COMPARATIVE ORIGINALISM IN CONSTITUTIONAL INTERPRETATION IN ASIA

Originalist approaches to constitutional interpretation take many forms across different constitutional contexts. This article examines the diversity of approaches to using constitutional history in constitutional interpretation and explores its practice across four Asian constitutional systems. It begins by examining the different ways in which constitutional courts and actors approach constitutional history. The article then explores at greater depth the constitutional practice of originalist arguments in four Asian jurisdictions: Malaysia, Singapore, India, and Hong Kong. The article concludes with reflections on the broader comparative observations gained from considering the salience of constitutional history in these Asian contexts.

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I. Introduction

1 Originalist approaches to constitutional interpretation take many forms.[1] An historical inquiry can draw on the original intentions or understandings of the meaning or application of the constitutional text. Originalism has become a prominent fixture of academic, judicial, and popular discourse in the US. Debate over the role that originalist analysis should play in constitutional interpretation continues to preoccupy a vast amount of American legal and political discussion. Yet, until recently, the use of originalist arguments outside the US has received little attention.[2] Conventional accounts have tended to

1 This article draws on Jamal Greene & Yvonne Tew, "Comparative Approaches to Constitutional History" in *Comparative Judicial Review* (Rosalind Dixon & Erin Delaney eds) (Edward Elgar Publishing, forthcoming) and Yvonne Tew, "Originalism at Home and Abroad" (2014) 52 Colum J Transnat'l L 781.

2 See, *eg*, Grant Huscroft & Bradley Miller, "Introduction" in *The Challenge of Originalism: Theories of Constitutional Interpretation* (Grant Huscroft & Bradley W Miller eds) (Cambridge University Press, 2011) at p 10: "[o]riginalist theory has little purchase outside the United States", Jack M Balkin, "Nine Perspectives on Living Originalism" [2012] U Ill L Rev 815 at 838: "American ideas of originalism are not widely adopted outside the United States", Kim Lane Scheppele, "Jack Balkin Is an American" (2013) 25 Yale JL & Human 23: "[i]nquiring this closely into a constitution's original meaning is done almost nowhere else in the world" and David S Law, "Judicial Comparativism and Judicial Diplomacy" (2015)

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characterise the notion of comparative originalism as an oxymoron. In recent years, however, an emerging body of scholarship has begun to explore the prevalence of originalist arguments in comparative contexts globally.[3]

2 This article examines the diversity of approaches to using constitutional history in constitutional interpretation and explores its practice across four common-law Asian constitutional systems. It begins in part II by examining the different ways in which constitutional courts and actors approach originalist arguments. Part III then turns to the use of constitutional history in the practice of constitutional review in the Asian jurisdictions of Malaysia, Singapore, India, and Hong Kong. All four case studies are post-colonial states that possess common-law systems based on British legal traditions with judiciaries that engage in constitutional review. The article concludes by reflecting on the broader comparative observations gained from considering the use and practice of originalism in constitutional interpretation in Asia.

II. Using originalism

3 Originalism has become a moving target.[4] In the US, originalist theory has evolved substantially from its beginnings as a primarily conservative movement with the aim of providing purportedly neutral criteria to restrain judges in constitutional adjudication. Contemporary work on originalism has offered various accounts that view originalism in terms of a positivist framework,[5] or as compatible with judicial activism[6] and even living constitutionalism.[7]

4 The discussion below considers how courts and constitutional actors use originalist arguments in diverse ways and for varied reasons.

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163 U Pa L Rev 927 at 932: "originalism has become a fixture of judicial, academic, and even popular debate in the United States but … it is 'simply not the focus, or even a topic, of debate elsewhere'".

3 See, *eg*, Yvonne Tew, "Originalism at Home and Abroad" (2014) 52 Colum J Transnat'l L 781, Jamal Greene, "On the Origins of Originalism" (2009) 88 Tex L Rev 1 at 5, David Fontana, "Comparative Originalism" (2010) 88 Tex L Rev 189 at 197, Ozan O Varol, "The Origins and Limits of Originalism: A Comparative Study" (2011) 44 Vand J Transnat'l L 1239 and Lael K Weis, "What Comparativism Tells Us about Originalism" (2013) 11 Int'l J Const L 842.

4 See Thomas M Colby & Peter J Smith, "Living Originalism" (2009) 59 Duke LJ 239.

5 See William Baude "Is Originalism Our Law?" (2015) 115 Colum L Rev 2349 at 2358–2361.

6 See Randy E Barnett, *Restoring the Lost Constitution* (Princeton University Press, 2003).

7 See Jack M Balkin, *Living Originalism* (Belknap Press, 2011).

It explores five variations in how a constitutional interpreter might approach originalist arguments in constitutional adjudication.

A. Intention or meaning?

5 Should inquiry into historical understandings focus on the original *intentions* of the drafters or the *meaning* of the constitutional text? Some originalist accounts (such as the first wave of the US originalism movement) focus on the intentions of the framers or drafters of the provision.[8] Alternatively, original-meaning theories of historical inquiry focus on the meaning a hypothetical reasonable person would have given the text when it was adopted. The distinctions between intentionalist and original-meaning-based approaches are often obscured in practice,[9] although they have substantially different theoretical foundations and can produce different results.

6 Consider, for example, the South African Constitutional Court's decision in the landmark case of *S v Makwanyane*.[10] In that case, the Constitutional Court acknowledged that the interim South African Constitution's negotiators had deliberately declined to prohibit capital punishment. Nevertheless, the court held that the death penalty was incompatible with the right to life guaranteed in s 9 of the South African Constitution.[11] The South African court appears to adopt a version of the view that a court should be bound by the applications to which the ratifying generation affirmatively committed the nation, but not by what that generation believed the commitment excluded.[12]

7 Contrast the Singapore Court of Appeal's reasoning in *Yong Vui Kong v Public Prosecutor*[13] ("*Yong Vui Kong*"), a case that also involved the constitutionality of the death penalty. Singapore's highest appellate court found that the lack of an explicit textual prohibition against inhuman treatment indicated that the mandatory death penalty did not infringe upon the right to life guaranteed by Singapore Constitution.[14] The Court of Appeal's originalist methodology in *Yong Vui Kong* is heavily focused on the textual meaning: it relies heavily on the lack of any explicit provision prohibiting inhuman punishment in the

8 See, *eg*, Robert H Bork, "The Constitution, Original Intent, and Economic Rights" (1986) 23 San Diego L Rev 823.
9 See Jamal Greene, "On the Origins of Originalism" (2009) 88 Tex L Rev 1 at 10.
10 1995 (3) SA 391.
11 The Constitution of the Republic of South Africa (as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly).
12 See Jed Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* (Harvard University Press, 2005) at p 14.
13 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489.
14 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [61]–[63].

Constitution as evidence of the original understanding of the provision. The Singapore court's originalist approach appears in service of legislative deference; it employs constitutional history as part of its prevailing legalistic interpretative approach.

8 Across the border in Malaysia, however, originalist discourse is characterised by a focus on constitutional history and the intent of the framers.[15] References to original intent dominate the Malaysian courts' originalist jurisprudence.[16] Originalist arguments in the Malaysian context have not centred on the textual public meaning of the Malaysian Constitution at the time of drafting.[17] Rather, originalist inquiry in constitutional interpretation is heavily influenced by the constitutional history surrounding its drafting. Extrinsic historical evidence is relied on by the courts not merely to provide an understanding of the context, but to determine the actual intentions of individual framers.[18] The Art 3(1) constitutional clause, which declares Islam as the religion of the Federation, has become the focal point of polarising debates over the religious identity of the Malaysian state. Secularists and Islamists battle over whether constitutional history supports their interpretation of the Art 3(1).[19] The overriding theme that emerges from the use of originalism in practice in Malaysia is that it is focused on the historical understandings and intentions of those involved in the drafting of the Malaysian Constitution.

B. Expectations or purposes?

9 Constitutional history may be invoked to identify the specific expectations that members of an earlier generation had as to how the

15 Yvonne Tew, "Originalism at Home and Abroad" (2014) 52 Colum J Transnat'l L 780 at 817 and 845–849.

16 See *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 at 56, *Teoh Eng Huat v Kadhi, Pasir Mas* [1990] 2 MLJ 300 at 301, *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi* [2000] 5 MLJ 375 at 384F, *Lina Joy v Majlis Agama Islam Wilayah* [2004] 2 MLJ 119 at 129, [18], *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585 at [3] and *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at 311.

17 Federal Constitution (Reprint, as at 1 November 2010) (M'sia).

18 For example, in *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin* [2009] 5 MLJ 464, the Malaysian Court of Appeal relied on an academic article published in the Cambridge Law Journal written by Ivor Jennings – one of the framers of the Malaysian Constitution – as extrinsic evidence in deciding how to interpret constitutional provisions about the head of State's right to dismiss a chief minister. Zainun Ali J exhorted the court to "have regard to extraneous matters such as [the Jennings] article … in order to distill the original and true intent behind constitutional provisions": at 534.

19 Federal Constitution (Reprint, as at 1 November 2010) (M'sia) Art 3(1): "Islam is the religion of the Federation; but other religions may be practised in peace and harmony".

constitution would apply. But a court may also invoke history to identify the broader purposes or values that motivated the constitution or its particular provisions. Viewed in this way, contemporaneous history helps to reveal the animating aims behind a constitutional document or the mischief it was meant to avoid. By contrast, an approach based on original expected applications ties current interpretation to the specific ways through which the founding generation thought to vindicate the constitution's ends.[20]

10 Consider the purposive use of constitutional history in India. The Indian Constitution's[21] starting point is usually invoked to identify the purpose behind the broader plan established at the nation's founding.[22] References to the framers of the Indian Constitution are used to support arguments about these constitutional purposes.[23] For example, in the Indian Supreme Court's significant decision on judicial appointments in 2015, the court repeatedly referred to the Constituent Assembly debates and other sources surrounding the drafting of the Indian Constitution in reaching its decision regarding judicial primacy in the appointment process.[24]

11 Examples of purposive interpretation can be seen elsewhere, including in contexts not traditionally associated with historical argument. In a Japanese Supreme Court case holding that a Shinto ground-breaking ceremony did not offend the separation of State and religion provided in Art 20 of Japan's Constitution,[25] dissenting judges made much of the history of state-sponsored religion following the 1868 Meiji Restoration.[26]

12 These examples invoke history to identify a problem the Constitution or its particular provisions were meant to remedy. Identifying those broader aims does not bind a constitutional interpreter to resolve current problems just as the framers and drafters would have contemplated. Rather, it suggests an interpretive approach that looks to the overarching purposes of the constitutional project.

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20 See Kim Lane Scheppele, "Jack Balkin Is an American" (2013) 25 Yale JL & Human 23 at 27.

21 Constitution of India (updated up to (One Hundredth Amendment) Act, 2015).

22 Sujit Choudhry, "Living Originalism in India? 'Our Law' and Comparative Constitutional Law" (2013) 25 Yale JL & Human 1 at 3.

23 Sujit Choudhry, "Living Originalism in India? 'Our Law' and Comparative Constitutional Law" (2013) 25 Yale JL & Human 1 at 3.

24 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776.

25 The Constitution of Japan (promulgated on 3 November 1946, came into effect on 3 May 1947).

26 "Case 34. *Kakunaga v Sekiguchi* (1977), The Shinto Groundbreaking Ceremony Case" in *The Constitutional Case Law of Japan, 1970 through 1990* (Lawrence W Beer & Hiroshi Itoh eds) (University of Washington Press, 1996).

C. Pluralist or dispositive?

13 Constitutional interpretation tends to be pluralistic. Courts typically supplement historical inquiry with other interpretive methods, whether grounded in text, doctrine, prudential reasoning, or prior precedent. On this pluralist view, constitutional history is one resource among many. Courts favouring a more determinative role for originalist understandings, on the other hand, regard the conclusions reached through historical analysis as dispositive or deserving of greater weight in interpretation.

14 For example, the Singapore Court of Appeal's decision in *Yong Vui Kong* reflects a more dispositive approach toward originalist understandings, compared to the pluralistic constitutional interpretation approach generally exhibited by the Indian Supreme Court. Consider also the US Supreme Court's decision in *District of Columbia v Heller*, which held that a Washington, DC prohibition on handgun possession infringed the Second Amendment of the US Constitution.[27] The court front-loaded its opinion with an extensive inquiry into the historical meaning of the Amendment's text. Only after its historical discussion did the court ask "whether any of [its] precedents forecloses" the conclusion it reached through historical analysis.[28] Placing history in this kind of privileged position reflects a different approach than one that views it as one resource among various other forms of interpretive analysis.

D. Interpretation or rhetoric?

15 History can be invoked as an interpretive tool, but it can also serve a rhetorical function. Judges in constitutional cases are aware that their audience is not merely the parties to the litigation; it also includes their colleagues on the bench as well as a broader public. The values the judges articulate and the relative weights they assign to those values must resonate with the public if the Judiciary's institutional legitimacy is to endure.

16 The burdens of persuasion may support a distinctly rhetorical invocation of history. In Malaysia, for example, originalist arguments extend well beyond the courts because it has rhetorical potency in public discourse.[29] Judges, scholars, politicians and activists mobilise originalist

27 See *District of Columbia v Heller* 554 US 570 (2008).

28 *District of Columbia v Heller* 554 US 570 at 619 (2008).

29 References to the "founding fathers" or "framers" in the same sentence as the "constitution" appeared in three major Malaysian publications 305 times from 2001 to 2004 and 285 times from 2005 to 2009. From 2009 to 2012, these terms (*cont'd on the next page*)

arguments to support their claims over Malaysia's secular or Islamic status because of the public appeal of such arguments.

17 Originalism's rhetorical appeal has been observed elsewhere. In the US, for example, originalism not only occupies a prominent place in public and political culture, but has also become a "site of popular mobilization".[30] Turkey provides another illustration. As Ozan Varol has observed, the Turkish Constitutional Court has conducted extensive historical analysis into the original vision of Mustafa Kemal Ataturk, the founder of the Republic of Turkey, in cases implicating Turkey's secular commitments.[31] Varol attributed this practice to a "cult of personality" around Ataturk, whom "the Turkish nation views … as a quasi-divine figure, a God-like war hero, and a foresightful President who led a battered nation from despair to glory".[32] The imprimatur of such a figure is an important resource in constitutional argument because of the rhetorical salience it provides.[33]

18 A constitution's rhetorical resonance, however, can cut both ways. If the drafting of the constitution is not a source of national pride, reference to the framers could carry negative weight. Several post-colonial African leaders have rejected Westminster or French-influenced constitutions, as Hastings W O Okoth-Ogendo has observed, ostensibly because those documents established non-autochthonous institutions that failed to fit local political and social conditions.[34]

E. Rules or standards?

19 Some constitutional provisions state clear, determinate rules. Other constitutional provisions are expressed as a standard or a general principle. Constitutional clauses that state a rule, standard, or principle lend themselves differently to historical analysis. Drafters use clear

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appeared in the same publications 216 times. These data are on file with the author. The newspaper publications used in the search are New Straits Times (Malaysia), Bernama (Malaysia General News) and The Edge.

30 Robert Post & Reva Siegel, "Originalism as Political Practice: The Right's Living Constitution" (2006) 75 Fordham L Rev 545 at 548.

31 Ozan O Varol, "The Origins and Limits of Originalism: A Comparative Study" (2011) 44 Vand J Transnat'l L 1239; see also section IIIC (*ie*, paras 40–55) below (discussing the role of B R Ambedkar in Indian constitutional rhetoric).

32 Ozan O Varol, "The Origins and Limits of Originalism: A Comparative Study" (2011) 44 Vand J Transnat'l L 1239 at 1283.

33 See Jamal Greene, "The Case for Original Intent" (2012) 80 Geo Wash L Rev 1683.

34 See Hastings W O Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in *Constitutionalism and Democracy: Transitions in the Contemporary World* (Douglas Greenberg *et al* eds) (Oxford University Press, 1993) at pp 65, 68 and 72.

rules – often in relation to the structure of government or historical compromises like treaties – when they wish to express a complete statement to limit discretion in future application. By contrast, provisions guaranteeing individual rights tend to be stated in broader, abstract terms as standards or principles. The nature of these rights provisions often calls for construction and development by future generations.

20 Judges in Malaysia that advocate a rights-expansive interpretation of the bill of rights in the Malaysian Constitution, for instance, typically use the language of originalism in a purposive manner. Proponents of this approach exhort the courts to "adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution".[35] According to this view, the framers themselves had contemplated the necessity of constitutional construction by future generations: "the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights".[36]

III. Doing originalism: Comparative case studies

A. Malaysia

21 Constitutional history in Malaysia is frequently invoked in debates over the role of Islam in the Malaysian Constitution. Contemporary Malaysian politics and adjudication divide over whether the modern Malaysian State is secular or Islamic. The Malayan Constitution, later the basis for the Constitution of Malaysia, came into force when Malaya gained independence from the British on 31 August 1957. Much of the debate has centred over the Art 3(1) clause: "Islam is the religion of the Federation; but other religions may be practised in peace and harmony".[37]

35 *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 at 288; see also *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia* [1999] 1 MLJ 266 at 271: "the Federal Constitution, unlike any ordinary statute, does not merely declare law … It also confers upon individuals certain fundamental and inalienable human rights, such as equality before the law. Its language must accordingly receive *a broad and liberal construction in order to advance the intention of its framers*" [emphasis added].

36 *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at 312 (quoting *Boyce v The Queen* [2004] 3 WLR 786).

37 Federal Constitution (Reprint, as at 1 November 2010) (M'sia) Pt I, Art 3(1).

22 Growing Islamist political and social discourse in Malaysia over the past three decades has challenged the established understanding during the constitution-making process that the Art 3(1) declaration of Islam's position would not undermine the new Malayan Constitution's secular foundation.[38] Historical arguments have featured prominently in the legal and political battleground. In the wake of growing Islamisation, its proponents have employed historicist rhetoric to expand Islam's constitutional scope. Secularists, in response, have sought to defend the Malaysian Constitution's secular basis by seeking recourse to the historical context and original understanding of Art 3(1).

23 Initially, constitutional arguments relied on the original intent of the framers to establish the Malaysian Constitution's secular foundations. In the 1988 decision of *Che Omar bin Che Soh v Public Prosecutor*,[39] the Malaysian Supreme Court was clear about the court's focus of inquiry: "[t]he question here is this: Was this the meaning intended by the framers of the Constitution"?[40] Using a historical lens, the court concluded that Malaya's history of British colonialism and drafting history showed that Islam's role was confined only to "rituals and ceremonies".[41]

24 Two years later,[42] the Malaysian Supreme Court likewise focused on the framers' intent to affirm the Malaysian Constitution's secular foundations:[43]

> Although normally … we base our interpretative function on the printed letters of the legislation alone, in the instant case, we took the liberty … to ascertain for ourselves what purpose the founding fathers of our Constitution had in mind when our constitutional laws were drafted …

25 Those wishing to prioritise Islam's position in the constitutional order, however, have mobilised historicist rhetoric to promote Islam's supremacy in the constitutional scope. In *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi*,[44] for example, the Malaysian High Court judge focused heavily on constructing a historical account of the constitutional bargain, arguing that the framers had intended to secure a

38 See, *eg*, Her Majesty's Stationary Office (London), *Report of the Federation of Malaya Constitutional Commission* 1957 (Colonial No 330) at p 99–100; see also generally Joseph M Fernando, "The Position of Islam in the Constitution of Malaysia" (2006) 37 *Journal of Southeast Asian Studies* 249.

39 [1988] 2 MLJ 55.

40 *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 at 56.

41 *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 at 56–57.

42 *Teoh Eng Huat v Kadhi, Pasir Mas* [1990] 2 MLJ 300.

43 *Teoh Eng Huat v Kadhi, Pasir Mas* [1990] 2 MLJ 300 at 301.

44 [2000] 5 MLJ 375.

dominant position for Islam as the result of the social contract between the Muslims and non-Muslims.[45] And, in *Lina Joy v Majlis Agama Islam Wilayah*,[46] the Malaysian High Court judge insisted that interpreting religious freedom to allow Muslims to convert out of Islam "would result in absurdities not intended by the framers" of the Malaysian Constitution.[47] The Malaysian High Court's historical accounts have been criticised as "revisionist" and "erroneous".[48] What is striking, however, is the courts' insistence on using historical arguments to support an expansive interpretation of the Islamic clause in the face of established Malaysian Supreme Court precedent confining Islam's Art 3(1) scope.

26 Judges who viewed this expansion of Islam's position with alarm fought back on originalist turf. In his dissent against the Malaysian Federal Court's majority opinion in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan*,[49] Richard Malanjum J asserted that the courts have a duty to uphold the individual's right of religious freedom. Significantly, the dissenting judge viewed *his* interpretation as faithful to the original intent of the constitutional framers: "[s]worn to uphold the Federal Constitution, it is my task to ensure that it is upheld at all times by giving effect to what I think the founding fathers of this great nation had in mind when they framed this sacred document".[50]

27 Recourse to constitutional history in Malaysia has also been used to advocate a purposive approach to interpreting the Malaysian Constitution's provisions on fundamental liberties.[51] Judges supporting such an approach exhort the adoption of "a liberal approach in order to implement the true intention of the framers of the Federal Constitution".[52] Proponents of this living originalist approach[53] seek to empower courts to protect individual rights from legislative infringement by *expanding* the scope of enforceable rights, and advocate

45 *Meor Atiqulrahman bin Ishak v Fatimah bte Sihi* [2000] 5 MLJ 375 at 384 and 385.
46 [2004] 2 MLJ 119.
47 *Lina Joy v Majlis Agama Islam Wilayah* [2004] 2 MLJ 119 at 129, [18]; see also Federal Constitution (Reprint, as at 1 November 2010) (M'sia) Art 11(1): "[e]very person has the right to profess and practice his religion".
48 See Li-ann Thio & Jaclyn Ling-Chien Neo, "Religious Dress in Schools: The Serban Controversy in Malaysia" (2006) 55 International and Comparative Law Quarterly 671 at 681–683.
49 [2007] 4 MLJ 585 at 623–624, [53].
50 *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585 at 619, [23].
51 See, *eg*, *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at [22]–[23].
52 *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 at 288; see also *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at 312.
53 Compare Jack M Balkin, *Living Originalism* (Belknap Press, 2011) at p 23 (arguing that "interpreters must be faithful to the original meaning of the constitutional text and to the principles that underlie them").

finding implied rights by looking at the Malaysian Constitution's text and founding principles.[54]

28 Strikingly, historical argument in Malaysia is often the domain of political liberals seeking to increase judicial oversight of the legislative process and the expansion of individual rights. Constitutional history is employed in support of a more rights-expansive constitutional adjudication approach and is not associated with judicial constraint. Secularists routinely reach back to the Malaysian Constitution's founding premises to argue for more robust protection of religious freedom and other constitutional rights.

29 Originalist discourse in Malaysia is characterised by a focus on the intent of the framers and the history surrounding the constitution-making process, rather than the textual meaning.[55] Historical evidence is viewed favourably as an extrinsic interpretive aid to determine the actual intentions of individual framers.[56]

30 Another feature of the use of constitutional history in Malaysia is that it has not been confined to the courts but has a distinctly popular dimension.[57] Debate over the original understanding of Art 3(1) extends well beyond the judicial sphere and historical arguments have rhetorical potency in the popular discourse. Like in the US,[58] the Malaysian Constitution has public salience in Malaysia and narratives about its founding and those involved in its framing carry authority in the public sphere.

31 Secularists and Islamists in Malaysia battle so deeply over the history surrounding the constitutional founding because it is, in essence, a struggle over the nation's identity. Constitutional history provides a way for political and legal actors to articulate a narrative about the nation's constitutional identity.[59] In Malaysia, historical arguments have potency in judicial and popular discourse because of its role in linking constitutional narrative with national identity.

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54 See, *eg*, *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 (right to life) and *Muhammad Hilman bin Idham v Kerajaan Malaysia* [2011] 6 MLJ 507 (freedom of assembly and association).

55 See Yvonne Tew, "Originalism at Home and Abroad" (2014) 52 Colum J Transnat'l L 780 at 845–849.

56 See, *eg*, *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin* [2009] 5 MLJ 464 at 534.

57 See Yvonne Tew, "Originalism at Home and Abroad" (2014) 52 Colum J Transnat'l L 780 at 813–814.

58 See Jamal Greene, "Selling Originalism" (2009) 97 Geo LJ 657 at 672–696.

59 See Carolyn Evans, "Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia" (2009) 23 Emory Int'l L Rev 437 at 438.

B. Singapore

32 Unlike Malaya's Constitution, which was conceived amidst the political excitement surrounding the road to independence, Singapore's constitutional origins emerged from more pragmatic circumstances. Singapore achieved independence from the British when, together with Sabah and Sarawak, it joined the Malayan Federation in 1963 to form the Federation of Malaysia. The union was unhappy and brief. In August 1965, Singapore separated from the Federation to become its own sovereign state. Instead of drafting a new constitution for the newly independent State, the Singapore government cobbled together a working constitution from a composite of several documents,[60] which were only consolidated in 1980. Although much of the Singapore Constitution[61] – particularly its fundamental liberties provisions – is based on Malaysia's Constitution, it is distinct in several ways; for example, the Singapore Constitution contains no reference to any established religion, and Malaysia's constitutional clause on Islam's position has no Singaporean counterpart.

33 The prevailing interpretive approach of the Singapore courts toward the Singapore Constitution has been characterised by strict legalism and a highly deferential stance toward the powerful political branches of government.[62] In light of Singapore's lack of momentous constitutional founding moment, it is unsurprising that judicial appeals to history have not featured prominently in its constitutional jurisprudence. That is, not until the Singapore apex court's prominently originalist decision in *Yong Vui Kong v Public Prosecutor*.[63] This 2010 case involved a challenge to the constitutionality of the mandatory death penalty brought by the appellant who had been convicted of drug trafficking.[64]

34 The Court of Appeal unanimously rejected Yong's argument that the mandatory death penalty constituted an inhuman punishment that violated the right to life guaranteed by Art 9(1) of the Singapore

60 The Constitution of the Republic of Singapore, in 1965, was essentially a composite of its amended state Constitution, the Republic of Singapore Independence Act 1965, and the applicable provisions of the Federal Constitution (1964 Reprint) (M'sia). These three documents were finally consolidated in 1980 when the Attorney-General was authorised to issue a reprint of the Constitution of the Republic of Singapore.

61 Constitution of the Republic of Singapore (1999 Reprint).

62 See Jaclyn L Neo, "Introduction" in *Constitutional Interpretation in Singapore* (Jaclyn L Neo ed) (Routledge, 2017) at pp 3–6.

63 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489.

64 See Misuse of Drugs Act (Cap 185, 2001 Rev Ed) (mandating the death penalty for trafficking 15g or more of heroin).

Constitution.[65] The court's opinion upholding the constitutionality of the mandatory death penalty is self-consciously originalist, focused on the constitutional text and intent of the framers. The court refused to find an implied prohibition against inhuman punishment in the Singapore Constitution, reasoning that the constitutional history at the time of drafting indicated that the framers had deliberately omitted to include such a prohibition.[66] In reaching its conclusion, the Singapore court rejected the relevance of Privy Council decisions from several Caribbean states with post-colonial constitutions that had overturned similar legislation mandating the death penalty,[67] emphasising these cases were decided "in a different *textual* context".[68] According to the court, the lack of any explicit textual provision prohibiting inhuman punishment in the Singapore Constitution was evidence of the framers' original understanding.[69]

35 The court attempted to support this understanding of Art 9 by dwelling on the original intent of the framers. Interestingly, in the case of Singapore, its Constitution was based on the Malaysian Constitution, which had been drafted by a constitutional commission chaired by Britain's Appeal Court Judge Lord Reid.[70] Despite the oddity of relying on the original intent of another nation's constitutional drafters,[71] the then Chief Justice paid particular attention to the Reid Commission *not* having recommended a prohibition against inhuman treatment, even though such a provision already existed in the European Convention on Human Rights at the time Malaya's Constitution was drafted. Since the "omission … was clearly not due to ignorance or oversight" on the part of the drafters,[72] concluded the court, to find that Art 9(1) encompassed such a prohibition would be "to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions".[73] The court also noted that Singapore's constitutional commission, convened in 1966, had proposed adding an express prohibition against inhuman punishment "but that proposal was ultimately rejected by the Government".[74] Thus, it was "not legitimate for [the] court to read into Art 9(1) a constitutional right which was

65 Constitution of the Republic of Singapore (1999 Reprint) Art 9(1): "[n]o person shall be deprived of his life or personal liberty save in accordance with law".
66 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [60]–[75].
67 See, *eg*, *R v Watson* [2005] 1 AC 472, *Bowe v The Queen* [2006] 1 WLR 1623 and *Reyes v The Queen* [2002] 2 AC 235.
68 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [50].
69 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [61].
70 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [62].
71 See Po Jen Yap, "Uncovering Originalism and Textualism in Singapore" in *Constitutional Interpretation in Singapore* (Jaclyn L Neo ed) (Routledge, 2017).
72 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [62].
73 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [59].
74 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [64].

decisively rejected by the Government in 1969, especially given the historical context in which that right was rejected".[75]

36 The Singapore court maintained its focus on constitutional history in two subsequent cases involving the same appellant. In 2011, the court drew on the "legislative history of the clemency power in this jurisdiction" to conclude that the Singapore Constitution "excludes any role for the President's personal discretion in the exercise of the clemency power",[76] despite the Singapore Constitution's textual provision that the President "may, on advice of the Cabinet" grant such a pardon.[77] The court also rejected Yong's appeal against his caning sentence, stating that there was "no evidence in the historical record" to indicate that the understanding of the right to "life" under Art 9(1), when the provision was adopted into the Singapore Constitution, prohibited corporal punishment.[78]

37 The originalist approach employed by the Singapore Court of Appeal bears little resemblance to the appeals to history displayed across the border in Malaysia. The Singapore court's originalist approach is less reactionary and historicist than its Malaysian counterparts, with little salience in public discourse. Judicial recourse to originalist arguments in Singapore is marked by legalism, and focused on text and precedent. Constitutional interpretation in Singapore is heavily formalist – and its originalist jurisprudence is no exception. The court in *Yong Vui Kong* adopted a narrowly textualist interpretation of the original understanding in service of judicial deference to the Legislature.[79] In contrast, invocations to history in Malaysia are typically employed to *expand* the scope of constitutional provisions – whether connected to religion or fundamental rights – and to motivate constitutional change.

38 Judicial invocation of history by the Singapore court reflects its deferential approach to the political branches. The court employs originalist arguments as a prudential doctrine: it is concerned with constraining judicial discretion and used in service of ensuring deference toward legislative majorities. Indeed, the court's original intent analysis appears strained largely because it is focused on the *legislative* intent of the Singapore Parliament, rather than the intent of the framers. It gives great weight, for instance, to the Singapore Parliament's act of not implementing the constitutional commission's

75 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [72].
76 *Yong Vui Kong v Attorney-General* [2010] 2 SLR 1189 at [174].
77 Constitution of the Republic of Singapore (1999 Reprint) Art 22P; see also Po Jen Yap, "Uncovering Originalism and Textualism in Singapore" in *Constitutional Interpretation in Singapore* (Jaclyn L Neo ed) (Routledge, 2017) at 123.
78 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [23].
79 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [49] and [52].

recommendation to insert a prohibition against inhuman treatment in 1966 – despite the fact that the commission made its recommendations four years after the Singapore Constitution came into effect.[80]

39 The manner in which historical arguments are employed in Singapore is unsurprising in light of its constitutional culture, which reflects "a predominant constitutional pragmatism"[81] due, at least in part, to its Constitution's beginnings as a basic working plan for governance. The Singapore court's reliance on history is in service of judicial deference, focused on text, and has little salience in the popular discourse outside the courts.

C. India

40 The Indian Constitution's creation is indissolubly linked to a narrative of the nation's independence. The making of the Indian Constitution began several months before India emerged from colonial rule in July 1947, and the final constitutional product came into force in January 1950. "In the Indian constitutional imagination", Sujit Choudhry observed, "the Constitution marks a decisive and sharp break with the past and was a central element in the formation of Indian polity".[82]

41 Historical appeals in India's constitutional practice resonate with the country's constitutional project and national identity. The Indian Constitution's starting point is invoked to identify the purpose behind the broader constitutional project established at the founding. References to the framers of the Indian Constitution – particularly, its chief architect, B R Ambedkar – are made to support arguments about these constitutional purposes. In this way, "Indian constitutional argument routinely reaches back to founding premises of the constitutional order to apply it to contemporary circumstances".[83]

42 The Indian Supreme Court's approach to constitutional interpretation has been described as "eclectic",[84] although this has not

80 See *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [64].

81 Li-ann Thio, *A Treatise on Singapore Law* (Academy Publishing, 2012) at paras 02.070–02.086 (describing Singapore's constitutionalism as "focused on experience … rather than an idealistic focus on abstract values".

82 Sujit Choudhry, "Living Originalism in India? 'Our Law' and Comparative Constitutional Law" (2013) 25 Yale JL & Human 1 at 3.

83 Sujit Choudhry, "Living Originalism in India? 'Our Law' and Comparative Constitutional Law" (2013) 25 Yale JL & Human 1 at 3.

84 Chintan Chandrachud, "Constitutional Interpretation" in *The Oxford Handbook of the Indian Constitution* (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds) (Oxford University Press, 2016) at p 73.

appeared to erode the court's institutional legitimacy in the public's view. While the Indian Supreme Court has not consistently adhered to a single, coherent interpretive approach, constitutional history has a presence in Indian constitutional practice. We offer three such examples.

43 Consider first the Indian Supreme Court's landmark decision in 2015 in *Supreme Court Advocates-on-Record Association v Union of India*[85] (hereinafter "*NJAC Case*"). Invoking the "basic structure" doctrine for only the fourth time in the court's history,[86] the court struck down a constitutional amendment and statute enacted to change the judicial appointments process. Since the court's 1993 decision in the "*Second Judges Appointments Case*",[87] judges have been appointed to the Indian Supreme Court and High Court through a "collegium" system of appointments, in which the Indian Chief Justice and other senior justices of the Indian Supreme Court play a primary role in the appointments process. The Indian Parliament, in 2014, sought to replace the "collegium" system with an appointments process led by a national judicial appointments commission. In a four-to-one majority decision, the court declared both the amendment and law unconstitutional for violating the independence of the Judiciary, a part of the basic structure of the Indian Constitution.

44 The focus on constitutional history in the *NJAC Case* is striking. In arguing the Government's case, the Attorney-General relied "emphatically" on the Constituent Assembly debates to argue that the Indian Supreme Court's earlier judgments on judicial appointments had been "diagonally opposite" to the "intent and resolve of the Constituent Assembly".[88] In response, the court's opinions repeatedly referred to the drafting debates to support the majority's conclusion that judicial primacy in the appointment process is an integral part of the independence of the Judiciary.

45 Kehar J, in his leading majority opinion, made frequent reference to Ambedkar's statements in Constituent Assembly debates over judicial appointments pertaining to judicial independence to assert that the drafters had intended that the appointments process be

85 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776.

86 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776; see also *L Chandra Kumar v Union of India* [1997] 3 SCC 261; *Minerva Mills v Union of India* [1980] 3 SCC 625; *Indira Nehru Gandhi v Raj Narain* (1975) 1 Suppl SCC 97.

87 *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441.

88 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776 at [17], [73] and [124], *per* Khehar J.

"shielded" from "political considerations".[89] Concluding that this was the framers' "true intent" behind the constitutional clause that the President appoint judges after "consultation" with the Chief Justice,[90] Kehar J declared that the word "consultation" could not "be assigned its ordinary dictionary meaning".[91]

46 Lokur J's opinion, too, paid close attention to history. Beginning with an invocation that "those who do not remember their past are condemned to repeat their mistakes",[92] he employed historical arguments to argue that the understanding at the time was that the President should consult and defer to the Chief Justice.[93] In addition to the Constituent Assembly debates[94] and Ambedkar's views – which he quoted at length[95] – Lokur J referred extensively to other sources from the time of the Indian Constitution's creation, such as memoranda submitted to the drafting committee,[96] as well as Granville Austin's influential work on the Indian Constitution and Constituent Assembly debates.[97]

47 The accuracy of the *NJAC Case* majority's historical claims regarding the primacy of the Judiciary in judicial appointments have been contested.[98] But the interpretive moves made by the majority are

89 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776 at [79].

90 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776; see also Constitution of India, Art 124.

91 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776 at [77], *per* Khehar J.

92 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776 at [4], *per* Lokur J.

93 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776 at [54].

94 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776 at [34]–[53].

95 *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776 at [18]–[24].

96 See *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776 at [31], [36], [38], [43] and [45]–[50].

97 See *Supreme Court Advocates-on-Record Association v Union of India* [2015] INSC 776 at [32] (referring to Granville Austin, *Indian Constitution: Cornerstone of a Nation* (Clarendon Press, 1966)).

98 See, *eg*, Arghya Sengupta, "Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Inquiry" (2011) 5 Indian J Const L 99 at 126 (arguing that the original understanding of "judicial independence" adopted by the Constituent Assembly was that there should be a "multiplicity of authorities checking and balancing each other") and Chintan Chandrachud, "Debating the NJAC Judgment of the Supreme Court of India: Three Dimensions" *UK Constitutional Law Association* (3 November 2015) <https://ukconstitutionallaw.org/2015/11/03/chintan-chandrachud-debating-the-njac-judgment-of-the-supreme-court-of-india-three-dimensions/> (accessed

(*cont'd on the next page*)

originalist, grounded in appeals to the intent of the framers and the aims behind the drafting of the Indian Constitution.

48 A second example of the use of constitutional history in practice is the decision of the Delhi High Court in *Naz Foundation v Government of Delhi*[99] ("*Naz Foundation*"). In this 2009 case, the court held a provision of The Indian Penal Code criminalising same-sex activity unconstitutional for violating constitutional guarantees of equality and liberty.[100] Appealing in soaring terms to the ideals and motivations behind the drafting of the equality and liberty provisions in the Indian Constitution, the court declared that "[t]hese fundamental rights had their roots deep in the struggle for independence".[101] Endorsing Granville Austin's characterisation of the Indian Constitution as "first and foremost a social document", the Delhi court made clear that it considered the Indian Constitution as aimed at achieving or fostering a "social revolution by creating an egalitarian society".[102]

49 In rejecting public morality as a justification for limiting rights, the Delhi High Court used Ambedkar's constitutional morality as a guide, noting that "[t]his aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly".[103] It "would be against constitutional morality", the court concluded, "to criminalize homosexuals only on account of their sexual orientation".[104] In this judgment, which has been called "a return to Ambedkar", the Delhi court "turned for help, to an older moment, a moment of origin".[105]

50 The *Naz Foundation* decision by the Delhi High Court has been hailed as an illustration of "a comparative, engaged living originalism in practice".[106] What is clear is that the use of history in *Naz Foundation* is

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31 August 2017); *cf* Khagesh Gautam, "Constitutionality of the National Judicial Appointments Commission: The Originalist Argument" http://nja.nic.in/P-950_Reading_Material_5-NOV-15/4.%20Khagesh%20Gautam.pdf (accessed 31 August 2017).

99 *Naz Foundation v Government of NCT of Delhi* (2009) 160 DLT 277.

100 *Naz Foundation v Government of NCT of Delhi* (2009) 160 DLT 277; see also The Indian Penal Code, Arts 14 and 21.

101 *Naz Foundation v Government of NCT of Delhi* (2009) 160 DLT 277 at [52].

102 *Naz Foundation v Government of NCT of Delhi* (2009) 160 DLT 277 at [80].

103 *Naz Foundation v Government of NCT of Delhi* (2009) 160 DLT 277 at [79].

104 *Naz Foundation v Government of NCT of Delhi* (2009) 160 DLT 277 at [80].

105 Gautam Bhan, "On Freedom's Avenue" in *The Right That Dares Speak Its Name* (Arvind Narrain & Marcus Eldridge eds) (Alternative Law Forum, 2009) at p 94.

106 Sujit Choudhry, "Living Originalism in India? 'Our Law' and Comparative Constitutional Law" (2013) 25 Yale JL & Human 1 at 18; see also Vikram Raghavan, "Navigating the Noteworthy and Nebulous in Naz Foundation" (2009) 2 NUJS L Rev 397 (arguing that "*Naz Foundation*'s beauty is that it skillfully mixes

(*cont'd on the next page*)

not in service of a rigidly textualist or a specific application form of originalism. As Sonia Katyal writes, the *Naz Foundation* court "reframed the concepts of originalism and morality to demonstrate how both ideas demanded the overturning of such laws".[107] The historical arguments invoked by the Delhi court go to the fundamental project and overarching goals of the Indian Constitution's establishment; it sounds in the "conscience of the Constitution".[108]

51 In 2013, the Delhi High Court decision was overturned by the Indian Supreme Court.[109] The court's panel decision upholding the constitutionality of the Indian penal code provision pays little attention to constitutional history. Yet, in a sense, the scepticism it expresses regarding relying on foreign experiences, in its association of Lesbian Gay Bisexual and Transgender (or "LGBT") rights claims with Western values,[110] appears to speak in the language of the Indian Constitution as an anti-colonial project.

52 Contrast the *Naz Foundation* Delhi High Court's judgment with the Indian Supreme Court's narrowly originalist approach in *AK Gopalan v State of Madras*[111] ("*Gopalan*"). This 1950 case involved a constitutional challenge to legislation authorising preventive detention. The court refused to interpret the Art 21 guarantee of due process for deprivations of life or liberty as containing any substantive protections. As long as the preventive detention statutes had been duly enacted according to procedures established by the Legislature, no due process had been violated.

53 Notably, in choosing to reject substantive due process in *Gopalan*, the court explicitly looked to the drafting history of Art 21.[112] India's constitutional framers had sought to avoid the American constitutional experience with substantive due process by amending the original wording of the Indian Constitution's due process clause;[113] Felix Frankfurter J, no less, had played a role in warning the drafters of the Indian Constitution to avoid the risk of *Lochner*-esque economic

originalism, rarely invoked by Indian courts, with pragmatism in constitutional interpretation").

107 Sonia K Katyal, "The Dissident Citizen" (2010) 57 UCLA L Rev 1415 at 1465.

108 *Naz Foundation v Government of NCT of Delhi* (2009) 160 DLT 277 at [80].

109 *Koushal v Naz Foundation*, Civil Appeal No 10972 of 2013 <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> (accessed 31 August 2017).

110 *Koushal v Naz Foundation*, Civil Appeal No 10972 of 2013 <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> (accessed 31 August 2017) at [52].

111 (1950) 1 SCR 88.

112 *AK Gopalan v State of Madras* (1950) 1 SCR 88 at 110–111.

113 *AK Gopalan v State of Madras* (1950) 1 SCR 88 at 111.

libertarianism.[114] Commenting on the court's decision, Burt Neuborne noted: "[a]s a matter of strict originalism, the *Gopalan* court was probably justified in declining to read substantive protections in article 21".[115] Indeed, the draftsmen had "carefully drafted" the clause precisely "to limit the judiciary's ability to apply it expansively".[116]

54 The *Gopalan* court's due process interpretation would be rejected in *Maneka Gandhi v Union of India*.[117] There, the Indian Supreme Court recognised an implied substantive due process right and advocated an expansive, purposive approach to the interpretation of fundamental rights, which would pave the way for the court to take on an assertive role in constitutional rights protection. Today, the *Gopalan* court's narrow approach to due process and originalism has fallen away from Indian constitutional jurisprudence even as the Indian Supreme Court has cemented its powerful institutional position against the political branches of government.

55 Constitutional interpretation in India is pluralistic, not predominantly focused on history. Nevertheless, when invoked, the power of historical arguments resonates with the broader ideals of India's constitutional project.

D. Hong Kong

56 Since coming into force on 1 July 1997, Hong Kong's Basic Law[118] has been a fault line of tension between the Hong Kong Court of Final Appeal and the Standing Committee of the National People's Congress of the People's Republic of China ("NPCSC"). The contestation over the Basic Law – and the role of constitutional history in its interpretation and application – exemplifies the broader conflict between the two systems of different ideological, cultural and legal traditions within modern Hong Kong.[119]

114 Burt Neuborne, "The Supreme Court of India" (2003) 1 *International Journal of Constitutional Law* 476 at 479, n 21.

115 Burt Neuborne, "The Supreme Court of India" (2003) 1 *International Journal of Constitutional Law* 476 at 479, n 21.

116 Burt Neuborne, "The Supreme Court of India" (2003) 1 *International Journal of Constitutional Law* 476 at 479, n 21.

117 *Maneka Gandhi v Union of India* (1978) 2 SCR 621.

118 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

119 Johannes Chan, "Hong Kong's Constitutional Journey, 1997–2001" in *Constitutionalism in Asia in the Early Twenty-First Century* (Albert H Y Chen ed) (Cambridge University Press, 2014) at pp 169 and 170–171.

57 Drafted by members of a committee drawn mostly from Mainland China and approved by NPCSC, the Basic Law codified policies in accordance with the Sino–British Joint Declaration of 1984[120] providing for Hong Kong to operate with a high degree of autonomy upon its transfer from Britain to China. Promulgated in 1990 by the National People's Congress, it came into effect in 1997 when Hong Kong become a Special Administrative Region under Chinese sovereignty. Final power to interpret the Basic Law is vested in NPCSC.[121] While the courts are authorised to interpret provisions of the Basic Law as well, the interpretations of NPCSC are binding on the courts of Hong Kong.

58 Despite the political climate in which it operates, the Court of Final Appeal has "ascended"[122] into the role of "custodian of the constitution";[123] it has done so by developing its own jurisprudence toward interpreting the Basic Law. The court has generally favoured a purposive approach, focused on the text, and has been sceptical of narrowly conceived historical claims tied to the original intent of the Basic Law's drafters. Advocating a "purposive approach" in *Ng Ka Ling v Director of Immigration*,[124] the court endorsed ascertaining the "true meaning" of the Basic Law by considering "the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context".[125] The court declared the Basic Law "a living instrument intended to meet changing needs and circumstances".[126] As commentators have observed, this living constitutionalist approach is in line with traditions of common law constitutionalism familiar to the Hong Kong legal system.[127] In this sense, it is Burkean, rather than historicist.

59 NPCSC, on the other hand, has not hesitated to refer to the original intent of the drafters of the Basic Law in its interpretations of the constitutional document. Reliance on legislative materials related to

120 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong.

121 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art 158.

122 Eric C Ip, "The Politics of Constitutional Common Law in Hong Kong under Chinese Sovereignty" (2016) 25 Wash Int'l LJ 565 at 565.

123 Albert H Y Chen & P Y Lo, "The Basic Law Jurisprudence of the Court of Final Appeal in *Hong Kong's Court of Final Appeal: The Development of Law in China's Hong Kong* (Simon N M Young & Yash Ghai eds) (Cambridge University Press, 2014) at pp 352 and 390.

124 *Ng Ka Ling v Director of Immigration* [1999] 2 HKCFAR 4.

125 *Ng Ka Ling v Director of Immigration* [1999] 2 HKCFAR 4 at [74].

126 *Ng Ka Ling v Director of Immigration* [1999] 2 HKCFAR 4 at [73].

127 Eric C Ip, "The Politics of Constitutional Common Law in Hong Kong under Chinese Sovereignty" (2016) 25 Wash Int'l LJ 565 at 593.

the drafting and enactment of the Basic Law form part of NPCSC's interpretive approach.[128] For example, in its 1999 Interpretation of the Basic Law, NPCSC referred to the written opinion of a preparatory committee in 1996 as evidence of the original legislative intent.[129] It then announced that "the interpretation of Court of Final Appeal [was] not consistent with the legislative intent".[130]

60 The Court of Final Appeal refused to take the original intent approach to interpreting the Basic Law highlighted by NPCSC. Two years later, in *Director of Immigration v Chong Fung Yuen*,[131] the court declared that task of the courts "is not to ascertain the intent of the lawmaker on its own".[132] "Once the courts conclude that the meaning of the language of the text when construed in the light of its context and purpose is clear", stated the then Hong Kong Chief Justice, "the courts are bound to give effect to the clear meaning of the language".[133] A court tasked with interpreting the constitution should not "on the basis of any extrinsic materials depart from that clear meaning and give the language a meaning which the language cannot bear".[134] After this case, Eric Ip observed, "Hong Kong judges seemed to have no obligation to follow the Standing Committee's arbitrary claims of 'original' intent".[135]

61 In light of the fact that the drafters of the Basic Law were mostly from Mainland China, it is unsurprising that the Hong Kong courts have continued to strenuously avoid interpretation based on the framers' intent. There is clearly a concern, as Albert Chen put it: "[i]f the original intent were to be given effect to, does this mean that the Basic Law would have to be interpreted in accordance with mainland Chinese

128 Simon Young, "Legislative History, Original Intent, and the Interpretation of Basic Law" in *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Hualing Fu, Lison Harris & Simon N M Young eds) (Palgrave Macmillan, 2007) at pp 15 and 16.

129 The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) And 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic Of China (adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999).

130 The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) And 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic Of China (adopted at the Tenth Session of the Standing Committee of the Ninth National People's Congress on 26 June 1999).

131 *Director of Immigration v Chong Fung Yuen* [2001] 4 HKCFAR 211.

132 *Director of Immigration v Chong Fung Yuen* [2001] 4 HKCFAR 211 at 223.

133 *Director of Immigration v Chong Fung Yuen* [2001] 4 HKCFAR 211 at 225.

134 *Director of Immigration v Chong Fung Yuen* [2001] 4 HKCFAR 211 at 225.

135 Eric C Ip, "The Politics of Constitutional Common Law in Hong Kong under Chinese Sovereignty" (2016) 25 Wash Int'l LJ 565 at 583.

thinking, assumptions, values and interest"?[136] This would only be the case, however, if interpretation were based on an original intent approach narrowly conceived. If we consider "[h]ow the constitutional text was understood by members of the community at the time of enactment", the historical context would include how the people of Hong Kong understood the wording and promise of the Basic Law when it was being drafted during the period following the Sino–British Joint Declaration.[137]

62 Writ large, though, the conflicts over the application of the Basic Law in modern Hong Kong are not simply over different interpretive methods but also between different institutional interpreters. Which forms of historical argument have salience – and with whom – depends a great deal on the particular political, cultural, and historical context of Hong Kong's "one country, two systems" arrangement under Chinese sovereignty.

IV. Conclusion

63 Originalism's variations across different comparative contexts underscore the value of a contextually-sensitive perspective in exploring the practice of constitutional interpretation. The uses of constitutional history in the four Asian jurisdictions explored in this article are complex and diverse. What the comparative analysis does highlight is that the salience of originalist arguments in a particular constitutional context is deeply connected to the nation's political and historical traditions and also often connected to temporal socio-cultural elements.

64 Historical arguments appear to thrive, for instance, in constitutional contexts where there is popular identification with the narratives associated with the constitution's founding. Originalist arguments have appeal in judicial and popular discourse in Malaysia – as they do in the US – because they are tied successfully to a constitutional narrative about the nation's independence that resonates with the people. In Singapore, the use of originalist interpretation in judicial reasoning has taken a more prudential form because of the more pragmatic role its Constitution occupies in its context as a result of its constitutional origins and history. The Court of Final Appeal's scepticism of the originalist methods of interpretation endorsed by NPCSC reflects a broader contestation over how Hong Kong's Basic Law should be regarded and who should interpret it. Factors related to

136 Albert H Y Chen, "The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives" (2000) 30 HKLJ 380 at 421.

137 Albert H Y Chen, "The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives" (2000) 30 HKLJ 380 at 421.

formal constitutional design and change may also influence the use of originalist arguments. For example, frequent constitutional amendment might dull references to the original constitutional design, though it might also spur dialogue about the constitution's core commitments, as in the case of India's basic structure doctrine.

65 Approaches to originalist arguments in constitutional interpretation stem from the particularities of local context and are shaped by the political and historical legacies of constitutional culture. Widening our perspective to consider the practice of historical arguments across various Asian contexts deepens our understanding of the complexities and nuances of approaches toward constitutional history and illuminates our perspectives on both comparativism and originalism.