

## Originalism: A Uniquely American Preoccupation?

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**Abstract:** *Originalismo: una preoccupazione unicamente americana?* – Is originalism a uniquely American preoccupation? The short answer is no. The longer answer is that originalist arguments take on distinct variations that reflect a nations’ particular cultural, historical, and political conditions. This paper explores the use of originalist arguments in contexts outside the United States, drawing on India, Malaysia and Singapore as illustrations. The comparative perspective it offers underscores that whether originalism thrives, and the form it takes, is culturally dependent and context specific.

**Keywords:** Comparative originalism; Constitutional history; India; Malaysia; Singapore.

### 1. Introduction

The key focus on the role of originalism in constitutional interpretation in Justice Gorsuch’s confirmation hearings highlights a curious feature of constitutional discourse in the United States: Americans are preoccupied with originalism. Discussion about originalism continues to rage in American scholarly, judicial, and even popular discourse. Much of the debate on originalism—as Professor Lawrence Solum’s statement on Justice Gorsuch’s hearings illustrates—has been chiefly focused on the experience of originalism in the United States.

This piece is oriented differently. My aim is to offer a comparative perspective on the use of originalist arguments in contexts outside the United States. Conventional accounts have tended to assume that originalist arguments have little salience outside the United States.<sup>1</sup> Recently, however, a growing amount of attention has been paid to the use of originalism elsewhere in the world.<sup>2</sup>

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<sup>1</sup>See, e.g., G. Huscroft, B.W. Miller, *Introduction*, in G. Huscroft, B.W. Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation*, 2011, 10 [hereinafter *Challenge of Originalism*] (“Originalist theory has little purchase outside of the United States and it is under pressure within the United States...”); J. Lepore, *The Commandments*, *New Yorker*, Jan. 17, 2011, 70 (“Originalism, which has no purchase anywhere but here [in the United States]...”); J.M. Balkin, *Nine Perspectives on Living Originalism*, 2012 *University of Illinois Law Review*, 2012, 815, 838. (“American ideas of originalism are not widely adopted outside the United States...”); K. Lane Scheppele, *Jack Balkin is an American*, 25 *Yale Journal of Law & the Humanities*, 2013, 23 (“Inquiring this closely into a constitution’s original meaning is done almost nowhere else in the world...”); J.M. Balkin, *Why Are Americans Originalist?*, in D. Schiff, R. Nobles, *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (eds), 2014 (“Originalism is mostly unknown outside of the United States.”).

<sup>2</sup> See, e.g., Y. Tew, *Originalism at Home and Abroad*, 52 *The Columbia Journal of Transnational Law*, 2014, 781; J. Greene, *On the Origins of Originalism*, 88 *Texas Law Review*, 2009, 1-5; D.

I consider how courts and constitutional actors in different legal systems use originalist arguments in constitutional interpretation. The ways in which courts use constitutional history—and their reasons for doing so—take on distinct variations reflecting the cultural, historical, and political conditions of particular nations. This comparative perspective underscores that whether originalism thrives, and the form that it takes, is culturally dependent and context specific.

In the discussion below, I draw on India, Malaysia, and Singapore as illustrations. All three are post-colonial Asian states that achieved independence from the British in the period following the Second World War. They all possess common-law systems based on British legal traditions, judiciaries with the power of judicial review, and written constitutions of approximately similar age. These three examples from South Asia and Southeast Asia highlights the distinctive origins and forms of originalist arguments in the world beyond the United States.

## 2. The Comparative Origins of Originalism

### *India*

India's constitutional history is an integral part of the nation's narrative of independence. The making of the Indian Constitution is linked to the country's emergence from British colonial rule; indeed, "the Constitution marks a decisive and sharp break with the past and was a central element in the formation of Indian polity."<sup>3</sup> In light of India's powerful constitutional moment, it is unsurprising that appeals to constitutional history and the founding of the Constitution resonate in Indian constitutional practice. Although the Indian Supreme Court has generally had an "eclectic" <sup>4</sup> approach to constitutional interpretation, it has availed itself of constitutional history. In such cases, references to the framers of the Indian Constitution are made to support arguments about the overarching purposes and aims of India's Constitution.

Take the Supreme Court's 2015 decision in the *NJAC Case* as an example.<sup>5</sup> In 2014, Parliament sought to replace the "collegium" system of judicial appointments, in which the Chief Justice and other senior justices play a primary role, with an appointments process led by a National Judicial Appointments Commission. By a four to one majority, the Indian Supreme Court struck down a constitutional amendment and statute enacted to change the judicial appointments process, invoking the "basic structure" doctrine for only the fourth time in its history.

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Fontana, *Comparative Originalism*, 88 *Texas Law Review*, 2010, 189-197; L.K. Weis, *What Comparativism Tells Us About Originalism*, 11 *International Journal of Constitutional Law*, 2013, 842; O.O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 *Vanderbilt Journal of Transnational Law*, 2011, 1239.

<sup>3</sup> S. Choudhry, *Living Originalism in India? "Our Law" and Comparative Constitutional Law*, 25 *Yale Journal of Law & the Humanities*, 2013, 1, 3.

<sup>4</sup> C. Chandrachud, *Constitutional Interpretation*, in S. Choudhry, M. Khosla, P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, 2016, 73.

<sup>5</sup> *Supreme Court Advocates-on-Record Association v. Union of India*, (2015) 5 RAJ 350 [hereinafter *NJAC Case*].

In response to the Attorney-General's argument that the Supreme Court's earlier judgments on judicial appointments had been "diagonally opposite" to the "intent and resolve of the Constituent Assembly,"<sup>6</sup> the Court repeatedly referred to the drafting debates to support its conclusion that judicial primacy in the appointment process is integral to judicial independence. Justice Kehar, a Judge of the Supreme Court and now the Chief Justice, drew on the statements of framer B.R. Ambedkar to assert that the framers' "true intent" behind the judicial appointments clause was that the President appoint judges after "consultation" with the Chief Justice.<sup>7</sup> His counterpart on the Supreme Court, Justice Lokur, also employed historical arguments extensively, referring to various sources from the constitution-making period, such as the Constituent Assembly debates<sup>8</sup> and memoranda submitted to the drafting committee.<sup>9</sup>

Although the Indian Supreme Court's reasoning in the *NJAC Case* have been critiqued on a variety of grounds,<sup>10</sup> the interpretive moves made by the majority are originalist in orientation, grounded in appeals to the framers' intent and the aims behind the Constitution's creation. Constitutional interpretation in India may be pluralistic, but historical arguments undeniably have salience when invoked—precisely because of their resonance with the broader ideals of India's constitutional founding.

### *Malaysia*

Originalist arguments are frequently employed in heated debates over the place of religion in the Malaysian Constitution. Divisions in Malaysian politics and adjudication arise over whether the identity of the modern Malaysian state is secular or Islamic. The Malayan Constitution, later the basis for the Federal Constitution of Malaysia, came into force when Malaya gained independence from the British on August 31, 1957. Article 3(1) of the Federal Constitution declares that: "Islam is the religion of the Federation; but other religions may be practised in peace and harmony."

Strikingly, secularists and Islamists on either side of the debate have relied on the original understanding of Article 3(1) to advocate their position. Historical arguments have featured prominently in contemporary debates about the scope of Article 3(1). Growing Islamist political discourse in Malaysia over the past three decades has challenged the established understanding that the inclusion of Article 3(1) clause during the constitution-making process was not meant to undermine the Constitution's secular foundation.<sup>11</sup>

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<sup>6</sup> *NJAC Case*, 5 RAJ 17, 73, 124.

<sup>7</sup> *NJAC Case*, 5 RAJ 350; see Constitution of India, art. 124.

<sup>8</sup> *NJAC Case*, 5 RAJ 34-53.

<sup>9</sup> See *id.* 31, 36, 38, 43, 45-50.

<sup>10</sup> See, e.g., Sengupta 2011, 126; Chintan Chandrachud: Debating the NJAC Judgment of the Supreme Court of India: Three Dimensions, UK Constitutional Law Association (2015), [ukconstitutionallaw.org/2015/11/03/chintan-chandrachud-debating-the-njac-judgment-of-the-supreme-court-of-india-three-dimensions](http://ukconstitutionallaw.org/2015/11/03/chintan-chandrachud-debating-the-njac-judgment-of-the-supreme-court-of-india-three-dimensions).

<sup>11</sup> See, e.g., Report of the Federation of Malaysia Constitutional Commission (London: Her Majesty's Stationery Office, 1957), 11. See generally J.M. Fernando, *The Position of Islam in the Constitution of Malaysia*, 37 *Journal of Southeast Asian Studies*, 2006, 249.

Supporters of an Islamic state have employed historicist rhetoric to argue for an elevated position for Islam in the constitutional order. In *Meor Atiqulrahman*,<sup>12</sup> for example, the Malaysian High Court constructed a historical account of the constitutional bargain to argue that the framers had intended to secure Islam's dominant position as a result of the social contract struck at the founding.<sup>13</sup> And in *Lina Joy*, the High Court asserted that allowing Muslims to convert out of Islam "would result in absurdities not intended by the framers . . ."<sup>14</sup>

Those who view the Constitution's basis as secular have sought recourse to the historical context and original understanding of Article 3(1). Consider the 1988 decision of *Che Omar bin Che Soh v. Public Prosecutor*,<sup>15</sup> where the Supreme Court, in expounding on the position of Article 3(1), stated: "The question here is this: Was this the meaning intended by the framers of the Constitution?"<sup>16</sup> 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."<sup>17</sup> Two years later, the Supreme Court likewise focused on the framers' intent to affirm the Constitution's secular foundations.<sup>18</sup> In similar vein, the judge who dissented with the Federal Court majority decision in the *Lina Joy* case asserted that the courts had a duty to uphold an individual's religious freedom, viewing this interpretation of the Constitution's protection of religious freedom as faithful to the framers' intent: "Sworn 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."<sup>19</sup>

What is striking about the originalist discourse in Malaysia, is that it is focused on the intent of the framers and the history surrounding the constitution-making process, rather than the original public meaning of the constitutional text described by Professor Lawrence Solum. Unlike public meaning originalism, historical arguments in Malaysia have not centered on distilling the original textual meaning of the constitutional provision in question, but rather on determining the actual intentions of the framers. Extrinsic historical evidence is viewed favorably as an interpretive aid to help determine what individual framers intended.<sup>20</sup>

Another feature of originalism in Malaysia is that it is not typically associated with judicial restraint. In American debates over originalism, its proponents have

<sup>12</sup> *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi*, (2000) 5 Malayan L.J. 375 (High Court, Seremban).

<sup>13</sup> *Id.* at 385; *see also id.* at 384.

<sup>14</sup> *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, (2004) 2 Malayan L.J. 119, [18]. *See* Fed. Const. (Malay.), art. 11(1) ("Every person has the right to profess and practice his religion...").

<sup>15</sup> *Che Omar Bin Che Soh v Public Prosecutor* (1988) 2 Malayan L.J. 55.

<sup>16</sup> *Id.* at 56.

<sup>17</sup> *Id.* at 56-57.

<sup>18</sup> *Teoh Eng Huat v Kadhi Pasir Mas (Susie Teoh)* (1990) 2 Malayan L.J. 300, 301. ("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.")

<sup>19</sup> *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan*, (2007) 4 Malayan L. J. 585 [23].

<sup>20</sup> *See, e.g., Zambry bin Abd Kadir v Mohammad Nizar bin Jamaluddin* (2009) 5 Malayan L.J. 464, 534 (CA).

defended its capacity to restrain judges from interfering with the outputs of the democratic process,<sup>21</sup> as well as to constrain judges from imposing their own subjective views in constitutional decision-making.<sup>22</sup> The Malaysian experience, however, shows the *inverse* phenomenon: historicist originalism has been employed to judicially expand constitutional provisions and to invalidate the outputs of legislative majorities. Secularists and Islamists in Malaysia respectively mobilize originalist arguments to support judicial expansion of constitutional religious liberty rights or the scope of Islam's constitutional position. Likewise, looking beyond Malaysia to another context in which originalist arguments have taken this orientation, the Turkish Constitutional Court has been viewed as judicially activist *and* originalist for its pro-secularism decisions to invalidate legislation allowing headscarves in higher educational institutions.<sup>23</sup> In neither of these countries is the language of originalism associated either with judicial deference to legislative majorities or the constraining of judicial discretion. Quite the opposite.

### *Singapore*

Unlike Malaya's Constitution, which was conceived amidst the political excitement on the road to independence, Singapore's constitutional origins emerged more pragmatically. After achieving independence from Britain, Singapore joined the Malayan Federation in 1963. Two years later, Singapore separated from the Federation to become its own sovereign state in August 1965. 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.<sup>24</sup>

Given Singapore's lack of a momentous constitutional founding moment, it is not surprising that originalism has not tended to feature prominently in its judiciary's approach to constitutional interpretation. Not, at least, until 2010, when the Singapore Court of Appeal's issued a decidedly originalist decision in the high-profile case of *Yong Vui Kong v. Public Prosecutor*.<sup>25</sup> Nineteen-year-old appellant Yong, who had been convicted of drug trafficking, brought a challenge to the constitutionality of the mandatory death penalty.<sup>26</sup> The Singapore Court unanimously rejected Yong's argument that the mandatory death penalty constituted an inhuman punishment that violated the right to life guaranteed by

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<sup>21</sup> See, e.g., R.H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Indiana Law Journal*, 1971, 1, 11 (asserting that "where the Constitution does not speak," the "correct answer" to the question "[A]re we all...at the mercy of legislative majorities?'...must be 'yes'").

<sup>22</sup> See, e.g., A. Scalia, *Originalism the Lesser Evil*, *The University of Cincinnati Law Review*, 1989, 849, 863–64 ("[T]he main danger in judicial interpretation...is that the judges will mistake their own predilections for the law...Nonoriginalism...plays precisely to this weakness...Originalism does not...for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself").

<sup>23</sup> See O.O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 *Vanderbilt Journal of Transnational Law*, 2011, 1239.

<sup>24</sup> The Singapore Constitution was eventually consolidated in 1980.

<sup>25</sup> *Yong Vui Kong v Public Prosecutor* [2010] 3 *Sing. L. Rep.* 489.

<sup>26</sup> See *Misuse of Drugs Act* (Cap 185, 2001 Rev Ed) (mandating the death penalty for trafficking fifteen grams or more of heroin).

Article 9(1) of the Singapore Constitution.<sup>27</sup> The Court's decision appears self-consciously originalist, focused on the constitutional text and intent of the framers. The Court rejected the idea that the Singapore Constitution contained an implied prohibition against inhuman punishment, reasoning that the constitutional history at the time of drafting indicated that the framers had deliberately declined to include such a prohibition.<sup>28</sup> The Court of Appeal's originalist reasoning has a textualist orientation: it relies heavily on the lack of any explicit textual provision prohibiting inhuman punishment in the Constitution as evidence of the framers' original understanding.<sup>29</sup>

The originalist approach employed by the Singapore Court of Appeal—in contrast to the historical invocations used in the Malaysian context—is marked by legalism, and focused on text and precedent. The Court in *Yong* adopted a narrow textualist approach to the original understanding of the constitutional text in service of judicial deference to the legislature.<sup>30</sup> Given the pragmatic origins of Singapore's Constitution, the manner in which the Singapore Court employs historical arguments is unsurprising. Constitutional interpretation in Singapore tends to be heavily formalist—and its originalist jurisprudence is no exception.

### 3. Conclusion

The story this piece tells about the experiences of these three Asian jurisdictions—from India in South Asia to the neighboring states of Malaysia and Singapore in Southeast Asia—suggests that the answer to the question of whether originalism thrives outside the United States is more complicated than conventional accounts suggest. But this may be the wrong question to ask. The more interesting question is *why* originalism has salience in different comparative contexts. Looking beyond the United States suggests that a country's attraction to originalist arguments has less to do with purely conceptual or normative justifications, and much more to do with the nation's particular political, cultural, and historical traditions.

Originalist arguments have popular appeal in Malaysia and India—as they do in the United States—because they have been tied successfully to a constitutional narrative about the nation's founding that resonates deeply with the people. In Singapore, on the other hand, originalist interpretation has a legalistic and prudential orientation because of the less glorified role its constitution occupies as a result of its pragmatic origins. The comparative perspective gained from looking beyond the United States highlights how originalism is a deeply contextual approach shaped by the constitutional ethos of the culture from which it emerges.

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<sup>27</sup> Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), art. 9(1) (“No person shall be deprived of his life or personal liberty save in accordance with law”).

<sup>28</sup> *Yong Vui Kong v Public Prosecutor* [2010] 3 Sing. L. Rep. 489 at [60]–[75].

<sup>29</sup> *Id.* at [61].

<sup>30</sup> *Id.* at [49], [52].