as the law of equal protection, free expression, due process and the like which has also evolved in modern western democracies as constitutional cases.

Under this theory, the scope of a constitutional right is defined largely by judicial perceptions of current social mores,¹¹⁵ incorporating contemporary values and attitudes into the judicial ‘understanding’ of the Constitution”.¹¹⁶ This method 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

¹¹¹ Wolcher, 267.

¹¹² Strauss, Living Constitution, 1.

¹¹³ Solum, 128, White, 7.

¹¹⁴ Wolcher, 267.

¹¹⁵ Solum, 128.

¹¹⁶ Ibid.

resolving contemporary issues with contemporary constitutional understandings by relying on “past authoritative interpretations by courts and relevant historical changes in the broader political culture”. This argument is often put forth in a debate between those who try to keep the Constitution in tune with the times and those who try to keep the times in tune with the Constitution.¹¹⁷ It is the pattern of critiquing originalism, insisting that the interpretation of the constitutional text evolve to meet the changed conditions in society, and pursuing reform through litigation strategies that made evolution central to judicial reasoning.¹¹⁸ It was also suggested that “living constitutionalism” may not be well-defined except by way of contrast with originalism. Some scholars just remarks that “Living constitutionalism is difficult to define, it is often described simply in opposition to originalism.”¹¹⁹

Proponents argue that the Constitution must be able to adapt to current needs and attitudes that have changed since the original drafting. In other words, the Constitution does not have one fixed meaning but is a dynamic document, the meaning of which can change over time.¹²⁰ One of its proponents believe that having an unchanging constitution would not fit our society very well. At best, it would be ignored or treated as a hindrance, “a relic that would keep us from making progress and prevent our society from working in the way it should.”¹²¹ Just like the originalism approach, there are various forms of living constitutionalism namely Constitutional Pluralism, Common

¹¹⁷ Baker, 98.

¹¹⁸ Solum, 1259. see also Adam Winkler, “*A Revolution Too Soon: Woman Suffragists and the “Living Constitution”*”, *New York University Law Review*, vol. 76, no. 7. (2001): 1456-1458.

¹¹⁹ Solum, 1259

¹²⁰ per District Judge, Peter Messite in *District of Columbia v Trump*, 315 F. Supp. 3d 875, 881 n.13 (D. Md. (2018)).

¹²¹ Strauss, 2.

Law Constitutionalism, Moral Readings, Super-Legislature and Popular Constitutionalism.¹²²

Unlike originalism which is united by the ideas of fixation and constraint, living constitutionalism is united by the idea of constitutional change, but there are many different ways that constitutional change can be accomplished. One of the persuasive arguments by proponents of living constitutionalism is that “such and evolutionary approach is necessary in order to provide the flexibility that a changing society requires and that the Constitution would have snapped if it had not been permitted to bend and grow.”¹²³

A great opponent of living constitution argues that these are constitution evolutionists who create new restrictions upon democratic governments and direct evolution towards greater personal liberty.¹²⁴ Another criticism against this approach is that it lacks a guiding principle of evolution as they follow nothing so precise. The direction and the philosophy is unclear that acts which are once prohibited are now permitted and which are once permitted are now forbidden. As described by a renowned originalist judge, Justice Scalia, “the key to that change is unknown and unknowable.”¹²⁵ It is also argued that there is no agreement nor chance of agreement upon what is to be the guiding principle of the evolution of constitutional meaning.¹²⁶

¹²² label “living constitutionalism” is used to refer to several distinct theories, ranging from David Strauss’s common law constitutionalism theory, to various forms of pluralism (including the multiple modalities view associated with Professor Philip Bobbitt), to Professor James Fleming and Professor Ronald Dworkin’s moral readings approach. See David A. Strauss, “Foreword: Does the Constitution Mean What It Says?”, *Harvard Law Review*, vol. 129, no. 1 (2015): 4-5. see also David A. Strauss, *The Living Constitution* 43–45. See Bobbitt, 12–13. See James E. Fleming, “Fidelity, Change, and the Good Constitution”, *American Journal of Comparative Law*, vol. 62, no. 7. (2014): 515. See Ronald Dworkin, *Freedom’s Law: The Moral Reading of The American Constitution*, (Oxford: Oxford University Press. (1996), 2-3.

¹²³ Scalia, *A Matter of Interpretation*, 41.

¹²⁴ *Ibid.*, 42.

¹²⁵ *Ibid.*, 46.

¹²⁶ Scalia, “The Lesser Evil”, 44-45.

Other methods to support the main approaches

(a) Textualism

Textualists emphasize on the plain meaning of the text and the meaning that would be understood by people at the time they were ratified. It means that the language of the constitutional texts is to be construed as they were publicly understood at the time of its ratification and argued based only on their original meanings.¹²⁷ Interpreters who rely on the text as their primary source are generally known as textualists and sometimes also known as literalist, strict constructionists, interpretivist, documentarian¹²⁸ and legalist, based on different levels of commitment to the text. Generally, textualists believe that there is an objective meaning of the text and do not usually inquire into matters relating to intent of the drafters, framers or ratifiers of the Constitution and its amendments when deriving meanings from the text. Practical consequences of a decision are not of their concern. A clause bound textualist focuses exclusively on a specific clause to interpret that clause on its own term. Some scholars described this as intra textualism where the focus is on syntax, organization and significant similarities and important differences in the wording and phrasing of the Constitution.¹²⁹ A structural textualist looks at a clause in the context the rest of the text especially the closely related clauses.¹³⁰

It is often described as the most classic method of constitutional interpretation and is also one of the forms of originalism. Some originalist judges, 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

¹²⁷ Guidelines on Constitutional Litigation (1988), 3.

¹²⁸ Baker, 70.

¹²⁹ Ibid., 70.

¹³⁰ Ibid., 95.

text.¹³¹ Some would allow for consideration of contemporary values to the extent that they have become incorporated in modern understanding of phrases in the Constitution. This is described as plurality use of textualism in combination with other interpretive methods which is distinguishable from a strict textualist or constructionist approach¹³². Apparently, this classification is related to the sources employed to seek constitutional meanings.¹³³

Generally, textualism is favoured mostly for its simplicity, transparency and predictability in judgments.¹³⁴ Under this approach, the focus is made solely on the objectively understood meaning of language independent of ideology and politics.¹³⁵ It is however mostly criticized because of the difficulty to ascertain the true meaning and possibility of judges to ascribe different meanings to the Constitution's text in accordance with their background.¹³⁶ There is also concern that strict reliance on the text may not be compatible with the provisions that seek to ensure preservation of fundamental constitutional rights or guarantees which would require a more flexible approach.¹³⁷ Ironically, it was observed that "textualism has a paradoxical quality of which all approaches to constitutional meaning are textual" because despite the constitution being a text, reference beyond the text per se is necessary as the text itself is often puzzling.¹³⁸ A good example would be a purposive approach which might also be identified as a purposive textualist as it seeks to articulate the purpose or goal or underlying principle behind a clause.¹³⁹

¹³¹ Chemerinsky, 16.

¹³² See Murill, B. J., "Modes of Constitutional Interpretation", *Congressional Research Service*, (2018): 1-10.

¹³³ Kirk, 328.

¹³⁴ Scalia, *A Matter of Interpretation*, 37-41.; Epstein & Walker, 5.

¹³⁵ Epstein & Walker, 5.

¹³⁶ Bobbit, 37.

¹³⁷ Bobbit, 38.

¹³⁸ Baker, 96. see also Walter Murphy, *American Constitutional Interpretation*, 393.

¹³⁹ See Breyer, pg no.

(b) History and Tradition Based Approach

Some interpreters rely on history and tradition to search for the original understanding in giving meaning to the Constitution.¹⁴⁰ They are actually employing the originalism approach with more focus on the aspect of historical quest in searching for the original meaning of the constitutional text. Courts have often considered historical practices or tradition in cases involving issues about separation of powers, federalism and individual rights, particularly when the text does not provide a clear answer.¹⁴¹

The debate over reliance on historical practice and tradition as a mode of interpretation resonates elements of debates over original meaning, judicial precedent and arguments based on moral reasoning and national ethos. It was contended by those favouring this method that it provides an objective and neutral basis for decision making and thereby promoting more stability and predictability in the law.¹⁴² It was also claimed that it could help to preserve settled expectations that have resulted from long standing compromises among the branches regarding allocation of power amongst them.¹⁴³

Opponents of this method argue that it may be difficult to establish definitively what the relevant historical or traditional practices are in order to properly interpret the Constitution. There will be debate over the interpretive meaning of history and tradition. Historical sources may differ and might not help to clarify patterns in historical practices and lead to results inconsistent with the original meaning. It could also allow the judges to engage in a form of “law office history”, that is, by simply choosing the sources that

¹⁴⁰ Baker, 76.

¹⁴¹ Murill, 21.

¹⁴² Gerhardt, 70-71, 86-87, similar arguments supporting the use of judicial precedent in constitutional interpretation.

¹⁴³ Curtis A. Bradley and Neil S. Siegel, “After Recess: Historical Practice, Textual Ambiguity and Constitutional Adverse Possession”, *Supreme Court Review*, vol. 1, no. 14. (2014): 40.

support or reject the historical practices favourable or unfavourable to them¹⁴⁴ because lawyers and judges are only trained in law, not history. Some other critics even cautioned that it could result in failure to protect minority rights, undermine the political branches in their efforts to be innovative and opt for novel solutions to old problems and could also end up legitimizing long standing historical practices that transgress moral principles, such as slavery and segregation.¹⁴⁵

(c) Doctrinalism

Interpreters who consult constitutional doctrines which articulate the relationship between the citizen and the government, defines the boundary between individual liberty and government power.¹⁴⁶ This method is the most commonly cited source of constitutional meaning that holds firm with established doctrines such as *stare decisis*¹⁴⁷ where prior decisions on questions and established precedents of constitutional law should usually be allowed to stand.¹⁴⁸ Supreme court opinions articulate constitutional law doctrines to implement the language of the Constitution, they are full of various multiple part tests, factorial analyses, levels of scrutiny, tiers of analyses and et cetera that provide rules for decisions. It contemplates “past interpretations as they relate to specific problems and tries to organize them into a coherent whole and fit the solution of current problems into that whole.”¹⁴⁹

¹⁴⁴ Alfred H. Kelly, “Clio and the Court: An Illicit Love Affair”, *Supreme Court Review*, vol. 1965, no. 5 (1965): 119-122. “Law office history” defined as “the selection of data favourable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.”

¹⁴⁵ John Manning, “Separation of Powers as Ordinary Interpretation”, *Harvard Law Review*, vol. 124, no. 8 (2011): 1943.

¹⁴⁶ Baker, 84.

¹⁴⁷ Black’s Law Dictionary (10th Ed 2014), 1626 refers to the doctrine of precedent under which a court must follow earlier judicial decisions when the same points arise again in litigation. This has been the central tenet of American constitutionalism from the founding to the present day.

¹⁴⁸ Michael J. Gerhart, *The Power of Precedent*, (New York: Oxford University Press. 2008), 147-148.

¹⁴⁹ Baker, 96.

Proponents of this approach believe that it provides possible principles, rules or standards to govern judicial decisions in future cases with arguably similar facts¹⁵⁰ thereby promising coherent and consistent answers in later cases¹⁵¹ and some measure of consistency, objectivity and stability in court's decision making and reduction of subjectivity and discretion of lower court judges for cases alike. It also argued that more decisions can be made more efficiently when judges do not have to decide each cases individually and increase the probability of judges to remain impartial and avoid value judgments is higher.¹⁵² It is also claimed to assure legitimacy of decisions that adhere to principles set forth in prior, well-reasoned written opinions, provide more predictability and consistency and renders decisions grounded in earlier cases while supporting the court's role as a neutral, impartial and consistent decision maker.¹⁵³

However, a precedent may be overturned in light of developing principles of law or if it is unworkable in practice or dependent on obsolete constitutional doctrine or undermined by new empirical findings. If no such reasons are present, the precedent should be allowed to stand.¹⁵⁴ Many of the decisions which overrule precedents rely on value judgments by the Court.

The disadvantages of this approach are, where there is overreliance on precedence especially on cases which might have been wrongly decided, it can perpetuate an erroneous interpretation of the Constitution. Some other commentators also commented that consistency, predictability, stability and neutrality are not really achieved as claimed by the proponents as some judges would choose among precedents that meets their inclination in order to overrule, to expand or to narrow the precedents.

¹⁵⁰ Bobbit, *Constitutional Fate*, 7.

¹⁵¹ Baker, 82, 84, 96.

¹⁵² Armstrong, Brison, 13.

¹⁵³ Gerhart, 70-71, 85-87.

¹⁵⁴ See *Roe v Wade* 410, US 113 (1973).

Some proponents of originalism would also argue against the use of judicial precedent that conflicts with original meaning and thereby allowing mistaken interpretations to persist.¹⁵⁵ Another paradox is when a dissenting judge disapprove of the majority's decision on account that the majority's legal doctrine is not to be found in the text of the Constitution.¹⁵⁶ If a reviewing court allows more than one competing lines of precedent to co-exist, it will be difficult to determine which doctrine applies to a given course of conduct. Results will likely cause inefficiencies, uncertainties and distorts the judicial coherence. This judicial incoherence, which arises from conflict between judicial decisions irrespective of their underlying methodological preferences,¹⁵⁷ will also threaten systemic impacts by reducing the rationality of the legal order. Competing precedents can cause difficulties to stakeholders to square regardless of the methodological approaches those precedents embody.

(d) National Identity

Sometimes judges would consider national identity or a tradition that is deeply rooted in a nation's history from which the most cherished values, moral and culture are passed down.¹⁵⁸ This is where reliance on national identity or national ethos become closely related to the moral reasoning approach.¹⁵⁹

Arguments supporting this approach is somewhat similar to that of moral reasoning approach where the national ethos underlies the text of the Constitution and that the use of this approach, allows judges to be more flexible to incorporate

¹⁵⁵ Murill, 11.

¹⁵⁶ Baker, 96.

¹⁵⁷ Kozel, 1861. see Ginsburg, J. dissenting in *John R. Sand & Gravel Co. v United States*, 552, U.S 130,144 (2008) where it was stated that "It damages the coherence of the law if we cling to outworn precedents add odds with later, more enlightened decisions."

¹⁵⁸ Murill, 16.

¹⁵⁹ Ibid.

contemporary values¹⁶⁰ and to fill in gaps in text to address situations unforeseen at the time it was adopted¹⁶¹ when deriving meaning from the Constitution. As with moral reasoning, critics against this approach raise concerns about this approach involving unelected judges determining constitutional meanings based on principles which are not objectively verifiable.¹⁶²

(e) Structuralism

Structuralism as an approach means inferences drawn from the design or structure of the Constitution that are mostly agreed upon is the relationships among the three branches of the federal government or commonly known as separation of powers or checks and balance, the relationship between the federal and state governments or commonly known as federalism and the relationship between the government and the people.¹⁶³ From these relationships, two basic approaches of structural reasoning can be deduced namely formalism and functionalism which structuralists often debate about. The deep structure of the Constitution is vertically arranged in Federalism and horizontally arranged in separation of powers.¹⁶⁴ The debate usually concerns about which approach demonstrates greater fidelity to the Constitution, which is nearest to the original meaning of the Constitution and which 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.¹⁶⁵

¹⁶⁰ In the case of United States, the use of this method has also added legitimacy as a mode of interpretation because it is specifically tied to the American identity and values and those aspects of the Constitution that are distinctly American.

¹⁶¹ Bobbit, 102.

¹⁶² Ibid., 137-139.

¹⁶³ Murill, 17.

¹⁶⁴ Baker, 79.

¹⁶⁵ Manning, 1939, 1942-44, 1950-52, 1958-60.

According to the formalism approach, “the Constitution sets forth all the ways in which federal power may be shared, allocated or distributed”.¹⁶⁶ It focuses on the structural divisions in the Constitution supporting the idea that close adherence to these rules is required to achieve the preservation of liberty. On the other hand, functionalism approach treats the Constitution’s text as stating the relationships among the three federal branches only at their apexes. In cases below the apexes, it is left to be worked out in practice how power may be distributed or shared.¹⁶⁷ Functionalists are more flexible and emphasize 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.¹⁶⁸ While the formalists adhere to original meanings but regards historical practices as irrelevant or illegitimate, 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.¹⁶⁹

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.¹⁷⁰ Proponents of structuralism claim that this approach is a method that contemplates the entire text of the Constitution instead of considering just a particular part of it. Some proponents also argue that this method, compared to the application of textualism method alone,

¹⁶⁶ Peter L. Strauss, “Formal and Functional Approaches to Separation of Powers Questions- A Foolish Inconsistency?”, *Cornell Law Review*, vol. 72, no. 4 (1987): 488-489.

¹⁶⁷ Strauss, 489.; Michael C. Dorf, “Interpretive Holism and the Structural Method”, *Georgia Law Journal*, vol. 92, no. 82 (2004): 833-850

¹⁶⁸ Manning 1950-1952.

¹⁶⁹ Murill, 18.

¹⁷⁰ Baker, 99.

produces clearer justifications for decisions requiring interpretation of ambiguous provisions and their application.¹⁷¹ It also provides a firmer basis to establish key constitutional rights compared to other methods.¹⁷²

Opponents against this approach maintain that this approach does not always lead to a clear answer. It is difficult for judges to apply and for laymen to understand.¹⁷³ Opponents also argue that determinations about the proper structure established by the Constitution are often subjective and that it does not provide a firm basis for personal rights because personal rights are considered to arise from the “structure of citizenship”¹⁷⁴ as opposed to the structure of the government under which they become “vulnerable to the government’s desire for power and its ability to manipulate the relation between citizen and state.”¹⁷⁵

(f) Value Based Approach/Moral Reasoning

Moral arguments are inspired by Immanuel Kant’s philosophy of morality based on practical reason.¹⁷⁶ Value based approach are based on the issue of whether or not the “contemporary community values” morally condemn a certain practice as a general matter.¹⁷⁷ This method is also sometimes referred to as arguments based on moral reasonings or moral readings.¹⁷⁸ Some constitutional provisions make reference to terms

¹⁷¹ Bobbit, 74.; Murill, 20.

¹⁷² Black, Structure and Relationship, 22.

¹⁷³ Bobbit 84-85.

¹⁷⁴ Ibid., 85-86.

¹⁷⁵ Ibid., 85-86.

¹⁷⁶ <https://doi.org/10.1093/oso/9780190246365.003.0001>

¹⁷⁷ In America the discussion on this method often cites the Supreme court’s interpretation of “cruel and unusual punishments” clause of the Eight Amendment. By this approach, courts look at the society’s evolving standards of decency and moral sentiment. Another argument by proponent of this method is that courts should follow the meta constitutional moral value of procedural fairness in the resolution of individual disputes as well as the general background value of ensuring broad participation in the processes and distributions of government. See Wolcher, 269.

¹⁷⁸ Baker, 89.

which are infused with certain moral aspects or ideals.¹⁷⁹ Arguments based on moral often focus on the limits of government authority over the individual.¹⁸⁰ During the founding of the American Constitution, political philosophy and moral reasoning were mostly based on natural rights and the laws of nature which find their roots from the Christian tradition.¹⁸¹ However, the Framers were mostly influenced by John Locke who believed that there was a body of ethical imperatives inherent in human beings and discovered by human reason alone.¹⁸² Another major influence of that era was Thomas Hobbes who introduced social contract to create a civil society under which individuals consent to government and yield some personal autonomy to society that in turn exercised this sovereignty to protect the individual's right to the pursuit of happiness, including the right to acquire and enjoy property that allowed a person to be independent and free to exercise other rights.¹⁸³

Nowadays, although values are often associated with moral values, there are many kinds of values that judges appeal to such as institutional values, efficiency or economic values that are not clearly moral in nature. However, moral values are often rooted from tradition and usually have the most force and affect constitutional interpretation in many ways. 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. They are assumed to be less

¹⁷⁹ Bobbit, 142.

¹⁸⁰ Ibid., 162.

¹⁸¹ Baker, 89.

¹⁸² Ibid., 90.

¹⁸³ Ibid., 90.

objectionable when they have been accepted by many people for a long time.¹⁸⁴ However, because there are so many value choices to be made, an interpreter must be imbued with a sense of prudence and aspiration at the same time. It is required to have prudence to practice statecraft in order that the policy can be governed wisely and pragmatically for the common good. It is also important to have a sense of appreciation for the aspirational nature of the Constitution, which is more than just a set of rules, that has certain goals that point the nation toward an attainable good life or a realizable vision of justice.¹⁸⁵

Proponents of this approach argue that general moral principles underlie much of the text of the Constitution. Therefore, the meanings of constitutional terms would produce a transparent¹⁸⁶ or “more candid opinions” instead of moral based judgments which are canvassed as textual arguments or following precedents.¹⁸⁷ It was further justified that this approach is appropriate based on the fact that the Framers designed the Constitution as an instrument that would grow over time and that it would allow more flexibility for judges, to incorporate contemporary values or fill in gaps in the text to address unforeseen situations at the time it was adopted,¹⁸⁸ when interpreting the Constitution.¹⁸⁹

The most popular criticism against the use of moral reasoning is that courts should not be “moral arbiters”¹⁹⁰ and that courts may be ill equipped to discern established moral principles. Moral or ethical arguments are often based on principles

¹⁸⁴ Armstrong, 18.

¹⁸⁵ Baker, 100.

¹⁸⁶ Breyer, 127.

¹⁸⁷ Sotirios A. Barber, *On What the Constitution Means*, (U.S: John Hopkins University Press, 1984), 40 and John Hart Ely, “Constitutional Interpretivism: Its Allure and Impossibility”, *Indiana Law Journal*, vol. 53, no. 45 (1978): 399, 410-414.

¹⁸⁸ Bobbit, 102.

¹⁸⁹ Ely, 1.

¹⁹⁰ Bobbit, 137.

which are “not objectively verifiable”¹⁹¹ and may require judges to choose between “competing moral conventions”.¹⁹² As a result, they might decide cases according to their own views or political inclination which is an undemocratic act.¹⁹³

(g) Purposivism

Purposivism was inspired by realism which has roots in Auguste Comte’s positivist philosophy.¹⁹⁴ Baker wrote that 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.¹⁹⁵ According to the purposive approach that was proposed by Barak, purposive interpretation begins with the idea that interpretation is about pinpointing the legal meaning of a text along the spectrum of its semantic meaning which sets the limit of interpretation. The text is not to be given a meaning that its language cannot bear. Criteria for determining the legal meaning of the text within its semantic boundaries is created by a system of interpretation established by purposive interpretation. A system of interpretation is proper only if it projects itself onto the normative text, clarifying it so that the text takes on a single, unique legal meaning.¹⁹⁶ The purpose of the text is derived from the context of the text based on those criteria.¹⁹⁷ Under this approach, the interpreter examines all data about the purpose of the constitutional text.¹⁹⁸

Barak claims that this approach maintains the integrity of its interpretive approach to all legal texts while expressing the uniqueness of the constitutional text. It

¹⁹¹ Ibid., 138.

¹⁹² Bobbit 139.; Ely, 59.

¹⁹³ Ely, 5.

¹⁹⁴ <https://www.britannica.com/art/realism-art>

¹⁹⁵ Baker, 99.

¹⁹⁶ Barak, 219.

¹⁹⁷ Ibid., 13.

¹⁹⁸ Ibid., 385

demonstrates its sensitivity to the uniqueness of a constitution in the balance it strikes between the intent of the Framers and the intent of the system.¹⁹⁹ However, he admitted that this approach favours the latter which is considered as the objective purpose, without negating the applicability of the former which is considered a subjective purpose.

(h) Consequentialism/ pragmatism

Pragmatism is a humanist philosophy inspired by progress and emancipation²⁰⁰ while consequentialism originates from secular humanism which propounds that ethical choices are judged by their results.²⁰¹ Unlike textualist and some originalist approaches to constitutional interpretation which focus generally on the text as understood by a certain group of people, pragmatist judges or interpreters take into account possible practical consequences of particular 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.²⁰² 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,²⁰³ 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

¹⁹⁹ Barak, 371

²⁰⁰ Ulf Schulenberg, “Pragmatism, Humanism and Form”, *European Journal of Pragmatism and American Philosophy*, vol. 13, no. 2 (2021): 5 available on <<https://journals.openedition.org/ejppap/2563>>.

²⁰¹ <https://secularhumanism.org/what-is-secular-humanism/secular-humanism-defined/#:~:text=Secular%20humanism%20propounds%20a%20rational,to%20justify%20its%20ethical%20principles>. (accessed 23 November 2023)

²⁰² Richard A. Posner, *The Problems of Jurisprudence*, (U.S: Harvard University Press, 1990), 3. see also Richard A. Posner and Cardozo, *A Study in Reputation*, (Chicago: University of Chicago Press, 1990), 28.

²⁰³ Paul Brest, *Processes of Constitutional Decision Making: Cases and Materials*, 54,552.

decisions. Even if a pragmatist judge make reference to those sources, his adhering to those sources is treated as a means rather than the end of the process of interpretation.²⁰⁴ The best pragmatic method would be the cost-benefit analysis that attempts to oust both deductions and a judge's personal preferences with a prediction. This method sometimes would overlap with the balancing approach or sometimes known as one of the forms of living constitutionalism.

There is another type of pragmatist approach where a judge plays a constructive role in deciding a question of constitutional law.²⁰⁵ He observes the passive virtues by declining to rule on constitutional issues in a case by adhering to certain doctrines including those under which a judge would avoid ruling on political or constitutional questions. This to avoid becoming frequently entangled in public controversies, to preserve the court's institutional capital for key cases or to allow for more space for democratic branches to address the issue.²⁰⁶ Supporters of pragmatist approach argue that the advantage of this approach is that it takes cognizance the political and economic circumstances surrounding the legal issue before the Court and seeks to produce optimal outcome.²⁰⁷ Another advantage is that it allows the court to issue decisions that reflect contemporary values to the extent that the court considers these values relevant to the costs and benefits of a particular interpretation.²⁰⁸ For this, pragmatism supports a view of the Constitution that is adaptable to changing societal circumstances or that at least reflects the proper role of the judiciary.²⁰⁹

²⁰⁴ Wolcher, 272.

²⁰⁵ Bobbit 7.; Brest, 55.

²⁰⁶ Brest, 55.

²⁰⁷ Bobbit, 61, Ibid., 54-55.

²⁰⁸ Breyer, 11-12.

²⁰⁹ Ibid.

This method is also open to criticism that consideration of costs and benefits unnecessarily injects politics into judicial decision making.²¹⁰ It would also render the judge's interpretation a pretense while decreeing his own personal preferences and can be seen as subjective or arbitrary.²¹¹ When the court observes the "passive virtues" by dismissing a case on jurisdictional grounds, it fails to provide guidance to parties for the future and to fulfil the court's duty to decide important questions about constitutional rights.²¹² It was also asserted that under this method, a judge would impermissibly usurp a policy making function that has been specifically assigned to the people's elected representatives.

(i) Balancing Approach

A metaphor to illustrate this method is a "blindfolded goddess of justice holding a set of scales to weigh the opposing claims to decide a dispute."²¹³ It is based on identification, valuation and comparison of competing interests.²¹⁴ Under this method, 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.

Aleinikoff argued that it resonates with current conceptions of law and notion of rational decision making. Pound further argued that balancing approach is appropriate as it supports the theory that "the law is an attempt to satisfy, reconcile, harmonize or to adjust overlapping and often conflicting claims and demands to give effect to the

²¹⁰ Scalia, *A Matter of Interpretation*, 45-47.; Murill, 14.

²¹¹ Wolcher, 272.

²¹² Gerald Gunther, "The Subtle Vices of the Passive Virtues: A Comment on Principle and Expediency in Judicial Review", *Columbia Law Review*, vol. 64, no. 1 (1964): 1-25.

²¹³ Baker, 100.

²¹⁴ Alexander Aleinikoff, "Constitutional Law in the Age of Balancing", *Yale Law Review*, vol. 96, no 5 (1987): 945.

greatest total of interests that weighs most in our civilization with the least sacrifice of the scheme of interests as a whole.”.²¹⁵

It was, however, argued that the problem with balancing approach is that the decision will not reveal much analysis except for a conclusion that the court finds in favour one party against the other. Those against this approach would criticize it as not being an appropriate scale of analogy “since the interests on both sides are incommensurate”, as if judging “whether a particular line is longer than a particular rock is heavy”.²¹⁶

(j) Living Originalism

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, in particular, to the rules, standards, and principles stated by the Constitution’s text. It also requires faithfulness to the principles that underlie the text in order to build out constitutional constructions that best apply the constitutional text and its associated principles in current circumstances. It is also consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to implement the Constitution’s words and principles.²¹⁷ The ratification of the Constitution begins a constitutional project that spans many generations and each generation must do its part to keep the plan going and to ensure that it remains adequate to the needs and the values of the people.²¹⁸

²¹⁵ Aleinikoff, 957.; see also Roscoe Pound, “Survey of Social Interests”, *Harvard Law Review*, vol. 57, no. 7 (1943): 39.

²¹⁶ per Antonin Scalia in *Bendix Autolite Corp v Midwesco Enters, Inc*, 486 U.S. 888, 897 (1988).

²¹⁷ Balkin, *Living Originalism*, 4.

²¹⁸ *Ibid.*

It is a hybrid theory that is said to have been developed by Professor Jack M. Balkin based on his framework originalism theory which views the Constitution as an initial framework for governance that sets politics in motion through constitutional construction. It also looks at the constitution as a framework that consists of the original semantic meanings of the words in the text including any generally recognized terms of art and the adopters' choice of rules, standards, principles and silences to limit, guide, and channel future constitutional construction.²¹⁹ The distribution of rules, standards, principles, and silences in the Constitution's text makes sense if a Constitution is an initial framework for governance that sets politics in motion and that has to be filled out over time.²²⁰ It ascribes reasons to constitutional adopters for their choice of language.²²¹

This approach frames the Constitution in general terms, based on original "semantic content" instead of original intent or "original expected application" of the Founding Fathers.²²² While it requires fidelity to the content of the constitutional provisions, it recognizes that changing social demands and social mores should influence constitutional construction. Although the framework remains, what is built on or around the framework can change and has changed almost continually from the Founding to the present day.

According to Balkin, living originalism seeks to eliminate the opposition between originalism and living constitution.²²³ New doctrines, practices, and

²¹⁹ Jack M. Balkin, "Nine Perspectives on Living Originalism", *University of Illinois Law Review*, vol. 1, (2012): 815- 817.

²²⁰ Balkin explained further that it means, "When the text states a determinate rule, we apply the rule today, because that is what the text says. Where the text states a standard, we apply the standard, because that is what the text says. Where the text states a principle, we apply the principle, because that is what the text says. And where the text is silent, we must build out the functions of government as best we can."

²²¹ Balkin. Nine Perspectives on Living Originalism, 817.

²²² Balkin, Living Originalism, 12-13.

²²³ Nelson Lund, Living Originalism, 31.

institutions have been built on top of the basic framework. These processes of constitutional construction are living constitutionalism that builds out the Constitution-in-practice through laws, doctrines, institutions, and practices. Meanwhile, originalism, which always involves both interpretation and construction, requires fidelity to the framework and the processes of living constitutionalism build on the framework. The two are actually opposite sides of the same coin.²²⁴ Therefore, Balkin pointed out, there is no contradiction between originalism and living constitutionalism.

It was argued that framework originalism is the best form of originalism under which the Constitution is a framework for government that is incomplete at the outset, and it must be built out over time by successive generations through the processes of constitutional construction.²²⁵ The best versions of originalism and living constitutionalism, correctly understood, are compatible rather than opposed.²²⁶ The method of text and principle does not treat the purposes, expectations, or intentions of the Framing generation as irrelevant. Rather, they are a resource for construction, which we use to create constructions in our own time. Balkin further explained, “We look to the past for meaning, advice, and guidance. We want to know how others have understood the project and its entailments. We care about the views of Framers and Founders because our past is a source of shared meanings and collective memories as well as a set of judgments about how to go forward; and we adopt, modify, reinterpret, and reject these meanings, memories, and judgments given our own situation and circumstances.”²²⁷

²²⁴ Balkin, *Nine Perspectives on Living Originalism*, 818.

²²⁵ *Ibid.*, 816.

²²⁶ *Ibid.*, 815.

²²⁷ *Ibid.*, 819.

Some views say it is originalism's version of living constitution, that is a result of originalism having evolved towards living constitutionalism. Thus, the most common criticism against this theory is that it is unclear whether it represents originalism or living constitutionalism²²⁸ and that it is a misleading abstraction because it is just one product of the many spokes of originalism that had gone through evolution.²²⁹ It was pointed out that the problem with Living Originalism is that "it lacks the analytic middle ground provided by asserted content, which stands between the unspecific linguistic meanings of abstract clauses and the over-specific policy expectations of political actors who use them."²³⁰

There are, however, arguments that conceiving originalism and living constitutionalism as incompatible does not entail a conclusion that there are only two theories that fill the space of constitutional theory. According to this argument, the hybrid theories such as living originalism are placed as the third category of constitutional interpretation theories which they describe as alternatives that combine elements of originalism and living constitutionalism.²³¹ It is further argued that to simply stating that theories that permitted change would be living constitutionalist and theories that forbade change would be originalist is fundamentally incorrect. Each plausible form of originalism has some account of legitimate constitutional change in the construction zone.²³² This third category contemplates changes in constitutional implementing rules in response to changing circumstances. It is also stressed that originalism and living constitutionalism cannot be differentiated on the basis of the

²²⁸ See Scott Soames, "Deferentialism, Living Originalism and the Constitution" in *the nature of legal interpretation: what jurists can learn about legal interpretation from linguistics and philosophy*, edited by Brian G. Slocum (Chicago: University of Chicago Press, 2017), 9

²²⁹ See Colby, 245.

²³⁰ Soames, 11.

²³¹ Solum, 1281.

²³² Solum, 1280.

distinction between static and dynamic constitutional doctrine as the real issue concerns only the limits that each approach imposes on constitutional change.

(k) Pluralist

Griffin observed that despite the debate among the competing constitutional methods, pluralism has been forgotten as an alternative.²³³ He added that even if there is a winner in this contest of the most justified theory, still there will not be a general theory of constitutional interpretation.²³⁴ A single method theory will only benefit a particular clause underlying the debate and not of much help in understanding the parts of the Constitution. Griffin wrote that pluralism will be the best method to represent the general theory that provides some guidance for understanding any provisions of the Constitution and illuminate the entire document rather than simply a few selected clauses.²³⁵

Pluralistic theories are superior to the alternative single method theories. A variety of ways to understand the Constitution is more appropriate because the Constitution is a complex document consisting of so many clauses, each of varying degrees of generality and ambiguity.²³⁶ Therefore, it is claimed to be the best candidate for a general theory that give meaning to the constitution as a whole. Pluralism recognizes all of the single method theories as justifiable to the extent that they are based on a recognized source of law.²³⁷ Some other scholars see that pluralism is due to different forms of authority that may be used to construct theories of constitutional

²³³ Stephen M Griffin, "Pluralism in Constitutional Interpretation", *Texas Law Review*, vol. 72, (1993-1994): 1753. The works of Phillip Bobbit, Robert Post, Richard Fallon have all produced pluralistic theories and Cass Sunstein and Daniel Farber are all reflecting pluralistic orientation.

²³⁴ Griffin, 1755.

²³⁵ *Ibid.*, 1754, 1769.

²³⁶ *Ibid.*, 1756.

²³⁷ *Ibid.*, 1761.

interpretation. Some academic writers consider pluralism in constitutional interpretation as assimilation into constitutional arguments of common law forms of reasoning.²³⁸

Those opposing pluralism as a method argue that pluralists are not able to decide cases when the forms of argument point in different directions and thus commit a kind of category mistake. The response to this was that the purpose of this theory is to provide persuasive descriptive explanatory and normative accounts of constitutional practice and not to serve the scholarly values to take the task of actual constitutional decision making.²³⁹

3.5 THE RELATIONSHIP BETWEEN CONSTITUTIONAL INTERPRETIVE APPROACHES AND THE PHILOSOPHICAL LEGAL THEORIES

From the above discussion, it can be seen that most approaches are inspired by humanistic and positivistic approaches which are separated from metaphysical elements and more dependent on empirical and rational proof rather. Except for textualist originalism and harmonious reading, the interpretive approaches too, depart from the text and language rules. Fidelity to language has always been closer to the metaphysical-based ideology like Aristotle and Thomas Aquinas. Text originally is bound and restrained by words due to the divine nature of language in which conservative values are preserved. In all the theories there is a presence of relativism and the debates which are argued based on dichotomies are evidence of dualism.²⁴⁰

The common debate on constitutional interpretive approaches among theorists often revolve around the following dichotomies:

²³⁸ Bobbit, 5.

²³⁹ Griffin, 1767.

²⁴⁰ see discussion on relativism and dualism in Chapter 2 and Chapter 5.

(a) Legal positivism versus natural law

The great influence of legal positivism resulting from detachment from metaphysics has led to the rise of humanism and ethical relativism which further led to change of values. Change of values led to change of meanings which affected the stability of language. When values are interpreted based on popular view, things which were never questioned before starts being questioned and a lot of novel cases to emerge. For example, right to cross dress and questioning of moral policing. Meanings are changed to suit the new circumstances beyond the original meanings, thereby, causing instability of language.

(b) Role of court in relation to separation of power

The above situation necessitate change in the role of court which originally was conservative and merely declaratory to become innovative which gives rise to judicial activism. As Blackstone rightly defined, judicial activism simply means a “judicial philosophy which motivates judges to depart from the traditional precedents in favour of progressive and new social policies.”. It is believed that the court needs to be proactive to enforce those changing values due to the ineffectiveness of other branches in playing such role.

With regards to the correlation between a judge’s worldview which is reflected through his ideology as was rightly observed by Wolcher, “the purely psychological hallmark of a genuine act of judicial interpretation is the judge’s conscious submission to an authority external to himself, that is the text of the Constitution as mediated through one or more methods of interpretation that the judge employs to construe it. What matters is that a “judge should seek in good faith to determine the command of the Constitution and apply the meaning of this command to a particular dispute without

attempting to smuggle in his own personal values and preference.”²⁴¹ “Indeed, the real structure of the rule of law is the formula that “Legal Text” plus “Method of Interpretation” plus “Good Faith Judicial Work” equals to “Legal Meaning”. It was also observed that constitutional interpretation cannot be found in its object, but in the quality of the interpreters, the augmentative techniques it applies and the standard it produces. Other than the courts, interpreters include non-judicial authorities such as the executive or the Parliament. It should be exercised collectively.²⁴²

3.6 CONCLUSION

Apparently, there are only two main approaches of constitutional interpretations. They are originalism and living constitutionalism. They may share sources but differ as to degree of reliance on a particular source. There are various sources of constitutional interpretation. Apparently, all of the sources are rooted to text and values as the primary source. For originalists in general, historiographical exercise, traditional and moral values are often consulted in search of original meaning or original understanding of the text. Meanwhile, the living constitutionalists will mostly depend on the evolving moral values followed by all of the other sources such as doctrine and philosophy to support their value-based arguments or moral reasonings which are evolving in nature. Perhaps this reflects what is written by Baker that constitutional interpretation is characterized by an “intellectual syncretism” that relies on these sources to varying degrees and often in combination.²⁴³ Different interpreters differ in approach, rely on different sources, analyse different constitutional questions, different emphasis and produce different outcomes. It is also to be noted that even reliance on the same source

²⁴¹ Wolcher, 246.

²⁴² Michel Troper, “Constitutional Interpretation”, *Israel Law Review*, vol. 39, no. 35 (2006): 88

²⁴³ Baker, 93.

might bring about different outcomes. However, some scholars believe that coherence and consistence is possible and can be achieved by striving for some measure of commensurability to fit together and weigh these various sources of constitutional meaning against each other.²⁴⁴

It was also argued that there are some vain attempts in constitutional theory that amount to false dichotomies that would not withstand a further examination.²⁴⁵ Example given was in the case of strict construction versus liberal construction. When an individual liberty is strictly interpreted, correspondingly it is interpreting the government power liberally and vice versa. Therefore, it can be said to be a pointless distinction. To begin with, it is not clear how an interpreter would interpret strictly or liberally. It is not judicial activism to enforce the Constitution and it is not self-restraint to refrain from enforcing the Constitution. It is simply enforcing or not enforcing the Constitution. The dichotomy between judicial restraint and judicial activism is not a characteristic of a judge's orientation to the court as an institution or to the principle of precedent. It is a characteristic of the judge's orientation of the role of courts to the rest of the society.²⁴⁶ Another example would be the difference between substance and procedure in relation to the Due Process clauses. There will be a procedural Due Process and a substantive Due Process. Everything in constitutional law is substantive except for procedural Due Process which concerns the fundamental fairness in providing adequate notice and a reasonable opportunity to be heard. That fairness, however, is of a substantive value. Finally, in relation to the distinction between interpretivists and non-interpretivists, all interpreters are both interpretivist and non-interpretivists in

²⁴⁴ Richard Fallon Jr., "A Constructivist Coherence Theory of Constitutional Interpretation", *Harvard Law Review*, vol. 100, no. 6 (1987): 1189.

²⁴⁵ Ibid.

²⁴⁶ Richard A. Posner, "The Meaning of Judicial Restraint", *Indiana Law Journal*, vol. 59, no. 1 (1983): 756

different ways. Everyone starts with the text and at times goes beyond the text. In a nutshell, those various approaches provide some appreciation of how abstract and subtle those approaches can be and how they might be in conflict or overlap with one another. The most important takeaway is therefore, worldview is indeed the defining aspect to constitutional interpretation that determines its coherence.



CHAPTER FOUR

THE MALAYSIAN COURT'S PRACTICE IN CONSTITUTIONAL INTERPRETATION

4.1 INTRODUCTION

The appraisal of the judicial approach by the Malaysian judiciary will be based on the approaches popularly discussed by the American constitutional scholars for reasons mentioned earlier, ranging from originalism to living constitutionalism. Because we are looking at trends, discussion based on American jurisprudence can give insights where our direction is going towards since more American values have been imported especially in advocating the notions of human rights and freedom. Based on the literature survey, the American scholarship which has been contributing this field for decades, has been found to present a more systematic flow of arguments and thus would best represent the modern discussion. In the following discussion, there will be indications that originalism, textualism, literalism, strict constructionism and formalist structuralism may converge in principle and share some common features.

4.2 BRIEF CONSTITUTIONAL HISTORY

With effect from 31st day of August 1957, the Malay States and the Settlements was formed into a new Federation of States by the name of the Federation of Malaya and thereupon the said settlements shall cease to form part of Her Majesty's dominions and Her Majesty shall cease to exercise any sovereignty over them and all power and jurisdiction of Her Majesty or of the Parliament of the United Kingdom in or in respect of the settlements of the Malay states or the Federation as a whole shall come to an end.

Independence was achieved by the transfer of power and jurisdiction of Her Majesty the Queen.¹ Subsequently, Sabah and Sarawak, which were then British colonies, joined the Federation in 1963 and Her Majesty again, relinquished her jurisdiction, upon which came to be called Malaysia.²

The Constitution was a result of compromises reached between major races of Malaya i.e., the Malays, the Chinese and the Indians. It was the fruit of joint Anglo-Malayan efforts of which the Malayan Parliament had no direct hand in its drafting.³ It was drafted by the Constitutional Commission which consisted of constitutional experts from various jurisdictions. Political power was originally in the hands of the Malay Rulers and the Malays” but citizenship was granted to all races. In return it was agreed that the Malays were accorded the special position especially in education, trade and commerce. Safeguards were also agreed for the religion of Islam, Malays, and the Malay Language as the national language of the Federation and subsequently for the bumiputras of Sabah and Sarawak. These safeguards were made as one of the Terms of Reference of the Constitutional Commission. Other recommendations in the term of reference include provisions for the establishment of a strong central government with the States and settlements enjoying a measure of autonomy, the safeguarding of the position and prestige of their Highness as Constitutional Rulers of their respective States and a common nationality for the whole of the Federation.⁴

The Constitution, to a large extent modelled on the Indian Constitution, which is elaborate and detailed with currently 183 Articles. However, despite the whole legal

¹ Ahmad Ibrahim, “The Influence of American Constitution on the Constitution of Malaysia” (paper presentation, International Conference: The U.S. Legal System and Its Influence on Malaysia and Asia, Kuala Lumpur, July 8-10, 1991).

² Ibid.

³ Ibid., 2.

⁴ Report of the Federation of Malaya Constitutional Commission 1957, Colonial No. 330 (London: Her Majesty's Stationary Office), 1957

system follows the British system, it does not follow England in having an unwritten constitution. The earlier British Commonwealth countries such as Canada, Australia and India followed the model of written constitutions as guide and inspiration.

Malaysia practices Parliamentary Democracy under the administration of a constitutional monarchy.⁵ This means that the Malaysian government is a limited government whereby the Yang di-Pertuan Agong who has sworn to uphold the Constitution as the sovereign and the power of the government of minister or public official, carry their duties and enjoy their rights and privileges within the constitutional limits. The legislative bodies i.e., the Parliament and the State Legislative Assemblies may make laws only in accordance to the provisions of the Constitution. Unlike the British system which upholds parliamentary supremacy, Malaysia upholds constitutional supremacy. This is reflected in Article 4 of the Federal Constitution which provides that “Any laws passed after Merdeka which is inconsistent with the Constitution shall to the extent of such inconsistency be void.”⁶ The existing laws shall remain in force and court may apply them with modifications as may be necessary to bring it into accord with the provisions of the Constitution.

As an overall observation, it is worthy to note Fernando’s observation that the Reid Commission, in conforming to the Alliance Party’s proposal while maintaining it’s practicability, had taken cognizance of the local sensitivities historically associated with the provisions relating to the communal issues. He also pointed out that the Commission intended to provide for the growth of a modern democratic polity based firmly on the principles of modern constitutionalism and democratic traditions.⁷

⁵ <https://melayu.library.uitm.edu.my/4678/1/Evolusi%20Perlembagaan%20Negeri.pdf> (Accessed on 5 December 2023)

⁶ Article 4, Federal Constitution.

⁷ Fernando, 98.

Jennings acknowledged the effort of the Reid Commission to retain continuity with the past and to achieve a compromise between the conflicting demands of the Malaya's plural society. He remarked that "Malaya will need to inherit a system which is understood and is practical, so that the aim should be to create a constitution compatible with the Terms of Reference, which does not depart radically from the present system."⁸ It is also important to note that such continuity can be described as the continuation of the past regimes which includes the recognition of the position and role of the rulers, especially with respect to Islam and Malay customs, which are similar with the corresponding provision under the 1948 constitutional regime.⁹ It was also pointed out that the Federation of Malaya Agreement 1948 partially had its roots in the Terengganu Constitution known as *Itqan al-Mulk bil Ta'dil al Suluk (1911)* and the Johor Constitution known as *Undang-Undang Tubuh Negeri Johor (1985)*.¹⁰

4.2.1 Malaysia's Constitutional Framework and Its Interpretive Jurisprudence

Fundamentally, the Malaysian Federal Constitution is based on the model of Constitutional Supremacy and recognized common law principles such as separation of power and the rule of law. However, these principles are variously interpreted, depending on the judges after having considered them on a case by case basis. Generally, it is trite that in interpreting the Constitution and the relevant common law principles that aid in interpreting it, Malaysia have been abiding to the doctrine of *stare decisis* which is to look at the common law precedents from the Privy Council cases. However, over time, with more novel cases are testing the normative practices, new

⁸ Fernando, 115 cited CO889/8, C.C 1000, Note by Jennings

⁹ 65, Abdul Aziz Bari, Religion, Law and Governance in Malaysia, *Pluto Journals, Islam and Civilisational Review*, vol.1 (2010), 68

¹⁰ <https://melayu.library.uitm.edu.my/4678/1/Evolusi%20Perlembagaan%20Negeri.pdf>

precedents are created based on precedents of foreign jurisdictions or even crude constitutional principles.

It is to be stressed here that however varied the constitutional interpretation methods are in Malaysia, constitutional supremacy remains the aim and defense of every argument in the Malaysian courts judgements even though the consequence might not accurately fulfil the vision. This will be illustrated in the upcoming discussion on trend of Constitutional interpretation in Malaysia.

Article 128 of the Federal Constitution gives power to the Federal Court to interpret the Constitution.¹¹ The supremacy of the Constitution permeates the reading and interpretation of all provisions of Federal Constitution. The important features of the Federal Constitution are interpreted in the light of Article 4. Among them are important firstly, judicial review. Through the establishment of the judiciary, any official acts which are unconstitutional may be called into account in the courts for judicial review. Similarly, laws which are inconsistent with the provision or spirit of the Constitution can be declared unconstitutional through judicial review. But the power of judicial review is limited by the Constitution by virtue of Article 4(3) of the Federal Constitution. Judicial review can be sought for various grounds such as contravention of fundamental liberties, equal protection and due process of law.

The Federal Constitution expressly provides for fundamental rights and liberties such as right to counsel, freedom of movement, freedom of speech and expression, right to assemble peacefully and right to form associations and right to property.¹² It was observed that the provisions on fundamental rights were heavily borrowed from the

¹¹ Article 128(2) Federal Constitution.

¹² See Articles 5(3), 9, 10 and 13, Federal Constitution.

Indian Constitution while drafted in the manner similar to the American Bill of Rights.¹³ These rights are provided with some restrictions, for example, freedom of movement is subject to any laws in relation to the security of the Federation or any part thereof, public order, public health or the punishment of offenders. Equal protection is also accorded with some exceptions such as Articles 8(1), (2) and (5) and Article 153. The Federal Constitution also provides for due process of law in Article 5(1).

The Malaysian Constitution, like the Indian Constitution, provides for a federal list, a state list and a concurrent list which spell out in great detail federal subjects, state subjects and concurrent subjects with respect to which (a) the Federation (b) the states and (c) both the Federation and the states have legislative and executive power. This merely reflects what has been stated in the terms of reference for the Constitutional Commission that, among others, to establish a strong central government. Hence, most of the important powers including those of finance are given to the Federation.¹⁴

The Malaysian Constitution provides for emergency powers to the Parliament and the Government in order to meet the dangers of subversion and communist insurrection.¹⁵ The YDPA may issue a proclamation of emergency if the security or economic life of the Federation or any part of it is threatened. While a proclamation of emergency is in force, the executive authority of the Federation shall, notwithstanding the Constitution, extend to any matter within the legislative authority of a State. It also extends to the giving of directions to a State Government or to any of its officers or authorities. In the meantime, the Parliament may notwithstanding anything in the

¹³ J.M Fernando cited C16.9, Jennings Papers, Paper Entitled, "Constitutional Experiences in Asia". 10-11

¹⁴ Ahmad Ibrahim, "The Influence of American Constitution on the Constitution of Malaysia", 1.

¹⁵ Clauses 150(1) and (2), Federal Constitution.

Constitution, make laws in regard to any matter, if it appears to Parliament that the law is required by reason of the emergency.

4.2.2 Traditional Elements

The special position of Islam, the Malay privilege, the national language and the positions of the Malay Sultans are the traditional elements or indigenous roots that are recognized by the Malaysian Constitution.¹⁶ These elements may have derived origin from the Terms of Reference of the Reid Commission which required, among others, provisions to safeguard the special position of the Malays and the bumiputras of Sabah and Sarawak and the Malay Rulers as constitutional monarchs.¹⁷

Article 3 of the Malaysian Constitution provides that Islam is the religion of the Federation, but other religions may be practised in peace and harmony in any part of the Federation. In his Highness' oath of office, the Yang di-Pertuan Agong declares that his Highness shall at all times protect the religion of Islam and uphold the rule of law and order in the country. In each of the Malay States which has a Ruler, the Ruler is the Head of the Religion of Islam in his State. In the Federal Territory, Penang, Malacca, Sabah and Sarawak, the Yang di-Pertuan Agong is the head of the Religion of Islam. Freedom of religion is also guaranteed in the Constitution and it is provided that every person has the right to profess and practise his religion, and subject to limitations which may be imposed on propagation of any religious doctrine or belief among Muslims, to

¹⁶ Abdul Aziz Bari, "Religion, Law, And Governance in Malaysia", *Islam and Civilizational Renewal*, (2010), 68. Also highlighted by Tun Salleh Abas in Dato' Menteri Othman Baginda, see also Tun Salleh Abas, Ahmad Ibrahim Memorial Lecture 2008 "Fifty Years of Constitutional Government In Malaysia" Delivered on 3rd December 2008 at Crown Princess Hotel, Kuala Lumpur. ** Former Lord President of the Federal Court of Malaysia and later Supreme Court of Malaysia, (1984-1988), Shamrahayu Abdul Aziz, *Kuasa Dan Peranan Raja-Raja Melayu Dalam Perlembagaan: Sejarah dan Masa Depan*. Seminar Perlembagaan Malaysia: "di Antara Sejarah dan Tuntutan Semasa, 1-8, <https://melayu.library.uitm.edu.my/cgi/users/login?target=http%3A%2F%2Fmelayu.library.uitm.edu.my%2Fcgi%2Fusers%2Fhome%3Fscreen%3DEPrint%253A%253AView%26eprintid%3D4679>.

¹⁷ The Reid Report 1957, 6

propagate it. Ahmad Ibrahim observed that this power has in fact been used largely to control deviant teachings in Islamic theory and practice.¹⁸

Article 153 of the Federal Constitution safeguards the special position of the Malays and the natives of Sabah and Sarawak and at the same time to safeguard the legitimate interests of the other communities in Malaysia. Owing to the neglect of the rural areas during the British occupation, the Malays and the Natives of Sabah and Sarawak have been left behind in education, commerce and industry. Therefore, this privilege is given in order to redress the balance between the multi races in Malaya and make the Malays and natives better able to compete with the other immigrant races who live mainly in the urban areas. Article 153 of the Federal Constitution provides for the reservation of quotas in respect of services, permits, the public service and education for the Malays and natives of Sabah and Sarawak. This special position however is balanced with equality before the law while aiming at economic and social equality.¹⁹

The Malaysian Constitution provides that the Malay language shall be the national language and so the Malay language has to be used for all official purposes.²⁰ However for non-official purposes, no person is prohibited or prevented from, using any other language or, from teaching or learning any other language. As regards to the privilege of the Malay Rulers, Article 181 of the Federal Constitution recognizes sovereignty, rights, powers and jurisdictions of the Malay Rulers within their respective states.

The above traditional elements are very fundamental and are definitely having impact on constitutional interpretation in Malaysia. Its importance was highlighted by Salleh Abas in the case of *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed*

¹⁸ Ahmad Ibrahim, *The Influence of American Constitution on the Constitution of Malaysia*, 16.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 17.

Alwi bin Syed Idrus where he mentioned that “It is the embodiment of traditional elements and values which are kept alive by the Constitution.”²¹

4.3 GENERAL RULES OF CONSTITUTIONAL INTERPRETATION LAID DOWN BY COURT

4.3.1 Text bound

In the earlier cases, it was observed that general principles were more oriented towards the conception of the supreme law of the land understood as permanent but flexible, language based on rules of construction, four walls principle, harmonious reading. The earliest case that can be traced to have laid down general rules on constitutional interpretation is *Loh Kooi Choon* in 1977. His Lordship Raja Azlan Shah began by setting the scene of what our constitution is and its fundamental feature,

The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.

Then, in explaining the role of court His Lordship quoted Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors*,²² 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...”. His Lordship also quoted Roskill L.J. in *Henry v Geopresco International Ltd*.²³ that, “It is the province of the courts to expound the law and “the

²¹ [1981] 1 MLJ 29.

²² [1913] AC 107 118.

²³ [1975] 2 All ER 702 718.

law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction." His Lordship then reiterated that "those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box."²⁴

On the issue of amendability, His Lordship stressed that "a distinction must be made between those parts of the Constitution which the framers thought should not suffer change and those that can be changed." He also explained that the framers prudently realised the need of change in the Constitution on the future context of things and experience and accordingly, they armed Parliament with "power of formal amendment".²⁵ His Lordship further explained, "They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later."

His Lordship took the view that "the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure." His Lordship concluded the judgment by emphasizing the four walls principle and quoted Frankfurter J. who said, "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it." This can also be illustrated in the case of *Theresa*

²⁴ [1975] 2 All ER 702 718.

²⁵ Articles 159 and 161E, Federal Constitution.

Lim Chin Chin v. Ketua Polis Negara in which the judge ruled, “we have to be guided by clear words of the Constitution and the Statute.”²⁶

In *Dato’ Menteri Othman Baginda* in which His Lordship Raja Azlan Shah quoted,

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, 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. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: “A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and 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.” The principle of interpreting constitutions “with less rigidity and more generosity” was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds* [1979] 3 All ER 129, 136..

In *Merdeka University v. Government of Malaysia*,²⁷ Tun Sufian also quoted Fisher as have been quoted by Raja Azlan Shah, but added on the four walls concept whereby the wording of our Constitution cannot be overridden by extraneous principles,

While it is true as stated by the learned Judge, following *Minister of Home Affairs v Fisher*,²⁸ that a Constitution should be construed with less rigidity and more generosity than ordinary law, nevertheless, like the Constitution of Western Nigeria which fell to be considered by the Privy Council in *Adegbenro v Akintola*,²⁹ our Constitution, paraphrasing the words of Viscount Radcliffe at page 551 in that case, now stands in its own right; and while it may be useful on occasion to draw on the practice and doctrine of other countries — cases from the United States, Canada, England and India were cited to us — it is in the end the wording of our

²⁶ [1988] 1 MLJ 293, 295.

²⁷ [1982] 2 MLJ 243.

²⁸ [1980] AC 319, 329, 360.

²⁹ [1963] 3 All ER 544.

Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other constitutions.³⁰

Raja Azlan Shah further stated that our approach to our Constitution should be the same as the approach of the Indian Supreme Court to problems of interpreting the Indian Constitution. On this he quoted Fazal Ali J. who said:

Courts interpret constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the ... requirements of ... society, the ... needs of the nation, the ... problems of the day ... It must take into consideration the temper of the times and the living aspirations and feelings of the people.³¹

4.3.2 Beyond Text

In the last 2 decades cases old principles were gradually given new spirit and have been inclined towards judicial creativity based on natural justice through which fundamental liberties are called to be construed liberally and prismatically. For example, the court grew more adventurous in 2007 when the dissenting judge in *Public Prosecutor v Kok Wah Kwan* formulated general guidelines for judges to play their role in law making through their grounds of judgments.³² Among the guidelines which concerns constitutional interpretation are firstly, by formulating original precedents for novel cases. Secondly, by overruling earlier precedents through judicial creativity. Thirdly, through constitutional review. Fourthly, to view spectrum of the law in its entirety. Fifthly, attitude towards binding precedent must be flexible and maneuverable on which can be refused or cited with disapproval. Sixthly, by importing rules of natural justice whereby judges have wide discretion in determining when they apply and to what extent is the application.

³⁰ [1982] 2 MLJ 243.

³¹ *Pathumma v State of Kerala* AIR 1978 SC 771, 774.

³² [2008] 1 MLJ 1(FC).

In 2009, the court in *Lee Kwan Woh v. Public Prosecutor*,³³ added some new general principles of constitutional interpretation. The court reminded first and foremost that, where when a written constitution guarantees a right, there is no conceptual difficulty. Therefore, it was emphasized that Article 5(1) which reads, “No person shall be deprived of his life or personal liberty, save in accordance with law.” ought not be interpreted by the use of canons of construction that applies to ordinary statutes. The principle of *sui generis* applies and constitutional interpretation should be governed by principles of its own. Secondly, the court then proposed a prismatic approach to interpret abstract concepts such as life and personal liberty in Article 5(1) which gives life to these abstract principles. The case of *Dato’ Menteri Othman Baginda* was referred to which also quoted *Fisher*. Thirdly, it was stressed that, the provisions under Part II of the Federal Constitution must be interpreted in the light of what has been correctly referred to as humanizing and all-pervading provisions of Article 8 which talks about right to equality. Article 8 is aimed at ensuring that legislative, administrative and judicial action is objectively fair, also houses within it the doctrine of proportionality which is the test to determine arbitrariness or excessive action against alleged infringement of fundamental rights. Fourthly, while the provisions that guarantee fundamental rights are to be read generously, provisions that limit or derogate it must be read restrictively. Applying this principle, right to life is more than mere animal existence and extends to right to livelihood and the quality of life while personal liberty extends to other rights including right to travel abroad.

In *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara*, the general principles of constitutional interpretation were laid down.³⁴ Firstly, those provisions promoting

³³ [2009] 5 MLJ 301.

³⁴ [2021] 4 MLJ 236, (per Tengku Maimun Tuan Mat)

fundamental liberties must be construed broadly. On this point, the case of *Lee Kwan Woh* was referred to, in which the court interpreted the provisions on fundamental liberties generously and prismatically. Secondly, provisions that derogate the provisions on fundamental liberties are to be interpreted narrowly.³⁵ Thirdly, judicial precedent plays a lesser part and therefore court should not confine rigidly to judicial precedent. Fourthly, constitutional provisions must be interpreted in the light of historical and philosophical context as mentioned *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*.³⁶ Fifthly, the constitutional provisions should not be construed as against each other.

In *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors and. Other Appeals*,³⁷ the court stated that the articles as contained in the Federal Constitution are of equal stature and importance and therefore must be interpreted harmoniously.³⁸ The Judiciary is the first vanguard and the final bastion of defence against any challenge to the Federal Constitution and the laws legislated by Parliament. It is inherently clear and unequivocal that the cardinal rule when interpreting the Federal Constitution and determining the intent of the Article, the language of the Federal Constitution must neither be tampered nor tempered. A puritanical stance is necessary so that the Federal Constitution must be read and construed as the architects of the Constitution had designed it to be. The Constitution was described as:

... the very framework of the body policy: its life and soul; it is the fountain head of all its authority, the mainspring of all its strength and power: The Executive, the Legislative, and the Judiciary are all its creations and derive their sustenance from it. It is unlike other statutes which can be at any time altered, modified or repealed..³⁹

³⁵ [2021] 4 MLJ 236, (per Tengku Maimun Tuan Mat)257.

³⁶ [2018] 1 MLJ 545.

³⁷ [2021] 3 MLJ 759.

³⁸ Ibid., (Hasnah Mohamad) [285].

³⁹ M.N. Rao, Amita Dhanda, *N.S. Bindra's Interpretation of Statutes*, (Nagpur: Lexis Nexis, 2007), 857.

Therefore, the language of the Constitution should be interpreted as if it were a living organism capable of growth and development of interpreted in the broad and liberal spirit and not in a narrow and pedantic sense.

4.4 CONSTITUTIONAL INTERPRETIVE APPROACHES IN THE MALAYSIAN COURT

In the Malaysian context, the two main approaches which are textualism and non-textualism, are often applied together with various methods which are often described based on canons of interpretation, 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, moral values and philosophical doctrines. It will be indicated that the non-textualist approaches will demonstrate more emphasis on the living constitutionalism arguments compared to the textualist judges.

(a) Living Constitutionalism

From the Malaysian court's perspective, living constitutionalism is more widely known as the "living document approach". It is quite established considering that it had its root from the common law tradition which was predominant in Malaya throughout its constitutional history. The great supreme court judges of Malaysia such as Raja Azlan Shah and Tun Sufian who were also Lord Presidents, have pronounced landmark judgments acknowledging this approach in many cases. However, unlike in the United States, the idea of a living document or living constitution view may occasionally maintain to find its roots to the text and apply the textualist method. This approach in Malaysia is applied in various ways and expressed different views. The conservative

view of this approach may still find its roots to the text and apply the textualist method while the liberal view of this approach tends to favor a more progressive interpretation.⁴⁰

The living constitution approach can be seen to be applied in some of the notable judgments by Raja Azlan Shah. In *Loh Kooi Choon v. Government of Malaysia*, His Lordship quoted Frankfurter J. to have mentioned that “a constitution has to work not only in the environment in which it was drafted but also centuries later.”⁴¹ His Lordship also quoted Thomas Paine who stated that, “The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man, neither has any generation any property in the generations which are to follow. It is the living and not the dead that are not to be accommodated.”⁴² In *Phang Chin Hock v. Public Prosecutor*,⁴³ the court described the Constitution as a living document intended to be a workable instrument that is also reviewable from time to time in the light of experience and amended if necessary. The above cases have been referred to and followed in many judgements, which will be illustrated in the discussion under the heading of “post-Amendment trend”

While highlighting the approach of living document, Raja Azlan Shah in *Loh Kooi Choon* emphasized on the use of settled rules of construction. Similarly, in *Dato' Menteri Othman Baginda*, in which His Lordship emphasized the importance of usage of language quoted. The application of canons of construction in the above cases will be further elaborated under the heading of “textualism”. This shows the trend that textualism was used as the main tool to realize the spirit of the living document.

⁴⁰ See *Dato' Menteri Othman Baginda v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243.

⁴¹ [1977] 2 MLJ 187.

⁴² Thomas Paine, *Rights of Man*, (G. Claeys, Ed.) (Indianapolis: Hackett Publishing Company, 1992), 98

⁴³ [1980] 1 MLJ 70.

In *Badan Peguam Malaysia v Kerajaan Malaysia*,⁴⁴ a fair, liberal and progressive construction was favoured in support of interpreting the Federal Constitution as a living document so that its true objects must be promoted.⁴⁵

Similarly, the same approach could be seen in the following two cases. The dissenting judgement in *Maria Chin v. Ketua Pengarah Imigresen*⁴⁶ 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*,⁴⁷ it was emphasized 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.⁴⁸ 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.⁴⁹

⁴⁴ [2008] 2 MLJ 285].

⁴⁵ Ibid., per Zulkefli Makinuddin, majority.

⁴⁶ *Maria Chin v Ketua Pengarah Imigresen* [2021] 1 MLJ 750.

⁴⁷ [2021] 4 MLJ 236.

⁴⁸ Ibid., per Nallini Pathmanathan dissenting.

⁴⁹ Ibid.

(b) Textualism

Generally the court in interpreting the Constitution, have shown great reliance on language and emphasized the importance of following the rules of construction.⁵⁰ While highlighting the approach of living document, Raja Azlan Shah in *Loh Kooi Choon* emphasized on the use of settled rules of construction. This, in explaining the role of court, His Lordship quoted Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors*, 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...”.⁵¹ In *Dato’ Menteri Othman Baginda*, Raja Azlan Shah quoted Lord Wilberforce in *Minister of Home Affairs v Fisher*, that “respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and 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.”.⁵²

In *Datuk Haji Harun bin Haji Idris v. Public Prosecutor*,⁵³ it was highlighted that the right to equal protection in the Malaysian context as provided under Article 8 of the Federal Constitution is not absolute and is subject and grounded to the text of our Constitution. There are various tools in which the courts apply textualism. In some cases, the court relied primarily on the semantic and syntactic approach, guided by the rules of construction. The following are the approaches often used by the Malaysian court in the first three decades after Independence.

⁵⁰ This is one of the strong features of textualism as explained in Chapter 3.

⁵¹ [1913] AC 107 118.

⁵² [1979] 3 ALL ER 21.

⁵³ [1977] 2 MLJ 155.

(i) Literal Ordinary Meaning

Textualist often resort to the literal meaning and ordinary meaning if the words are clear and unambiguous. Originalist judges who employ the literalist approach have been described as strict textualists, strict constructionists or strict legalists.⁵⁴ 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*, *Public Prosecutor v. Khong Theng Khen & Anor*⁵⁵ and *Teng Cheng Poh v. Public Prosecutor*.⁵⁶ Similarly, Tun Suffian’s dissenting judgment in *Dato’ Menteri Othman Baginda*⁵⁷ illustrates a literalist view in his ruling where he viewed that there has to be a clear language to confer jurisdiction to the *Dewan*⁵⁸ 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.

(ii) Semantic, Contextual/Reasonable/Harmonious interpretation

Harmonious interpretation can be seen to be applied in *Assa Singh v. Menteri Besar of Johor*,⁵⁹ where as far as pre-Merdeka laws are concerned, the court interpreted Articles 4(1) and 162 of the Federal Constitution as read together to mean that a pre-Merdeka law will continue in force after

⁵⁴ See discussion on textualists in Chapter 3.

⁵⁵ [1976] 2 MLJ 166.

⁵⁶ [1977] 2 MLJ 66.

⁵⁷ [1981] 1 MLJ 29.

⁵⁸ “*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.

⁵⁹ [1969] 2 MLJ 30.

Independence Day. It also means that even if the pre-Merdeka law is inconsistent, it does not render the whole enactment to be void. If it is inconsistent, it will be repealed by appropriate legislature but until then, it will be modified without going to the Parliament by order of His Majesty within the period of 2 years to bring its provision into accord with the Constitution. The court quoted Lord Denning which was quoted in *Surinder Singh Kanda v. The Government of the Federation of Malaya*⁶⁰ where he said, “in a conflict of this kind between existing law and constitution, the Constitution must prevail.”⁶¹ The court then applied the existing law with modification to bring it into accord with the Constitution. Therefore, the Police Ordinance was not held to be void. Similarly, in *Assa Singh*, Restricted Resident Enactment 1933 (‘RRE’) was held to be valid as the rights guaranteed under Article 5 of the Federal Constitution having read into the Enactment.⁶²

Another authoritative case that illustrates the importance of the harmonious interpretation is *Phang Chin Hock*, in which the court emphasized that all provisions in the Federal Constitution are to be treated as of equal stature and are to be read harmoniously. Therefore, the rule of harmonious construction must be applied to give effect to Articles 4 and 159 of the Federal Constitution. Applying the harmonious rule of construction, the court then was unanimous in agreeing with Raja Azlan Shah in *Loh Kooi*

⁶⁰ [1962] 28 MLJ 169.

⁶¹ Ibid., 31.

⁶² Ibid., 14-15, right to be informed as soon as may be of the ground of his arrest to be allowed to consult and be defended by legal practitioner of his choice, to be produced without unreasonable delay within 24 hours before a magistrate, not to be further detained without order of magistrate.

Choon that Parliament has power to make constitutional amendments even if the constitutional amendment is inconsistent with the Constitution.

In the case of *Fathul Bari bin Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors*,⁶³ the court was applying the cardinal rule in dealing with the text which is to give the widest meaning to legislative entries. Similarly, in *Letitia Bosman v. Public Prosecutor* the court, applying the cardinal rule of interpretation, interpreted the words “with respect to” in Article 74 with extensive amplitude; entries in the legislative list are read in the widest possible construction according to ordinary meaning of the words in the entry, extend to all ancillary or subsidiary matters.⁶⁴ Another rule is that the function of the entries is not to confer powers of legislation but to demarcate the fields in which legislative bodies operate.⁶⁵

Another example of is in *CTEB v Ketua Pengarah Pendaftaran Negara*,⁶⁶ the majority, following *Loh Kooi Choon*,⁶⁷ 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 rewriting its provisions. In the majority view, “law” was interpreted to mean only ordinary laws. This view was supported with the argument that the spirit of the Constitution is to allow amendment. It was clearly stated in the amendment of Article 121 of the Federal Constitution that power must be conferred by federal law. Based on this premise, the courts power to judicial review is statutory and

⁶³ [2012] 4 MLJ 281.

⁶⁴ [2020] 5 MLJ 277 (FC).

⁶⁵ Ibid.

⁶⁶ [2021] 4 MLJ 236 (FC).

⁶⁷ [1977] 2 MLJ 187 (FC).

therefore the courts can be restrained by federal law. It was also highlighted by the majority that the constitutionality of the amendment, if ever challenged, is a different matter and should be left for the legislative body to discuss.⁶⁸ As far as the present amendment is concerned, it has been approved with clear wordings that power must be conferred by federal law.

In *Goh Leong Yeong v. ASP Khairul Fairoz bin Rodzuan*⁶⁹ the court in interpreting the word “offence” which is a general word of wide amplitude quoted *Letitia Bosman*⁷⁰ and applied the principle that applies to legislative list to the effect that the widest possible construction must be put on the word “offence”. The power of Parliament to create offence was interpreted to include the power to legislate on ancillary matters that can be fairly and reasonably be included in the entry. The rationale is that creation of offences serves no purpose in the administration of justice without punishment for its commission. Therefore, the power of Parliament to create offence is understood to include the power to create punishment.

In *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and other appeals*,⁷¹ the court applied textual interpretation where it stated, between the implicit concept and the express textual provision, the latter should take precedence.⁷² The court reminded, to hold BSD which stresses on non amendability, will go against the clear and express provision of Article 159 of the Federal Constitution. It was also said that on this ground, BSD was validly rejected. The court also said that theories which evolved from historical, social and political context of foreign nations, is different from

⁶⁸ [1977] 2 MLJ 187 (FC).

⁶⁹ [2021] 5 MLJ 474 (FC).

⁷⁰ [2020] 5 MLJ 277 (FC), 585 (Azahar Mohamed FCJ).

⁷¹ [2021] 2 MLJ 822 (FC) Zabariah Mohd Yusof FCJ.

⁷² *Ibid.*, [191] (Zabariah Mohd Yusof).

our own historical and constitutional concept. They should not be forced onto our own Federal Constitution as aid of interpretation.⁷³

In *Ketua Polis Negara v. Abdul Ghani Haroon*,⁷⁴ the court followed the same approach as in *Loh Kooi Choon* where the court emphasized that Article 5(2) of the Federal Constitution should be interpreted and applied according to the wording of the Constitution as a whole. In *Danaharta Urus Sdn Bhd. v. Kekatong Sdn. Bhd.*,⁷⁵ 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.⁷⁶

In, *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara, Malaysia & Anor*,⁷⁷ 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. In *Dato' Seri Ir. Hj Mohammad Nizar bin Jamaluddin v. Dato' Seri Dr Zambry bin Abdul Kadir*,⁷⁸ 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. Overall, the court was quite consistent in applying a

⁷³ [2021] 2 MLJ 822 (FC) Zabariah Mohd Yusof FCJ. [194]

⁷⁴ [2001]4 MLJ 11.

⁷⁵ [2004]2 MLJ 257.

⁷⁶ [1977] 2 MLJ 187.

⁷⁷ [1999] 2 MLJ 241.

⁷⁸ [2010] 2 MLJ 285 (FC).

harmonious construction and respecting the Shariah court's jurisdiction in cases involving purported civil-Shariah jurisdictional conflicts.⁷⁹

In the dissenting judgment of *Rovin Joty*, harmonious construction of Articles 4(1) and 159(1) of the Federal Constitution was applied in support of the notion of judicial supremacy. Applying the harmonious construction approach, “law” was interpreted to mean all laws including the amending law that derived its power from Article 159 of the Federal Constitution.⁸⁰ Whereas the majority defines law as only ordinary laws.⁸¹

In *Zaidi Kanapiah*, the court in its minority judgment⁸² echoed Abdul Hamid's judgment in *Kok Wah Kwan* on the explanation the application of separation of powers which is to comply with Articles 4(1), 128(6) and 162 of the Federal Constitution. In *JRI Resources Sdn. Bhd. v. Kuwait Finance House*,⁸³ the court in its majority judgment quoted stated that parliamentary democracy requires a blending and not a separation of the executive and legislative branches. The court when on to quote that a “porous border is inevitable”, which means they are all overlapping and cannot be separated in a water tight way.⁸⁴

In *Kok Wah Kuan*, the court defined the doctrine of separation of power as written by the Constitution. The Federal Constitution spells out the functions of the three branches. 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.

⁷⁹ see *Sukma Darmawan, Soon Singh A/L Bikar Singh v Pertubuhan 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 Faridah bte Dato Talib* [1992] 2 MLJ 793.

⁸⁰ [208] (Nallini Pathmanathan FCJ dissenting).

⁸¹ [2021] 2 MLJ 822 (per Zabariah Mohd Yusof FCJ) [64].

⁸² [2021] 3 MLJ 759(per Zaleha Yusoff FCJ).

⁸³ [2019] 3 MLJ 561 [FC].

⁸⁴ Azahar Mohamed FCJ quoted Shad Saleem Faruqi in *Our Constitution* (2019), 76.

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.⁸⁵

In *Datuk Seri Anwar Ibrahim v. Government of Malaysia*,⁸⁶ the Court decided that the power to determine any of the circumstances mentioned in Article 149(1) (a-f) of the Federal Constitution should be ascribed to the legislature or otherwise, the doctrine of separation of power will be violated.⁸⁷ According to the court, this power has been clearly provided by the wording of Article 149 of the Federal Constitution. The issue of subject matter jurisdiction was made based on the presumption that every word in law was to be given meaning, the court must endeavour to give significance to every word used.⁸⁸

In *JRI Resources*, the wordings in the Ninth Schedule were given a considerable attention.⁸⁹ The court in its majority judgment highlighted the difference between “ascertainment” and “determination” in the Ninth Schedule. “Ascertainment” as according to Stroud’s Judicial Dictionary,⁹⁰ means to make known or made certain. Whereas “determination”, according to *Regina v. Young (Trevor)*,⁹¹ connotes end of the process, that which the court eventually decides, or, when the decision is announced.⁹² It was also highlighted that those two terms should not be confused for ascertainment refers to a ruling and determination is final in nature.⁹³ It was suggested in the majority judgment that the doctrine of separation of power should be understood as overlapping

⁸⁵ See paragraph [356] (Tun Hamid Mohamed FCJ).

⁸⁶ [2021] 6 MLRA [FC].

⁸⁷ Ibid., [53] (Zaleha Yusoff FCJ).

⁸⁸ Ibid.

⁸⁹ (Mohd. Zawawi Mohd. Salleh FCJ, majority).

⁹⁰ 9th Ed (2016).

⁹¹ [2004] 1 WLR 1587.

⁹² May LJ in *R v Coates* [2004] 1 WLR 3043, English COA.

⁹³ Majority’s decision at paragraph [96]-[97] (Mohd Zawawi Mohd Salleh FCJ)

and blending of power which result in complementary activity by the different branches. This makes separation of power in its absolute sense impossible.⁹⁴ It should not be rigid, fixed or static but should continue to evolve.⁹⁵

In *Datuk Seri Anwar Ibrahim v. Government of Malaysia*,⁹⁶ the majority chose to be restrained by refusing to answer constitutional question on the ground that the issue was academic. In *Maria Chin* the majority emphasized that by giving literal interpretation for provisions which are clear and unambiguous, it will not breach any rules of constitutional interpretation. It was decided that the wordings of the Constitution that reads “the high courts and inferior courts shall have jurisdiction and powers as may be conferred by or under federal law” are clear and ambiguous and admits of no other interpretation.⁹⁷ On the canons of constitutional interpretation, it was accepted by the court that the Constitution must be interpreted in the light of its historical and philosophical context but there is no guaranteed constitutional right to a perceived “unhindered access” to a court of law seeking for full remedy. The type and extent of remedy available is a matter for the legislature to decide.⁹⁸

An example of doctrines defined within the limitation of text can be seen in the majority judgment of *Maria Chin*, in which judicial power was defined based on the concept of separation of power but within the limits of the constitutional text. The issue was concerning the right to travel which stems from judicial power in Article 121(1) of the Federal Constitution. Questions posed should be whether the section 59A of the Immigration Act 1959/63 is void under Article 4 of the Federal Constitution for being inconsistent with Article 121(1) of the Federal Constitution and not whether it is

⁹⁴ Majority’s decision at paragraph [99] (Mohd Zawawi Mohd Salleh FCJ)

⁹⁵ Ibid., [100].

⁹⁶ [2020] 4 MLJ 133.

⁹⁷ [2021] 1 MLJ 750, [85] (per Majority).

⁹⁸ Ibid., [99].

constitutional in the light of *Semenyih Jaya Sdn. Bhd. v. Tanah Hulu Langat*⁹⁹ and *Indira Gandhi a/p Mutho v Islam Perak & Ors.*¹⁰⁰ Otherwise, it will be misunderstood that the decision means Article must bow to the doctrine of separation of powers.¹⁰¹ In this case, separation of power was described as a doctrine which prohibits the legislature to enforce the law that it makes and it is for the executive to interpret the law that it enforces and for the judiciary to rewrite the law it interprets.¹⁰² Whatever law conferred on the three branches cannot be invoked on the ground that it encroaches the imperatives of the Federal Constitution. This includes the power given to Parliament through Article 121 of the Federal Constitution to enact federal laws to limit judicial power.¹⁰³

In *Maria Chin*, it was mentioned that those wordings in Article 121(1) of the Federal Constitution are carefully chosen words which are intended to mean what they say and say what they mean. They mean that the Parliament may by legislation determine the jurisdictional boundaries of judicial power.¹⁰⁴ Article 4 of the Federal Constitution is to safeguard the supremacy of Federal Constitution by preventing Parliament from passing any law it pleases, or when it is inconsistent between post Merdeka law and the Federal Constitution and the inconsistency is irreconcilable.¹⁰⁵ The majority of the panel explained that Article 4 of the Federal Constitution has nothing to do with judicial power governed by Article 121 of the Federal Constitution. The impugned law is to be tested against the provision conferring its power and legitimacy and force of law, which is Article 121(1) of the Federal Constitution and not

⁹⁹ [2017] 3 MLJ 561.

¹⁰⁰ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*, [2018] 1 MLJ 545.

¹⁰¹ [2021] 1 MLJ 750, [25].

¹⁰² [2021] 1 MLJ 750, [26].

¹⁰³ *Ibid.*, 4.

¹⁰⁴ *Ibid.*, (Rohana Yusof FCJ) [42].

¹⁰⁵ *Ibid.*, [78].

against Article 4 of the Federal Constitution.¹⁰⁶ Article 4 of the Federal Constitution cannot be used to strike down any law as the provision does not operate on its own. It must be read in conjunction with other provisions in the Federal Constitution. Article 4 of the Federal Constitution operates as a mechanism to declare any post-Merdeka law void for being inconsistent with any other provisions of the Federal Constitution.

The court in *Maria Chin* also applied a harmonious interpretation in defining law.¹⁰⁷ Law was given the meaning having regard the distinction drawn between ordinary laws enacted in the ordinary way and acts of Parliament that affect the Federal Constitution. It is the ordinary law that is meant by law in Article 4(1) of the Federal Constitution. The court also referred to the case of *Mohamed Habibullah b Mahmood v Faridah bte Dato' Talib*¹⁰⁸ which quoted *Phang Chin Hock v. Public Prosecutor*.¹⁰⁹ In addressing the issue of whether “personal liberty” concerning Article 5 of the Federal Constitution should be given a narrow or expansive interpretation, the court refrained from interfering and quoted Raja Azlan Shah in *Loh Kooi Choon* who said, “those who find fault with the wisdom or expediency of the impugned act, and with vexatious interference of fundamental rights, normally must address themselves to legislature, not the courts, they have their remedy at the ballot box.”¹¹⁰

In *Gin Poh Holdings Sdn. Bhd. (in voluntary liquidation) v. The Government of State of Penang & Ors*,¹¹¹ the Federal court summarized the principles applicable to the interpretation of entries in the legislative list. The entries are treated as are wide and they should be understood to demarcate not to the extent that it permits inclusion of

¹⁰⁶ [2021] 1 MLJ 750, see paragraph [79].

¹⁰⁷ Ibid., [129].

¹⁰⁸ [1992] 2 MLJ 793.

¹⁰⁹ [1980] 1 MLJ 70 (FC).

¹¹⁰ *Maria Chin v Ketua Pengarah Imigresen* [2021] 1 MLJ 750 see paragraph [213].

¹¹¹ [2018] 3 MLJ 417.

matters with no rational connection to it or override or render meaningless another entry. Apart from that, when in conflict, the court should attempt to reconcile by harmonious construction. These principles were also quoted by the court in *Letitia Bosman*.¹¹²

Under the Special Rule for Legislative List, The Pith and Substance Test, the Constitution is understood by reading its legislative list is one of the ways of the textualist approach.¹¹³ In interpreting the legislative list, the court in *Gin Poh* summarized a few principles to be applied.¹¹⁴ Firstly, the legislative list does not confer legislative power but demarcate the area in which Parliament and state may make laws. Secondly, it is to be interpreted liberally according to the rule of widest amplitude. If there is conflict, the meaning that renders meaningless another entry is to be overridden. Thirdly, constitutional validity of the law still depends on compliance with other provisions of the Federal Constitution such as those related to fundamental liberties. Fourthly, *ejusdem generis* does not apply in interpreting the legislative list. The court applied the textualist approach and emphasized that the words of Article 74(4) of the Federal Constitution are to be followed. This means, where general as well as specific expressions are used in describing any of the matters enumerated in the list set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter. The interpretation of the Constitution according to the legislative list was also aided by the principle of pith and substance as illustrated in the case of *Mamat bin Daud & Ors v. Government of Malaysia*.¹¹⁵

In *Koperal Zainal Mohd Ali v. Selvi Narayan*,¹¹⁶ the majority ruled that there is nothing in the Federal Constitution that provide directly or vaguely the right of the estate

¹¹² [2020] 5 MLJ 277, [22].

¹¹³ See also discussion 3.3, Chapter 3.

¹¹⁴ [2018] 3 MLJ 417, [47]-[62].

¹¹⁵ [1988] 1 MLJ 119.

¹¹⁶ [2021] 3 MLRA 424 [FC].

of a deceased to exemplary damages.¹¹⁷ This lacuna must be cured by Parliament due to absence of a clear constitutional provisions providing for such right. There is a remedy provided under the Civil Law Act to 1956 to do justice to the deceased's estate in order that the appellants are allowed to walk free.¹¹⁸

In *Rovin Joty*, the court looked at the historical perspective and intention of the Framers but are still confined to the constitutional text.¹¹⁹ It means that while the text must be interpreted in its historical and philosophical context, such context must only support what is in the text. The court in interpreting Article 121 of the Federal Constitution ruled that conferment of court's jurisdiction and powers by federal law is entrenched in the constitutional history.¹²⁰ It was recorded in history that a provision on rule of law, though was deliberated at the drafting stage, was not included as it was decided by the Reid Commission that Federal law may prescribe what the legislature considers as sufficient remedy, which can best be provided by ordinary law.¹²¹ The provision on rule of law was taken out and did not remain in the Federal Constitution. Therefore, the absence of the rule of law provision cannot be treated as written in the Federal Constitution. For it to be enforced, it will have to be expressly provided by a federal law.

The court also defined the word "law" to the effect that amending laws are sole prerogative of Parliament for emergency under Article 159 of the Federal Constitution. This was also supported by the court in *Loh Kooi Choon* that law must be taken to mean "law made in exercise of power of constitutional amendment under clause 159(3) with the result that clause 4(1) does not affect amendment under clause 159(3)". Even though

¹¹⁷ [2021] 3 MLRA 424 [FC]. (Per Rodzariah Bujang FCJ).

¹¹⁸ Ibid., 424.

¹¹⁹ [2021] 2 MLJ 822, [277] (Zabariah Mohd. Yusof FCJ).

¹²⁰ Ibid.

¹²¹ Ibid., [94].

the power to amend the Constitution was entrusted to the Parliament, such power is restricted. It means that exercise can only be made after a careful consideration of the content and the requirements of a larger proportion of members. This serves as a check and balance against overzealous amendment at the same time flexibility in amending to adapt changing of values in society.¹²²

(c) Originalism

In the Malaysian context, the term originalism is relatively new.¹²³ They can be represented by the strict textualists, or the historicists or the original meanings at the time the constitution was ratified. Principally, there is no coherence in the definition of originalism, just as reflected by the American scholarship. However, there is a possibility that originalism has been applied in Malaysia but was not labelled as such.

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, this approach is compatible for Malaysia since it practices a limited government with sovereignty of Rulers and power of the government understood within the constitutional limits. 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.

¹²² [2021] 2 MLJ 822, 18.

¹²³ We take note that originalism as has been convincingly explained by Justice Scalia that it does not mean strict textualism or strict constructionism. However, for the purpose of this research, strict textualism or strict constructionism will be discussed under originalism as it is mostly understood as part of originalism due to its reference and emphasis on the importance of text. See also discussion under section 3.4 in Chapter 3.

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 constitutional interpretive approach in Malaysia.

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.¹²⁴ Liberty was defined based on what has been understood by the people at the time of ratification, which is also what was traditionally understood.¹²⁵ 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 judges are not elected members to represent the democratic rights of the people.¹²⁶

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.¹²⁷ Therefore, it is very important to

¹²⁴ A. Scalia, *The Essential Scalia; On the Constitution, the Courts and Rule of Law*, (Jeffrey S. Sutton and Edward Whelan Eds.), (Canada: Penguin Random House, 2020), 155. *Roe v Wade*, 410 U.S 113 (1973).

¹²⁵ See discussion under 2.2.4.2.2.(d) in Chapter 2.

¹²⁶ See A. Scalia, *A Matter of Interpretation*.

¹²⁷ On the Malay Rulers and the Monarchical System see Articles 32, 38, 40, 41, 42, 44 and 70 of the Federal Constitution, On Islam see Articles 3 and 11 of the Federal Constitution, On Special Rights of Malays and Bumiputera, see Article 153 of the Federal Constitution, On Malay Language, see Article 152 of the Federal Constitution.

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 in the case of *Dato' Menteri Othman Baginda v Dato' Ombi Syed Alwi bin Syed Idrus*, where he mentioned that, "It is the embodiment of traditional elements and values which are kept alive by the Constitution."¹²⁸ 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).¹²⁹ 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 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 to find the right meaning. It is 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

¹²⁸ [1981] 1 MLJ 29, 8.

¹²⁹ In order for '*urf* to constitute a valid basis for legal decision it must be the consistent practice of a group of people. The practice of an individual is not '*urf* but rather it is a person's habit. '*Urf* must also be acceptable and reasonable. Hence, the practices that are devoid of benefits or involve disadvantages are not considered as legal '*urf* see Al-Zarqa, *al-Madkhal al-Fiqhi al-Amm*, (Damascus: Matabi' Alif Ba', 1967): 131.

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.¹³⁰ This is none other than taking into consideration the early practices, which is also has a very strong backing in Islamic law which forms one of the traditional elements.¹³¹

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* 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*, “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.¹³² In *Merdeka University v. Government of Malaysia*,¹³³ a historical inquiry into the usage words “national language” thoroughly done to prove the extent of their meaning. In *Meor Atiqurrahman bin Ishak & Ors v. Fatimah Sihi & Ors*,¹³⁴ 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

¹³⁰ A Monir Yaacob, “*Adat*, A Source of Malaysian Law”, *Sari*, vol. 2, no. 1 (1984): 65-79.

¹³¹ *Ibid.*, 65.

¹³² The traditional elements as listed by Tun Salleh Abas are the Sultanate or Rulership, the Islamic religion, the Malay language and Malay privileges.

¹³³ [1982] 2 MLJ 243.

¹³⁴ [2006] 6 MLJ 605.

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.¹³⁵ However, the court has to also show how it deals with the restriction based on the wording of Article 11(5) of the Federal Constitution.

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, our court in interpreting the Constitution, have shown great reliance on language and emphasized the importance of following the rules of construction. Raja Azlan Shah in *Loh Kooi Choon* emphasized on the use of settled rules of construction. This, in explaining the role of court, His Lordship quoted Lord MacNaghten in *Vacher*¹³⁶, 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*, Raja Azlan Shah quoted Lord Wilberforce in *Minister of Home*

¹³⁵ Abdul Aziz Bari, "Islam in the Federal Constitution: A Commentary on the Decision of *Meor Atiqurrahman*", *Malaysian Law Journal*, vol. 2. no. 9 (2000): MLJ 133.

¹³⁶ *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107, 118.

Affairs v Fisher,¹³⁷ that “... 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.”. In *Danaharta Urus Sdn. Bhd. v. Kekatong Sdn. Bhd.*,¹³⁸ 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 *PP v. Kok Wah Kuan*,¹³⁹ the court defined the doctrine of separation of power as written by the Constitution. The Federal Constitution spells out the functions of the three branches. 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.¹⁴⁰

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*,¹⁴¹ the court observed that it was clearly stated in the amendment of Article 121 of the Federal Constitution that power must be conferred by federal law. This means, the court’s power to review judicial decision 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.¹⁴² As far as the

¹³⁷ [1979] 3 All ER 21.

¹³⁸ [2004] 2 MLJ 257.

¹³⁹ [2008] 1 MLJ 1.

¹⁴⁰ [2008] 1 MLJ 1, (Per Tun Abdul Hamid Mohammad), [356].

¹⁴¹ [2021] 4 MLRA 678.

¹⁴² Ibid.

present amendment is concerned, it has been approved with clear wordings that power must be conferred by federal law. In *Koperal Zainal bin Mohd. Ali v. Selvi a/p Narayan & Anor*,¹⁴³ it was made clear that given the clear constitutional provision, the alleged incongruity of the law must be cured by parliament and not the court lest 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 as per stated by the text.

(d) Purposive/Legislative Intent Approach

For the purpose of discussion under this heading, the purposive approach will be discussed together with rule against absurdity and the legislative intent approach. This is because in the Malaysian context, the application has been somewhat similar. Though it is acknowledged that there might be some academic and scholarly debates on the classification of these rules, this thesis will not touch on the contested issues.¹⁴⁴

In *Loh Kooi Choon*, the court also interpreted the Constitution based on rule against absurdity. His Lordship Raja Azlan Shah said, “If it is urged that the Constitution is on the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers, to limit a power, in its own nature illimitable.”. He further said that in the context of clause (1) of Article 160 of the Federal Constitution, “law” must be taken to mean law made in exercise of ordinary legislative power and not made in exercise of the power of constitutional amendment under clause (3) of Article 159 of the Federal Constitution, with the result that clause (1) of Article 4 of the Federal

¹⁴³ [2021] 3 MLRA 424, 437.

¹⁴⁴ As have been explained in Chapter 3, some scholars categorize absurdity rule to be part of purposive and some place it under textualism. Some even differentiates purpose for being the outcome of applying the law in question rather than intention of legislator in enacting the law in question. For some scholars purposivism is intentionalism.

Constitution does not affect amendments made under clause (3) of Article 159 of the Federal Constitution. It was also said in the court that Article 4 of the Federal Constitution did not apply to the Federal Constitution itself as it is not possible that the Federal Constitution is internally inconsistent. That means the Federal Constitution empowers the Parliament to amend the Constitution in any way they think fit provided it complies with procedures set out in Article 159 of the Federal Constitution.¹⁴⁵

In *Phang Chin Hock*, the word law in Article 4 of the Federal Constitution means only ordinary laws enacted by Parliament and excludes law to amend the Constitution under Article 159 of the Federal Constitution. Only the former must be in accordance with the Federal Constitution. The latter is allowed by the Constitution to be inconsistent with prescribed conditions.¹⁴⁶

The Court when it quoted *Fisher's* case in *Dato Menteri Othman Baginda*, it can be implied that the interpretation of the text was aided by purposive approach with great emphasis on language. Purposive approach as understood in the Malaysian context in this era includes to negate the absurd result. This can be seen in the case of *Phang Chin Hock* where Sufian LP said, "If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, Article 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention."

¹⁴⁵ See *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187

¹⁴⁶ See *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70 (FC)

As mentioned earlier, the purposive approach may sometimes overlap with the rule against absurdity. In the case of *Teoh Eng Huat v Kathi Pasir Mas & Anor*,¹⁴⁷ the court found a cause to depart from the literal interpretation and instead applied a purposive approach with reference to the intention of the drafters. The court in *Kamariah Ali v. Kerajaan Negeri Kelantan*¹⁴⁸ applied the purposive approach because applying the literal meaning for the words “persons professing the religion of Islam” would defeat the purpose of the Act as the applicants have renounced from Islam.¹⁴⁹ The court referred to the case of *Dewan Undangan Negeri Kelantan v. Nordin Salleh & Anor*¹⁵⁰ which quoted *Fisher* that the interpretation of a constitution must be “suitable to its character but not forgetting that respect must be paid to the language which has been used.”. The court also referred to an Australian case of *Attorney General of the Commonwealth ex Relatione Mc Kinley v Commonwealth of Australia*,¹⁵¹ where the court reminded that “the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.”. The court also referred to the case of *Sarla Mudghal v. Union of India*¹⁵² in which it was clear that a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce his previous marriage and desert his wife, cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited.”. In *Kamariah Ali*, the court decided that the material time is when they commit the offence under *Undang-Undang Majlis Agama Islam dan Adat*

¹⁴⁷ [1986] 2 MLJ 228.

¹⁴⁸ [2002] 3 MLJ 657.

¹⁴⁹ Ibid.

¹⁵⁰ [1992] 1 MLJ 697.

¹⁵¹ [1975] 135 CLR 1,17.

¹⁵² [1995] 3 SCC 635, 647.

Istiadat Melayu Kelantan and not upon declaring to no longer be a Muslim after having committed such offence. The declaration of renouncing the religion Islam by virtue of right to freedom of religion cannot be abused and does not automatically absolve the applicants from their offences committed when they were still Muslims. The question of the right to renounce the religion of Islam is therefore not relevant.

The Court in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar & Ors.*¹⁵³ 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. Government of Kelantan*,¹⁵⁴ the court's ruling that conversion out of Islam cannot be invoked by a Muslim as a right serve as a protective measure against abuse of fundamental rights guaranteed by the Constitution. The rule against absurdity was also applied in *Faridah Begum Bte Abdullah v Sultan Haji Ahmad Shah Al-Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al-Mu' Adzam Shah*¹⁵⁵ in which the court recognized 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 international law and would open a floodgate of litigation by foreigners against Rulers. Likewise, in the case of *Badan Peguam Malaysia v. Kerajaan Malaysia*¹⁵⁶ 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 *Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia & Ors and other Appeals*,¹⁵⁷ the court chose an approach that did not defeat the purpose of Article

¹⁵³ [2003] 3 MLJ 705.

¹⁵⁴ [2005] 1 MLJ 197.

¹⁵⁵ [1996] 1 MLJ 617.

¹⁵⁶ [2008] 2 MLJ 285.

¹⁵⁷ [2003] 1 MLJ 321.

5 of the Federal Constitution. In *Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia & Anor*,¹⁵⁸ in the dissenting judgment, purposive approach was applied. An interpretation that would advance the object and purpose of the amendments is the prime consideration.¹⁵⁹ The purpose of Article 149 of the Federal Constitution is to enable parliament, once any event in paragraphs (a)-(f) has occurred, to make laws providing suppression and preventing its recurrence.¹⁶⁰ So Parliament is given a special power to legislate to combat subversion. Article 149 of the Federal Constitution does not endow executive with similar legislative competence.

In *Letitia Bosman*, the dissenting judge interpreted the word law in the proviso of Article 5 of the Federal Constitution using the absurdity test. The judge said if the proviso is accorded a literal or perfunctory reading, it would suggest that so long as the legislature has followed the established procedure for the enactment of a statute, then the deprivation of a person's life or personal liberty is permissible and valid. The judge is widening the definition of law as was also defined in the cases of *Lee Kwan Woh v. Public Prosecutor*,¹⁶¹ *Alma Nudo Atenza v. Public Prosecutor & Anor Appeal*,¹⁶² *Badan Peguam Malaysia v. Kerajaan Malaysia*,¹⁶³ *Sivarasa Rasiah v. Badan Peguam Malaysia*¹⁶⁴ and *PP v. Gan Boon Aun*.¹⁶⁵

In *Rovin Joty*, the dissenting argument on the definition of law was based on logic, that there is no mention of "ordinary law" anywhere in the Constitution and that the Constitution did not differentiate ordinary laws from amending laws. It follows that it is illogical that no law can be struck down except that the judiciary has power to do

¹⁵⁸ [2021] 6 MLRA 42.

¹⁵⁹ *Ibid.*, (per Vernon Ong, FCJ) [140].

¹⁶⁰ *Ibid.*, [158].

¹⁶¹ [2009] MLJU 1879.

¹⁶² [2019] 4 MLJ 1.

¹⁶³ [2008] 2 MLJ 285.

¹⁶⁴ [2006] 1 MLJ 727.

¹⁶⁵ [2016] 4 MLJ 265.

so. It is also illogical that the federal law which can be struck down by the judiciary can control and circumscribe judicial powers. The reservoir of power has to be judicial review that derives power from Article 4(1) of the Federal Constitution. Therefore, it was argued in the dissenting judgment, that the courts power of judicial review is constitutional.¹⁶⁶ In this regard, it is the court's view that there is no single provision in the Federal Constitution that can claim superiority over the other provisions. Article 4(1) provides for a declaratory provision of the FC being the supreme law of the Federation and any legislation passed after Merdeka day which is inconsistent with the Federal Constitution is void. It provides for the challenge on legislative competency and validity and the manner of challenging it. To qualify or suspend the application of Articles 4 and 149 would run contrary to the very objective and purpose of Article 4, namely, the declaration of constitutional supremacy of the Federal Constitution. Article 4 cannot be suspended by any other article in the FC. Article 4 is unlike the provisions in Articles 5, 9, 10 or 13 which relate to fundamental rights, which can be, and are suspended by Article 149. Article 149 therefore stands in equal footing with other provisions in the Federal Constitution. Article 149 is the power given to Parliament to enact laws which satisfies the requirement as stated in paras (1)(a)–(f). Article 4(1) is not to operate the way the appellants suggest it to be.

In some cases, the purposive approach may have been understood as the antithesis of the textual approach altogether.¹⁶⁷ If it is to be rightly understood from what has been originally intended by this approach, it should not have to be in conflict

¹⁶⁶ [2021] 2 MLJ 822, (Zabariah Mohd. Yusof) [88].

¹⁶⁷ see *Teoh Eng Huat v Kadhi of Pasir Mas, Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu Kelantan* [1986] 2 MLJ 228, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*, [2018] 1 MLJ 545.

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.¹⁶⁸

(e) Subject Matter Approach

In *Jabatan Pendaftaran Negara & Ors. V. Child* the majority held that the subject matter in dispute is within the legislative list, supported by intention of the Framers that Muslims are to be governed by their religion.¹⁶⁹ This is supported by another judgment in *Mohd. Habibullah bin Mahmood v. Faridah bte Dato' Talib*¹⁷⁰ by Harun Hashim where he held that the objective view of the constitution was obvious from the very beginning that the Framers intended that Muslims of this country shall be governed by Islamic family law, which is evident from the Article 74 (2) and the Ninth Schedule.¹⁷¹ Similarly, in *Kamariah Ali*¹⁷² and *Zi Publications*,¹⁷³ based on the intention of the Framers, it was held that Muslims are subject to the enacted state laws of religious nature.

(f) Arguments based on History and Tradition

In the Malaysian context, historical documents and traditions from customary practices are often consulted to infer the original intention of the drafters for the purpose of supporting the meaning and usage of words in the Constitution. This can be seen in *Dato' Menteri Othman Baginda* in which the court studied the customary practice in

¹⁶⁸ Aharon Barak, *Purposive Interpretation in Law*, Translated by Sari Bashi (United States: Princeton University Press, 2007), 219, see also Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, (Kansas: Lawrence University Press, 1999), 59.

¹⁶⁹ [2020] 2 MLJ 27.

¹⁷⁰ [1992] 2 MLJ 793.

¹⁷¹ *Ibid.*, 9.

¹⁷² *Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan, Malaysia dan Satu lagi* [2002] 3 MLJ 657.

¹⁷³ *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153.

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, “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.¹⁷⁴ In *Merdeka University Berhad v. Government of Malaysia*¹⁷⁵, the usage of the words “national language” was thoroughly examined with support of historical documents to prove the extent of their meaning.

In *Faridah Begum bte Abdullah v. Sultan Haji Ahmad Shah Al-Mustain Billah*,¹⁷⁶ 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.

The court in *Merdeka University Berhad*,¹⁷⁷ ruled that a university falls within the definition of public authority in Article 160(2) of the Federal Constitution and thereby caught within the scope of Article 152 of the Federal Constitution. The court supported its reasoning with the history of language provisions which indicated that *Bahasa Melayu* was intended for official purposes. The court in *Meor Atiqudrahman bin*

¹⁷⁴ The traditional elements as listed by Tun Salleh Abas are the Sultanate or Rulership, the Islamic religion, the Malay language and Malay privileges.

¹⁷⁵ [1982] 2 MLJ 243.

¹⁷⁶ [1996] 1 MLJ 617.

¹⁷⁷ [1982] 2 MLJ 243.

Ishak & Ors v Fatimah bte Sihi & Ors,¹⁷⁸ also resorted to historical aid in articulating the issue of jurisdictional conflicts.¹⁷⁹ 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.¹⁸⁰

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 the light of the traditional elements resonates with the historical approach wherein substantial reliance is placed on the traditional elements which are peculiar to Malaysia.¹⁸¹ The court in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* also distinguished the local cases with Indian cases¹⁸² In *Datuk Haji Harun Idris v. Public Prosecutor*, 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.¹⁸³

In *Maria Chin*, the court recognized the historical and philosophical concept as one of the canons of constitutional interpretation.¹⁸⁴ Reference to constitutional history happened in this case wherein the removal of the provision on enforcement of rule of law in the white paper due to impracticality to provide for all possible contingencies within the limits of the Constitution became one of the reasonings to the court's

¹⁷⁸ [2006] 4 MLJ 605.

¹⁷⁹ Ibid., (Abdul Hamid Mohamad), [45].

¹⁸⁰ [2020] 5 MLJ 277.

¹⁸¹ [1981] 1 MLJ 29, (Salleh Abas FJ).

¹⁸² [1969] 2 MLJ 129.

¹⁸³ [1977] 2 MLJ 155.

¹⁸⁴ Ibid.

judgment.¹⁸⁵ Based on this historical evidence, the court justified that sufficient remedies can best be provided by the ordinary law while the type and extent of remedy available will be a matter for the legislature to decide.¹⁸⁶

(g) Four Walls Approach

The four walls approach means that the Constitution is to be interpreted in accordance with the Malaysian context as mentioned by Raja Azlan Shah in *Loh Kooi Choon* who quoted Frank J in *Adegbenro v. Akintola* that it is the wordings of our Constitution itself that has to be interpreted and applied and that the extraneous principle from other jurisdictions should not override the provisions of our Constitution.¹⁸⁷ Reference to other Constitutions, he explained, is only limited for the purpose of learning from their experience and their progress within their legal landscape. The four walls approach is a way to limit the source of reference to only those relevant in the Malaysian context, taking into account especially the traditional elements. The case of *Loh Kooi Choon* has been the main reference for other cases which sought to apply this approach. The application of four walls approach was supported and justified by Tun Sufian in the case of *Merdeka University* that “our approach to our Constitution should be the same as the approach of the Indian Supreme Court” and quoted Fazal Ali J. in *Pathumma v State of Kerala*:

Courts interpret constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the ... requirements of ... society, the ... needs of the nation, the ... problems of the day ... It must take into consideration the temper of the times and the living aspirations and feelings of the people.¹⁸⁸

¹⁸⁵ [1977] 2 MLJ 155.

¹⁸⁶ Ibid., [99].

¹⁸⁷ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, *Adegbenro v Akintola* [1963] A.C. 614 (P.C.).

¹⁸⁸ [1978] AIR SC 771, 774.

Reference to Indian cases was used sparingly and limited to our Constitution. In *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia*, Tun Sufian emphasized that Article 5 of the Federal Constitution makes no mention of the word “procedure” unlike Article 21 of Indian Constitution “no person shall be deprived of his life or personal liberty except according to procedure established by law”. Our Constitution is worded differently, which is “save in accordance with law, which means that its application will not be similar to that of the Indian Constitution.”¹⁸⁹

The court was careful to apply Indian cases due to some differences between the Indian Constitution and the Malaysian Constitution. In *Karam Singh*, the court ruled that whether or not the facts on which order of detention is to be based are sufficient or relevant is for the executive to exercise its discretion and not for court. The court explained that the power of detention in Malaysia, unlike in India, is entrusted in the highest authority. Whereas in India, such power is entrusted to minor officials, therefore strict compliance with procedure is necessary. The court, however, in *Karam Singh*, expressed preference of English law over Indian cases. Justice Ong Hock Thye took the view that “English courts take a more realistic view of things, unlike Indian cases, are indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers”, Englishmen on average doesn’t think along parochial or provincial lines on important questions of the day. Despite multiracial, Malaysia does not have two different views regarding subversion. The virtue of compactness” is that it makes for closer uniformity. India, a vast subcontinent people think differently who are thousands of miles apart having a divergent interest on what is good in a certain state might not be in another state.”¹⁹⁰ Despite of great

¹⁸⁹ [1969] 2 MLJ 129.

¹⁹⁰ [1969] 2 MLJ 129 (Ong Hock Thye CJ Malaya).

persuasive value particularly on constitution, model of our constitution.¹⁹¹ This argument was also referred to in *Datuk Harun Idris* on the principles of equality.

It is observed from the above illustrations that in the early years after independence, constitutional supremacy was mostly understood and upheld and through the living constitutional approach. The literal and ordinary meaning of the text would indicate, at the first instance, a meaning that would favour the presumption of constitutionality of an impugned law or executive action and likewise, the constitutional text would be given the meaning predominantly based on the presumption of constitutionality. External aid such as historical documents and customary practices are applied in support of the usage and meaning of the words of the Constitution. The trend was mostly unanimous except very few cases. Presumption of constitutionality manifests judicial deference to the legislative branch. In *Theresa Lim Chin Chin & Ors v. Inspector General of Police*, the court also showed deference in separation of power and the law is clear.¹⁹² The court is to declare what the law is, not to abdicate the duties of court but balance between executive and citizens.¹⁹³

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 and Tunku Abdul Rahman Putra Al-Haj*,¹⁹⁴ 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*

¹⁹¹ [1969] 2 MLJ 129 (Suffian Hashim FJ).

¹⁹² [1988] 1 MLJ 294.

¹⁹³ Ibid., (Suffian Hashim LP).

¹⁹⁴ [1963] 1 MLRH 160.

Choon,¹⁹⁵ the court quoted Frankfurter J. who said, “The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it”. The court also emphasized that each country frames its constitution according to its genius and for the good of its own society.¹⁹⁶ Likewise, in *Zaidi Kanapiah*,¹⁹⁷ the court stated that even though reference to foreign doctrine or jurisprudence is permissible whenever relevant, they are not binding.¹⁹⁸

In *Datuk Harun Idris*, right to equality under Article 8 of the Federal Constitution was understood as not absolute. the application of equality principles deduced from foreign judgments¹⁹⁹ is subject to modification. It does not mean all laws must apply uniformly to all persons anywhere. Equality in the Malaysian context is subject and grounded to the text of our Constitution. This means that right to equal protection is only permitted within what was provided under clause 8(5) and qualified by Article 15.

This approach was also emphasised in *Public Prosecutor v. Pung Chen Choon*,²⁰⁰ where the court cautioned that foreign cases are of little relevance and therefore need not be discussed. This part of the judgment was later followed in *Letitia Bosman v. Public Prosecutor*.²⁰¹ 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.²⁰² The court in *Public Prosecutor v. Kok Wah*

¹⁹⁵ [1977] 2 MLJ 187.

¹⁹⁶ see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544, 551.

¹⁹⁷ [2021] 3 MLJ 759.

¹⁹⁸ *Ibid.*, (per Zaleha Yusof FCJ) [208].

¹⁹⁹ *Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, (Per Sufian Hashim LP).

²⁰⁰ [1994] 1 MLJ 566.

²⁰¹ [2020] 5 MLJ 277.

²⁰² *Ibid.*

*Kuan*²⁰³ explained that separation of powers in Malaysia is not definite nor absolute and Malaysia's conception of the said doctrine presents features that does not comply strictly with the doctrine as it was understood under the common law system.²⁰⁴ 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 operate when the judiciary enforces what has been made law and approved by the legislature.²⁰⁵

Gradually compliance with the four walls approach seems to be fading. In *JRI Resources* dissenting judgment,²⁰⁶ the court expressed that while the Federal Constitution does not expressly delineate the principle of separation of power, the principle is taken for granted as a constitutional fundamental. Lord Diplock was quoted to have said that it is a well-established principle as a rule of construction applicable to constitutional instrument under which this governmental structure is adopted that the absence of express words in the Federal Constitution prohibiting the exercise of a particular power by a different branch of government does not by any means imply that it is permitted.²⁰⁷ Apart from that, "judicial power" was defined by describing its core features based on foreign cases Australian cases wherein it was stated that there has never been found possible to define judicial power that is at once exhaustive and exclusive.²⁰⁸ Definition by way of description was preferred to giving a precise formula

²⁰³ [2008]1 MLJ 1.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid., (Richard Malanjum dissenting).

²⁰⁷ Lord Diplock in *Hinds v The Queen* 1977 AC 195, 212 also *Liyanage v Queen*, it would be "inappropriate "to have the judicial power shared with executive or legislature.,²¹ see also Montesquieu, *The Spirit of Laws*, (1748) Book XI Chapter 6, 293.

²⁰⁸ (Per Richard Malanjum) see *Ex parte Boilermakers' Society of Australia* [1956], 94 CLR 254, *Mellifont v Attorney General (Queensland)* [1991] 104 ALR 89 p.94, eg *Ex parte Tasmanian Breweries Pty Ltd* [1970] ALR 449, per Walsh J.

on the basis that the true criterion to determine whether judicial power is vested in Syariah Council is what powers are expressly or impliedly included, not excluded from the scope.²⁰⁹

Similarly, in *Bato Bagi & Ors v. Kerajaan Negeri Sarawak and Another Appeal*,²¹⁰ cases and materials from foreign jurisdiction were also referred to such as the judgment of Sutherland J in *Springer v Government of the Philippine Islands*²¹¹ and the writing of James Madison entitled “The Structure of the Government” to support the view stressing the importance of checks and balance to maintain the rule of law. The U.S Federalist Papers was also quoted to support the point that proper checks and balances must be furnished between the different departments.²¹²

In *Dato’ Seri Anwar Ibrahim & Anor v. Government of Malaysia*,²¹³ reference was made to international human rights jurisprudence and Human Rights Committee’s interpretation of ICCPR Article 12 in the General Comments²¹⁴ because it bears similarity with Art 9(2) of the Federal Constitution. Justification for such reference was made by the court as follows, “I see no impediment making reference to developments in international human rights jurisprudence to ensure that our own Article 8(1) of the Federal Constitution is interpreted as prismatically and as purposively as possible as was done in *Alma Nudo*.”²¹⁵ In addressing constitutional review, the court made reference to European model influenced by Hans Kelsen’s jurisprudence.²¹⁶

²⁰⁹ *JRI Resources Sdn. Bhd. v Kuwait Finance House* [2019] 3 MLJ 561.

²¹⁰ [2011] 6 MLJ 297.

²¹¹ 277 U.S 189 (1928), 201.

²¹² see the Federalist Papers No. 51, 1788, *JRI Resources Sdn. Bhd. v Kuwait Finance House* [2019] 3 MLJ 561, 22.

²¹³ [2020] 4 MLJ 133.

²¹⁴ No. 27 2 November 1999, para 14.

²¹⁵ [2020] 4 MLJ 133 (Per David Wong, dissenting).

²¹⁶ [2020] 4 MLJ 133, (Per Nalini Pathmanathan, Majority) [230].

In *Maria Chin*, Article 121(1) of the Federal Constitution which confers power to Parliament to limit judicial power, the effect is that Parliament can depart from the general law or fundamental principles such as natural justice by expressing its clear intention.²¹⁷ The court supported this argument with English cases. However, the majority decision emphasized that doctrines are not absolute nor can take precedence over constitutional supremacy.²¹⁸

(h) Structuralism

Structuralism can be seen to be applied in several leading Malaysian cases which mostly articulate the doctrine of separation of powers.²¹⁹ However, different cases may have different judicial attitudes on the subject. In *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamed*,²²⁰ the court applied an approach that resembles the description of formalist structuralism.²²¹ The court reiterated the role of court as a final arbiter and mentioned that in doing so, it was performing a constitutional function.²²² 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.²²³ It serves as guardian of the Constitution within the terms and structure of the Constitution itself. In *Johnson Tan Han Seng v Public Prosecutor*,²²⁴ the doctrine of separation of powers was upheld in favour of the executive in relation to a proclamation of emergency. The

²¹⁷ [2021] 1 MLJ 750, [90].

²¹⁸ *Ibid.*, [253].

²¹⁹ For details on structuralism see discussion in section 3.4 (e).

²²⁰ [1987] 1 MLJ 383.

²²¹ 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.

²²² [1987] 1 MLJ 383.

²²³ *Ibid.*, (per Raja Azlan Shah).

²²⁴ [1977] 2 MLJ 66.

courts were reluctant to interfere, guided by the position in England and India. In *Koperal Zainal Mohd. Ali & Ors v. Selvi Narayan & Anor*,²²⁵ 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.

In *Danaharta Urus Sdn. Bhd. v. Kekatong*,²²⁶ the court applied the principle of presumption of constitutionality to show judicial deference to constitutionality of laws. Similarly, in *Latifah Mat Zin v Rosmawati Sharibun & Anor*,²²⁷ 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 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*,²²⁸ stood firm with the role of court as the ultimate interpreter of the Constitution even where a litigant sought protection of political rights. The doctrine of pith and substance was applied in *Mamat bin Daud*²²⁹ 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.

²²⁵ [2021] 3 MLRA 424.

²²⁶ [2004] 2 MLJ 257 (FC).

²²⁷ [2007] 5 CLJ 253.

²²⁸ [1987] 1 MLJ 471.

²²⁹ [1988] 1 MLJ 119.

The court while addressing the constitutionality and validity of the impugned provision in *Rovin Joty*,²³⁰ 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. In *Rovin Joty*, the court gave rationale of POC as the rationale for the presumption of constitutionality is because Parliament is in a better situation to decide on social policy matters rather than the courts.²³¹ Parliaments represents the will of a democratically elected majority, hence their decision ought to be accepted as legitimate. The courts, which are not elected from the will of the population, are in no position to determine on policy matters, are tasked with resolving of disputes independent from the influence of the media, popular public opinion or pressure groups in the analysis and application of legal rules and principles and interpretation of legal texts.

Similarly, in *Dato' Seri Anwar Ibrahim v. Public Prosecutor*,²³² 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*,²³³ 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.

²³⁰ [2021] 2 MLJ 822.

²³¹ [2021] 2 MLJ 822 (per Zabariah Mohd Yusoff FCJ) [77].

²³² [2021] 6 MLRA.

²³³ [2015] 6 MLJ 751.

The court in *Zaidi Kanapiah v. ASP Khairul Fairoz bin Rodzwan and other cases*²³⁴ and *JRI Resources Sdn. Bhd. v. Kuwait Finance House (M) Bhd.*²³⁵ 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. Inasmuch 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*²³⁶ 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 authorizing 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 approach²³⁷ 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* 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.²³⁸ 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.²³⁹ In *Rovin Joty*, it was

²³⁴ [2021] 3 MLJ 759, see (Hasnah Hashim FCJ) [76].

²³⁵ [2019] 3 MLJ 561, see (Azahar Mohamad FCJ) [63].

²³⁶ [2000] 4 MLJ 77.

²³⁷ Functionalism and formalism is one of the forms under structuralism as discussed in section 3.4(e) Chapter 3.

²³⁸ [1979] 1 MLJ 135.

²³⁹ [2021] 1 MLJ 750.

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 Federal Constitution harmoniously.²⁴⁰

In *JRI Resources*, the court in its majority judgment referred to the item 4(k) of the Federal List in Ninth Schedule of the Federal Constitution.²⁴¹ The Federal Constitution is silent on the methodology to be used to ascertain Islamic law in the aspect of Islamic finance. Therefore, the court was of the opinion that it falls entirely within the powers and discretion of Parliament to decide how this should be exercised. One of the important features of the Federal Constitution is that it does not contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or legislature. The court quoted Lord Diplock in *Hinds v. The Queen*, which was applied by both sides of the bench, that “the Constitution does not normally contain any express prohibition because it is taken for granted that the basic principle of separation of power will apply to the exercise of their respective function by the three branches. According to the dissenting view, if the Constitution silent, foreign cases and the theory of separation of power from foreign books can be referred to. The same Australian cases were also applied by both sides of the bench. The court viewed that the subject matter in question does not fall under which one branch of government should not exercise the function of another. The court concluded that the power of Parliament has assigned role of ascertaining Islamic law in resolving Islamic financial dispute in the civil court to both Syariah Advisory Council (SAC) and the courts which is the most recent Parliament’s policy and methodology to ascertain Islamic law to resolve dispute. This is also in line with a Singaporean case of

²⁴⁰ [2021] 2 MLJ 822.

²⁴¹ Ibid. (per Azahar Mohamed), see also Faruqi, *Document of Destiny*, (Malaysia: Star Publications, 2008), 62-64.

Mohd Faizal bin Sabtu v. PP,²⁴² which indicates that it reflects more of the functional aspect of efficiency of the constitutional arrangement of our Federal Constitution. This is a constitutional mechanism in order to assist the courts in applying the correct Islamic laws to resolve dispute and uphold Syariah compliance.²⁴³

(i) Conservative; Nothing is Absolute Approach

In *Datuk Seri Anwar Ibrahim*, freedom was interpreted as not being absolute and curtailed by Article 9 of the Federal Constitution.²⁴⁴ Under Article 9 of the Federal Constitution, freedom of movement is not absolute. The court followed the case of *Assa Singh v. MB Johore* in which freedom was understood as “liable to be curtailed by laws made or to be made by Parliament to the extent mentioned by clause (2) read with clause 3” in the interests of the security of the Federation, public order, public health or the punishment of offenders, restricting freedom of movement or residence between a state and other states.²⁴⁵ Had these rights were absolute, Parliament would then have been completely debarred from making any law in view of taking away or abridging any of those rights. The legislative power under Article 74 of the Federal Constitution is limited by Article 9 of the Federal Constitution and all laws by Parliament with respect to these rights must observe these limitations. In line with the doctrine of separation of power, any issues concerning the question of whether any law has transgressed these limits is to be ascertained by the court by applying the test of proportionality. This way,

²⁴² [2012] 4 SLR 947.

²⁴³ Raja Azlan Shah’s Law Lecture 2018, “Politics and the Judiciary”, 32 Lord Reed was quoted to have said that “although different functions of the state are best performed by different institutions, those institutions have to operate with some degree of integration if society is to function well.”, see *JRI Resources Sdn. Bhd.*, 73.

²⁴⁴ [2021] 6 MLRA 42.

²⁴⁵ [1969] 2 MLJ 30.

the interests of the state or community at large and the protection of fundamental rights can be balanced.²⁴⁶

Presumption of constitutionality has become part of Malaysian jurisprudence. In *Letitia Bosman*, the court in justifying this principle quoted Lord Diplock who said, “In dealing with matters of public law, modesty, I believe to be the most important of judicial virtues, the recognition that judges, however eminent in the law, are not the ultimate repositories of human wisdom in answering the kinds of social, economic and political questions with which parliament and administrators have to deal.”²⁴⁷ The court went on explaining that “the judicial function of assessing the constitutional legitimacy of a legislation is delicate. To declare an act unconstitutional is onerous burden on the courts, for a statute is enacted by an elected legislature which is conversant with the needs and aspirations of the people. The courts have to strike a balance, do not hold legislation unconstitutional in a light vein.”²⁴⁸ The court also quoted Lord Reed who said, “In politics, as in diplomacy, evasion and ambiguity can be constructive, and may be necessary to achieve a consensus. Politicians typically defend their decisions on the basis of their moral convictions or their views of social or economic policy. Their decisions are accepted as legitimate because of the government’s democratic mandate.”²⁴⁹ It can thus be inferred that Parliament is deemed better placed than the courts to determine social policy considering the fact that members of Parliament are democratically elected and represent the will of people.

²⁴⁶ [2021] 6 MLRA 42.

²⁴⁷ *Letitia Bosman v Public Prosecutor* [20202] 5 MLJ 277, see also Lord Diplock, The Second Tun Abdul Razak Memorial Lecture, “Judicial Control of Government” [1979] MLJ cxi at cxlvii.

²⁴⁸ MP Jain, *Balancing the Felt Necessities of Time and Constitutional Fundamentals*, *Indian Constitutional Law*, 7th Ed, (Penang: Virgo Printing and Packaging, 1987),1641.

²⁴⁹ Speech delivered on 32nd Sultan Azlan Shah Law Lecture delivered on 22 November 2018, 13-15.

(j) The Liberal Approach

This approach is very much akin to living constitutionalism which has been popularly discussed by American constitutional scholars.²⁵⁰ It is also important to note that the liberal interpretation of the Constitution, understood as one of the canons of interpretation, does not necessarily represent liberalism or a liberal view.

While this approach has been ingrained in the classic cases such as in *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus*²⁵¹ by judges who are more inclined towards judicial restraint, it is also popular among judges who are more willing to exercise judicial activism. In the case of *Dato' Menteri Othman 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 the light of an ambulatory approach.²⁵² In the case of *JRI Resources*,²⁵³ 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 Bosman*²⁵⁴ and *Iki Putra*,²⁵⁵ the court reiterated the liberal interpretation of the legislative entries by

²⁵⁰ In the Malaysian context, the liberal reading is seen to be compatible with the living document approach. Bindra's works which has been one of the main references in the subject of constitutional or statutory interpretation may have had some influence on the Malaysian constitutional jurisprudence. See discussion in section 3.3. "the way a constitution should be treated which is, as a living organism which is capable of development and growth as it is built for the future and written to be understood by voters and a paramount law under which laws are to be made. It follows that its language is to be interpreted with broad and liberal spirit, not narrow and pedantic."

²⁵¹ [1981] 1 MLJ 29.

²⁵² (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.

²⁵³ [2019] 3 MLJ 56.

²⁵⁴ [2020] 5 MLJ 277.

²⁵⁵ [2021] 2 MLJ 323.

emphasizing the cardinal rule that the word “with respect to” in Article 74 of the Federal 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.²⁵⁶

(k) Arguments Based on Moral Reasoning or Value-Based Approach

Some writers claimed that based on the Westminster constitutional model, the fundamental rules of natural justice were invoked as an interpretive aid in Singapore,²⁵⁷ and by extension to Malaysia, as can be seen in *Ong Ah Chuan v Public Prosecutor*.²⁵⁸ The meaning of “law” in the fundamental liberties provision was held to embody “fundamental rules of natural justice”. In *Kok Wah Kwan*, the dissenting judge was of the view that 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.²⁵⁹ It was also suggested that judges have wide discretion in determining when and to what extent natural justice can be applied.

In addressing right to life, the word “law” in Article 160 of the Federal Constitution was defined by the court in *Lee Kwan Woh* to include common law as defined by the Interpretation Act which is the common law of England. The court extended common law to include rule of law, from which it was formed and the rules of natural justice. The court explained that the rule of natural justice includes procedural irregularity which is an integral part of rule of law. In *Nivesh Nair a/l Mohan v. Dato*

²⁵⁶ [2021] 2 MLJ 323, see paragraph [46] and [75]

²⁵⁷ Kevin Tan “Interpreting the Westminster Model Constitution.” *Constitutional Interpretation in Singapore, Theory and Practice*. Edited by Jaclyn Neo. (New York: Routledge, 2017), 61.

²⁵⁸ [1981] 1 MLJ 64.

²⁵⁹ (Per Richard Malanjum), 360.

Abdul Razak bin Musa & Ors,²⁶⁰ the court indicated that natural justice was part of the BSD.²⁶¹

(I) Basic Structure Doctrine (“the BSD”)

The Basic Structure Doctrine is regarded as the pinnacle of judicial creativity²⁶² and mainly inspired by an Indian case of *Kesavananda Bharati* that stresses on certain features in the Constitution that form the basic fabric that cannot be removed or amended by way of constitutional amendment or a legislation. The BSD however has to be distinguished from the notion of basic structure which is understood as part of the traditional elements mentioned in the case of Dato’ Menteri Othman Baginda. BSD was first introduced in the case of *Sivarasa Rasiah* where it was stated that “it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution”.²⁶³

The court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Anor*²⁶⁴ observed that judicial power remains in the marginal note of the article but removed from the provision.²⁶⁵ The court quoted Australian cases which interpret

²⁶⁰ [2021] 5 MLJ 320.

²⁶¹ See *Kesavananda v The State of Kerala* [1973] SCR Supp 1, 4.

²⁶² Sri Murugan Alagan, 50th Anniversary of the Basic Structure Doctrine, [2023] LR 3, 413.

²⁶³ Per Gopal Sri Ram, *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333.

²⁶⁴ [2017] 3 MLJ 561 (Per Zainun Ali FCJ).

²⁶⁵ Ibid.

judicial power from which the framers took the phrase. The court also quoted the case of *Datuk Seri Anwar bin Ibrahim v. Government of Malaysia*²⁶⁶ where it was held that the provision must be interpreted in connection with shoulder note, which gives a clue to the meaning and purpose of the phrase “judicial power”, in which such phrase appears. The court also highlighted that in *Kok Wah Kwan*, the dissenting opinion focused on the important feature in a democratic system of government.²⁶⁷ Most importantly, in its dissenting judgment, the court challenged the validity of the amendment 1988 which is alleged to have impinged the separation of power and independence of judiciary features of the constitution.²⁶⁸ The concept of judicial power was interpreted in a manner that balances the presumption of constitutionality based on the understanding that the court’s function is to test the legality of an action against principles and standards established by the constitution. By this understanding, the court will refrain from declaring a law to be invalid unless there is a clear transgression of constitutional principles. The court in *Semenyih Jaya* demonstrates that there is a clear transgression of the basic structure by applying the textual interpretation by way of defining what amounts to transgression.²⁶⁹

In *Datuk Seri Anwar Ibrahim*²⁷⁰ BSD was applied in the light of the principle of constitutional supremacy, and the Presumption of Constitutionality. The court took the view that the BSD is inherent in the provisions of the Constitution.²⁷¹

In the dissenting judgment of *JRI Resources* and the dissenting judgment of *Maria Chin*, constitutional supremacy was defended through the BSD. It was stated that

²⁶⁶ [2011] 1 MLJ 158.

²⁶⁷ Ibid., 21.

²⁶⁸ Ibid., 22 [74].

²⁶⁹ [2017] 3 MLJ 561.

²⁷⁰ [2020] 4 MLJ 133.

²⁷¹ Ibid. (per Chief Justice Tengku Maimun).

“The principles of procedural impropriety or proportionality are legal principles that the courts and the legal counsel employ to examine a decision; to reason why a decision is proper or otherwise. These reasonings and principles can never be abrogated or abolished by a stroke of a pen in any statute without offending the principles of constitutional supremacy for the reasons already discussed in the trilogy of decisions of the Federal court.”.²⁷²

In *Rosliza Ibrahim*,²⁷³ it was held that question on a person’s constitutional identity necessitates constitutional interpretation. In addressing this issue, it was necessary to distinguish between “profess” and “practice” because “profess” is a constitutional term which is justiciable before the civil courts. “Profess” and “practice” involve a question of faith and thereby fall under Article 121(1A) of the Federal Constitution.²⁷⁴ The ascertainment of the meaning of “professing the religion of Islam” will be done by civil court in which judicial power was solely vested. In defining judicial power, the court was guided by the BSD.

The BSD, however, was rejected by the majority in *Maria Chin*. It was emphasized that doctrines are not absolute nor can take precedence over constitutional supremacy.²⁷⁵ Adhering to the principle of constitutional supremacy by virtue of Article 4 of the Federal Constitution, the court was of the opinion that any law will be liable to be struck down as being unconstitutional if it is inconsistent with the Federal Constitution regardless of whether it concerns a basic structure or otherwise.²⁷⁶ In relation to the word “inconsistent” in Article 4 of the Federal Constitution, the court

²⁷² Per Mary Lim FCJ in *Maria Chin*, Per Richard Malanjum in *JRI Resources*, [123] “Based on the above, it is thus incumbent on me to apply the basic structure doctrine to determine whether sections 56 and 57 of the CBMA 2009 ought to be struck down.”

²⁷³ [2021] MLJU 104, (per Tengku Maimun Tuan Mat CJ).

²⁷⁴ *Ibid.*, 24.

²⁷⁵ [2021] MLJU 12, [253].

²⁷⁶ *Ibid.*, [231].

was of the opinion that there was no necessity to determine if the law in question destroys or offends the basic structure of the Federal Constitution. In a nutshell, the general rule on doctrines cannot be above the Federal Constitution.²⁷⁷ The court made clear that the BSD aims to strike down abuse by Indian Parliament of its power by which amendments to the Indian Constitution destroys its basic features. It follows that if there are no amendments made, the doctrine has no application.²⁷⁸ Therefore, the application of the BSD when there is no amendment will tantamount to misapplication of the doctrine. The application of Basic Structure doctrine in this case was rejected based on the court's stance in *Loh Kooi Choon*.²⁷⁹

In rejecting the applicability of the BSD in *Zaidi Kanapiah*, the court explained that there is no unanimity of opinion of what defines the "basic structure".²⁸⁰ The BSD is against the principle of amendability of the constitution. The court stated further that had the framers intended it to be unamendable, it would have been expressed in clear words.²⁸¹ The court referred to the case of *Loh Kooi Choon* in which Justice Wan Suleiman ruled that it is not for Parliament to determine whether an amendment is necessary or not. Also quoted was the case of *Lim Kit Siang* in which it was stated that courts have power to not only interpret the Constitution but to review it.²⁸² However, it was stressed that constitutional role must be strictly in accordance with the constitution and the law.

²⁷⁷ [2021] MLJU 12, paragraph [160].

²⁷⁸ Ibid., [141].

²⁷⁹ See *Loh Kooi Choon*, 25.

²⁸⁰ [2021] 3 MLJ 759, (Per Hasnah Hashim FCJ).

²⁸¹ Ibid., [263].

²⁸² *Lim Kit Siang Siang v Dato Seri Dr Mahathir Mohamed* [1987] 1 MLJ 383.

(m) Prismatic Approach

An interpretation that employs a prismatic approach is one that there is no limit just as light when it “passes through a prism” as stated in *Lee Kwan Woh*.²⁸³ It is popular among the proponents of liberal view. By this approach both enumerated and unenumerated rights can be claimed through the constitutional provisions. This can be seen in the dissenting view in *Maria Chin*, in which “personal liberty” was interpreted prismatically and liberally prismatic on the ground that the constitution is a living and organic document.²⁸⁴

(n) Pluralism

Pluralism or a combination of multiple approaches can be seen for example in *Bato Bagi* in which the Court looked at intention and the whole structure of the constitution and favoured a wholesome, wider and more generous interpretation of citizenship. It was also argued that the provisions on citizenship deserve a harmonious, humanizing and all-pervading approach. Contextual and prismatic approaches were also employed inasmuch 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.²⁸⁵ 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.²⁸⁶ In *Indira Gandhi*, the majority interpreted Article 121(1) of the Federal Constitution from a historical and philosophical context. A purposive approach

²⁸³ Per Gopal Sri Ram in *Lee Kwan Woh v. Public Prosecutor* [2009] 5 MLJ 301.

²⁸⁴ [2021] MLJU 12, [172].

²⁸⁵ [2011] MLJU 699.

²⁸⁶ [2021] 2 MLJ 323.

was also adopted in this case while some judicial precedents were not followed.²⁸⁷ In *Dato' Seri Anwar Ibrahim*, the dissenting judges revisited the intention of the drafters and invoke the BSD while upholding constitutional supremacy.²⁸⁸

In *Maria Chin's* dissenting judgment, the court 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 BSD.²⁸⁹ Textual approach was applied in interpreting Article 4(3) of the Federal Constitution on compliance with procedure²⁹⁰ while preferring liberal and prescriptive reading for the whole of Article 4.²⁹¹ The dissenting judge also reminded that Part II of the Federal Constitution must be evaluated holistically and not piecemeal. Meanwhile, Article 4(1) of the Federal Constitution was interpreted based on the intention of parliament and analysis of structure of Article 4 of the Federal Constitution which is to enforce the rule of law.

In *Zaidi Kanapiah*, the majority's view approved reference to foreign cases when it quoted as example the doctrine of prospective overruling from American and Indian jurisprudence in *Dato' Yap Peng* in which the court affirmed the case of *Link Letter v. Walker*²⁹² which was cited with approval and applied by the Indian Supreme court in *IC Golaknath & Ors v State of Punjab*.²⁹³ It was also highlighted that the stare decisis doctrine can be done away with if it is a decision of a smaller bench. The Court in articulating Articles 159(1) and 121(1) of the Federal Constitution also discussed canons of interpretation in view of the BSD and Kelsen's theory of grundnorm. The

²⁸⁷ [2018] 1 MLJ 545.

²⁸⁸ [2021] 6 MLRA.

²⁸⁹ [2021] 1 MLJ 750 (per Nallini Pathmanathan FCJ), 845.

²⁹⁰ *Ibid.*, [60].

²⁹¹ *Ibid.*, [64].

²⁹² [1965] 381 U.S 618.

²⁹³ [1967] AIR 1643.

BSD in this case, which was applied to uphold Constitutional Supremacy, was claimed to be ingrained in Article 4(1) of the Federal Constitution. Accordingly, Article 121(1) of the Federal Constitution was harmoniously interpreted with Article 4(1) of the Federal Constitution.²⁹⁴ Prismatic approach was also employed in interpreting the fundamental rights provisions.²⁹⁵

4.5 CONCLUSION

Normatively the Malaysian judiciary upholds constitutional supremacy²⁹⁶ and is deferential to the doctrine of separation of powers but varies in its interpretive approach. In each reasonings, 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, the 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.²⁹⁷ A more critical evaluation is presented in Chapter 5.

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 approach,

²⁹⁴ [2021] 3 MLJ 759, [100]

²⁹⁵ *Ibid.*, [134]

²⁹⁶ 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 812 case, 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.

²⁹⁷ see also Thomas E. Baker, “Constitutional Theory in a Nutshell”, *William and Mary Bill of Rights Journal*, vol. 13, no. 57. (2004): 108.

arguments based on national identity, moral reasoning, doctrines and philosophies, may overlap as common currency among originalists and non-originalists.²⁹⁸ It means that, while these different approaches can be grouped together based on their characteristics or their compatibility, 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 any possible conflict with the executive branch of the government, by preferring a literal approach in interpreting the constitutional provisions.²⁹⁹ There are also judgments where the court, while having demonstrated its creativity, applied the conservative approach.³⁰⁰ Based on these observations, there appears to be the growth of a pluralistic approach in the 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 the legal reasoning. Coherence means a state of affairs free from inconsistency, which is logically structured and do not suffer from internal contradiction.³⁰¹ There has to be a consensus on at least the fundamental constitutional principles to establish a common ground or a reliable benchmark.³⁰² When there is a common ground, there will be uniformity at least at a foundational level.³⁰³ For this

²⁹⁸ 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) of the Federal Constitution.

²⁹⁹ H.P. Lee and F.A. Trindade, “Tun Suffian’s Contribution to Malaysian Constitutional Law” in *The Constitution of Malaysia Further Perspectives and Developments: Essays in Honor of Tun Mohammed Suffian*, edited by F.A. Trindade and H.P. Lee (Kuala Lumpur: Pelanduk Publications, 1986), 204.

²⁹⁹ Ibid.

³⁰⁰ see *Rovin Joty Kodeeswaran*, [2021] 2 MLJ 822, (per Nallini Pathmanathan)

³⁰¹ Julie Dickson, “Interpretation and Coherence in Legal Reasoning,” in *Stanford Encyclopedia of Philosophy* via <https://plato.stanford.edu/entries/legal-reas-interpret/> (accessed 26 June 2023)

³⁰² Ibid.

³⁰³ see John McGarry, “*The Possibility and Value of Coherence*”, *Liverpool Law Review*, vol 34, no. 18 (2013), 18.

reason, coherence is described as a special virtue of interpretation in legal reasoning.³⁰⁴ It was suggested that coherence can be achieved through semantic inquiry.³⁰⁵ If the various interpretive approaches are anchored on a common ground, it will be more likely that their applications will produce a harmonious result.



³⁰⁴ Dickson, The Role of Coherence in Legal Reasoning.

³⁰⁵ 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 Scalia, Reading Law and Barak, Purposive Interpretation.

CHAPTER FIVE

THE JUDICIAL PHILOSOPHY OF THE MALAYSIAN COURT IN CONSTITUTIONAL INTERPRETATION

5.1 INTRODUCTION

There is no specific definition of judicial philosophy but it can be described as varying attitudes of judges, which are either restraint or activism. Both of these philosophies are capable of being applied together with any of the tools of interpretation. Judicial philosophy can be manifested in judicial opinions. As was mentioned in Chapter 3, the underlying philosophy of judges' subscription to interpretive methods depends very much on their belief of what the role of court is. From the analysis of various approaches in Chapter 3, it is observed that the judicial activists believe that on the premise that the Constitution is not just black letter words and that it has spirit and soul, it should be founded on values of freedom and justice and doctrines like rule of law, separation of power and natural justice.¹ They also believe that it is the court's role to enforce these values and read those values into the provisions of the Constitution. On the other hand, judges who show deference to the principles of judicial restraint believe that the role of court is only to declare the constitutional provisions and enforce them as they stand.² They believe that whatever lacunae and defects, they are for the legislative body to look into, as Raja Azlan Shah said, the "cure is in the ballot box".³

Recognizing a legal philosophical theory reflected in a judicial opinion therefore provides an insightful perspective that exceeds the bare judicial argument stated in the

¹ See discussion under section 3.5.

² Ibid.

³ Per Raja Azlan Shah in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187

decision⁴ which is useful in contextualizing a judge's decision-making methods. By analysing a decision from a legal philosophical perspective, a judge's judicial philosophy is better understood in view of defending constitutional values from the perspective of many legal philosophical theories given the fact that often times different philosophies are utilized for different purposes. The legal philosophy in a judge's decision provides a clearer understanding of the opinion and renders a more meaningful debate of the issues rather than just a superficial classification of "liberal" or "conservative" orientation.

Dressel have earlier made some observations in relation to mega-political cases in Malaysia that the attitude of the courts in Malaysia have been ambiguous and less consistent in asserting or restraining the government power. He further described how the courts behaved differently, i.e., some have actively intervened to check executive abuse, uphold the supremacy of law, make governments more accountable, and protect the rights of citizens while others seem to have subverted the rule of law and undermined mechanisms of accountability on behalf of narrow interests. In some other cases, any engagement with political and constitutional governance issues have simply been avoided. He basically categorize attitudes of courts into two main divisions namely assertiveness and deference or restraints.⁵ Meanwhile he noted that the method used to evaluate the court attitude in the past has often led to two main outcomes namely legal and political. While Dressel focuses on the external factors that had possibly influenced the adjudication process in his analysis such as the particular administration in the judges' power, race, gender and the educational background,⁶ this research will focus

⁴ Ferrera and Alexander, *Judicial Philosophy or Mere Co-Incidence*, 590.

⁵ Björn Dressel, "Politics and the Federal Court of Malaysia, 1960–2018: An Empirical Investigation", *Asian Journal of Law and Society*, vol. 9, no. 1 (2020): 2.

⁶ Ibid.

more on the activity of interpretation itself and its sources according to various approaches and the legal philosophical theories underlying them. In this Chapter, findings from the cases and data collection analysis will be presented in view of demonstrating the trend and highlighting incoherence in the Malaysian judicial philosophy as demonstrated in the court judgements.⁷ Under the philosophical evaluation of the Malaysian court practice in section 5.4, the discussion will incorporate responses from the interviews done. The finding from this analysis will be able to give an indication of the court's direction.

5.2 PAST TREND

It is established that Malaysian judges in interpreting the Constitution, has been consistent with the idea of constitutional supremacy by adhering significantly to the common law tradition, modified to local circumstances⁸ with a strong belief in the notion of the constitution as a living document.⁹ However, the manner in which the court adheres to such principles has gone through some evolution. A more detailed observation is presented below to indicate such evolution.

In the first three phases which is in the post independence phase, the pre-1988 Amendment phase, and post-1988 Amendment phase, most judges are conservative and it was very rare to find judgements which allows judicial and legislative review. Judges who show strong fidelity to the text are mostly regarded as conservative judges or

⁷ Such incoherence is evaluated based on factors contributing to the problems of modern interpretive methods as outlined in section 2.4 of Chapter 2.

⁸ R.H. Hickling, "The Historical Background to the Malaysian Constitution" in *Reflections on the Malaysian Constitution, Persatuan Aliran Kesedaran Negara*, (Penang: Virgo Printing and Packaging, 1987), 21.

⁹ See Tun Mohamed Suffian Hashim, *An Introduction to the Constitution of Malaysia* (3rd edition), (Kuala Lumpur: Pacifica Publications, 2007), 18, per Raja Azlan Shah Ag LP in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ; see also Chapter 2, *Climates of Freedom*, and the speech "Evolving a Malaysian Nation" in chapter 12, *The Legal Profession and Legal Practice*.

traditionalists. The characteristics of the reasonings of most conservative is that the text will be a primary reference unless there is absurdity in following the text. Largely, the traditional view can be said to be inclined towards literalism and textualism. Only when there is ambiguity, a history-based argument is employed to justify the intention of a constitutional provision. However, the Malaysian version of a conservative view is neither necessarily literalist nor strict textualist. It is balanced with the living document approach and contextual approach giving due consideration to the traditional elements mentioned in the beginning of Chapter 4. Accordingly, they can, more or less match the description of originalism. They are also judicially restrained as the methodologies they prefer represent a restrained role of judiciary. The role of judiciary as understood by this group is restrained by text. It means that the understanding of any theories and doctrines such as separation of powers and constitutional supremacy is limited and subject to what is stated in the Federal Constitution.

It follows that these fundamental constitutional theories, in their understanding, cannot be applied in their absolute sense. As a result, judgments emanating from this view often exhibit judicial deference to the legislative and executive bodies from which preference to non-justiciability and affirming the presumption of constitutionality is the outcome. The fourth phase is where most liberal view begins to spread its wings through minority judgments. It is the beginning of reception of judicial activism in judgment through minority judgments. In the fifth phase, Judicial activism forms the majority and overrule the traditional approaches. The liberal view mostly forms the majority decision with strong resistance from the conservative view who became the minority. This can be seen in many recent cases where judgments become lengthy with features and characteristics described under the discussion of current trend in section 5.3.

5.2.1 Post-Independence

Generally, this can be described as the common law era in which the court, mostly comprised of English judges or English trained judges were practicing the common law approach mostly by way of abiding to the doctrine of *stare decisis* based on cases decided by the Privy Council and House of Lord.¹⁰ In the earlier period of post-independence. Most cases were involving constitutional rights arising from enforcement of pre-Merdeka emergency laws. The court was generally showing deference to the executive's power to enforce such laws and the principle of presumption of constitutionality under the presumption that Government always acts for the best interest of the people.¹¹ In *Stephen Kalong Ningkan*, it was stated that Article 4 of the Federal Constitution requires that the law may only be questioned in a proceeding for a declaration that the law is invalid and that there must be a specific declaration of invalidity.¹² The court even acknowledged in *Eng Keock Cheng v. PP* that the Parliament has power to legislate emergency laws even if they are inconsistent with the Federal Constitution.¹³ To some quarter, this illustrates traces of the practice of Parliamentary supremacy. In the spirit upholding the principle of separation of power, the court acknowledge that the Judiciary's power very much restrained.¹⁴ The Court was more inclined to refer mostly to English decisions and to a lesser extent to Indian decisions.¹⁵

¹⁰ Walter Woon, "Precedents That Bind, A Gordian Knot: "Stare Decisis" in the Federal Court of Malaysia and the Court of Appeal, Singapore", *Malaya Law Review*, vol. 24, no. 5 (July 1982): 3

¹¹ *Stephen Kalong Ningkan v Government of Malaysia* [1968]

¹² *Ibid.*, 73.

¹³ *Eng Keock Cheng v Public Prosecutor* [1966] 1 MLJ 18.

¹⁴ *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969].

¹⁵ *Ibid.*

5.2.2 Pre 1988 Constitutional Amendment

In this phase, it was observed that under the reign of three great Lord Presidents, the Malaysian Constitutional jurisprudence was moving towards developing its own common law. The three great luminaries were the late Tun Suffian, His Royal Highness Raja Azlan Shah and Tun Salleh Abas.

Generally, in the earlier period of this phase, in most cases the court was able to apply plain reading of the Constitution. It continued to be judicially restrained¹⁶ and adhered to the principle that rights and freedom are not absolute.¹⁷ The court showed impartiality in articulating the principle of separation of power by reminding each branch accordingly.¹⁸ The principle of separation of power was also understood within the constitutional limit. For example, in *Ah Thian* and *Johnson Han Teng Seng*, while acknowledging the power of Parliament to make laws, the court reminded that our country practices constitutional supremacy and not parliamentary supremacy.¹⁹ The court also tersely in *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah* reminded that discretion and legal power has legal limits and that the court has power to interfere,²⁰ echoed by *Lim Kit Siang v. Dato Seri Dr Mahathir Mohamed*²¹ and *Tun Datuk Haji Mohamad Adnan Robert v. Tun Datu Haji Mustafa bin Datu Harun*²² and *JP Berthelsen v. Director General of Immigration Malaysia & Ors.*²³ The court also,

¹⁶ See *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120, *Dato' Menteri Othman Baginda v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385.

¹⁷ See *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29, *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50, *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33, *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 294, *Ong Ah Chuan* [1981] 1 MLJ 64.

¹⁸ *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66, *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

¹⁹ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112.

²⁰ *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135.

²¹ [1987] 1 MLJ 383

²² [1987] 1 MLJ 471

²³ [1987] 1 MLJ 134

whenever appropriate, emphasized their role as guardian of the Constitution and the final arbiter but within the constitutional terms and structure.²⁴

It was in this phase that the court was able to state clearly some fundamental principles, though not exhaustive, in interpreting a constitution.²⁵ Gradually, as the country grew more matured, the concept of four walls interpretation was introduced to limit and filter the sources from which the court referred to. The four walls approach was described by the court as observing the limits of constitutional interpretation by adhering to the principle of constitutional supremacy which follows with a literal interpretation of the letters of the law or in the event of conflict, necessitates a harmonious interpretation.²⁶ The principles of constitutional supremacy and presumption of constitutionality permeates all approaches and methods that would be used in interpreting the Malaysian Constitution.²⁷ Even the principles of equality and proportionality do not escape the limits of the constitutional text. It was dynamic as to how these principles were upheld in different cases. Above all, the court have been consistent in upholding these principles and repeatedly in many cases that the function of court is judicial and not legislative in nature.²⁸ The court was open to judicial and legislative reviews but in order to control and filter vexatious and frivolous proceeding, the court imposed a requirement that leave of a judge is first to be obtained before the validity of law can be scrutinized or before the validity of the Constitution can be

²⁴ *Lim Kit Siang Siang v Dato Seri Dr Mahathir Mohamed* [1987] 1 MLJ 383.

²⁵ See *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, *Dato Menteri Othman Baginda v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 (FC).

²⁶ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, *Dato' Menteri Othman Baginda v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

²⁷ *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 .

²⁸ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 (FC), *Lim Kit Siang v Public Prosecutor* [1980] 1 MLJ 293.

challenged²⁹ and emphasized that the judiciary must presume that acts legislated by Parliament to be constitutional and try to sustain the validity of the legislation.³⁰

The court was quite consistent in interpreting the Constitution, with unanimous approach of the “living document” approach but within the limits of the constitutional text. Textualism was predominantly a preferred method. The court was open to the idea of amending the Constitution to adapt to the changing needs of the society while balancing it with stringent checks to prevent overzealous amendments that undermine the original intention of Framers. The division of court in its views among the judges were not so significant. However, this phase unfortunately ended with an unpleasant episode of judicial crisis in 1988, together with an instrumental constitutional amendment.³¹

5.2.3 Post 1988 Amendment

In this phase, the aftermath of the 1988 amendment was predominantly and continuously flooded with cases involving jurisdictional conflict between the civil and the Syariah courts which revolves around Article 121(1A) of the Federal Constitution.³²

²⁹ See *Abdul Karim Abdul Ghani v Legislative Assembly of Sabah* [1988] 1 MLJ 171 *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128.

³⁰ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, *Dato' Menteri Othman Baginda v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

³¹ Removal of Lord President Tun Salleh Abas, see Tun Mohd Salleh Abas and K. Das, *May Day for Justice: The Lord President's Version*, (Kuala Lumpur: Magnus Book, 1988). see also Amendment Act [A704].

³² *Mohd Habibullah bin Mahmood v Faridah Dato' Talib* [1992] 2 MLJ 793, *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, *Dalip Kaur* [1992] 2 MLJ 793, *Hajah Halimatussaadiah bte Haji Kamaruddin v Public Service Commission* [1994] 3 MLJ 61, *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor* [1999] 2 MLJ 241, *Soon Singh A/L Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489, *Syed Zolkaffly Shaik Natar v Majlis Agama Islam Pulau Pinang* [2003] 3 MLJ 705, *Kamariah Ali v Kerajaan Negeri Kelantan* [2002] 3 MLJ 657, *Meor Atiqulrahman bin Ishak & Ors v Fatimah bte Sihi & Ors* [2000] 5 MLJ 375, *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585, *Latifah Mat Zin v Rosmawati Sharibun & Anor* [2007] 5 CLJ 253, *Subashini a/p Rajasingam v Saravanan a/l Thangatoray & Other Appeals* [2008] 2 MLJ 147, *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor (Kerajaan*

In almost all of these cases except the minority judgments, the court applied the textual and harmonious approach, the pith and substance approach and the subject matter approach. Not much philosophical arguments were put forward as most of the arguments were rooted to Article 3(1) of the Federal Constitution which clearly expressed the special position of Islam in the Federal Constitution. The Court was generally deferential to the jurisdiction of the Syariah courts.

In most cases which are not involving jurisdictional conflicts, the court continues to show fidelity to the constitutional text,³³ to observe the boundaries of separation of power³⁴ and adhere to the principle that freedom is not absolute.³⁵ In *Ooi Kean Theong*,³⁶ the court made clear of its stand, that there is no necessity of dwelling into jurisprudential aspect of rights and personal liberty in order to stretch the scope of right to life as the limit is clear.

It is also in this era, beginning approximately in the year 2008 while the Islamic provisions in the Federal Constitution were still given a favourable interpretation, that judicial activism has been germinating. Though not yet widespread, through the introduction of a new approach that recognizes unenumerated rights, aside from the enumerated rights, the court in *Lee Kwan Woh v. Public Prosecutor*, introduced the

Malaysia, intervener) & Anor [2008] 3 MLJ 617, *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354, *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor* [2011] 2 MLJ 281, *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281, *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153, *State Government of Negeri Sembilan & Ors v Muhamad Juzaili bin Mohd Khamis & Ors* [2015] MLJU 597, *Viran A/L Nagapan v Deepa A/P Subramaniam* [2016] 1 MLJ 585, *Federal Territory Islamic Religious Council v Victoria Jayaseele Martin* [2016] MLJU 40.

³³ *Ketua Polis Negara v Ghani Haroon* [2001] 4 MLJ 11, Article 5 of the Federal Constitution was construed based on the words itself, natural and ordinary meaning.

³⁴ *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351.

³⁵ *Abdul Ghani Ali v Public Prosecutor* [2001] 3 MLJ 561, *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun* [2000] 4 MLJ 77, *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, *Pengarah Imigresen Negeri Sabah v Sugumar Balakrishnan* [2002] 4 CLJ 105.

³⁶ *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 2 CLJ 701.

prismatic approach.³⁷ Earlier, in *Public Prosecutor v. Kok Wah Kwan*, through its dissenting judgement, judicial activism was manifested when the judge promoted creative interpretation of law and call for more creative judges to introduce new judges' role among others, to formulate original precedents, to overrule earlier precedents.³⁸ With judicial activism being applied in *Lee Kwan Woh* and *Kok Wah Kwan* was overruled while *Loh Wai Kong* was criticized and moral arguments are given paramount consideration.³⁹ The judge in this case also expressed disapproval and criticism towards literal interpretation but still respected and quoted the classic case of *Dato' Menteri Othman Baginda*. This is perhaps the beginning of the trend of collateral attack and open criticism towards the conservative and traditional approach. This is followed by *Sivarasa Rasiah* in the year 2010 which overruled *Loh Kooi Choon*.⁴⁰ In *Bato Bagi*, a pragmatic, purposive and liberal fashion of interpretation was promoted to safeguard explicit and implicit rights.⁴¹ Strict constructionism was highly criticized. In *Semenyih Jaya*, judicial activism continues to secure its place in the judiciary in 2017. Moving towards creating a new trajectory, the wave of judicial activism continues to reach its goal until today and it will be discussed under the current trend in the next section.

5.3 THE CURRENT TREND AND THE NEW TRAJECTORY

There is no dispute that the Malaysian court is generally in agreement on upholding constitutional supremacy, living constitution, rule of law or separation of power. But how these fundamental constitutional principles are interpreted differs from how such

³⁷ [2009] 5 MLJ 301.

³⁸ [2008] 1 MLJ 1 (per Richard Malanjum, dissenting).

³⁹ [1979] 2 MLJ 33.

⁴⁰ *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

⁴¹ *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297.

principles were understood from one group to another. Various methods and approaches are applied to justify these principles. Based on the observation on the court judgments and after having analysed input from the respondents, it is apparent that in the first few decades after Independence, the court was quite consistent in its inclination towards the conservative approach.⁴² However, beginning the last two decades, the court appeared to be illustrating a variety in its stance. It seems that the Court's stance can generally be divided into two competing approaches. The first group can be said to be representing the conservative view while the second group can be described as those representing the liberal view.

Judges who are keen towards judicial activism and departing from the text to enforce moral values with emphasis on human rights often represent the liberal view.⁴³ They are generally non-textualists or non-originalists, though in a small number of cases, may occasionally apply the textualist approach if the text complies with values they believe ought to be upheld. They believe that the role of judiciary is not limited to interpreting the law but also makes law and to a certain extent, amend the law.⁴⁴ A judge's role extends beyond the text. Common law doctrines such as separation of power and rule of law are applied in their widest sense. A judge's role is to enforce morality and uphold human rights to fill in the lacuna in the law. This notion gives rise to the prismatic approach in interpreting the Constitution. They are not bound by the text and in a lot of cases, they can appear to be departing from the text, even if they claim to be bound by the text. As a result, constitutional supremacy as they understood

⁴² Comments by Judge 1 and Academician 1 on judicial activism that it was influenced by the current political situation.

⁴³ The duty of enforcing fundamental rights falls upon the judiciary, based on the doctrine of separation of powers, which is part of upholding the constitutional supremacy.

⁴⁴ Shad Saleem Faruqi, "Judicial Activism & Constitutional Supremacy", *Unpublished Article*, (2018): 3.

may appear to have been extended according to doctrines and to some extent, may amount to judicial overreaching or judicial supremacy as the judiciary often assumes absolute power to check other democratic branches. In addition, the presumption of constitutionality is often rebutted through approaches such as the BSD and the prismatic approach.

The following are the features of this current trend and new trajectory:

5.3.1 Judicial Attitude

(a) Judicial Activism and Liberal View versus Judicial Restraint and Conservative View

Description of trends in judicial philosophy often involves two opposite directions such as liberal versus traditional or conservative view, originalist versus non-originalist view, non-textualist versus textualist view, and judicial activism versus judicially restrained view. The seminal scholarship on judicial activism in Malaysia was initiated by a former Court of Appeal judge who describes judicial activism as a judicial decision that is creative, that breathes life into the law, that involves positive inductive reasoning and takes into account the social needs of the time, at the same time paying heed to the principles of justice and the legal constitutional framework within which that decision is made.⁴⁵ Professor Shad describes that the task of interpretation is a creative task as most legal words are “like amoebas constantly changing shape”. He also describes a judicial decision which is a product of judicial activism or judicial creativity is that which is based on a non-literal interpretation and rejects strict textualism or plain meaning of words. To him, apart from just paying attention to the letters of the law, an

⁴⁵ Mohd Hishamudin Yunus, “Judicial Activism – The Way to Go?”, *Malayan Law Journal*, vol. 6, no. 7. (2012): 17.

activist judge's decision is also based on the spirit of the law, the legislative history and the legal system as a whole. Thus, an activist judge views the law holistically, purposively and contextually. The consequence and the functionality of the law is also given due consideration. Precedents and the "dead hands of the past" are not favoured in judicial activism. Most importantly, it is also said that judicial activism emphasizes on coherence and harmony and reads a norm as part of the whole system.⁴⁶ A judicial decision that is a product of judicial activism also possesses an innate sense of equity and justice and right and wrong when formal rules are supplemented with "non-rule standards" such as principles, presumptions and a dimension of morality.

Prior to its introduction by some activist judges, the court was reluctant to accept judicial activism. The majority in the case of *Rovin Joty* has warned of judicial activism that may succumb into judicial overreaching. The idea of judicial activism in Malaysia seems to have found its grounding in the United States' celebrated case of *Marbury v Madison* and later moved to the Indian Supreme Court case of *Kesavananda Bharati v State of Kerala* which was known for its BSD. The BSD fits nicely within the description of judicial activism in that it is "paying heed to the constitutional framework" by striking down legislative or executive acts which are in conflict with the "basic structure" of the Federal Constitution.⁴⁷

Faruqi views that judicial activism is justified by moral and philosophical considerations and on the premise that the Constitution is not just black letter words, but has spirit and soul. Accordingly, the Constitution should be founded on values of freedom and justice and doctrines like rule of law, separation of power and natural justice. It follows that it is the court's role to enforce these values because the judiciary

⁴⁶ Faruqi, *Judicial Activism & Constitutional Supremacy*, 3.

⁴⁷ *Ibid.*

is seen as a moral institution and the bulwark of liberties.⁴⁸ According to him, judicial activism finds its support in Article 162(6) of the Federal Constitution where the court actually has power to make necessary modification to the Constitution by amending it. This means that judges can bring the law into accord with the Constitution and amend the Constitution through judicial interpretation. He also mentioned that it will be impossible to promote constitutional supremacy through literal interpretation. Instead, it will result in absolutism, shields abuse of power and prevents accountability.⁴⁹ Apparently, the change of trend from restrained and conservative interpretation that is highly deferential to the executive to the liberal and activist interpretation is reactionary to uncontrolled executive power as a result of failure of the traditional parliamentary techniques which does not seem to be working well in providing a check and balance.⁵⁰ In fact, judicial activism and judicial review are regarded as essential aspect of check and balance. Some other reasons to justify the need of judicial activism, among others, are ambiguities and gaps in the law and novel situations which necessitate a holistic view as propounded by Ronald Dworkin. The holistic view requires judges to reach out beyond formal rules. According to the holistic view, the non-rule standards such as doctrines and principles are regarded as integral part of law.

It is believed that the “seeds of judicial activism are germinating” in the Malaysian judiciary through individual judges who are seen as future hope to provide active leadership in order to preserve, protect and defend the Federal Constitution. However, Faruqi cautioned that creativity and justice does not always go together and

⁴⁸ Faruqi, Speech at Lincoln’s Inn, 8

⁴⁹ Ibid, 3

⁵⁰ Interview with Judge 5 on 14 March 2023

is prone to abuse of power. Judicial overreaching is definitely not the desired outcome of judicial activism.⁵¹

The prismatic approach was introduced through the dissenting judgement in *Kok Wah Kuan* in 2008 and the majority decisions in *Lee Kwan Woh* in 2009, which overturned *Kok Wah Kuan*'s majority ruling. This was followed by the Court in *Sivarasa Rasiah* in 2010, *Semenyih Jaya* 2017, *Indira Gandhi* in 2018 and *Alma Nudo* in 2019, which in addition to the prismatic approach, highlights another feature of liberal approach based on BSD. Driven by the spirit of upholding judicial integrity and undertaking moral enforcement, a new trajectory of cases is created. With the rise of this new trajectory, the non-originalist or non-textualist approach became more favourable. Unfortunately, this has given an impression which is highly suggestive of judicial supremacy and judicial over-reaching.

(b) Introduction of new issues, irrelevant issues and revisiting of settled issues

In the recent years, in many judgments, the court has gradually become more open to discussing new issues dissenting judgement. For example, in the case of *Semenyih Jaya*⁵² and *Indira Gandhi*,⁵³ the court took it upon itself to discuss issues which are not raised, which is the applicability of the BSD. Similarly in the dissenting judgment of *Zaidi Kanapiah*, the BSD was brought up even when it does not involve removal of judicial power or conferment of judicial power to non-judicial branch. These irrelevant issues which are introduced through collateral attack are surprisingly often cited in other case as a binding precedent despite its obiter status. In *JRI Resources*, the issue revolved

⁵¹ Interview with Academician 1 on 19 May 2023.

⁵² *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and Anor* [2017] 5 CLJ 526.

⁵³ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.

around what is judicial power but nevertheless, the issue of BSD was still brought up.⁵⁴ In *Dhinesh Tanaphll*, while the ouster clause appeared to be not unconstitutional, the BSD was still raised.⁵⁵ Whether raised or not, the BSD and the judicial power issue will always be raised by one side of the bench which will get the other side of bench to get tangled into replying on the same issue.⁵⁶

In the past record, following the long standing tradition, the court was not keen on introducing issues not raised by parties. The court in *Jabatan Pendaftaran Negara & Ors v. A Child & Ors.*,⁵⁷ the court firmly reminded that “there is no necessity to deal with a question on legitimacy of the child as it was not in dispute. However, despite strong resistance from conservative judges who maintains loyalty to old tradition, the battle on new issues or non-issue continue to be entertained by the other side of the bench.

As a result of irrelevant issues being brought up, judgments become thick and lengthy. This can be seen in recent cases in which one view which usually contains new issues or long history of doctrines or a review of historical records that has been settled. Such long grounds are usually to justify departure from text with other seemingly strong arguments from history and authorities from other jurisdictions.⁵⁸ Some of these cases became lengthy because they dwell on history of doctrines and legislative history to support the BSD while some would deliberate on new issues. The opposite view will then be forced to come up with also long judgments to address the issues raised by the other side of the bench. For example, despite the majority’s reluctant in the case of

⁵⁴ *JRI Resources Sdn. Bhd. v Kuwait Finance House* [2019] 3 MLJ 561.

⁵⁵ *Dhinesh a/l Tanphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ.

⁵⁶ See *Rovin Joty Kodeeswaran* [2021] 2 MLJ 822 and *Zaidi bin Kanapiah* [2021] 3 MLJ 759.

⁵⁷ *Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener)* [2020] 2 MLJ 277, (per Rohana Yusof) [87].

⁵⁸ This is illustrated in *Semenyih Jaya* [2017], *Indira Gandhi* [2018], *Maria Chin* [2021], *JRI Resources* [2019], *Letitia* [2020], *Jabatan Pendaftaran v. A Child* [2020], *Rovin Joty* [2021], *Zaidi Kanapiah* [2021], *Goh Leong Yong* [2021], *CTEB* [2021].

Rovin Joty to raise the applicability of the BSD, they had no choice but to offer explanation as to the non-applicability of such doctrine and this contributed to the long judgement.⁵⁹

(c) Collateral Attack and Intense Overruling

The court in the case of *Sivarasa Rasiah* in the year 2010 overruled the judgment of *Loh Kooi Choon* which had withstood the test of time on the applicability of the BSD.⁶⁰ Such overruling was proudly acknowledged as a frontal attack and cited with approval in *Semenyih Jaya*.⁶¹ In *Indira Gandhi*, collateral attack was launched against *Subashini*,⁶² *Mohd Habibullah* and *Lina Joy*⁶³ and *Lee Kwan Woh* against *Kok Wah Kwan*.⁶⁴ In *Zaidi Kanapiah*, the dissenting judge claims that the majority in *Maria Chin* and *Rovin Joty* does not form ratio and that the court decided “on their own volition”.⁶⁵ The latest edition of collateral attack was recorded in the judgement of *Dhinesh Tanaphll* which claimed to have overruled *Maria Chin* and *Rovin Joty* to uphold the applicability of the BSD in Malaysia.

The practice of collateral attack against the courts own precedent was not common in the Malaysian court judgments until recently. The majority judgment in *Zaidi Kanapiah* expresses disapproval of collateral attack and reminded that constitutionality of laws cannot be questioned by way of collateral attack in order to prevent vexatious and frivolous challenges.⁶⁶

⁵⁹ [2021] 2 MLJ 822 (per Zabariah Mohd Yusof) [177].

⁶⁰ *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333.

⁶¹ [2017] 3 MLJ 561 (per Zainun Ali) [81].

⁶² *Ibid.*, [98].

⁶³ *Ibid.*, [102].

⁶⁴ *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

⁶⁵ [2021] 3 MLJ 759, [67].

⁶⁶ *Ibid.*, [288].

5.3.2 Popular Approaches: Departure from Text

(a) Supremacy of Common Law Principles and Doctrines

The recent trend has shown a great deference on doctrines for example, the dissenting judgement in *Rovin Joty* quoted the judgment in *Alma Nudo*, that the Federal Constitution as it stands today must be read in accordance with its provisions as objectively construed in the context of the nation as a “constitutional monarchy premised on parliamentary democracy” and that it must be construed in a holistic manner. Consistent with the dissenting judges’ belief in the notion that the role of judiciary is to evaluate the law, the dissenting view maintains that the Federal Constitution does not envisage unjust, unreasonable and oppressive law.⁶⁷ In *Sivarasa Rasiah*, the majority view clearly expressed that the equality doctrine in reality is inspired by the equal protection clause from the 14th Amendment to the Constitution of the United States. It is through the Supreme Court’s interpretation of the due process clause that an implied right to equality was extended to the right to challenge any form of state action as arbitrary, was established through case law.⁶⁸ The majority judgment also stated that the equality principle was drawn from Dicey’s rule of law, one of the pillars of which is that persons are equal before the law. The majority also cited an Indian case, *Indira Nehru Ghandi v Raj Narain*⁶⁹ to support the equality principle. On the principle of separation of power, in *JRI Resources*, the dissenting view insisted to subscribe to the strict view of separation of power as understood under the common law with no overlapping at all.

⁶⁷ *Rovin Joty*, [2021] 2 MLJ 822, [359] (iii) (per Nallini Pathmanathan).

⁶⁸ See *Poe v Ullman* 367 U.S 497 (1961), 543; *Williams v Illinois* 399 U.S 235 (1970), 262.

⁶⁹ AIR [1975] SC 2299, 2470 (per Chandrachud J), *Sivarasa Rasiah*, [2010] 2 MLJ 333, [21].

The court in the past did not approve such deference. It has been reminded time and again in earlier judgements that,⁷⁰ while doctrines can be a guiding principle, it cannot amount to doctrinal supremacy that prevails over the constitutional text. The majority in *Kok Wah Kuan* was firm that the separation of power doctrine is understood subject to the Federal Constitution. Therefore, the court acknowledge some overlapping because the Constitution allows it. The same view was expressed in *Rovin Joty*.⁷¹ However, with the recent trend, the Malaysian interpretive jurisprudence has varied in its stance.

(b) Importation of Foreign Doctrines through Foreign Precedents

It has been settled for many years that the Malaysian court does not favour foreign doctrines. It upholds the four walls principle and limits any importation of foreign sources only to the extent permitted by the constitutional text.⁷²

In the recent cases, there is a rising number of judgments in which a great deal of effort was spent to explain foreign theories and their history. To illustrate, in the dissenting judgment in *Zaidi Kanapiah* and *Datuk Seri Anwar Ibrahim*, the Kelsen's theory, the German Constitution and the Constitution of Germany was discussed in a great detail.⁷³ In the case of *Rovin Joty*, the dissenting judge took a departure from the text and resorted to common law cases from the United Kingdom and Singapore to apply contemporary approach which are flexible and pragmatic as introduced in those foreign cases.⁷⁴ Following such methods, law according to the dissenting judgment,

⁷⁰ see per Hasnah Mohamad [272] in *Zaidi Kanapiah* "In light of the clear and purposeful intention of the architects of our Constitution as well as the judgments of this court in *Loh Kooi Choon*, *Phang Chin Hock* and more recently in *Letitia Bosman*, *Maria Chin* and *Rovin Joty*". See also per Abdul Rahman Sebli in *Maria Chin*

⁷¹ *Rovin Joty*, [2021] 2 MLJ 822, [125], *JRI Resources* (per Azahar Mohamad)

⁷² *Loh Kooi Choon*, [1977] 2 MLJ 187, *Kok Wah Kuan*, [2008] 1 MLJ 1

⁷³ *Zaidi Kanapiah*, [2021] 3 MLJ 759 [68]-[71]

⁷⁴ *Rovin Joty*, [2021] 2 MLJ 822, (Per Nalini Pathmanathan)

must therefore be interpreted according to the rule of law that includes the procedural and substantive dimensions of the rule of law, which are its integral components. In *Lee Kwan Woh*, similar view forms the majority ruling whereby such components are made of elements of justice, fairness, due process and proportionality which are often discussed together with Article 8 of the Federal Constitution.

It follows, from the approval of the above sources in the recent cases, that the prismatic approach and the BSD are justified. In *Indira Gandhi*, the court declares that based on the case of *Kesavananda Bharati*, judicial review has to be based on the BSD. This observation is consistent with the notion that judicial power is part of the basic structure of the Constitution. On that account, the BSD was introduced. It can also safely be said that, based on the writing of Justice Hishamuddin, judicial activism in Malaysia is very much intertwined with the idea of the BSD.⁷⁵ As was also observed by a group of renowned scholars, to acknowledge and to uphold the BSD is an admirable manifestation of judicial activism.⁷⁶ In fact, the inception of the BSD would not have realized but for the judicial creativity of judges who are inclined towards the BSD. The court judgments in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*, also known as the “trilogy of cases”, have been described in recent cases as landmark cases upholding and recognizing the reception of the BSD in Malaysia. The majority judgment in these cases and all other cases following them reject literal and textual reading and favour the prismatic approach. The BSD and prismatic approach is mostly applied in cases involving interpretation of the provisions on fundamental liberties, on judicial power and challenging the ouster clauses. For example, in the case of *Lee Kwan Woh*, the prismatic approach was used in the interpretation of “life” and “liberty”.

⁷⁵ See Hishamuddin Yunus, “Judicial Activism”, 7.

⁷⁶ Johan Shamsuddin et al., “Judicial Activism”, *Unpublished Article*, (n.d.): 3.

The majority in *Maria Chin* pointed out that there is nothing wrong about highlighting the basic features of the Federal Constitution but what becomes problematic is that BSD is not confined to the terms of written constitution. It has been extrapolated to include a doctrine of law which is separation of power, to the extent that void for being inconsistent with the doctrine despite the absence of an express term in the Federal Constitution. Separation of power is interpreted in an open ended manner and possibly too much inclined towards judicial supremacy.

The bottom line is, the BSD was given too much exaltation that it seems to be treated like the lynchpin of constitutional law in Malaysia.⁷⁷ From the interpretation of natural justice to rule of law, to separation of power, to judicial power and Articles 4, 5, 8 and 121(1) are all based on doctrine. There is no clear guidance as to what extent these doctrines are applicable in the Malaysian context. As was rightly pointed out by an academician, in discussing the fundamental principles such as rule of law and separation of power, the application of BSD is really irrelevant.⁷⁸

(c) Natural justice

In the dissenting judgement of *Maria Chin*, natural justice was not defined in the Constitution but the dissenting judge quoted the definition of natural justice as specified by Lord Diplock in order to justify departure from the text.⁷⁹ The discussion on role of court is also often brought up through which the court is split into two views. The recent view that competes the long-standing court practice is that the court takes it upon itself

⁷⁷ Paper presentation by Benjamin Joshua Ong at UM-NUS Joint Hybrid Symposium: Constitutional Amendments and The Basic Structure in Malaysia on 15 October 2022. This view has also been reiterated by some judges in *Maria Chin*, *Zaidi Kanapiah*, *Rovin Joty* and also supported by some other presenters in the symposium.

⁷⁸ Ibid.

⁷⁹ *Maria Chin*, [434] per Tengku Maimun.

to evaluate the law. This can be seen in the dissenting judgement of *Maria Chin*.⁸⁰ The dissenting judge highlighted that while administrative natural justice relates to situations where there is a breach of some right by the administrative branch, constitutional natural justice refers to the validity of the law passed, that is, whether the law is not unfair, arbitrary or oppressive.⁸¹ To relate the principle of equality with right in Article 5 of the Federal Constitution, the dissenting judge highlighted procedural fairness as another way of saying that constitutional natural justice is embedded in Articles 5(1) and 8(1) of the Federal Constitution. The dissenting judge cited with approval the Indian case of *Maneka Gandhi* to emphasize on the importance of natural justice in which the court held that ‘the soul of natural justice is fair-play in action and that is why it has received the widest recognition throughout the democratic world’. As opposed to the conservative view on the court’s function, the majority in *Rovin Joty* was firm on its stand to decide a case in accordance with the Federal law and that the court’s jurisdiction and power is only derived from Federal law.⁸² The majority cautioned that judges do not derive power in a vacuum nor can create jurisdiction for itself. The court went on to say that the court should not derive power from amorphous doctrine from foreign jurisdictions.

(d) Freedom and equality centric definition

Arguments relating to conceptions in the name of fundamental liberties, equality and universal human right are often reflected in judgments which supports judicial activism. In other words, the trend has been that while the conservative bench is striving to protect the constitutional text while the other side of the bench is striving to introduce a

⁸⁰ *Maria Chin*, [2021] 1 MLJ 750, [92].

⁸¹ *Ibid.*, [189].

⁸² [2021] 3 MLJ 759, (per Zabariah Mohd Yusof) [121].

revolutionary meaning through which the concept of freedom and equality would permeate. In the dissenting judgment of *Maria Chin*,⁸³ it was remarked that a ‘law’ is not law just because it was passed by Parliament and have all the constitutional procedural checked to make it law. Law must be, the court reminded, as Article 4(1) suggests, be passed in accordance with the Federal Constitution which necessarily requires compliance with Part II on Fundamental Liberties. In *Rovin Joty and Zaidi Kanapiah*,⁸⁴ the dissenting judgments demonstrate revisiting of settled issues concerning the meaning of “law” mentioned in Article 4 and 159 of the Federal Constitution read together,⁸⁵ in the name of freedom and equality. Contrary to the term “law” understood through the textual approach based on *Loh Kooi Choon* and *Phang Chin Hock*, law in Article 4 of the Federal Constitution is interpreted harmoniously with Article 149 of the Federal Constitution which empowers the Parliament to enact laws for prescribed circumstances stated in paragraphs (a)-(f) subject to safeguard in Articles 151 and 159 of the Federal Constitution. This way, the provisions in the Constitution treated as equal stature and harmoniously.⁸⁶

The term “life” in Article 5(1) of the Federal Constitution according to the dissenting view in *Maria Chin*, is said to not be confined to mere animal existence but encompasses an entire spectrum of rights integral to meaningful human existence.⁸⁷ The

⁸³ [2021] 1 MLJ 750(per Tengku Maimun), [92].

⁸⁴ See *Rovin Joty Kodeeswaran* [2021] 2 MLJ 822 and *Zaidi Kanapiah v ASP Khairul Fairoz bin Rodzwan and other cases* [2021] 3 MLJ 759.

⁸⁵ Article 4(1) FC says “This Constitution is the supreme law of Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of inconsistency, be void.”. Article 159(1) Reads, “Subject to the following provisions of this Article and to Article 161E, *the provisions of this Constitution may be amended by federal law*.”. (Emphasis added.) Article 160 defines ‘law’ as including written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.”. ‘Federal law’ is defined in the same article as (a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and (b) any Act of Parliament.

⁸⁶ See *Zaidi Kanapiah* [2021] 3 MLJ 759, per Hasnah Hashim and *Rovin Joty*, [2021] 2 MLJ 822, (per Zabariah Mohd. Yusof).

⁸⁷ [2021] 1 MLJ 750, (per Tengku Maimun), [93].

dissenting judge calls for harmonious reading of right to life and right to equality in access to justice and protection of the law as enshrined in Article 8.⁸⁸ Further, the right of access to justice was extended to include the right to an effective remedy based⁸⁹ some academic opinion that “effective access to justice can thus be seen as the most basic requirement, the most basic ‘human right’ of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all.”⁹⁰

(e) Judicial Supremacy

The trend within the past two decades has been that the court has been gradually directed towards restoring judicial power and judicial independence. It is important to note that while these are important to protect judicial integrity, unbridled judicial power or judicial independence can fall into the cracks of judicial supremacy.⁹¹ The role of court as guardian has been overly emphasized with support of Indian cases such as *Kesavannada Barathi* to claim that judicial independence and strong judiciary is not antithesis to constitutional supremacy and in fact, a result and feature of Constitutional Supremacy.⁹² From the case analysis, it is apparent that especially after *Sivarasa Rasiah* and *Semenyih Jaya*, the “judicial theme” has been more focused on judicial integrity and judicial independence by aiming at restoring judicial power and to a certain extent, tilted towards judicial supremacy. In the recent cases, the term judicial power was often

⁸⁸ [2021] 1 MLJ 750, (per Tengku Maimun) paragraph [94].

⁸⁹ Ibid., [95]. Bryan Garth and Mauro Cappelletti, “Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective”, *Buffalo Law Review*, vol. 27, (1978): 184-185.

⁹⁰ Ibid.

⁹¹ See *Nik Elin Zurina & Tengku Yasmin Natasha v Kerajaan Negeri Kelantan* [2023] 3 MLJ 829 and Speech by The right Honourable the Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat, On the Occasion of *The opening of the Legal Year 2024 ('oly 2024')* Monday, 15 January 2024, Putrajaya International Convention Centre ('PICC') https://www.kehakiman.gov.my/sites/default/files/2024-01/oly%202024%20%20speech%20by%20trh%20the%20chief%20justice%20of%20mala_240115_114911.pdf.

⁹² [2021] 1 MLJ 750, [790].

brought up and interpreted in the manner that tilts towards judicial supremacy. In *Maria Chin*, the scope of the role of court based on its dissenting judgement was extended to enforce breach of fundamental liberties on the argument that, if the court by virtue of Article 4 can strike down unconstitutional laws, then it should also be able to enforce breach of fundamental liberties that arise from such invalid laws or else the concept of rule of law and Article 4 will be rendered nugatory and otiose. The dissenting judge was convinced that Article 4 is pervasive enough to encompass the enforcement mechanism.⁹³ Many issues are redirected to the interpretation of Article 4(1) and reference are often made to doctrines of separation of powers, checks and balance and the rule of law to justify inherent power of the court.⁹⁴

“Judicial power” in Article 121(1) was discussed in both *Sivarasa Rasiah* and *Semenyih Jaya*.⁹⁵ From these two cases, source of judicial power is understood to be inherent in the court, as a result of applying the BSD. Through these two cases, a frontal attack was launched against the judgment in *Loh Kooi Choon* on the point of amendability of the Constitution and the meaning of law.⁹⁶ In *Kok Wah Kuan’s* dissenting judgment and *Datuk Seri Anwar Ibrahim*⁹⁷ the court defined “judicial power” as inherent in the courts. The dissenting judgment in *Kok Wah Kuan* also claimed that the literal reading by the majority view erodes the judicial power.⁹⁸ It was admitted in the dissenting judgment of *Zaidi Kanapiah’s* case⁹⁹ that it has to be the “superior judiciary” which is given the power to strike down unconstitutional laws because the Federal Constitution is not self-executing. The dissenting judge further explained that

⁹³ [2021] 1 MLJ 750.

⁹⁴ *Indira Gandhi, Datuk Seri Anwar Ibrahim v Government of Malaysia* [2020] [20] (per Tengku Maimun Tuan Mat)

⁹⁵ *Datuk Seri Anwar Ibrahim*, [86].

⁹⁶ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

⁹⁷ *Ibid.*

⁹⁸ *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

⁹⁹ See *Zaidi Kanapiah*, paragraph [93].

the judiciary's superior role is justified as a mechanism to help enforce the Constitution. The term "superior judiciary" was claimed to have originated from the Reid Commission Report 1957.¹⁰⁰ In *Koperal Zainal*, the dissenting judge acknowledged lack of constitutional remedy within the Federal Constitution but in effect, it did not reduce the power of court to redress for infringement of constitutional rights.¹⁰¹ It seems that absence of express stipulations did not result in an inability to enforce the fundamental rights. Instead, the court allowed itself to give any relief or order it considered appropriate. All seems to lay in the hands of the judiciary.

On the contrary, the conservative views in *Kok Wah Kuan*, *Rovin Joty* and *Goh Leong* maintained that judicial power is interpreted as enforced by federal law, as clearly stated in the constitutional text.¹⁰² The phrase "conferred by federal law" plainly means that the source of judicial power is from federal law.¹⁰³

5.3.3 Outcomes

(a) No Finality in Judgments

It was settled that the BSD has no application in Malaysia. This was clearly decided by the majority in *Loh Kooi Choon*, *Phang Chin Hock*, *Letitia Bosman*, *Maria Chin*, *Zaidi Kanapiah* and *Rovin Joty*. Despite rejection of the BSD, it was approved in *Sivarasa Rasiah*.¹⁰⁴ In 2010, *Sivarasa Rasiah* overruled *Loh Kooi Choon* which has established a settled law for many decades. From *Sivarasa* flowed the trilogy of cases i.e. *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* which created a new trajectory to introduce and

¹⁰⁰ Reid Commission Report, paragraph 161, *Zaidi Kanapiah*, [2021] 3 MLJ 759, [93].

¹⁰¹ Ibid., paragraph 123, see also *Koperal Zainal Md Ali v Selvi a/l Narayan* [2021] 3 MLRA 429.

¹⁰² *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1, *Rovin Joty Kodeeswaran* [2021] 2 MLJ 822 [21], *Goh Leong Yeong v ASP Khairul Fairoz bin Rodzuan* [2021] 5 MLJ 474.

¹⁰³ Ibid. (per Zabariah Mohd Yusof)

¹⁰⁴ See paragraph [7] (per Gopal Sri Ram).

justify importation the BSD to the effect of overruling the earlier cases from the same court. Unfortunately the creation of a new trajectory has caused instability in the development of our constitutional jurisprudence and no finality in judgments. While majority are firmly following the settled precedents, the dissenting judgements in the cases rejecting the BSD were also firm in expressing their opposite view. As the saga continues, the case of *Dinesh Tanaphll*¹⁰⁵ made a collateral attack on the decision of *Maria Chin* and *Rovin Joty* and declared them as no longer a good law.

The practice of the BSD has shown that it allows the court to arbitrarily strike down laws even without parties applying for leave and to interpret a law that no longer reflects the position of the present law. This defies canon of construction and legal logic and create fallacious precedent. This was rightly observed in *Zaidi Kanapiah*¹⁰⁶ and *Kok Wah Kuan*.¹⁰⁷ In *Goh Leong*, the majority view highlighted that it was the fifth time, at the time the case *Goh Leong* was decided, that BSD issue was brought before the court.¹⁰⁸

The state of uncertainty of the law can be prolonged by the undesired effect of linking everything to the phrase “basic structure” and packaging all fundamental constitutional concepts as the BSD, which is, everything will stand and fall with it.¹⁰⁹

¹⁰⁵ [2022] 3 MLJ.

¹⁰⁶ *Zaidi Kanapiah*, [2021] 3 MLJ 759, (per Zaleha Yusof), [311].

¹⁰⁷ *Kok Wah Kuan*, (per Abdul Hamid Mohamad) [11].

¹⁰⁸ *Goh Leong Yong*, (per Rahman Sebli) [150].

¹⁰⁹ Benjamin Joshua Ong, “Constitutional Amendments and the Basic Structure in Malaysia” (paper presentation, UM-NUS Joint Hybrid Symposium, October 15, 2022).

(b) Grey areas and inconsistencies

From the analysis of cases, it can be seen that inconsistencies of approach in the Malaysian Judiciary happens at various levels. The most apparent would be the two different camps that divided the judiciary which is the conservative approach and the liberal approach. Ironically, in some cases, they share the same landmark cases, same principles, same lines from some luminary judges.

(c) Unclear and Inconsistent Usage of Methods

Most inconsistency can be traced from the application of the BSD. It was pointed out in some writings that while BSD claims to be employing a harmonious reading, it is not ideal for BSD to be described as interpretive tool.¹¹⁰ If at all it is promoting the fundamental constitutional principles like rule of law and separation of power then they should be squarely confronted meaningfully as the concepts themselves suggest. They do not need to be packaged as the “basic structure”.¹¹¹

In the case of *Indira Gandhi*, the majority demonstrated the textualist arguments in advocating judicial supremacy within the civil courts.¹¹² The demand for clarity of text was not dealt with in an equal manner when the court discusses about the basic structure and inherent power in Article 4 or when it argues for inherent judicial power in Article 121(1) of the Federal Constitution. In some cases, harmonious reading was understood as antithesis to textualism. For example, in many cases in which the court applies BSD and criticize textual reading, the court would at the same time claim to be

¹¹⁰ See Wilson Tay, Tan Kian Leong, and Shukri Shahizam, “Basic Structure as Interpretive Tool?”, 5.

¹¹¹ Benjamin Joshua Ong, “The Basic Structure Doctrine, Less Than Meets the Eye”, Constitutional Amendments and the Basic Structure in Malaysia” (paper presentation, UM-NUS Joint Hybrid Symposium, October 15, 2022).

¹¹² See *Indira Gandhi*, para [92] where it quoted the Andrew Harding that “As things stand the civil courts exercise the power of judicial review and this is of course part of the judicial power. Nothing in clause (1A) attempts to interfere with this proposition”.

applying harmonious reading.¹¹³ The correct understanding is that harmonious interpretation is part of textualism.

Another example would be the case of the “living constitutionalism” or “living document” approach, which has been more inclined towards moral arguments instead of textual arguments. In *Maria Chin*, the dissenting judge who, on the ground that a Constitution is a living and organic document, viewed that ‘personal liberty’ in Article 5(1), read prismatically and purposively, encompasses the right to travel abroad. On the ground of humanity, the judge also remarked that, despite judges being reclusive by nature, “they can hardly afford to be blind to the realities of life.”¹¹⁴

Similarly, the principle of separation of powers and rule of law, all trending towards departing from the constitutional text. This can be seen in the dissenting judge in *Zaidi Kanapiah* in interpreting the word “law” which was made under Article 159 of the Federal Constitution, departed from the text due to alleged absurdity and was quick to resort to a German philosophy, the Kelsen’s theory of *grund norm*, foreign textbooks on the concept of constitutionalism, Indian and Irish free jurisprudence. Apparently, the dissenting judge overlooked the word “subject to” appearing in Article 159 of the Federal Constitution which connotes clearly that amendments are allowed subject to a specific procedure and conditions.¹¹⁵

On the application of harmonious reading there are differences between liberal bench and the conservative bench in the manner it is applied. For example in *Zaidi Kanapiah*, Articles 4 and 159 of the Federal Constitution when read harmoniously means that the Constitution empowers the Parliament.¹¹⁶ This is closer to a more

¹¹³ See for example per Tengku Maimun [100] in *Zaidi Kanapiah* and [389(h)] in *Maria Chin*, per Nallini Pathmanathan in *Maria Chin* [318].

¹¹⁴ *Maria Chin*, [172].

¹¹⁵ *Zaidi Kanapiah*, (per Tengku Maimun Tuan Mat) [81], Article 159(1) of the Federal Constitution.

¹¹⁶ [2021] 3 MLJ 759, (per Zaleha Yusof).

methodical canon of construction as described in Chapter 3. Meanwhile the harmonious reading by the dissenting judgment in *Zaidi Kanapiah* did not fully analyse the text and was not exactly reflecting a harmonious reading in its proper sense.¹¹⁷ Similarly in *Rovin Joty*, harmonious reading was understood as harmony with the principles of separation of power and rule of law and does not mean reading textually for it would tantamount to violating the basic and foundational structure of the Federal Constitution.¹¹⁸

In *Zaidi Kanapiah* on the issue of judicial power, after a lengthy discussion on the BSD, a foreign doctrine, and the great amount of effort on justifying them, the court's dissenting view stated that it is not necessary to depend on a foreign doctrine because judicial power is already inherent in the supremacy clause, Article 4(1) of the Federal Constitution.¹¹⁹ The conclusion was made by reconciling the foreign doctrine with the supremacy clause, that the doctrine has been ingrained in Article 4(1) of the Federal Constitution. In like manner, the dissenting view also cited *Loh Kooi Choon* which clearly rejected BSD while also citing *Semenyih Jaya* and *Indira Gandhi* which upheld BSD. While respecting the dissenting judge's opinion, it has to be highlighted that such approach appears to be unclear and inconsistent.¹²⁰ There appears to be all right argument as there is no proper demarcation of rules.¹²¹

¹¹⁷ [2021] 3 MLJ 759, (per Tengku Maimun Tuan Mat).

¹¹⁸ *Rovin Joty*, (per Nalini Pathmanathan) [374].

¹¹⁹ *Zaidi Kanapiah*, see paragraphs [104] and [105] is contradicting paragraphs [94] and [95].

¹²⁰ See [94] per Tengku Maimun, BSD can be interpreted to be inherent and part of constitutional supremacy. In another view in *Semenyih Jaya* in which the court also favoured the BSD, it was clearly stated that BSD originated from an Indian case. See also per Abdul Rahman Sebli in *Maria Chin*, "The difficulty with the doctrine is that 'basic structure' is not confined to the written terms of the Federal Constitution. It has been extrapolated to include a doctrine of law, in this case the doctrine of separation of powers. This leads to a situation where a law that is duly passed by Parliament is rendered void for offending the doctrine of separation of powers even where it is not inconsistent with the express terms of the Federal Constitution. Herein lies the paradox.

¹²¹ See discussion under relativism in Chapter 2.

Unclear usage of method can be seen in the case of *Indira Gandhi* and *SIS Forum* in which term “inferior court” appearing in Article 121(1) of the Federal Constitution were taken to include the Syariah courts and therefore the Syariah courts are understood to mean inferior courts.¹²² It was not clear how the court reasoned this. Professor Kessler commented that the technical meaning of “inferior court” is that the court that has limited jurisdiction whereas for the laymen, as opposed to superior courts, it means the court that is worse. But superior court he said is not one that is better, it is just the one with unlimited jurisdiction. He pointed out that this is an illustration of the broader point that language can be misleading if we are not very careful about precisely what terms are technical terms and what are not. He highlighted that unfortunately the court had misconstrued that by applying the BSD, the Syariah courts are powerless. Indeed, the Syariah court does have the power to review the *fatwa*.¹²³

Inconsistent and unclear usage of methods have led to selective application of methods. For example, departure from earlier precedents of *Subashini* and *Lina Joy* was approved in *Indira Gandhi* but was heavily criticized when allegedly breached by the conservative bench in *Maria Chin* and *Rovin Joty* by not following *Alma Nudo*, *Semenyih Jaya* and *Indira Gandhi*.¹²⁴ The BSD proponents were quick to rule the judgment as per incuriam.¹²⁵ The fight about adherence to binding precedents remain inconsistent. In *Datuk Seri Anwar Ibrahim*,¹²⁶ though the dissenting judgment

¹²² See *SIS Forum* per Tengku Maimun [35], *Indira Gandhi* per Zainun Ali [80].

¹²³ Clive Kessler, Constitutional Amendments and the Basic Structure in Malaysia” (paper presentation, UM-NUS Joint Hybrid Symposium, October 15, 2022).

¹²⁴ See *Subashini a/p Rajasingam v Saravanan a/l Thangatoray & Other Appeals* [2008] 2 MLJ 147, *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585, *Rovin Joty Kodeeswaran v Lembaga Pencegahan Jenayah & Ors* [2021] 2 MLJ 822, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, *Maria Chin v Ketua Pengarah Imigresen* [2021] 1 MLJ 750, *Alma Nudo Atenza v Public Prosecutor & Anor Appeal*, [2019] 4 MLJ 1, *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Anor* [2017] 3 MLJ 561.

¹²⁵ see *Goh Leong Yong*, [104].

¹²⁶ [2020] MLJU 119.

demonstrates creativity, to justify extension of meanings beyond the constitutional text using a textual meaning of Article 128 of the Federal Constitution is giving an impression that there is nothing stopping the court from whimsically choosing any particular method or depart from established methodical approaches.

Additionally, BSD proponents appears to be preferring some inferior authorities or minute considerations such as dissenting opinions, obiter judgments or even the size of the bench to support their stand.¹²⁷ It is trite that BSD had no application in Malaysia. This was made clear in the case of *Loh Kooi Choon* and *Phang Chin Hock*. Though it was largely claimed that BSD reinforces the principle of separation of power and that separation of power is the integral part of BSD, its proponents seem to be adopting methods without any clear guidance and therefore rendering it to not have a clear identity.¹²⁸ Though it may have been inspired by a good cause, the vagueness and amorphousness of this doctrine would amount to a what is only fitting under the description of a relativistic approach which approves and entertain all opinions as right.¹²⁹ This will only result in obscurity as it will lead to having no finality in judgement. In the Malaysian context, at the outset, BSD was inspired by *Kesavananda Bharati* from which BSD was understood in the technical sense which is unamenability of the Constitution and so are the earlier Federal Court cases which rejected it such as *Loh Kooi Choon* and *Phang Chin Hock*. As it became more popular, BSD starts becoming a “label” which is plastered onto all other constitutional principles such as

¹²⁷ [2021] 3 MLJ 759, (per Tengku Maimun, dissenting) [34].

¹²⁸ See *Zaidi Kanapiah, Maria Chin, Rovin Joty*.

¹²⁹ See for example the case of *Maria Chin* which was overruled by *Dhinesh Tanaphll*, for more discussion under 5.4.2 on the evaluation of relativism.

maintaining judicial power, judicial independence, meaningful checks and balance, rule of law and separation of power.¹³⁰

To begin with, there is no consensus as to what constitutes the “basic structure”, even in India where it allegedly originated from.¹³¹ From an academic perspective in a recent symposium on BSD, it was highlighted that there has been confusion among the proponents of BSD in that it ended up being used as a “buzzword”, became a “rhetorical flourish”.¹³² It was also observed that just when it was settled on a pattern, it turns out that the law “turns another corner”.¹³³ It was also rightly observed that BSD is like a pendulum with panel within the same court claims it applies while some do not. The pattern seems to begin with objection by majority to BSD in the Federal Court, followed by approval of BSD by minority and eventually by majority. This was described as uncertainty as the supposedly settled law became seemingly “upended with each consecutive decision attacking the BSD or defending it.”. Similar view was shared by another academic writer in her writing that the majority judgement in *Maria Chin* has certainly dealt a significant blow to it to the effect that BSD and the trilogy of cases became uncertain.¹³⁴ Simply put, “basic structure” becomes pointless and unnecessary. With respect, this can be illustrated in a number of cases. In the celebrated case of *Sivarasa Rasiah* through which the judge eagerly introduced BSD and overruled the long standing landmark case of *Loh Kooi Choon*, it turns out that what the judge ruled as “violation of the basic structure” was simply an argument about violation of

¹³⁰ Benjamin Joshua Ong, The Basic Structure Doctrine, Less Than Meets the Eye, Constitutional Amendments and the Basic Structure in Malaysia” (paper presentation, UM-NUS Joint Hybrid Symposium, October 15, 2022).

¹³¹ [2021] 3 MLJ 759, (per Zaleha Yusof) [258].

¹³² Benjamin Joshua Ong, The Basic Structure Doctrine, Less Than Meets the Eye, Constitutional Amendments and the Basic Structure in Malaysia” (paper presentation, UM-NUS Joint Hybrid Symposium, October 15, 2022).

¹³³ Ibid.

¹³⁴ See *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* see also Jaclyn Neo, “A Contextual Approach to Unconstitutional Amendments”.

fundamental right. There was no need of mentioning basic structure in the first place.¹³⁵ In *JRI Resources*, the real debate was actually about what is judicial power but in the dissenting judgement, it was canvassed in the cloak of the “basic structure”.¹³⁶ In *Titular Roman*, the dissenting judge pointed out that the judiciary is of coordinate status to the other branches of the state because the “basic structure” is “sacrosanct” while in actual fact that was simply an argument about separation of powers in which there is no issue of amenability at the outset.¹³⁷ Likewise, in *Alma Nudo*, the judge stresses that separation of power is part of the basic structure of the Federal Constitution. The effect of this statement highlights certain foundational unwritten constitutional norms. Mentioning the basic structure becomes redundant. In *Rovin Joty*, applying the BSD, the dissenting judge interpreted Article 4 by unpacking the provision into the fundamental pillars of constitutional democracy, constitutional supremacy, separation of power and the rule of law. This case has nothing to do with amenability and the dissenting judge can arrive at the same decision even without ever having to apply BSD. Similarly also in *Dhinesh Tanaphll* in which it was unanimously held that the impugned provision of the Prevention of Crime Act (POCA) should be read subject to Articles 4 and 5(2) of the Federal Constitution following adherence to the BSD. This case, again, does not involve amenability thereby rendering the application of BSD irrelevant.

From the above illustrations, it appears as though the panellists were conflating such expansive argumentations, amounting to obiter in the aforesaid cases, so that such obiter may be referred and cross referred again and again within the same generation of panellist and thus permitting subsequent decisions overseen by the same panellist to

¹³⁵ Benjamin Joshua Ong, The Basic Structure Doctrine, Less Than Meets the Eye, Paper presentation at University of Malaya.

¹³⁶ *JRI Resources Sdn. Bhd. v Kuwait Finance House* [2019] 3 MLJ 561.

¹³⁷ Benjamin Joshua Ong, The Basic Structure Doctrine, Less Than Meets the Eye, Paper presentation at University of Malaya.

purport that BSD has become established and accepted. From Ong's observation, it appears that the conservative view are more clear on the interpretive principles compared to the activist judges' view which seemingly conflated and amorphous. It follows, however, because BSD was applied so assertively and relentlessly, the opposite bench seems to be dragged into the conflation. What ought to be a unanimous decision in upholding judicial control over the executive power ends up divided just because the other camp of the court does not agree about BSD and its application.¹³⁸

Another example is that often times judgement which are not guided by a proper framework tends to reflect what was preached was not practised either by action or by omission. For example, in *Datuk Seri Anwar Ibrahim*, the dissenting view which applied the BSD warned against rewriting the Constitution but in the very same case, its own interpretation departed from the text and extend or restrict meanings based on imported foreign doctrines.¹³⁹

There are also inconsistencies in the application of precedents that applied by both camps to support their cases. There are also cases when the 2 camps agree on the general principles but they do not agree on whether the general principles were complied with or not. Sometimes by using the same test, they both arrive at different conclusions.¹⁴⁰ *Dato Menteri Othman Baginda* was popularly cited by both activist and conservative bench for the principles laid down by Raja Azlan Shah on interpreting the Constitution that, "a constitution being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way."¹⁴¹ "Broadly" and "not in a pedantic way" are both

¹³⁸ [2021] 3 MLJ 759, (per Hasnah Hashim, majority) as opposed to (per Tengku Maimun, dissenting).

¹³⁹ *Datuk Seri Anwar Ibrahim* [2020] MLJU 119, [89].

¹⁴⁰ Ibid.

¹⁴¹ [1981]1 MLJ 29.

general descriptions needing a further explanation. Therefore, it is open for interpretation by both sides of the bench.

It has been a long-standing precedent that *Loh Kooi Choon* sees no ambiguity in Articles 4 and 159 of the Federal Constitution when read together and that it clearly rejects BSD. However, it is to be pointed out that even in interpreting courts earlier judgements, there appears to be inconsistencies. For example, reference to *Loh Kooi Choon* by both side of the court is rather confusing. In *Zaidi Kanapiah*, the dissenting judge showed some effort to reinterpret *Loh Kooi Choon* to be silent on the application of the BSD and therefore not to be understood as conclusive proof for rejecting BSD. The court rejection to the idea of basic structure was understood as only confined to the Indian notion of basic structure¹⁴² and therefore *Loh Kooi Choon* was considered to be fairly reasoned. On the other hand, in *Sivarasa Rasiah*, the court in supporting BSD mentioned clearly that the court's stand in *Loh Kooi Choon* was misplaced.¹⁴³

Historical approach and philosophical arguments, remain as popular approaches by both camps of the court. In supporting BSD, the court artfully defines BSD as articulated in an Indian case, *Kesavananda Bharati*, Canadian cases, *Reference Re Senate Reform*¹⁴⁴ and *Re Session of Quebec*¹⁴⁵ and a Singaporean case, *Mohd Faizal bin Sabtu v. Public Prosecutor*.¹⁴⁶ By applying the two Canadian test derived from the Canadian case in interpreting Article 121(1) of the Federal Constitution for example,

¹⁴² per Tengku Maimun [74], "In Malaysia, the Indian notion of the BSD was rejected in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 [78] From what I can gather, the opinion of the two benches in *Loh Kooi Choon* and *Phang Chin Hock* appears to be this. 'Law' as appearing in art 4(1) of the FC means the same thing as 'federal law' in art 159(1) otherwise known as 'ordinary law'. By confining the definition of 'law' in art 4(1) to simple 'ordinary law', a law amending the FC is not caught by the definition of 'ordinary law' and thus, any amendment to the FC cannot by virtue of that interpretation be taken to conflict with art 4(1).

¹⁴³ *Sivarasa Rasiah* per Gopal Sri Ram [8].

¹⁴⁴ [2014] 1 SCR 704.

¹⁴⁵ [1998] 2 SCR 217.

¹⁴⁶ [2012] SGHC 163.

the court seems to give the impression that foreign cases are more prevailing than what the text means as set out in its own earlier decisions. As a result, the effect of Article 121(1A) is understood from the context of the history of foreign jurisdictions, which are supported by Privy Council decisions and English textbooks without having regard to the history of Malaya itself. In *Datuk Seri Anwar Ibrahim*,¹⁴⁷ the historical approach was applied to explain the intended meaning of separation of power, rule of law and checks and balance. In *Rovin Joty*, the draft of the Reid Commission Report was presented as historical document which allegedly explains the intention behind the omission of Article 4 of the Draft which provided for rule of law, was meant to be broader than what the draft itself proposed and not because the drafters considers it repugnant to the very ethos of the Federal Constitution.¹⁴⁸ It was also claimed that Article 4 of the Draft was intended to be worded more permissively than restrictively because the broader necessarily includes the narrower. Therefore, the conclusion made by the dissenting judge was, by removing Article 4 of the Draft, the drafters intended for the supremacy of the Federal Constitution to be stretched as widely as possible.¹⁴⁹

¹⁴⁷ [2020] MLJU 119.

¹⁴⁸ The Draft reads:

4 Enforcement of the Rule of Law

(1) Without prejudice to any other remedy provided by law —

(a) Where any person alleges that any provision of any written law is void he may apply to the Supreme Court for an order so declaring and, if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and, in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void.

(b) Where any person affected by any act or decision of a public authority alleges that it is void because —

(i) the provision of the law under which the public authority acted or purported to act was void, or

(ii) the act or decision itself was void, or

(iii) where the public authority was exercising a judicial or quasi-judicial function that the public authority was acting without jurisdiction or in excess thereof or that the procedure by which the act or decision was done or taken was contrary to the principles of natural justice,

he may apply to the Supreme Court and if the Court is satisfied that the allegation is correct, the Court may issue such order as it may consider appropriate in the circumstances of the case; ...

¹⁴⁹ [2021] 2 MLJ 822, [83],[88].

The court referred to historical evidence by using historical argument which extended to support the relevance of BSD.

Usage of the same historical and philosophical approach by the conservative bench was quite straightforward and was more confined to what is permitted by the constitutional text. For example, in *Rovin Joty*, in the majority judgment, the historical and philosophical context was derived from what is evident from the draft.¹⁵⁰

The rising trend has been to depart from text on the ground of absurdity.¹⁵¹ Apparently, what was not questionable in the past becomes questionable, absurd and allegedly causing mischief at present. Mischief and ambiguity seems created to open the debate of settled issues.¹⁵² The departure from the constitutional text is often justified with the spirit of living constitution, separation of power and the rule of law as decided in common law cases and some selected local precedents. A clear illustration of the departure from the text can be seen in the judgment in *Letitia Bosman*, which was also reproduced from *Lee Kwon Woh, Alma Nudo, Badan Peguam Malaysia, Sivarasa Rasiah* and *Gan Boon Aun*, the dissenting judgment in interpreting “law” in Articles 4 and 159 of the Federal Constitution as defined in Article 160(2) of the Federal Constitution, which is the written law and the common law in so far as it is in operation in the Federation or any part thereof, any custom or usage having the force of law in the federation or any part thereof, encompassing the common law of England, and the rule of law which requires that law must therefore be clear, stable, generally prospective, of general application, administered by an independent judiciary, which incorporates the

¹⁵⁰ Paragraph 174 of the Report of the Federation of Malaya Constitutional Commission by the Reid Commission in 1957 which succinctly explained the powers accorded to Parliament to enact laws in relation to preventive legislations.

¹⁵¹ See for example in *Maria Chin* (per Tengku Maimun) [28], (per Zainun Ali) [127] in *Indira Gandhi*.

¹⁵² See paragraph [821], [2021] 1 MLJ 750.

right to a fair trial¹⁵³ and includes the rules of natural justice. In *Zaidi Kanapiah*, different set of views on what constitutes “law” were demonstrated. One view is following canons of interpretation whole canon, while the other is using absurdity rules that would justify departure from applying such canons. According to the dissenting judgement, it was stated that the term “law” in Articles 4(1) and 121 of the Federal Constitution as understood textually is “defeated by historical records”. The proper analysis of the historical records, as the dissenting judge claims, “belie the strained method of interpretation”.¹⁵⁴ The absurdity that concerns the dissenting judge lies within the effect of the so called “strained” method of interpretation is that judicial power merely becomes a statutory power which may be curtailed by Parliament which is undesirable from the dissenting judge’s point of view. It seems that, this trend of departure from the text seems to have given more emphasis on other sources as a more prevailing constitutional interpretive source, instead of the constitutional text.

5.4 A PHILOSOPHICAL EVALUATION ON THE MALAYSIAN COURT’S PRACTICE

In this section, a philosophical evaluation is done based on the key aspects as identified and explained in Chapter 2 which forms a criterion to achieve coherence. Input from respondents were analysed in assisting this evaluation.¹⁵⁵ As have been explained in Chapter 2, coherence of interpretation is determined by coherence in worldview. A coherent worldview will result in a coherent understanding of values. An incoherent or unclear worldview will result in incoherence in understanding values and further results

¹⁵³ As defined under section 66 of the consolidated Interpretation Acts of 1948 and 1967, see *Letitia Bosman v Public Prosecutor* [2020] 5 MLJ 277, *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, *Alma Nudo Atenza v Public Prosecutor & Anor Appeal*, [2019] 4 MLJ 1, *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 and *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333

¹⁵⁴ *Zaidi Kanapiah* [2021] 3 MLJ 759, (per Tengku Maimun Tuan Mat), [96], *Alma Nudo* [103]-[104].

¹⁵⁵ Interview questions are based on the research questions

in incoherence in interpretation. Incoherence of method becomes problematic because it carries together incoherent standards of evaluation of values.

From the cases, it is observed that, at the outset, some interpretive approaches have been misunderstood or given a new understanding that departs from its intended purpose. For example, if harmonious meaning is intended to be part of textualism, it is clearly wrong to apply it outside the textual method.¹⁵⁶ From the philosophical legal aspect, this current trend can be described as depicting a reception of consequentialist, positivist and pragmatist view that takes into consideration of the social pressure, and arguing on the basis of natural justice through which values are interpreted relatively. Other than the preferred methodologies of using historical arguments, harmonious interpretation and prismatic approach other common trend within this view is their highlights on *obiter dicta*, minority and dissenting judgments. Unfortunately, these methods appear to have a profound role in justifying collateral attacks on other cases in the effort of building the new trajectory.

5.4.1 Defining Aspects of Interpreting a constitution

There is no unanimous understanding of what are the key aspects in interpreting a constitution and what they mean. However, from the case laws, general principles were laid down without a detailed explanation on the importance of the key aspects upon which the principles were formulated. This way, general principles can be misapplied, misunderstood, or lose its ground. For example, despite reference by many cases to the general principles laid down in *Dato' Menteri Othman Baginda*, they were coloured by the judge of the day because those principles lacked explanation on their philosophical

¹⁵⁶ See discussion on Textualism in Chapter 3.

foundations. In fact, other cases can keep changing it's philosophical grounding to suit the current circumstances.

Generally, all respondents agree that in principle, text plays a very important role in interpreting the Constitution. With the exception of Academician 1 who viewed that language does not carry any fixed meaning and quoted Oliver Wendell Holmes. Academician 2 acknowledged the importance of language but highlighted that in relation to the Federal Constitution, language has been problematic because the English version remains as an authoritative text until present day and that it is seen that there are no positive efforts in making Bahasa Melayu the authoritative text. There is also a lot of discrepancies between the English and the Malay translation of the Federal Constitution. Even if it is in the English language, sometimes a lot of terms are ambiguous. Therefore, to him language can no longer be an important aspect of interpreting the Constitution especially in the context of Malaysia in this day and age. Respondents also generally agree that if the language is clear and unambiguous, the text is to be followed. If the words are unambiguous, other sources can be employed, respondents are also unanimous on resorting to the intention of the text. Respondents vary in the sources to extract the intention. Some respondents would prefer employing the historical arguments. However, they vary in opinion on the sources to support the historical arguments. Most respondents suggest the historical materials such as the Reid Report, the white paper and some respondents suggest historical facts and reports from other jurisdiction from which a provision find its origin, for example, Article 5 was from India and India took from Japan. Thus, check the Japanese debates and historical materials might be relevant materials. Some other respondents prefer moral arguments to support the purpose of a constitutional provision. The sources of moral arguments

are mainly international instruments on human rights. Some others would go further to accept international instruments.

(a) Role of Worldview

The current trend is to lay down general principles based on *sui generis*, broad interpretation, historical arguments, intention and the BSD. However, the manner in which *sui generis* is being applied and understanding what is a narrow or broad interpretation were not discussed as following the rules of language. There has to be a limit to an interpretation whether a restriction or expansion. A proper and coherent worldview that steers clear from the elements of a secularized worldview such as relativism and dualism will be closest to providing a clear framework.

Ultimately all respondents were unanimous that the worldview of judges and their ideologies are strong determining factor in interpreting the constitutional language and values. For example, judges of both sides in *Maria Chin* and *Rovin Joty*, historical materials will be selected in accordance with their ideologies, both used historical arguments but different interpretation of Reid draft report on rule of law and history of POCA.¹⁵⁷ From this it can be confirmed that largely, language and worldview are indeed the key aspects in constitutional interpretation. A lot of respondents also added human rights and fundamental liberties as another key aspect as being attached to the purpose of constitution while some other respondents also added that *stare decisis* remains dominant. On the correlation of methods with legal philosophy, generally all respondents agree to their nexus.

¹⁵⁷ Refer to illustration of *Rovin Joty*'s case under 5.3.3(c).

(b) On Role of Language

Language is the vehicle through which coherence can be achieved. From the cases, it is observed that there is lacking in discussion on definition. If at all discussed, the correct language rules and traditional semantics are neither traceable from the western nor the Islamic sense. Though generally most respondents acknowledged the importance of language, there seems to be confusion in their understanding of the role of language. For example, textualism is mostly understood as literalism or strict constructionism.

Based on the explanation in Chapter 2, what makes the earlier civilizations more coherent in their worldview seems to be their adherence to language rules. It follows that, language can play an important role and serve as a second layer of verification to filter arbitrariness, especially in the times in which worldviews are exposed to distortion.

5.4.2 On the Relationship between Worldview and Constitutional Interpretive Approaches¹⁵⁸

There is generally an agreement that there is relationship of worldview and with constitutional interpretive approaches but considered as not significant and accepted as normative. A few respondents however qualified that it should be kept personal but admit it cannot be avoided.

5.4.3 Evaluation of Coherence

Respondents also generally agreed that the current trend is incoherent and the reasons for incoherence is the differences in worldview of judges. However, they differ on the acceptance of incoherence as a norm. The majority of the respondents agree that

¹⁵⁸ A brief introduction on this topic was given in Chapter 2 and most of the discussion can be found in Chapter 3.

incoherence is a norm in a developing country and is acceptable. But their acknowledgment of incoherence and acceptance of it vary based on their understanding of coherence. Some understand coherence as applying the same interpretive method or measure coherence based on a show of the same ideology while some others treat differences of ideology as acceptable, provided they are legally justified arguments.

Most respondents commented that coherence cannot be measured because there is no one right answer, must give due respect to judicial independence and freedom of judges in making decision. Some respondents are of the view that the court does not mind incoherence because of respect to independence of judges. Some gave example that if the court wants to impose coherence it can be done with the courts power to make a policy of one voice and empanelling system. These are also stated as examples of mechanisms to promote coherence. All respondents agreed that plurality of method is acceptable but some view that amount to incoherence and some opposite. Even among respondents who agree that there is incoherence, accept and acknowledge such incoherence as a norm. Generally, all respondents agree that the current trend is incoherent but some respondents observe that the trend is now slowly moving towards stability with a liberal and progressive approach and accepting of the applicability of BSD.

Overall, it seems that, based on the defining aspects as discussed in Chapter 2, the current trend is losing its grounding on language as the preference grows towards relativism. We have lost both the strong elements and foundation which are also the defining aspects that serve as key to coherence in constitutional interpretation. For words which used to be unambiguous, all respondents are unanimous that they are to be understood in the literal sense. Only the ambiguous words are being subject of discussion in terms of its sources and methods. In the present day, it seems that a lot of

words which used to connote or indicate clear meaning has now become ambiguous and its clarity of meaning becomes debatable and subject to changes following the current needs. For example, gender used to be for just man and woman but now no longer. Equality used to be accepted to be understood to mean following hierarchy but now based on egalitarian which is based solely on human reasoning.

Non textualist approaches are most likely to be vulnerable to incoherence especially if understood within a framework or ideology that succumbs into at least one of the features of a secularized worldview as mentioned in Chapter 2. It follows that the analysis on coherence will be made based on the characteristics of modern constitutional interpretation as follows:

(a) Dualism

Dualism is present in the understanding of judges both from the conservative as well as the liberal ideologies which can be reflected in their judgments. It can be present in both forms and substance. Dualism in form may happen, for example, in applying textualism whereby some judges understand semantic analysis as only confined to literal meaning of words. As a result, text is understood as exclusive of history and tradition. When in actuality, history includes semantic analysis and should not be understood as incoherent with the tradition. Similarly, a living constitutionalist who applies a liberal approach in enforcing values, did it in such a way that departs from the text of the constitution and independent of the meaning of the constitutional provisions under the guise of broader interpretation. The spirit of living constitution does not have to be departing from the text. In fact, the spirit of living constitution can be upheld by paying fidelity to the text.

Dualism in substance can be seen mostly in cases involving jurisdictional conflicts between civil-syariah in which fundamental rights are understood as separated from any religious values or commands. A lot of cases which involve “moral policing” such as *Muhammad Juzaili Khamis*, *Rosliza Ibrahim*, *Iki Putra* and *SIS Forum* reflect a dualist interpretation that if Islamic law is applied and if the Syariah courts are given their jurisdiction, it will not do justice for the other party who is not in favour of the Syariah jurisdiction.¹⁵⁹ Supposedly whether it is the civil court or the Syariah court, justice is one.

Besides, certain key terms and conceptions are treated independent from values when in fact values are inherent in them. For example, right and freedom have been understood as independent of ethics. This also can be seen in some religious offences cases such as in the dissenting judgement of *Juzaili Khamis* and *Lina Joy*. Another striking example can be seen in the understanding of the concept of secular country in the debate of secular versus Islamic country which was influenced by dualism. In *Che Omar Che Soh*, “Islam” was given a secularized meaning that confined it to only rituals and ceremonies.¹⁶⁰ The case was then quoted extensively to support limited application of Islamic laws in the country. It has to be noted here that even if the laws are secular, values in the law do not necessarily have to be denied of its religious values and virtues in human affair.¹⁶¹

¹⁵⁹ *State Government of Negeri Sembilan & Ors v Muhamad Juzaili bin Mohd Khamis & Ors* [2015] MLJU 597, *Negeri & Anor* [2021] MLJU 104, *Iki Putra Mubarrak v Kerajaan Negeri Selangor* [2021] 2 MLJ 323, *SIS Forum Malaysia v Kerajaan Negeri Selangor, Majlis Agama Islam Selangor* [2022] 3 MLRA 131.

¹⁶⁰ *Che Omar bin Che Soh* [1988] 2 MLJ 55.

¹⁶¹ Syed Muhammad Naquib al-Attas, *Prolegomena to the Metaphysics of Islam: An Exposition of the Fundamental Elements of the Worldview of Islam*, (Kuala Lumpur: Penerbit UTM Press, 2014)..

(b) Relativism

Judicial activism attracts mostly non-textualists and liberal minded judges who claim to uphold the spirit of living constitutionalism and treats natural law, natural justice and rule of law as their primary support in advocating human rights and fundamental liberties in the name of justice and equality. Unchecked understanding of justice and equality without a clear approach,¹⁶² or methods which are applied selectively stand a chance of succumbing into relativism. Recourse to a doctrine such as the BSD unconstrained by the Constitution is easily caught under relativism because the doctrine fails to demarcate their own definition with no support of a clear interpretation rules or discerning sources for interpretation.¹⁶³ In *Sivarasa Rasiah*, the judge stated that courts should be free to develop the Malaysian doctrine on the facts of each case.¹⁶⁴ Without a proper framework or correct worldview, this is like a signed blank cheque that can be filled by anyone to suit the desire of the day.¹⁶⁵ When interpretation is done without a proper framework or without using a clear approach, there will be a greater tendency for method shopping and cherry picking and risk of producing a relativistic interpretation. Absolute values will be rejected and all arguments will be accepted to suit the demand and desire of the society. This can be illustrated in some cases, mostly in the recent ones.

¹⁶² See 5.3.3(a) and (d)(i), all cases discussed under this section are subject to relativistic interpretation.

¹⁶³ For more details on detecting relativism see R. George White, "The Consequence of Contemporary Legal Relativism", *University of Toledo Law Review*, vol. 22, no. 1 (1990): 73-106.

¹⁶⁴ *Sivarasa Rasiah*, [2010] 2 MLJ 333 [8].

¹⁶⁵ [2021] 3 MLJ 759, [94].

In *Indira Gandhi*, the methodology was unclear as demonstrated in the earlier section of this chapter.¹⁶⁶ With the impression of an unclear framework, the judgement also made mention of fundamental Islamic conception such as *adl* (justice) and *syura* (consultation) without support of a single decent authority to justify their definition and understanding of such terms.¹⁶⁷ Neither was there any expert opinions to support the view. This amounts to misrepresentation of key terms through inappropriate use and reduction in their meanings. BSD seems to be the primary justification behind most arguments. With absence of a clear worldview or method, various arguments including unsupported prejudicial remark gains approval, as it was shown when the court questions the sincerity of the party and doubted the converting parent's "niyaat" in Islamizing the child.¹⁶⁸ Similarly in *Zaidi Kanapiah*, "natural justice" was not defined. This opens doors to the importation of any relativistic interpretation of values and further, to arbitrariness.

In the spirit of equality and justice, the court departed from its earlier precedent set in *Subashini* and preferred the high court decision.¹⁶⁹ The High Court's decision in *Subashini* which extended the interpretation of the word "parent" has been overturned at the apex level. The Court of Appeal and the Federal Court stick to the meaning of the clear word, a father or a mother. At the High Court, the meaning was extended to both parents as

¹⁶⁶ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.

¹⁶⁷ *Ibid.*, [134].

¹⁶⁸ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, [136].

¹⁶⁹ *Ibid.*, [144]-[145].

“envisaging and enjoining parents to act as a united whole in unison”. This interpretation was claimed to be more consistent with Articles 5, 8 and 11 of the Constitution, norms and convention of equal rights of both parents as understood in the context of the UDHR and CEDAW. The call to depart from *Subashini* came along with a collateral attack against it.¹⁷⁰

In *Maria Chin* the dissenting judge departed from the four walls approach and was inspired by precedents from liberal view in the United States’ in their human rights agenda.¹⁷¹ An analogy with the US Constitution supremacy clause was drawn in aiding the interpretation of the Federal Constitution’s supremacy clause by which constitutional supremacy would be extended to judicial supremacy through the court’s supreme role in interpreting the constitution.¹⁷² In addition, in interpreting the concept of natural justice was also not guided by a clear method. It was claimed to be inspired by Kelsen’s grundnorm theory and also the BSD from India. Natural justice was defined following *Maneka Gandhi* in which it was quoted, “Natural justice here is not therefore natural justice in the administrative law sense of the term. Administrative natural justice relates to situations where there is a breach of some right by the administrative branch. Constitutional natural justice refers to the validity of the law passed, that is, whether the law is fair or oppressive”.¹⁷³ To collaborate and combine both the Kelsenien theory and natural law is not possible as they are not

¹⁷⁰ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, [171].

¹⁷¹ [2021] 1 MLJ 750 (per Tengku Maimun) [788] A distinction between United States and United Kingdom was drawn in paragraph [36].

¹⁷² *Ibid.*, [37] and [38].

¹⁷³ *Ibid.*, [189].

compatible with each other. It is a known fact that Kelsen rejects natural law and promotes legal positivism.¹⁷⁴ Consistent with the effort of elevating the judiciary, the interpretation of Article 4 of the Federal Constitution was expanded to justify judicial supremacy by extending the scope of the role of court. The four walls approach and the landmark cases of *Loh Kooi Choon* was not complied with.¹⁷⁵

5.5 CONCLUSION

From the findings, in view of measuring the level of coherence, it can be seen that constitutional interpretation is greatly influenced by the philosophy of judges in interpreting the key concepts such as justice, equality and right. This was observed from the way judges define terms and digest such concepts. It is also clear that the evolution of the Malaysian judicial philosophy in constitutional interpretation is influenced by judges' ideology, politics and the ruling government. A clear illustration can be seen from the change of direction in the judiciary which was very much related to the appointment of judges with specific ideology in the apex court and change of government in 2018.¹⁷⁶ This was confirmed by most respondents in responding to the research question in relation to the relationship between judicial philosophy and interpretive methods. It also proves worldview as the defining key aspect in interpreting the constitution as mentioned in Chapter 2. In terms of coherence, it is clear that the current trend is not on the path of coherence because of the presence of the root causes of incoherence described under section 2.4 in Chapter 2.

¹⁷⁴ See Peter Langford, John McGarry, Ian Bryan, *Hans Kelsen and the Natural Law Tradition*, (Boston: Brill, 2019), 462.

¹⁷⁵ [2021] 1 MLJ 750 [57], [58] and [793].

¹⁷⁶ Dressel, 1-32; Tew, *Constitutional Statecraft in Asian Courts*, 4.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1 CONCLUSION

This study examines the judicial philosophy of the Malaysian court in interpreting constitutional provisions and evaluate its coherence. This is done by analysing the judicial trend of the Malaysian Federal Court's judgments from which the approaches commonly applied in Malaysia and the manner in which they are applied are identified to understand the court's judicial philosophy in interpreting the constitutional provisions, its development and the direction to which the Malaysian judiciary is heading. By understanding its direction and inclination, judgments can be further introspected for future developments and be a good guide for future reasonings with strong grounding based on proper philosophical groundings. The values and principles that a particular judicial philosophy seeks to uphold would then be a resourceful guide to measure the uniformity and coherence in judgments. From the analysis, patterns of reasoning can also be deduced, if they match any descriptions of any legal-philosophical theories, in view of identifying contributing factors, internal and external, that may influence a judgment. The evaluation will then be significant in identifying the root cause of incoherence which is most crucial in any effort to propose a sound solution. This study is therefore a pioneering work of comprehensive evaluation of coherence in the judicial trend in constitutional interpretation in the Malaysian context, backed by philosophical grounding.

Coherence is key especially in constitutional interpretation, as it is quality of forming a unified whole or quality of being logical and consistent and a systematic or

logical connection or consistency.¹ When an argument is coherent in all of its separate parts with one another, it fulfils the ultimate criterion of truth. The opposite of a coherent system is a chaotic one in which there is no logical pattern or consistency to its behaviour over any immediately practical time frame.² In Islam, one aspect of coherence is in relation to unity of ideas. Coherence in this sense is understood as the internal unity of ideas and mind revealed in intellectual and spiritual coherence which depends upon the soundness and integrity of concepts connoted in language, the instrument of reason which influences the reasoning of its users.³ Incoherence in constitutional interpretation begins with incoherence in worldview and language as explained in Chapter 2 which addresses the first objective of this study.

This study begins with a foundation in Chapter 2 in which the defining aspects of constitutional interpretation which are language and worldview are highlighted from both the western and Islamic perspective. Based on the exposition of the important aspects of constitutionalism and constitutional values, both the classical philosophical view and the view based on Islamic tradition share common ideas which emphasize on the role of language and ideas in relation to democratic values from which most key terms and concepts converge upon. The importance of language in the context of a written constitution is represented by the constitutional text itself while worldview is represented by legal philosophical ideology from which constitutional theories are derived, upon which the constitutional interpretive methods are developed. Having a written constitution, reference to the constitutional text is inevitable. Therefore, the role

¹ Merriam-Webster.com Dictionary, “Coherence”, <<https://www.merriam-webster.com/dictionary/coherence>> (accessed 28 February, 2023).

² Waldrop, M. M., *The Emerging Science at the Edge of Order and Chaos*, (New York: Touchstone, 1992).

³ Syed Muhammad Naquib al-Attas, *Prolegomena to the Metaphysics of Islam: An Exposition of the Fundamental Elements of the Worldview of Islam*, (Kuala Lumpur: Penerbit UTM Press, 2014).

of language is so important such that without primary reference to its rules and semantics, there will be no limit to an interpretation hence leading to whimsical manner of assigning meaning to the constitutional text. In the Islamic tradition, the demarcation is clearer as most disputed terminologies are related to the key terms and concepts such as justice, equality, rights, duties and liberties which are all rooted to the semantic field derived from the Quranic vocabulary. The linguistic structure in the Quran is such that is established upon a fixed system of roots while its semantic structure is governed by a clearly defined system of semantic field that determines the conceptual structures inherent in its vocabulary. For example, when interpreting the fundamental liberties provisions concerning “right” which is derived from the word “*haq*” in Arabic which also connotes “truth”, it should only then be construed within such context that points to truth or as the English word would suggest, to do the “right” thing. Right to commit crime or to express oneself in a way that does not lead to truth therefore should not be acknowledged as of right.

The importance of a sound worldview cannot be understated. Under the western heading, we discuss worldview so that we can understand judicial philosophy from the trend in judgments involving constitutional cases. Under the Islamic discussion, it was clearly laid down by some scholars how important worldview is to shape a person’s judgement or interpretation of values. Worldview in that sense is not discussed in the Western scholarship. It is also in Chapter 2 that assert any worldview that is tainted by the secular features is flawed and incoherent. The secular features which are relevant to the scope of this study is relativism and dualism. Much of the modern constitutional theories and their respective interpretive methods easily succumbs into partaking the secular features as social change has demanded for modernity which includes departing from the textual tradition built upon religious foundation under the pretext of progress

and development. The most important takeaway from this chapter is that a worldview and language become the defining aspects which are key in constitutional interpretation. A worldview that steers clear from the features of a secularized worldview and fidelity to the language through cognizance of the constitutional text is therefore likely to produce the least incoherent judgment and increase a higher chance of coherence.

The nexus between legal philosophical theories, constitutional theories and constitutional interpretive methods is proven and illustrated in Chapter 3 which addresses the second objective of this study. It is also in this Chapter that various interpretive approaches are discussed by exploring their underlying jurisprudence, how they evolved and their characteristics with the emphasis on their respective propositions and aims. Textualist originalism is specially highlighted in this chapter because it gives a strong emphasis in language, its rules and its semantics, which potentially fulfils the defining aspects that becomes a major factor in achieving coherence as discussed in Chapter 2. By establishing in Chapter 3 the relationship between methods and their underlying legal philosophy, it is evident that some methods have been designed or formulated to prove or uphold the legal philosophy they carry. For example, following the liberalist and progressive approach such as consequentialism and pragmatism, moral values are evaluated based on human reasoning devoid of guidance by religion and revelation. The discussion in Chapter 3 can be resourceful in informing whether the application of the approaches, methods and sources are in accordance to the inspiration from which they were formulated with a good opinion that that all methods are intended for a good cause. Incoherence also happens by departing from the original purpose of formulating a certain method apart from application of methods with a distorted framework as a result of a mixed or secularized worldview.

Chapter 4 extends the application of constitutional interpretive methods from Chapter 3 to the Malaysian context. It begins with the presentation the Malaysian constitutional and historical background, with special emphasis on the traditional elements, to set the scene of the local context. The second part of Chapter 4 examines the most commonly applied constitutional interpretive approaches based on analysis of the Malaysian Federal Court judgments from 1960's to 2023, of approximately 150 cases. The common approaches are such as literal reading, broad interpretation, generous interpretation, purposive interpretation and harmonious construction or other source-based approaches such as historical and traditional approach, arguments based on national identity, moral reasoning, doctrines and philosophies. Normatively the Malaysian judiciary upholds constitutional supremacy⁴ and is deferential to the doctrine of separation of powers but varies in its interpretive approach. In each reasonings, 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, the 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.⁵ It was observed from the analysis that the most popular approach that is gaining approval in the Malaysian judiciary seems to be the prismatic approach which gives a new breath

⁴ 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 812 case, 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.

⁵ see also Thomas E. Baker, "Constitutional Theory in a Nutshell", *William and Mary Bill of Rights Journal*, (2004): 108.

to the living constitution approach and the non-amendability of the Constitution which is anchored on the BSD. Through judicial activism, some cases have been claimed to have formed a new trajectory that signifies the change of wave from the conservative view to the liberal view.

It is also important to note that the various canons of interpretation such may overlap as common currency among the liberal view and the conservative view.⁶ It means that, while these different approaches can be grouped together based on their characteristics or their compatibility, it may not necessarily be the case in all instances. Uniformity of approaches does not guarantee coherence in the legal reasoning because coherence means a state of affairs free from inconsistency, which is logically structured and do not suffer from internal contradiction.⁷ There has to be a consensus on at least the fundamental constitutional principles to establish a common ground or a reliable benchmark.⁸ When there is a common ground, there will be uniformity at least at a foundational level.⁹ It follows that if the various interpretive approaches are anchored on a common ground, it will be more likely that their applications will produce a harmonious result. It is for this reason that coherence is described as a special virtue of interpretation in legal reasoning.¹⁰ It has also been suggested that coherence can be

⁶ 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) of the Federal Constitution.

⁷ Julie Dickson, "Interpretation and Coherence in Legal Reasoning," in *Stanford Encyclopedia of Philosophy* (2008). See Levenbook, "The Role of Coherence in Legal Reasoning", *Law and Philosophy*, vol. 3, no. 3 (1984): 373.

⁸ Dickson, 1025.

⁹ see John McGarry, "The Possibility and Value of Coherence", *Liverpool Law Review*, vol. 34, no. 1 (2013): 18.

¹⁰ Dickson, 18

achieved through semantic inquiry.¹¹ Accordingly, textualist originalism will be a model of a best practice, as explained in Chapter 2.

Chapter 5 is an extension of Chapter 4 which presents a more critical analysis of the Malaysian Federal Court judgements from the philosophical perspective to evaluate coherence. Responses from participating respondents from amongst judges, practitioners and academicians are also incorporated in this chapter. From the findings, it can be seen that constitutional interpretation is greatly influenced by the philosophy of judges in interpreting these concepts from the way they define terms and digest concepts, in view of measuring the level of their coherence. Chapter 5 also aims at illustrating the salient points established in Chapters 2 and 3, through the Malaysian Federal Court cases, the connection of certain approaches with certain ideology by demonstrating that choices of methodologies are determined by the courts' worldview that is manifested through the legal philosophies from which they originate. The worldview will then define the choices of sources and approaches. It is also clear that the evolution of the Malaysian judicial philosophy in constitutional interpretation is influenced by judges' ideology, politics and the ruling government. A clear illustration can be seen from the change of direction in the judiciary which was very much related to the appointment of judges with specific ideology in the apex court and in 2018, change of the ruling government¹² which were instrumental in forming a new trajectory that signifies the change of wave from the conservative view to the liberal view. This was confirmed by most respondents in responding to the research question in relation to the relationship between judicial philosophy and interpretive methods. It

¹¹ 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 Scalia, *Reading Law* and Aharon Barak, *Purposive Interpretation*.

¹² See Dressel, 6; Tew, *Constitutional Statecraft in Asian Courts*, 18.

also proves worldview as the defining key aspect in interpreting the constitution as mentioned in Chapter 2. In terms of coherence, it is clear that the current trend is not on the path of coherence because of the presence of the root causes of incoherence described under section 2.4 in Chapter 2. Overall, Chapter 5 confirms the hypothesis through a detailed analysis of incoherence in the context of Malaysia in relation to the features of a secularized worldview which is relativism and dualism which contributes in perversion of key terms and key concepts.

To sum up, any judicial philosophy which is devoid of a proper worldview and departs from original meaning and the language rules will result in incoherence in interpretation. The current judicial philosophy of the Malaysian court is incoherent because it departs from the text, is based on an unclear worldview and tilting towards judicial overreach and departure from the text. This last chapter concludes by summarizing the important takeaways from each chapter and presents a recommendation of a more coherent interpretive approach which realizes the defining aspects as elucidated in section 2.2.4 of Chapter 2 and which steers clear from the features of a secularized worldview as also discussed in section 2.4 of Chapter 2. It was observed that the most methodical approach that fits in such description is what has been called as textualist originalism that was propounded by Justice Scalia.

As far as the Islamic perspective is concerned, it is to be pointed out here that it is not branding of “Islamic approach of constitutional interpretation” that should be the main concern. Instead, it is the preservation of key terms and concepts which are more fundamental as have been clearly elucidated in Chapter 2. It is also acknowledged that the Constitution being governed by the general principles of *dusturi* in Islam cannot be interpreted using another general law such as the *Shariah* or natural law. Its generality and universality show flexibility because it does not even prescribe a particular form of

government structure whether monarchy or democratic any particular mode of constitutional interpretation. As have been explained, matters of *siyasi* are *juz'i* in nature. By virtue of this flexibility, Islam gives room for any contemporary theory to be developed or any best practices to be preferred as long as they are in compliance with the fundamental principles. In its flexibility lies its dynamism from which the concept of dynamic stabilism can be derived while dismissing the features of a secularized worldview as mentioned in section 2.4. Therefore, textualist originalism, if understood properly, can best fulfil such description. 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 understanding original meanings given that the Malay *adat* has a strong root in the Islamic tradition. To do justice on this argument, is only fair that a further illustration on this point is devoted in another research.

6.2 BEST PRACTICES AND RECOMMENDATIONS

While it is true that there is no one correct method, there needs to be a possible recommendation based on the guidelines in the interest of uniformity. It is therefore, highly recommended that the one that is the most compliant with the defining aspect is likely to be a preferred method. From the lessons learnt from the past, it should also be noted on how not to interpret the Constitution. Interpretation should not succumb into the relativistic, dualistic or making semantic change on meanings of words following social change as these are the main factors which prevent coherence as have been explained in Chapter 2. A sound solution can therefore be found in methods in which those features are absent.

Though it is not fully guaranteed that a completely mature theory of constitutional interpretive method can be presented, but it is still possible to propose a theory most likely to be in compliance with the factors supporting the defining aspects that leads to coherence and mitigate arbitrariness. This is a legitimate expectation that has to be acknowledged given that interpretation has an aspect of human factor which is the judges' minds, of which no one method can claim to have control. The best practice is therefore considered based on methods and rules which are best in emphasizing the defining aspects. As explained in Chapter 2, the defining aspects are important because, if carefully observed and properly understood, they serve as a guide to provide better chances for achieving coherence in constitutional interpretation, as well as a benchmark for coherence. Though it has been mentioned earlier that coherence may not be guaranteed with the application of any single approach, but for the purpose of uniformity, some methods are highlighted as a preferred method, with some modifications. As observed in Chapter 3, only Scalia made an effort to come up with a convincing methodical approach for constitutional interpretation which is what his proponents describe as "textualist originalism". Others have been vague.

From what has been explained in Chapter 3, originalism may have been used interchangeably with intentionalism in most writings. It has been associated with intentionalism as some scholars understood originalism as mainly referring to original intent. However, the version of originalism which seemingly a candidate of best practices that gives due consideration to the defining aspects is Scalia's understanding of originalism which places great emphasis on original meaning of words. Intent is to be derived solely from the text. Therefore, he proposes that the objective meaning be

made the sole criterion of interpretation.¹³ Textualist originalism as explained by Scalia,¹⁴ is the most grounded to the defining aspects because firstly, through their great reliance on textualism, it promotes fidelity to language in general and the constitutional text in particular. Secondly, from the philosophical point of view on language, textualism being the most classic method is more grounded to truth.¹⁵ In the interest of coherence, textualists believe that the goal of judicial interpretation is to give effect to the text that law makers have adopted and that the people are entitled to rely on.¹⁶ In some literatures, originalism has been associated with strict textualism. Scalia rebutted this claim and explained that textualist 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. The fair reading approach as explained by Scalia is a defining feature of textualist originalism. Scalia also reminded that a democratic nation needs written constitution not to reflect current values but to protect values against prevailing wisdom. To determine current values will be done through elections, not by judges.¹⁷ Originalism is good for the purpose of coherence, it emphasis on general rules that can provide “notice and certainty to the public that is expected to obey the law”, ensuring consistent treatment and not be subjected to the predilections of the current justices on the court or to “shifting popular opinion”.¹⁸ Textualist originalism has a higher chance of preventing judges, who claims to represent the society, from changing the law in ways

¹³ Scalia, *Reading Law*, see under Preface.

¹⁴ See discussion in Chapter 3 under Originalism.

¹⁵ For example, the Quranic vocabulary which is protected from the semantic change because of the root system and the *mukjizat* that it is immutable).

¹⁶ Scalia, *Reading Law*, see under the heading “The How of This Book”.

¹⁷ Antonin Scalia, Ed. Kevin A Ring, *Scalia’s Court: A Legacy of Landmark Opinions and Dissents*, , (USA: Regnery Publishing, 2004), 4..

¹⁸ *Ibid.*, 2.

that violate the enduring values the nations enshrined in the text of the Constitution¹⁹ or adding new rights or restriction of individual liberty without textual or historical support which could have been simply added without following the procedures set forth in the Constitution itself. It is important that judges steer clear from policy making role, as understood under the separation of power doctrine. The strength of textualist originalism is that it is clear of its approach and very methodical as compared to most non textualists. As Scalia has rightly pointed out, “you can’t beat my methodology with no methodology”.²⁰

Though textualist originalism may have some characteristics of positivism, it does not have the element of separation between law and morality nor does it promote value neutral interpretation. Priority is given to reasonable textual meaning and in any event of ambiguity, original meaning stands as supported by long established custom and tradition.²¹ Original meaning is not confined to only empirical based claim. The problematic feature of positivism which is the separation of law and morality and to be value neutral is not present. If it has been approved by the tradition, it can be recognized as original meaning.

Textualist originalism is a perfect fit for the Malaysian legal framework. As explained in Chapter 4, the Malaysian legal system is characterized by the Westminster system with some modifications to suit its unique feature. This unique feature is none other than the traditional elements which became the defining feature and identity for Malaysia which are pivotal in shaping the Malaysian legal philosophy. Therefore, it is very important to choose a method that is most accommodative and protective of the traditional elements. It is also trite that the founding fathers of Malaysia were showing

¹⁹ Scalia, *Scalia’s Court*, 4.

²⁰ Scalia, *Reading the Law*, 8

²¹ Scalia, *Scalia’s Court*, 89.

deference to the country's democratic structure through their understanding of separation of power. To show deference to the country's respective arms from the Islamic worldview is to put things in its place. To place great emphasis on structure in the eyes of originalist and in the Malaysian context it has long been practiced. This can be understood to be equivalent to following *adat* by which prioritizing duty above than rights is not contradictory to the Syariah principles as explained in Chapter 2.

It has been highlighted 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 of Scalia. It can be said that the general principles listed by Scalia represents all that is required in constitutional interpretation to ensure coherence and stability. However, in the Malaysian context, because there were hardly any literature to develop any scholarship which specifically focuses on the application of any text-bound approaches, such an idea could not be systematically developed in the context of constitutional interpretation.

For example, the original meaning as explained by Scalia should be based on the meaning employed when the Constitution was ratified. This means the best references such as lexicons must be those which are representing the age in which the constitution was ratified to find the right meaning. It is 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 *adah* (convention) in Malaya at that time. Throughout the Malaysian legal history, *urf* and *adat* has been recognized as authoritative in a judicial process. This is

none other than taking into consideration the early practices, which is also has a very strong backing in Islamic law which forms one of the traditional elements.²² Originalism gives due consideration to *urf and adat* through language as guide.²³ Values from the *adat* are inherent in the language. Language and values are understood in harmony hence resulting a coherent interpretation.

It is therefore timely that the Malaysian court adopts textualist originalism especially in combating the threat of judicial overreaching. It was admitted that activist law making involves keeping pace with ideas that have gained acceptance in the society.²⁴ Therefore, judicial activism if not curbed may pose danger as “acceptance” in the society has become trendy and very much dependent on relativism thereby causing judicial overreaching to be rampant and accepted as a norm. Largely, value judgments which are based on relativistic interpretation may grow into arbitrariness. There is a high risk of the non-textualist approach to be vulnerable to relativism which further leads to arbitrariness and then to injustice. Incidentally, living constitutionalism is usually favoured when departing from the text because of its open endedness and its capacity for redefinition over time.²⁵

Clearly, textualist originalism can be the most workable method in Malaysia though a further illustration on the application of originalism in Malaysia can be devoted in further research. To recommend this approach is does not only serve to illustrate best practices but it can be a good model to demonstrate possibility of achieving a coherence from both the established western and Islamic tradition. Through originalism as a

²² Refers to Islamic maxim “*Al-Adah muhakamah*”.

²³ Originally language should represent custom, they are not interpreted separately or dualistically. Define *adat* and its relationship with language; *adat* is defined by language-possibly many scholarly opinions. There are certain conditions to be fulfilled in order for ‘*urf* and *adat* in order to be admissible as authoritative.

²⁴ Faruqi, Speech Delivered at Lincoln’s Inn in 2018, 27.

²⁵ Cass Sunstein, *The Partial Constitution*, (U.S.: Harvard University Press, 1993), 99.

vessel, it is hoped that efforts supporting its application in Malaysia to be a catalyst to revive the importance of language. By applying originalism, it is hoped that judges will do what is within their power following the language rules as the main guide for interpretation.

Ultimately textualist originalism is a lesser evil weighing the available options within the system. For the purpose of this thesis, recommendations are made based on the higher likelihood of arriving at a more predictable pattern. Just as Scalia emphasized, he never claimed that originalism guaranteed accuracy but it is superior to all other alternatives. With limitation of time and space, a more detailed deliberation on this debate will be reserved for another research. As far as this thesis is concerned, suffice to mention here that textualist originalism is the most workable approach within our constitutional system that can preserve our unique tradition that forms our country's identity.

6.2.1 Legitimate Expectations

It is important to mention at the outset that, though there is no guarantee that originalism is a perfect or a problem-free approach, it is believed to be the closest approach towards achieving coherence and the best alternative to mitigate arbitrariness. Arbitrariness is influenced by human factor and cannot be entirely controlled by judicial power. 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 lexicons. This approach is also balanced with other democratic branches of government which are the executive and the legislative. Conversely, as for the living constitution approach, the minds of judges are relied upon to measure moral progression and act upon their perception without a standard measure.

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 to enforce an unjust law. As Raja Azlan Shah said, the cure is with the "ballot box". Any indeterminacy that arises is not left unaddressed and can be amended through legitimate and democratic process by the legislative bodies. Scalia's approach balances the judges' role and the parliament as the best arbiter for public interest. While originalists generally 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. To optimize the workability of this approach, there has to be some administrative measures to support its application such as ensuring the drafting policies to always be consistent and up-to-date especially in terms of usage of terminologies and clarity in expressing them. All parties involved in the amendment process from the policy makers from the relevant Ministries, the legal advisers and the drafters must be at the same page in understanding the terms and concepts from the provisions sought to be amended.

6.2.2 Awareness and Reforms

(a) Collective roles

In the effort to strive towards coherence, there has to be a collective role. The court is not the sole body to ensure coherence. Incoherence of a collective agency should not be countered by an arbitrary power focused on one agency or one individual in authority. Incoherence of understanding between agencies and individuals should be remedied by a proper education based on a clear and coherent worldview.

For example, Dewan Bahasa dan Pustaka (DBP), which is 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 preserving and reviving the original meanings of words especially value-laden terms. Given that language also carries worldview, it is also important that, for the purpose of local use, the English language is translated to Malay language following the local context to ensure there is no mix up of worldviews that can result in confusion and error in understanding. Other bodies such as a judicial academy, the Judicial Appointment Committee and the Judicial and Legal Training Institute (ILKAP) can contribute immensely as well.

(b) Reviving the Original Meanings of Key Terms and Key Concepts

The original meaning of words and key principles should be restored through lexicons and treatise to ascertain right usage of words at every level of society. Among the legal fraternity, the text is a medium to convey the law from legislature to the judiciary and the counsels. There has to 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.

(c) Reform on legal education

This is to be done based on the proper understanding of the concept of knowledge and education. The above efforts can only be possible when an educational reform is done to ensure proper understanding of the concept knowledge and education. Since it has been made clear on importance of the role of worldview, education is no doubt key to having a clear worldview. Though to rehabilitate the state of education is likely to be a long-term project which does not promise an overnight transformation, it can begin with an awareness on the importance of the right education which can start immediately. The legal fraternity should not escape the educational reform which includes refinement of their ethics. The Islamic worldview for example, stresses on *adabul qadi* for judges which rests upon the internal factor of legal interpretation, which is the mind of the judge. Judges' ethics are very important given that, as remarked by Eugen Erlich, judges' personality influence justice and that there is no guaranty of justice except the personality of the judge, as said by Cicero. The judge is indeed the speaking law.²⁶

²⁶ Jan M Van Dunné, "The Personality of the Judge and Legal Decision Making in Private Law" (paper presentation, Annual Meeting of the Law and Society Association, Toronto, Canada, June 3-6, 1982).

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