KOK WAH KUAN: AN UNFORTUNATE LEGACY OF THE 1988 CONSTITUTIONAL AMENDMENT

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Introduction

The Federal Constitution of Malaysia is document of compromise since its inception.[1] In the years since the nation's independence, the Federal Constitution's integrity has been further compromised by amendments that disregard fundamental concepts of constitutionalism and lessons learnt from experiences of countries that preceded us in their nation building ventures. The document we borrowed now bears little resemblance to the document it was meant to be.

This paper seeks to highlight one anomaly in our Federal Constitution - an anomaly that threatens the core of our constitutional makeup - Article 121(1). This article prior to the 1988 amendment read:

> Subject to clause (2) the *judicial powers* of the Federation shall be vested in two high courts of co-ordinate jurisdiction...and such inferior courts as may be provided by Federal law. [Emphasis added]

But the 1988 amendment removed the words "judicial powers" leaving article 121(1) as follows:

> There shall be two High Courts of co-ordinate jurisdiction and status...and the High Courts and inferior courts shall have such

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1 See Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia* (Star Publications 2008) 2-18.

> *jurisdiction and powers as may be conferred by or under federal law.* [Emphasis added]

If one is to take a literal reading of the amended article, the conclusion is that the courts are now subservient to Parliament, leaving the jurisdiction of the judiciary entirely in the discretion of the legislature. Such proposition challenges our democratic institutions and undermines the spirit of our constitution.

Constitutional Supremacy and Constitutionalism

To subject the jurisdiction of the judiciary to the discretion of Parliament renders the concept of constitutional supremacy, provided by Article 4 of the Federal Constitution, meaningless.[2] A constitution functions as a source of sovereignty and legitimizes power exercise within a state.[3] Parliament derives its legislative function from the constitution. Similarly, the government derives its executive mandate, and the judiciary derives its adjudicative power, all from the same source – the Federal Constitution. To subject judicial powers to the discretion of the legislator is to deny the functions of the third pillar of our democratic institutions.

The effects of article 121(1) are so far reaching that it also dislocates the social contract theory from our constitutional structure. The term "social contract" essentially means that the constitution is a form of "written contract" whereby the people surrender the right to self-rule over to the state, in return for governance in accordance to the terms of the "contract".[4] Social contract theory also pre-empts the real danger of state institutions abusing the terms of the "contract". Hence, the judiciary is empowered with "judicial powers", forming the third pillar of our

2 Article 4(1) Federal Constitution reads: 'This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.'

3 See Kevin Tan, Yeo Tiong Min & Lee Kiat Seng, *Tan, Yeo & Lee's Constitutional Law in Malaysia & Singapore* (2nd edn, Butterworths 1997) 84.

4 For social contract theory, see generally Thomas Hobbes, *Leviathan*; John Locke, *Second Treatise of Civil Government*.

society to provide redress through judicial review of governmental actions and legislative measures. Without this final arbiter in questions of law, who else can ensure that the terms of our "social contract" are kept in check?

Judicial power to interpret the constitution also performs a stabilizing function. The removal of this power and to subject it to the discretion of the legislature disrupts the natural evolution of our constitution. Being a living document,[5] the constitution must accommodate a certain measure of flexibility. This is so to avoid John Locke's "justifiable rebellion' should the constitution fail to reflect prevailing social norms. If the courts were ousted in its jurisdiction to exercise its interpretative function in updating the constitution according to societal norms, then John Locke would be right:

> Where…people or any single man are deprived of their right, or are under the exercise of a power within right, having no appeal on earth…They have a liberty to appeal to heaven.[6]

In this context, appealing to heaven, in the absence of court redress means to rebel against oppression. As such, the court's judicial powers allow the constitution to grow and evolve with societal norms, providing a stabilizing factor in the balance of state powers.

Thus, the court's interpretative function as a final arbiter on all questions of law not only serves to uphold the constitution (as an object), but also promotes constitutionalism (as a concept):

5 The 'living constitution' approach is not universally accepted as the preferred method in constitutional interpretation. See Sotirios A Barber SA & James E Fleming, *Constitutional Interpretation - The Basic Questions* (OUP 2007), Jeffrey Goldsworthy, *Interpreting Constitution - A Comparative Study* (OUP 2007).

6 Kenneth Clinton Wheare, *Modern Constitutions* (2nd edn, OUP 1966) 52.

> Constitutionalism by dividing power provides a system of effective restraints upon governmental actions…[7]

Effective restraint on governmental actions within the framework of our country requires two watchdogs. The first watchdog is our Parliament, but due to the Westminster parliamentary system, our Parliament can only check on the government effectively if certain socio-political elements were present.[8] In short, Parliament cannot be relied on consistently to check on the executive.[9] This leaves us with the judiciary as the only reliable watchdog against governmental tyranny and mismanagement.

As such, "judicial powers" cannot be subjected to the discretion of Parliament because the court not only upholds the body of law that is the constitution, but it also upholds constitutionalism, the spirit of the constitution itself. The courts must not give a literal reading to article 121(1) as without the words "judicial powers", the spirit of the constitution would be defeated.[10]

The Rule of Law and Separation of Powers

The removal of "judicial powers" from article 121(1) also violates the Rule of Law which is an intrinsic principle of our constitution. Despite the definitional problems

7 Friedrich CJ in *Limited Government: A Comparison* in (n 3) 5.

8 One of the most glaring examples of how Parliament cannot be relied upon to conduct adequate check on executive is the sheer amount of constitutional amendments that has been passed. Professor Shad Saleem Faruqi noted that in 50 years since Malaysia's independence, there had been 51 amendments to the constitution, individually clauses of amendments thus numbered around 700.
See <http://www.malaysianbar.org.my/echoes_of_the_past/major_changes_to_the_constitution.html>.

9 Cf. Barendt observed that Jennings did not share this view. Barendt stated that: '…[Jennings] concluded that the separation principle was irrelevant as a safeguard against bureaucracy or tyranny; what prevented that was democratic control through the House of Commons and the *party system*. [emphasis added]. See Eric Barendt, 'Separation of Powers and Constitutional Government' [1995] Public Law 603, 604.

10 The courts judicial power does not depend on it being specifically provided by the constitution. See for example the Indian constitution.

surrounding this doctrine;[11] we cannot deny that the framers of our constitution had intended to reflect the Rule of Law in our basic charter.[12]

Dicey's proposition of the three manifestations of the Rule of law[13] has formed the modern constitutional discourse, and the first one states:

> …that no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner *before the ordinary courts of the land.*[14] [Emphasis added]

The first manifestation proposed by Dicey is universally reflected in all approaches to the Rule of Law.[15] The non-contentious nature of this rule[16] is due to the fact that it promotes due process of the legal procedure, that the law must be supreme as opposed to the influence of arbitrary power and the prevention of

11 For modern discourses on the definitional problems of the rule of law, see David Kairys, 'Searching for the Rule of Law' [2003] 36(2) Suffolk UL Rev; Lord Bingham, *The Sixth Sir David William Lecture on The Rule of Law*, <http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf>.

12 The Rule of law (Kedaulatan undang-undang) is the 4th rule in the national principles (Rukun Negara), and Dicey's first two stipulation of the Rule of law can be deduced from articles 5 to 8 of the Federal Constitution; see also *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* [1998] 3 MLJ 289 at pg 305 per Gopal Sri Ram

13 Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (10nd edn, MacMillan 1959) 188, 193, 195.

14 ibid 188.

15 For contrasting approaches of the Rule of law, see Kevin Tan Yew Lee, 'Asian Discourses on the Rule of Law' [2004] SJLS 35; Kairys (n 11); Miguel Schor, 'Rule of Law' [2007] Legal Studies Research Paper Series 07-14 <http://ssrn.com/abstract=889472> accessed 13 August 2010.

16 The removal of judicial power of the courts and to subject it to the discretion of parliament is contrary to even the most 'minimalistic' exposition of the Rule of Law. For this 'minimalistic' view, see (n 11) 318. Khairy stipulated 3 requirements for the Rule of law to exist:
(1) Certain relationship, events and transactions should be subject to rules;
(2) The rules laid down should be followed and should apply to everyone, including *limits on the government and the powerful*;
(3) And the rules should be enforced with some *mechanism for seeking redress*. [emphasis added]

arbitrary power of the legislature and the executive lies in the hand of the judiciary. The removal of the words "judicial powers" and to subject the court's jurisdiction to federal law[17] would produce the result where a breach of the law are met with no redress.

But the doctrine that suffered the most is the concept of Separation of Powers – a doctrine that traces its modern incarnation to the words of Montesquieu:

> When the legislative and executive powers are united in the same person…there can be no liberty…again there is no liberty, if judicial power be not separated from legislative and executive…there would be an end to everything, were the same man, or same body…to exercise those three powers…[18]

We inherited this doctrine from English jurisprudence, but the English themselves had always found Separation of Powers a rather inconvenient concept. As noted by Leyland:

> It is perhaps surprising that the concept of Separation of Powers has ever been considered to be significant to the British constitution, given that the most influential version of it…emerged after the fundamentals of our constitutional arrangements were set in place…[19]

Similarly, as noted by Jackson and Leopold:

17 Article 160(2) Federal Constitution defined 'federal law' 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'.

18 Baron de la Brède et de Montesquieu 'De L'Esprit des Lois' Book XI, Chapter 6 (1748) in Maurice JC Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press 1967).

19 Peter Leyland, *Administrative Law* (5th edn, Oxford University Press 2005) 22.

> There is not, and never has been, a strict separation of powers in the English Constitution…[20]

However, it must be noted that the applicability of the doctrine of Separation of Powers has never been a matter of absolute adherence, but a matter of degree. No country practises separation of powers in the sense that there is absolute isolation between the three institutions in personnel, function and control. This has caused some writers to reject this doctrine as a mere political concept; too fluid to be applied in the legal context,[21] or in the case of the United Kingdom, too contradictory as it requires a radical shift in the restructuring of the balance of power between the legislature, executive and judiciary.[22]

While the difficulty of fully embracing the doctrine of Separation of Powers in the United Kingdom is very real, the same cannot be said about the constitutional structure of Malaysia. Although it is true that our constitution does not provide for a "pure" or "strict" doctrine of Separation of Powers, it is wrong to say our constitution does not provide for the Separation of Powers. Even in the United Kingdom, judges often draw upon the principle of Separation of Powers in the interpretation of statutes. As Lord Diplock stated (albeit in the context of the sovereignty of Parliament):

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[20] Paul Jackson & Patricia Leopold, *O Hood Phillips and Jackson Constitutional and Administrative Law* (8th edn, Sweet & Maxwell 2001) 26.

[21] Geoffrey Marshall, *Constitutional Theory* (Clarendon Press 1971) 97; Walter Bagehot, *The English Constitution* (Fontana Library 1963) 65 with introduction by Crosman R H S; Eric Barendt, 'Separation of Powers and Constitutional Government' [1995] Public Law 603, 604 on Jenning's scepticism towards the doctrine of Separation of Powers.

[22] See Nicholas W Barber, 'Prelude to the Separation of Powers' (2001) 60(1) Cambridge LJ 59-88. Barber rejects Barendt's 'partial' version of Separation of Powers where it requires the court to protect the liberty of the citizens from the other two organs as too ambitious because this would undermine the doctrine of Parliamentary Sovereignty.

> It cannot be too strongly emphasized that the British Constitution, though largely unwritten is firmly based on the separation of powers: Parliament makes the laws, the judiciary interpret them.[23]

We, as with the United Kingdom to a large degree, practise a contemporary doctrine of Separation of Powers in the sense that our constitution provides that 'powers and personnel being largely – but not totally – separated with checks and balances in the system to prevent abuse.'[24] The Federal Constitution originally provided a structure of three distinct bodies that perform separate functions to ensure adequate check and balance and to prevent arbitrariness of any one body, but the 1988 amendment seeks to destroy this balance. It is the role of the courts to prevent the inevitable corruption of absolute power. As such, judges must always be mindful of the dynamics of power in the state, lest they themselves become an instrument of oppression.

The Court's Interpretation of "Judicial Powers"

In a string of cases following *Dato Yap Peng v PP*,[25] the courts had defended its inherent jurisdiction necessary for it to function not only as a court of law, but also as an integral component of our democratic institution.

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[23] *Duport Steels Ltd v SIRS* [1980] WLR 142.

[24] Hilaire Barnett H *Constitutional and Administrative Law* (7th edn, Cavendish Publishing 2006) 76; see also *Minerva Mills Ltd v Union of India* [1980] AIR SC 1789 as per Bhagwati J at 1825.

[25] [1987] 2 MLJ 311, 314, as per Abdoolcader SCJ who defined the words 'judicial powers' in article 121(1) Federal Constitution as '… the power to examine question submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties.' This definition did not find favour with the Mahathir administration which subsequently leads to the amendment of the impugned article. For an account of the circumstances leading up to the amendment, see H P Lee, *Constitutional Conflicts in Contemporary Malaysia* (OUP 1995).

In *R Rama Chandran v The Industrial Court of Malaysia*,[26] Edgar Joseph Jr FCJ defended the inherent jurisdiction of the court (albeit vis-à-vis statutory jurisdiction) in citing Sir Jack Jacob QC:

> …the source of the inherent jurisdiction of the court is derived from its nature as a court of law…the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law…for the essential character of a superior court necessarily involves that it should be vested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is *intrinsic* in a superior court; it is its very life-blood, its very essence, its immanent attribute. *Without such a power, the court would have form but would lack substance.*[27] [Emphasis added]

It must be emphasized that a court that exercises its jurisdiction depending on the discretion of Acts of Parliament faces the danger of being a tool of oppression. The judge then warned:

> …lest we forget…the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court.[28]

In the same case, Edgar Joseph Jr FCJ defended the need for the judiciary to act proactively in the exercise of their "judicial powers" to uphold the due process of law to prevent improper vexation or oppression. His Lordship demonstrated his commitment to the need for check and balance through judicial review:

[26] [1997] 1 MLJ 145
[27] ibid 237-238.
[28] (n 26) 238-239.

> It cannot be said, therefore, that by intervening in the manner which we propose…we would be trespassing into the domain of the executive, thus violating the doctrine of the separation of powers, and so acting undemocratically.[29]

Similarly, in *Sugumar Balakrishnan v Pengarah Imegresen Negeri Sabah*,[30] Gopal Sri Ram JCA equated the constitutional right of a person to approach the courts to seek redress with plain common-sense. According to His Lordship, to give effect to clauses that seek to oust the "judicial powers" of the court would do injustice to the Rule of Law if administrative acts or decisions are affected by an error of law.[31] In regard to the amended article 121(1) of the Federal Constitution, the judge merely stated that:

> …in accordance with well established principles of constitutional interpretation, the deletion [of the words "judicial powers"] does not have the effect of taking away the judicial power from the High Courts.[32]

Judge Sri Ram's in *Sugumar Balakrishnan* did not expand on the interpretation of article 121(1) after the 1988 amendment. This highlights the fact that despite legislative effort to remove judicial powers from the court, to entertain the thought that the courts can only exercise their interpretative function subject to the discretion of parliament is absurd. This is because to allow the legislature to exclude the jurisdiction of the courts, is to allow the government, through the parliament to act arbitrarily without supervision – a breach of the concept of *Nemo Judex in Causa Sua*. Gopal Sri Ram drew a similar conclusion by quoting Bhagwati J in *Minerva Mills Ltd v Union of India*:

[29] (n 26) 198.
[30] [1998] 3 MLJ 289 (CA).
[31] ibid 307-309.
[32] (n 30) 307.

> ...the *constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action*. So also if the legislature makes a law and a dispute arises whether in making the law the legislature had acted outside the area of its legislative competence... its resolution cannot... be left for the determination of the legislature.[33] [Emphasis added]

Judge Sri Ram also emphasized in *Sugumar Balakrishnan*, the need for judges to look beyond written law when conducting judicial review:

> ...judicial review is a basic and essential feature of the Constitution and no law passed in Parliament in exercise of its constituent power can abrogate it or take it away...the exercise of power by the executive or any other authority must not only be conditioned by the constitution but also *in accordance with law*...[34] [Emphasis added]

It should be noted that the phrase "in accordance with law" does not mean law in the narrow sense, and necessarily transcends written laws.[35] These cases not only illustrated the judiciary's dedication to upholding the Rule of Law, but also show the understanding the judiciary have for their role in the structure of governance and the effect their judgments have on the health of our democratic institutions.

[33] (n 30) 306. See also *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.
[34] (n 30) 306-307.
[35] Cf. *Pihak Berkuasa Negeri Sabah v Sugumar* [2002] 3 MLJ 72 (FC) 89-94, where Mohd Dzaiddin FCJ took a narrow and literal approach to ouster clauses and rejected the 'substantive' nature in judicial review.

The case of *Kok Wah Kuan*

The Court of Appeal in *Kok Wah Kuan v PP*[36] took the opportunity to determine the effect of the removal of the words 'judicial powers' from article 121(1) vis-à-vis the doctrine of Separation of powers. His Lordship Sri Ram persevered in his resistance against encroaching executive powers. In answering affirmatively to the question of whether the doctrine of Separation of powers is an integral part of the constitution, the judge cited Lord Diplock in *Hinds v The Queen*:

> It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government...[it] is implicit in the very structure of a constitution on the Westminster model is that judicial power, however it be distributed...is to continue to be vested in persons appointed to hold judicial office...[37]

In support of the principle that Parliament cannot legislate away, in acts of parliament or acts amending the constitution, the inherent powers of the judiciary, Judge Sri Ram cited *Sugumar Balakrishnan*:[38]

> The Constitution of Sri Lanka does not even mention the expression judicial power. Yet...it has been held that despite the omission, the provisions in that document...manifest an intention to secure in the judiciary a freedom from political, legislative and executive control...[Similarly] the Indian Constitution also does not make mention of judicial power...Yet the same position obtains there as in Sri Lanka.[39]

[36] [2007] 5 MLJ 174.
[37] ibid 180. See also *Hinds v The Queen* [1976] 1 All ER 353.
[38] [1998] 3 MLJ 289, 308.
[39] *Kok Wah Kuan v PP* [2007] 5 MLJ 174, 179-180.

However, a foreseeable argument could flow from the above quote – that the liberal approach of reading the words "judicial powers" into the Indian and Sri Lankan constitution is a product of judicial interpretation in order to avoiding absurdity. The same cannot be said for our constitution, as Parliament specifically removed the words "judicial powers" through Amendment Act A704 of 1998, signalling an unequivocal intention to arrest these powers from the courts.[40]

While it is true that an omission cannot be equated with a specific removal of the words "judicial powers", such argument is necessarily flawed because the duty of the courts is not merely to give effect to intentions of Parliament, especially so in the case of constitutional interpretation in a country with a supreme constitution, the courts have an added responsibility of upholding the integrity of the constitution. As Richard Melanjum CJ stated in his dissenting judgment in *Kok Wah Kuan* at the Federal Court:

> I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution…the Courts in Malaysia can only function in accordance with what have been assigned to by Federal laws. Accepting such a proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system…I do not think that as a result of the amendment our courts have now become servile agents of federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a Federal Law…The courts cannot obviously be confined to 'federal law'. Their role is to be servants of the law as a whole.[41]

[40] Cf. the argument that it was not the intention of parliament to extinguish the courts' inherent power to review executive and legislative actions. See (n 1) 630.

[41] *PP v Kok Wah Kuan* [2008] 1 MLJ (FC) 20-21.

His Lordship's statement above echoed the holistic understanding of 'law' delivered by Bhagwati J in *Sampath Kumar v Union of India*,[42] whereby being servants of the law, judges must not only give effect to written law, but beyond that, the courts must always consider the law as a whole, the written and the unwritten, especially those intrinsic principles in our basic charter.

To ignore the intrinsic principles in our constitution is to ignore the will of the drafters of the constitution. For example, the rules of natural justice were never mentioned in our constitution, it nevertheless is implicit in the structure of fundamental liberties found in articles 5 through 13. Intrinsic principles like these were taken for granted by the drafters of our constitution as without which, the rights conferred on the citizen would be meaningless. Similarly, to ignore the fact that Separation of Powers and the Rule of Law were intrinsic in our constitution is to do injustice to the structural integrity of our basic charter.[43]

Another reason for judges to avoid a literal approach to constitutional interpretation is because the constitution should be seen as a living document.[44] For the constitution to remain relevant, it needs to be able to adapt to changing social norms. Judge Sri Ram was critical of the literal approach, and instead advocated a prismatic approach, highlighting the need to read the constitution generously, not literally,[45] to rediscover the values that the drafters of a constitution intended to convey. While acceptance of the "prismatic" approach is not universal, it is well

[42] 1987 SCR (3) 233, 1987 SCC Supl. 734

[43] See *Ong Ah Chuan v PP* [1981] 1 MLJ 64 (Privy Council) 71 (Lord Diplock).

[44] For support for the 'living constitution' approach, see generally *McCulloch v Maryland* (1819) 17 US 316, as per Marshall CJ – '[The Constitution] was intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs'; *Missouri v Holland* (1920) 252 US 416, as per Holmes J; *Boyce v The Queen* [2004] UKPC 32, as per Lord Hoffman; Justice Michael Kirby, *Sir Anthony Mason Honorary Lecture*, published in (2000) MULR 1; *PP v Kok Wah Kuan* [2008] 1 MLJ 1, 22-23, as per Richard Melanjum CJ. Cf. criticisms of the 'living constitution', see William H Rehnquist, 'The Notion of a Living Constitution' (1976) 53 Texas LR 693; Goldsworthy (n 5) 327-328; Barber & Fleming (n 5) 16-25.

[45] For 'prismatic approach', see *Lee Kwan Woh v PP* [2009] 5 CLJ 631, as per Gopal Sri Ram.

accepted that constitutional provisions, unlike statutory provisions, cannot be read literally.

Constitutional provisions are generally drafted in broader terms than statutory provisions. The former seeks to convey values and principles, and in lieu of the potential difficulty of legislative amendments, also attempts to be relevant for extended period of time. Statutory provisions on the other hand are drafted with precision and clarity to ease day to day administrative usage. As such, to read broadly drafted constitutional provisions with a view of giving effect to the literal meaning of the words used, will deprive the provision of the values they intended to convey.

Kok Wah Kuan at the Federal Court

Abdul Hamid PCA, delivering his judgment on behalf of the majority, reversed the Court of Appeal's decision. The Federal Court in *PP v Kok Wah Kuan*[46] took a literal approach in interpreting the amended article 121(1) of the Federal Constitution, apparently oblivious to the constitutional ramifications of their decision. Judge Abdul Hamid held:

> After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts…If we want to know the jurisdiction and powers of the two High Courts we will have to look at federal law…[47]

Abdul Hamid distinguished *Kok Wah Kuan* from *Dato' Yap Peng* stating that:

[46] [2008] 1 MLJ 1.
[47] ibid 14.

> …[*Dato' Yap Peng*] was decided, not on the ground that it was inconsistent with the doctrine of separation of powers. It was decided on the ground that it was inconsistent with the term 'judicial power' of the court then provided by art. 121(1) of the constitution…[48]

The Federal Court failed to recognize that the term "judicial power" provided in article 121(1) prior to the 1988 amendment was a clear indication that judicial power of the court is a different form of power, separated and distinct from executive and legislative powers, and is not derived from any statute or rule of law, as stated by Edgar Joseph Jr in *R Rama Chandran v The Industrial Court of Malaysia*.[49]

Judge Abdul Hamid then summarized the history of the doctrine of Separation of Powers[50] and concluded:

> …the absence of a separation of powers, particularly between the executive and the legislative, is more explicit…as in the Westminster style parliamentary system. Malaysia, like the United States has a written Constitution that spells out the functions of the three branches. At the same time it follows the Westminster model and has its own peculiarities…In other words we have our own model.[51]

As mentioned above, the applicability of the doctrine of Separation of Powers has never been a matter of absolute adherence, but a matter of degree. No country practises Separation of Powers with absolute isolation between the

[48] (n 46) 15.
[49] (n 27).
[50] Abdul Hamid cites Wikipedia as his source in tracing the historical development of the doctrine of separation of powers. In doubt as to the accuracy of the law reports, I have double checked the two reports of Kok Wah Kuan available and confirmed that my doubts were unfounded as Wikipedia appears in both reports: [2008] 1 MLJ 1,16; [2007] 6 AMR 269, 279.
[51] *PP v Kok Wah Kuan* [2008] 1 MLJ 1,16.

institutions of the state. Doing so would risk administrative deadlock and prevent the mechanism of check and balance from functioning.

It is clear that Judge Abdul Hamid did not consider check and balance as an integral part of the doctrine of Separation of Powers. In an attempt to expose the absurdity of the doctrine of Separation of Powers, His Lordship drew on the example that ministers would similarly offend the separation of powers when exercising the powers of making delegated legislation, and hence acting unconstitutionally.[52]

Such a comparison is ill drawn, as it is incorrect to equate the derogation from a strict separation of powers with a slight derogation in lieu of the need for check and balance. When a minister makes law (delegated legislation) on behalf of the legislature, the conceptual integrity of the doctrine of Separation of powers is reconciled by the fact that delegated legislation is subject to parliamentary scrutiny.[53] However, to subject the court's jurisdiction to the discretion of parliament is to destroy check and balance by removing the only institution i.e. the judiciary, capable of performing checks on executive actions. The faulty logic in Abdul Hamid's comparison is too glaring to ignore.

While the Federal Court sets an unfortunate precedent in *Kok Wah Kuan*, Judge Richard Melanjum provided a measure of solace in his dissenting judgment. In reminding judges of their multifarious role in the constitutional context, His Lordship sets out the creative functions of the judiciary:

> Though there is much truth in the traditionalist assertion that the primary function of the courts is to faithfully interpret and apply laws framed by elected legislatures, there are, nevertheless, a host of

[52] ibid 18.

[53] However, the effectiveness of parliamentary checks on delegated legislations is questionable, but this is a problem of procedures and implementation, not of constitutional conflict. See (n 1) 515-516.

> circumstances in which the role of a judge is not just to deliver what is already there. The role is constitutive and creative and goes far beyond a mechanical interpretation of pre-existing law. It extends to direct or indirect law making…[54]

In the face of such a negative development within the Federal Constitution, the indirect law making function of the common law seems to be the most appropriate and immediate solution to a most unfortunate precedent arising out of article 121(1) of the Federal Constitution. The basic charter of a country is the foundation on which legal structure is built. It legitimizes and authorizes the exercise of power, without which the scale of collective justice tilts only towards the powerful. When judges are summoned to exercise their inherent duty to calibrate the scales of justice, they must answer courageously as servants of the law.

[54] Richard Melanjum CJ's dissenting judgement in *PP v Kok Wah Kuan* [2008] 1 MLJ 1.