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MALAYSIA—DEATH OF A SEPARATE CONSTITUTIONAL JUDICIAL POWER

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This article examines the position of the separation of powers doctrine within the *Federal Constitution* of Malaysia and in particular, the position of "the judicial power of the Federation" before and after the 1988 constitutional amendment to Article 121. Through textual analysis and a review of the extant case law, conclusions are offered regarding the manner in which the separation doctrine is incorporated within the *Constitution* and whether its principles may apply with implicit constitutional force, the efficacy of the 1988 amendment to effect substantive constitutional change, and whether "the judicial power of the Federation" remains exclusively vested in the courts established under Article 121. The Federal Court's decision in *Public Prosecutor v. Kok Wah Kuan* [2008] 1 M.L.J. 1 is discussed.

I. INTRODUCTION

In 1988, the Malaysian Parliament amended Article 121(1) of the *Federal Constitution* ("*Constitution*") to delete the provision which had expressly vested "the judicial power of the Federation" in the High Courts and the inferior courts of the country.[1] Consequently, Article 121(1) now merely states that those courts "shall have such jurisdiction and powers as may be conferred by or under federal law".[2] The amendment caused much disquiet. Doubts were held about its precise effect.[3] Some commentators feared that the courts might have been completely divested of "the

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1 In this article, any reference to the 1988 amendment is limited to the amendments affecting Article 121 made by s. 8 of the *Constitution (Amendment) Act 1988* (Act A704): see Part II, below. The bill was introduced into Parliament on 15 March 1988 and the amendment came into force on 10 June 1988.

2 "Federal law" means Acts of Parliament made since the independence of the Federation of Malaya on 31 August 1957 and "existing laws" which were already in operation immediately before that date and continuing thereafter to operate under Part XIII of the *Constitution*: *Constitution*, art. 160.

3 See *e.g.* Andrew James Harding, "The 1988 Constitutional Crisis in Malaysia" (1990) 39 I.C.L.Q. 57 at 62 [Harding, "1988 Crisis"]; Andrew James Harding, *Law, Government and the Constitution in Malaysia* (London: Kluwer Law International, 1996) at 134 [Harding, "Law, Government"].

judicial power"[4]—"So where does judicial power now lie? No one clearly knows."[5] On the other hand, a report of the International Commission of Jurists assumed that "the judicial power" remained vested in the courts but expressed another concern that:

> The formulation of Section [sic] 121 … makes the High Court's jurisdiction and powers dependent upon federal law, i.e. the court has no constitutionally entrenched original jurisdiction. This undermines the separation of powers and presents a subtle form of influence over the exercise of judicial power. This makes the operation of the High Court dependent upon the legislature and is a threat to the structural independence of the judiciary.[6]

A. *Impetus behind the Amendment*

After the complete abolition of Privy Council appeals in 1985,[7] momentous events soon thrust greater importance upon the local courts—particularly the Supreme Court as the final appellate court—and caused the Prime Minister, Dr. Mahathir, to regard them as an obstruction.[8] In 1987, a public scandal emerged when the government awarded the North-South Highway privatization contract to UEM—a company controlled by UMNO, the Prime Minister's own political party. When the Leader of the Opposition commenced a "public interest" action alleging corruption and illegality, the Supreme Court urgently granted an interlocutory injunction restraining UEM from executing the contract,[9] and the High Court later refused to strike out the

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4 See *e.g.* Sultan Azlan Shah, "The Role of Constitutional Rulers and the Judiciary Revisited" in V. Sinnadurai, ed., *Constitutional Monarchy, Rule of Law and Good Governance* (Kuala Lumpur: Professional Law Books, 2004) at 385, 403.

5 Wu Min Aun, "The Malaysian Judiciary: Erosion of Confidence" (1999) 1 Aust. J. Asian L. 124 at 128.

6 International Commission of Jurists, "Attacks on Justice 2000—Malaysia" (13 August 2001), online: International Commission of Jurists <http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23243>. Another author says, more plainly, that the amendment "virtually emasculated the judiciary" as its "powers were removed from the Constitution and transferred to Parliament": Barry Wain, *Malaysian Maverick: Mahathir Mohamad in Turbulent Times* (Basingstoke: Palgrave Macmillan, 2009) at 71 [Wain].

7 See *Constitution (Amendment) Act 1983* (Act A566), s. 17; Tun Mohamed Suffian, *An Introduction to the Legal System of Malaysia*, 2d ed. (Petaling Jaya: Penerbit Fajar Bakti, 1989) at 62 [Suffian, "Legal System"].

8 See generally Tun Salleh Abas, *The Role of the Independent Judiciary* (Kuala Lumpur: Promarketing Publications, 1989) at 9-16 [Salleh Abas]; Tun Mohamed Salleh Abas & K. Das, *May Day for Justice* (Kuala Lumpur: Magnus Book, 1990) [Salleh Abas & Das]; H.P. Lee, "A Fragile Bastion under Siege—The 1988 Convulsion in the Malaysian Judiciary" (1990) 17 Melbourne U.L. Rev. 386 at 388-394; H.P. Lee, *Constitutional Conflicts in Contemporary Malaysia* (Kuala Lumpur: Oxford University Press, 1995) at 45-52 [Lee, "Constitutional Conflicts"]; Harding, "1988 Crisis", *supra* note 3; Harding, "Law, Government", *supra* note 3 at 133-136, 142-148; Gordon Paul Means, *Malaysian Politics: The Second Generation* (Singapore: Oxford University Press, 1991) at 193-218 [Means]; R.S. Milne & Diane K. Mauzy, *Malaysian Politics under Mahathir* (London: Routledge, 1999) at 29-49; Wain, *supra* note 6 at 69-76.

9 *Lim Kit Siang v. United Engineers (M) Bhd.* (25 August 1987), Civil Appeal No. 363 of 1987 (S.C.): a transcript of the decision appears in *Lim Kit Siang v. United Engineers (M) Bhd. (No. 2)* [1988] 1 M.L.J. 50 at 53 (H.C.) [*UEM (No. 2)*]. This RM3.4 billion privatization to a company "which had never built a major road or bridge" would enable UMNO to repay its massive debts which were already in default: see Wain, *supra* note 6 at 135-138.

action.[10] Also, in April 1987, Dr. Mahathir was challenged for the position of UMNO president in the party elections. Although he narrowly retained his position, eleven party members (the so-called "UMNO 11") sued to nullify the results. The High Court dismissed their suit, despite holding that the elections were indeed null and void, because it found that UMNO had in fact become an "unlawful society" under the relevant legislation.[11] By March 1988, the political survival of both UMNO and the Prime Minister hung in the balance with a pending Supreme Court appeal.[12]

However, the UEM and UMNO cases were not the direct cause of the 1988 amendment. By 15 January 1988, two months before the amendment bill was even introduced, the UEM case had already been finally resolved, with the Supreme Court deciding in favour of UEM and the government.[13] The UMNO appeal, initially fixed for hearing by the full nine-judge bench, was delayed and eventually dismissed in August 1988[14]—in the wake of those infamous events relating to the Lord President's dismissal and the suspension of five Supreme Court judges[15]—by a select bench "which seemed to be more attuned to realities of power".[16] Both cases were resolved without the amendment ever being legally relevant or helpful to the Prime Minister's interest in their outcome.

In March 1988, the amendment was essentially the response of a government intent on stopping its executive and legislative actions from being undone by judicial decisions. The judiciary, it was perceived, had repeatedly thwarted the government's power since 1986. Particularly, through a series of decisions, the courts—without striking down any legislation—had applied common law principles in deciding whether certain executive powers under statute had been validly exercised. In *Berthelsen v. Director General of Immigration*,[17] a foreign journalist successfully challenged a decision under the *Immigration Regulations 1963* revoking his employment pass; the court held that he ought to have been accorded natural justice first.[18]

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10 *UEM (No. 2)*, *supra* note 9.

11 *Mohd. Noor bin Othman v. Mohd. Yusof Jaafar* [1988] 2 M.L.J. 129 (H.C.). There are indications that the defence itself had sought that outcome because Dr. Mahathir intended to form a successor party "free of the troublemakers." His rivals, however, turned the tables on him after he had done that, by filing a last-minute appeal. A successful appeal would instead restore an UMNO free of Dr. Mahathir's faction, by then members of their new party. See Harding, "1988 Crisis", *supra* note 3 at 59; Wain, *supra* note 6 at 71-76, 136-138; Rais Yatim, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy* (Kuala Lumpur: Endowment, 1995) at 324-326 [Rais Yatim].

12 See Lee, "Constitutional Conflicts", *supra* note 8 at 53; Wain, *supra* note 6 at 72. For one view of the prospects of that appeal, see Dato Sri George Seah, "If UMNO-11 Appeal Had Been Heard …" (2003) 23:11 Aliran Monthly 35.

13 *Government of Malaysia v. Lim Kit Siang* [1988] 2 M.L.J. 12 (S.C.) (principally on the ground that the plaintiff lacked *locus standi*).

14 *Mohamed Noor bin Othman v. Mohd. Ismail bin Ibrahim* [1988] 3 M.L.J. 82 (S.C.).

15 Two of those judges were later also dismissed. See *Report of the Tribunal Established under Article 125(3) and (4) of the Federal Constitution. Re: Y.A.A. Tun Dato' Hj. Mohamed Salleh Abas* (Kuala Lumpur: Govt. Printer, 1988); *Report of the Tribunal Established under Article 125(3) and (4) of the Federal Constitution. Re: Y.A. Tan Sri Wan Suleiman bin Pawan Teh & Ors.* (Kuala Lumpur: Govt. Printer, 1988); *Report of the Panel of Eminent Persons to Review the 1988 Judicial Crisis in Malaysia* (Kuala Lumpur: n.p., 2008).

16 Means, *supra* note 8 at 241.

17 [1987] 1 M.L.J. 134 (S.C.) [*Berthelsen*].

18 Soon afterwards, Dr. Mahathir criticized the judiciary for giving "its own interpretation" to legislation, ominously warning that "we will have to find a way of producing a law that will have to be interpreted according to our wish": "I Know How the People Feel" *Time* (Asia edition) (24 November 1986) 18.

In *Persatuan Aliran Kesedaran Negara v. Minister of Home Affairs*,[19] the court quashed the minister's decision refusing a permit, on grounds that his "absolute discretion" under the *Printing Presses and Publications Act 1984* had been exercised on irrelevant considerations. In *Re Tan Sri Raja Khalid bin Raja Harun*,[20] while releasing a detainee under the *Internal Security Act 1960*, the court affirmed that "the action of the Crown or its ministers or officials is subject to the supervision and control of the judges on *habeas corpus*. The right to the writ … exists at common law".[21] Again, in *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri*,[22] the court ordered another detainee's release, finding the minister's detention order under the same Act to have been made *mala fide*. In each case,[23] the court was regarded as having made or applied law which was not actually required by statute, thereby contradicting or even defying statute law.[24]

In other cases, the courts had gone further and actually struck down legislation held to be unconstitutional.[25] Crucially, the significance of Article 121(1) itself came to be tested in *Public Prosecutor v. Yap Peng*,[26] when the Supreme Court struck down section 418A of the *Criminal Procedure Code.* That section had been earlier introduced to empower the Public Prosecutor[27] to peremptorily require the removal of any criminal case pending before an inferior court to the High Court. It was held to be "both a legislative and executive intromission into the judicial power of the Federation" vested in the courts by Article 121.[28] While remarking on the difficulty in defining "judicial power", Abdoolcader S.C.J. endorsed the statement that what will or will not constitute an interference with the judicial power is a matter to be decided in each case on its own facts and circumstances.[29]

It was thus perceived that not only was the judiciary exercising its power to interfere with the executive power but, against Parliament's intentions, it could also—by resorting to "the judicial power of the Federation"—arrogate to itself powers it could unilaterally determine to be "judicial". The judiciary was accused of having

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Berthelsen is thought to have been the reason for this: see Salleh Abas & Das, *supra* note 8 at 11; Lee, "Constitutional Conflicts", *supra* note 8 at 47. Although his statements were later held not to have constituted a contempt of court, it could not have pleased him that the courts had described them as stemming from "a misconception of the role of the courts" and reflecting his "confusion on … the doctrine of the Separation of Powers": see *Lim Kit Siang v. Mahathir Mohamad* [1987] 1 M.L.J. 383 at 385, 386 (H.C. and S.C.) [*Mahathir*].

19 [1988] 1 M.L.J. 440 (H.C.).

20 [1988] 1 M.L.J. 182 (S.C.).

21 *Ibid*. at 185.

22 [1988] 1 M.L.J. 468 (H.C.).

23 Dr. Mahathir himself was in fact the responsible minister, having concurrently become the Minister of Home Affairs on 17 March 1986.

24 See *e.g*. Malaysia, Dewan Rakyat, *Parliamentary Debates*, vol. 2, no. 9, col. 1585 (18 March 1988) (Dato' Seri Dr. Mahathir bin Mohamad, Prime Minister).

25 See *Mamat bin Daud v. Government of Malaysia* [1988] 1 M.L.J. 119 (S.C.). Two other cases were reversed on appeal: see *Malaysian Bar v. Government of Malaysia* [1987] 2 M.L.J. 165 (S.C.) rev'g [1986] 2 M.L.J. 225 (H.C.); *Government of Malaysia v. Menon* [1990] 1 M.L.J. 277 (S.C.) rev'g [1987] 2 M.L.J. 642 (H.C.).

26 [1987] 2 M.L.J. 311 [*Yap Peng*].

27 The Attorney-General is the Public Prosecutor: *Criminal Procedure Code*, s. 376. See also *Constitution*, art. 145.

28 *Supra* note 26 at 318.

29 *Ibid.* at 317, approving *Liyanage v. The Queen* [1967] 1 A.C. 259 at 290 (P.C.) [*Liyanage*].

intruded upon the government's mandate to enact laws (then, in fact, sufficient even to amend the *Constitution*)[30] and upon Parliament's legislative power.[31] The Prime Minister held that Parliament should be supreme[32] and in moving the 1988 amendment, he asserted—without any apparent irony—that it was necessary to *preserve* the separation of powers.[33]

The amendment was therefore intended to have the dual effects of "restricting the power of the judiciary to introduce into statute law and the Constitution concepts which do not expressly appear in them"[34] and depriving the judiciary of any claim to a plenary "judicial power of the Federation". It was intended that federal law would wholly and prescriptively define the judicature's power.[35]

B. *Aftermath*

The true effect of the 1988 amendment, however, became a chronic vexed question. Some ten years later, the Court of Appeal in *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah*[36] made perhaps the first direct assertion that the amendment had not divested the courts of "the judicial power of the Federation" and that the constitutional separation of powers was preserved.[37] But in 2007, the Federal Court in *Public*

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30 It generally requires a two-thirds majority of votes of all members in each house of Parliament to amend the *Constitution*: *Constitution*, art. 159. After the 1986 general elections, the government coalition held 148 of the 177 seats in the lower house, the *Dewan Rakyat*. The upper house, the *Dewan Negara*, comprised 69 members, of whom 43 were appointed by the King on executive advice and 26 elected by the 13 State Legislative Assemblies (two each): *Constitution*, art. 45(1)(aa) as am. by *Constitution (Amendment) (No. 2) Act 1984* (Act A585). Since the coalition was also in power in all States, it had complete control of the upper house. See Election Commission, *Report on the Malaysian General Elections 1986* (Kuala Lumpur: Jabatan Percetakan Negara, 1988) at 46-47.

31 See Malaysia, Dewan Rakyat, *Parliamentary Debates*, vol. 2, no. 8, col. 1358-1360 (17 March 1988) (Dato' Seri Dr. Mahathir bin Mohamad, Prime Minister) (where it was even said that the judiciary had engaged in opposition politics and would "bend over backwards" to decide against the government); Malaysia, Dewan Rakyat, *Parliamentary Debates*, vol. 2, no. 9, col. 1576 (18 March 1988) (Dato' Seri Dr. Mahathir bin Mohamad, Prime Minister).

32 See Malaysia, Dewan Rakyat, *Parliamentary Debates*, vol. 2, no. 8, col. 1369 (17 March 1988) (Dato' Seri Dr. Mahathir bin Mohamad, Prime Minister). However, Article 4(1) of the *Constitution* provides for constitutional supremacy, stating: "This Constitution is the supreme law of the Federation and any law … which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void." See also *Ah Thian v. Government of Malaysia* [1976] 2 M.L.J. 112 (F.C.).

33 See *e.g.* Malaysia, Dewan Rakyat, *Parliamentary Debates*, vol. 2, no. 8, col. 1369-1370 (17 March 1988) (Dato' Seri Dr. Mahathir bin Mohamad, Prime Minister).

34 Harding, "Law, Government", *supra* note 3 at 134. See also Rais Yatim, *supra* note 11 at 104-105.

35 See Malaysia, Dewan Rakyat, *Parliamentary Debates*, vol. 2, no. 9, col. 1576-1577, 1584-1585 (18 March 1988) (Dato' Seri Dr. Mahathir bin Mohamad, Prime Minister).

36 [1998] 3 M.L.J. 289 at 307-308 (C.A.) [*Sugumar*].

37 A much more subtle assertion had appeared earlier in *MBf Holdings Bhd. v. Houng Hai Kong* [1993] 2 M.L.J. 516 at 528 (H.C.). In most other cases, the courts had apparently assumed that they continued exercising "the judicial power of the Federation": see *e.g. Sunkyong International Inc. v. Malaysian Rubber Development Corporation Bhd.* [1992] 2 M.L.J. 146 (S.C.); *Param Cumaraswamy v. MBf Capital Bhd.* [1997] 3 M.L.J. 824 (C.A.); *Uthayakumar v. Public Prosecutor* [2003] 5 M.L.J. 433 (H.C.); *Public Prosecutor v. Ottavio Quattrocchi* [2004] 3 M.L.J. 149 (F.C.); *Wasli bin Mohd Said v. Public Prosecutor* [2006] 5 M.L.J. 172 (H.C.) [*Wasli*]; *Eric Chia Eng Hock v. Public Prosecutor (No. 1)* [2007] 2 M.L.J. 101 (F.C.). *Contra Filotek Trading Sdn. Bhd. v. Buildcon-Cimaco Concrete Sdn. Bhd.* [1999] 4 M.L.J. 268 at 281 (H.C.) [*Filotek*]; *Samy Vellu v. Nadarajah* [2000] 4 M.L.J. 696 at 711-712 (H.C.).

Prosecutor v. Kok Wah Kuan[38] overturned that position, holding that the "judicial powers" of the courts were now solely determined by the "jurisdiction and powers" conferred on them by federal law; "the judicial power of the Federation" had become irrelevant.[39] Quite extraordinarily, the Court also effectively held that the separation of powers doctrine itself was not an integral part of the *Constitution*; until then, it had always been accepted that the *Constitution* embodied that doctrine.[40] In 2009, another bench of the Federal Court unanimously refused to disturb that decision.[41]

This article examines those two conclusions in *Kok Wah Kuan* and argues that the 1988 amendment actually fails to make any substantive constitutional change, such that the *Constitution* continues to embody the separation doctrine as before and "the judicial power of the Federation" continues to vest in the Article 121 courts. Part II provides an overview of the textual changes made by the amendment. Part III describes the *Kok Wah Kuan* decision. Part IV examines the issue of whether (and if so, how) the *Constitution* embodies the separation doctrine and Part V argues that the vesting of "the judicial power of the Federation" remains unaffected by the textual changes.

II. Textual Changes to Article 121

The amendment is shown as follows, with deletions struck through and insertions underlined:

> (1) ~~Subject to Clause (2) the judicial power of the Federation shall be vested in~~ <u>There shall be</u> two High Courts of co-ordinate jurisdiction and status, namely—
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> (a) one in the States of Malaya, which shall be known as the High Court in Malaya …; and

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[38] [2008] 1 M.L.J. 1 (F.C.) (Ahmad Fairuz C.J., Abdul Hamid Mohamad P.C.A., Alauddin C.J.M. and Zaki Azmi F.C.J., in a joint judgment delivered by Abdul Hamid Mohamad P.C.A.; Richard Malanjum C.J.S.S. dissenting on the point though not in the decision) [*Kok Wah Kuan*].

[39] *Ibid.* at paras. 11, 21-22. See also text accompanying notes 127-129.

[40] See *Loh Kooi Choon v. Government of Malaysia* [1977] 2 M.L.J. 187 (F.C.) [*Loh Kooi Choon*]; *Fan Yew Teng v. Government of Malaysia* [1976] 2 M.L.J. 262 (H.C.) [*Fan Yew Teng*]; *Phang Chin Hock v. Public Prosecutor* [1980] 1 M.L.J. 70 (F.C.) [*Phang Chin Hock*]; *Mustapha bin Harun v. Legislative Assembly of Sabah* [1986] 2 M.L.J. 388 (H.C.); *Salleh bin Jafaruddin v. Celestine Ujang* [1986] 2 M.L.J. 412 (S.C.); *Mahathir*, *supra* note 18; *Lee Gee Lam v. Timbalan Menteri Hal Ehwal Dalam Negeri* [1993] 3 M.L.J. 265 (H.C.); *Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 M.L.J. 145 (F.C.) [*Rama Chandran*]; *Meow Loong Onn v. Public Prosecutor* [1997] 2 M.L.J. 612 (H.C.); *Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek* [1997] 3 M.L.J. 23 (C.A.); *Mohd. Yusof bin Mohamad v. Kerajaan Malaysia* [1999] 5 M.L.J. 286 (H.C.); *Abdul Shaik bin Md. Ibrahim v. Hussein bin Ibrahim* [1999] 5 M.L.J. 618 (H.C.); *Chee Pok Choy v. Scotch Leasing Sdn. Bhd.* [2001] 4 M.L.J. 346 (C.A.); *Public Prosecutor v. Anwar Ibrahim* [2002] 2 M.L.J. 730 (H.C.); *Anwar bin Ibrahim v. Public Prosecutor* [2004] 3 M.L.J. 517 (F.C.); *Kok Wah Kuan v. Pengarah Penjara Kajang* [2004] 5 M.L.J. 193 (H.C.); *Palm Oil Research and Development Board v. Premium Vegetable Oils Sdn. Bhd.* [2005] 3 M.L.J. 97 (F.C.); *Indah Desa Saujana Corp Sdn. Bhd. v. James Foong Cheng Yuen* [2006] 1 M.L.J. 464 (H.C.); *Wasli*, *supra* note 37. See also Tun Mohamed Suffian, *An Introduction to the Constitution of Malaysia*, 2d ed. (Kuala Lumpur: Govt. Printer, 1976) at 21-22, 97; Suffian, "Legal System", *supra* note 7 at 10, 13.

[41] An application to review the earlier decision, pursuant to the Court's inherent jurisdiction, had been made to that bench (Arifin Zakaria C.J.M., Augustine Paul and Mohd. Ghazali F.C.JJ.). See M. Mageswari, "Youth to be detained at the pleasure of the Agong" *The Star* (23 July 2009), online: The Star Online <http://thestar.com.my/news/story.asp?file=/2009/7/23/nation/20090723114635&sec=nation>.

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo …;[42]

~~and in such inferior courts as may be provided by federal law~~ and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.[43]

(2) ~~The following jurisdiction shall be vested in~~ There shall be a court which shall be known as the Mahkamah Agung (Supreme Court)[44] … and the Supreme Court shall have the following jurisdiction, that is to say:

(a) exclusive jurisdiction to determine appeals from decisions of a High Court or a judge thereof …;
(b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
(c) such other jurisdiction as may be conferred by or under federal law.[45]

Three preliminary observations may be made about these textual changes. Firstly, the amendment altered the drafting scheme within Articles 121(1) and (2). The prior scheme consisted of an exceptional saving of certain "jurisdiction" to the Supreme Court, leaving the plenary "judicial power of the Federation" apparently vested in the High Courts and inferior courts only. In fact, the Supreme Court also was invested with "the judicial power of the Federation", although Clause (2) did not

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42 It is a historical curiosity that there are two co-equal High Courts. At the formation of Malaysia in 1963, it was decided to re-constitute a High Court for each of the three federating constituents—the Federation of Malaya, Singapore, and Sabah and Sarawak considered together as "Borneo"—each retaining its own chief justice and judges. A new Federal Court (presided over by a Lord President) was created above those courts. See Harry E. Groves, *The Constitution of Malaysia* (Singapore: Malaysia Publications, 1964) at 99. Singapore separated from that federation in 1965 and the High Courts in Malaya and Borneo have remained. Means is incorrect in suggesting that the two High Courts resulted from the 1988 amendment as part of the government's plan to divide judicial authority so that "no court had final ultimate jurisdiction for the Federation as a whole, and thus the question of where ultimate judicial authority rested was made ambiguous": see Means, *supra* note 8 at 237.

43 Except with respect to the federal territories, matters pertaining to Islam (as enumerated in the *Constitution*, Ninth Schedule List II para. 1) fall within the exclusive legislative competence of the States, and the Syariah courts (which have jurisdiction only with respect to those matters and only over persons professing the religion of Islam) are established by State law. This article does not discuss the jurisdictional tension between the Article 121 courts and the Syariah courts but see text accompanying note 165 for the limited relevance of Clause (1A) in this article.

44 This was the originally named Federal Court: see *supra* note 42; renamed the Supreme Court in 1985 pursuant to the *Constitution (Amendment) Act 1983* (Act A566): see also Suffian, "Legal System", *supra* note 7 at 62; and renamed again the Federal Court in 1994 pursuant to the *Constitution (Amendment) Act 1994* (Act A885). Also by Act A885, the High Court in Borneo was renamed the High Court in Sabah and Sarawak, the Chief Justice of each High Court was re-designated its Chief Judge, and the Lord President re-designated the Chief Justice of the Federal Court. A newly-created Court of Appeal (headed by a President) was also interposed between the High Courts and the Federal Court: *Constitution*, art. 121(1B).

45 Unlike the insertion at the end of Clause (1), paragraph (c) had already been inserted earlier, in 1985, by the *Constitution (Amendment) Act 1983* (Act A566).

expressly mention it.[46] In the altered scheme, there is of course no longer any express *vesting* of "the judicial power". Instead, each Clause now takes the form of *establishing* a particular court or courts,[47] and then *expressly demarcating* its or their "jurisdiction and powers" or "jurisdiction". This alteration itself does not cause any difficulty—the existence of a judicature, with each court thereof having an identifiable jurisdiction, is still being provided for—and if in the new scheme "the judicial power of the Federation" remains to be found vested in the Clause (1) courts, the same reasoning would apply equally to Clause (2), since both Clauses now have similar form.[48] Secondly, any *substantive* change intended by the amendment was apparently directed at Clause (1) only; the amended Clause (2) continues to provide for the existence of the *same* Supreme Court and to specify the *same* jurisdiction which it previously had. Thirdly, the amendment to Clause (1) essentially involved the substitution of the vesting formula with the "There shall be" formula at the beginning, and the insertion of the new "jurisdiction and powers" provision at the end.[49] It was this particular amendment which caused the court in *Kok Wah Kuan* to decide that *statutory* "jurisdiction and powers" has now replaced the *constitutional* "judicial power of the Federation" as the sole determinant of the judicature's power.

III. The *Kok Wah Kuan* Decision

In *Kok Wah Kuan*, a child was convicted of murder, the punishment for which would have been death if he had been an adult. Section 97(2) of the *Child Act 2001*, however, required a child "to be detained … during the pleasure of [the King][50]", and the child was accordingly sentenced. On appeal, the Court of Appeal[51] decided that the section effectively gave the King the power to determine the measure of a punishment, which was in nature a judicial power. Since the King must act on ministerial advice,[52] the section had vested a judicial power in the executive in violation of the separation of powers doctrine,[53] which the Court held to be "an integral part" of the *Constitution*.[54] Being therefore inconsistent with the *Constitution*, the section was to that extent void

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46 See *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 M.L.J. 233 at 235 (P.C.), decided when the Court was still called the Federal Court: see *supra* note 44.

47 The courts were, of course, already in existence.

48 Likewise, to Clause (1B) which was inserted later, also in similar form, to establish the Court of Appeal: see *supra* note 44.

49 In *Kok Wah Kuan*, Abdul Hamid Mohamad P.C.A. mistook this provision as pre-existing the amendment: *supra* note 38 at paras. 9-10. In fact, it was inserted during the amendment by s. 8(b) of Act A704. The mistake is not material to his decision or to the arguments here: see text accompanying notes 160-168.

50 The titular head of state is the *Yang di-Pertuan Agong*: *Constitution*, art. 32; here, as commonly, rendered "the King".

51 *Kok Wah Kuan v. Public Prosecutor* [2007] 5 M.L.J. 174 (Gopal Sri Ram, Zulkefli and Raus Sharif JJ.C.A., in a joint judgment delivered by Gopal Sri Ram J.C.A., who had earlier written the *Sugumar* judgment).

52 See *Constitution*, arts. 40(1), 40(1A); *Teh Cheng Poh v. Public Prosecutor* [1979] 1 M.L.J. 50 at 52 (P.C.).

53 *Cf. The State (O) v. O'Brien* [1973] I.R. 50 (H.C. and S.C.); *Browne v. The Queen* [2000] 1 A.C. 45 (P.C.); *Director of Public Prosecutions of Jamaica v. Mollison* [2003] 2 A.C. 411 (P.C.). Compare *R. v. Secretary of State for the Home Department, Ex p. Venables* [1998] A.C. 407 (H.L.).

54 *Supra* note 51 at para. 8.

and the sentence was set aside.[55] In so deciding, the Court observed that the 1988 amendment "did not have the effect of divesting the courts of the judicial power of the Federation".[56]

The Federal Court reversed the Court of Appeal's decision. Richard Malanjum C.J.S.S. decided that section 97(2) was valid because it was still the court exercising a judicial power in sentencing the child to be detained[57] (although the real issue concerned not the court's sentencing power but *the King's* power to determine the duration of that detention). Nevertheless, he strongly disagreed that after the amendment the courts could function only as permitted by federal law; in his view, Article 121(1) was not "the whole and sole repository" of the judicial power.[58] The majority led by Abdul Hamid Mohamad P.C.A., however, decided the case on the basis that "[t]he [separation of powers] doctrine is not a *provision* of the Malaysian Constitution".[59] Any legislation which was inconsistent with the doctrine alone would not be unconstitutional; to be unconstitutional, the legislation also had to be inconsistent with a "specific provision" of the *Constitution*.[60] After the 1988 amendment, the specific provision—that "the judicial power of the Federation shall be vested in" the courts—was no longer present in Article 121(1). Since there was no specific provision with which section 97(2) could be said to be inconsistent, the section was upheld. *Yap Peng*[61] was distinguished precisely on the point that the same provision was then still present in Article 121(1), and section 418A of the *Criminal Procedure Code* was rightly held to be unconstitutional for this inconsistency.[62]

IV. Separation of Powers

A. *The Kok Wah Kuan Approach*

Abdul Hamid Mohamad P.C.A. describes a separation of powers as "a political doctrine under which the legislative, executive and judicial branches of government are kept distinct, to prevent the abuse of power".[63] He does not analyse it any further, but evidently,[64] the learned judge has adopted Professor Vile's "pure doctrine" of the separation of powers as the starting point for his own reasoning. That "pure

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55 See *supra* note 32. Insofar as it stipulated that a child should not be sentenced to death, the section remained valid.

56 *Supra* note 51 at para. 4.

57 *Kok Wah Kuan*, *supra* note 38 at paras. 33-34.

58 *Ibid.* at paras. 37-39. But *quaere* whether the judicature can constitutionally have any power otherwise. Where a written constitution exists, the legislature, executive and judicature "take their powers directly or indirectly from it": Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1960) at 62. Jennings was of course one of the authors of the *Constitution*: see *infra* note 111. *Cf. R. v. Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254 at 270 (H.C.A.) [*Boilermakers Case*] where it was held that Chapter III of the Australian Constitution (including the similar s. 71: see Appendix) was "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested".

59 *Kok Wah Kuan, supra* note 38 at para. 17 [emphasis added].

60 *Ibid.* at paras. 12-13, 17-18.

61 See text accompanying note 26.

62 *Kok Wah Kuan*, *supra* note 38 at paras. 12-13.

63 *Ibid.* at para. 14.

64 *Ibid.* at paras. 14-17.

doctrine" encompasses the three elements of "separation of agencies" (the legislative, executive and judicial agencies or organs of government must be kept distinct), "separation of functions" (the function of each of those organs must be kept distinct) and "separation of persons" (the persons who compose each of those organs must be kept distinct, with no mixture of membership).[65]

Since this "pure" separation is clearly not evident in the *Constitution*, Abdul Hamid Mohamad P.C.A. rejects the proposition that the separation doctrine is "an integral part" of it.[66] Instead, he adopts a more qualified notion, by a reasoning which proceeds as follows: If the *Constitution* is irreconcilable with the "pure doctrine", then whether or not the separation doctrine can still be said to be incorporated must depend on its *acceptance* by this particular constitution;[67] that acceptance is *piecemeal*, effected through the "specific provisions" of the *Constitution*;[68] therefore, the doctrine can be said to be incorporated only if and insofar as some element or principle of it has been re-enacted in or as some "specific provision" of the *Constitution*;[69] hence, legislation is unconstitutional only if it is inconsistent with some such "specific provision" which has incorporated the doctrine. On this reasoning, reincarnation within the text simultaneously demonstrates both the *fact* and the *form* of the doctrine's "incorporation".

This approach actually puts the doctrine outside the *Constitution*, because it would now be sufficient to look only at those "specific provisions" said to contain elements or principles imported from the doctrine, without looking at the doctrine itself.[70] Conversely, whatever element or principle of the doctrine that has *not* been re-enacted within the text is treated as *not* part of the *Constitution* at all, and therefore has no force of law whatsoever.

B. *The Orthodox Approach*

Decisions of the Privy Council and the High Court of Australia on the same issue have long established that it is *not* irreconcilable for a constitution to incorporate the separation doctrine, and yet not have a strict or full separation of powers as propounded by the "pure doctrine". It is recognized that those statements stand at different points in a two-step interpretative process which reconciles them, and that they relate to two separate issues—whether the doctrine is in *fact* incorporated and if so, in what particular *form* it is incorporated.[71]

Firstly, it would be sufficient to conclude that a constitution in *fact* incorporates the doctrine if its basic structure and terms make apparently exclusive dispositions of

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65 M. J. C. Vile, *Constitutionalism and the Separation of Powers*, 2d ed. (Indianapolis: Liberty Fund, 1998) at 13-18. Vile sets this "pure doctrine" as a benchmark in defining the essentials of the doctrine, as yet uncomplicated by other constitutional theories which might impinge on it. See also Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971) at 100.

66 *Kok Wah Kuan*, *supra* note 38 at paras. 13-17.

67 *Ibid.* at para. 27.

68 *Ibid.* at paras. 11-12, 17.

69 *Ibid.* at paras. 12-13, 17-18, 27.

70 *Ibid.* at paras. 18-20.

71 See *Attorney-General for Australia v. The Queen* [1957] A.C. 288 at 311-315 (P.C.), (1957) 95 C.L.R. 529 at 537-540 [*Attorney-General for Australia* cited to A.C.].

the different functions of government to the different corresponding organs.[72] Such a "bare structure"[73] provides the "logical inferences"[74] or the "principal textual indication"[75] sufficient for this conclusion. The *Constitution* is plainly divided into distinct parts dealing with "The Executive",[76] the "Federal Legislature"[77] and "The Judiciary".[78] In the first part, Article 39 mandates that the "executive authority of the Federation shall be vested in [the King]", in the second, Article 44 mandates that the "legislative authority of the Federation shall be vested in a Parliament", and in the third, the previous Article 121(1) mandated that "the judicial power of the Federation shall be vested in" the designated courts.[79] This language is *imperative*—demanding that a particular power should be vested in a particular institution; thus, implicitly prohibiting its vesting elsewhere.[80] Professor Lee has concluded that "the … strength of the 'logical inferences' can be felt when perusing the structure of the Malaysian Constitution prior to 1988" and that its scheme "clearly embraced a separation of powers within the Westminster context".[81] The *fact* of the doctrine's incorporation is therefore attributed primarily to the tri-partite constitutional structure created, rather than to any specific text.[82]

However, the text certainly would determine if there is any departure from the "pure doctrine", and therefore determines the actual *form* taken by the doctrine within a constitution.[83] In *Attorney-General for Australia*, Viscount Simonds said:

> Then it has been urged that the doctrine has not always been closely observed in regard to the separation of legislative and executive powers. This is perhaps so,

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72 For decisions of the Privy Council, see especially *Attorney-General for Australia*, *supra* note 71 at 311-313; *Liyanage*, *supra* note 29 at 287-288; *Hinds v. The Queen* [1977] A.C. 195 at 212-213 [*Hinds*]. For decisions of the High Court of Australia, see especially *New South Wales v. Commonwealth* (1915) 20 C.L.R. 54 at 88-90, 108 [*Wheat Case*]; *Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257 at 264 [*Re Judiciary and Navigation Acts*]; *Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan* (1931) 46 C.L.R. 73 at 89-90, 96-97; *Boilermakers Case*, *supra* note 58 at 275. See also Cheryl Saunders, "The Separation of Powers" in Brian Opeskin & Fiona Wheeler, eds., *The Australian Federal Judicial System* (Melbourne: Melbourne University Press, 2000) 3 at 7-8 [Saunders].

73 *Supra* note 71 at 312.

74 *Boilermakers Case*, *supra* note 58.

75 Saunders, *supra* note 72 at 8.

76 *Constitution*, Part IV Chapter 3.

77 *Constitution*, Part IV Chapter 4.

78 *Constitution*, Part IX.

79 For the argument that the deletion of this vesting formula makes no difference, see Part V, below.

80 *Supra* note 71 at 312. In *Kok Wah Kuan*, Abdul Hamid Mohamad P.C.A. was inconsistent. When noting its absence from the amended text, he regarded the vesting formula as being merely declaratory: *supra* note 38 at paras. 10-11; but when distinguishing *Yap Peng*, he clearly treated it, when present, as an imperative which had been contravened: *supra* note 38 at para. 12. See also text accompanying notes 62, 127-128.

81 H.P. Lee, "The Judicial Power and Constitutional Government—Convergence and Divergence in the Australian and Malaysian Experience" (Sixth Tun Mohamad Suffian Memorial Lecture delivered at the Faculty of Law, University of Malaya, 8 April 2005) (2005) 32 J.M.C.L. 1, online: Commonwealth Legal Information Institute <http://www.commonlii.org/my/journals/JMCL/2005/1.html> [Lee, "Judicial Power"]. For cases consistent with this conclusion, see *supra* note 40.

82 Consequently, any *deficiency* in the text would not prejudice the *fact* of the doctrine's incorporation in a clearly tri-partite constitution: see *Hinds*, *supra* note 72 at 212 (where Lord Diplock observed that "the absence of express words to that effect" did not prevent a separation of powers); *Liyanage*, *supra* note 29 at 287-288. See also text accompanying note 132.

83 See Saunders, *supra* note 72 at 8.

> but the explanation of it rests *not on a theoretical rejection of the doctrine but upon the text* of the Constitution …[84]

Therefore, any apparent inconsistency between the text and the "pure doctrine" is no basis for denying the *fact* of the doctrine's incorporation in the clearly tri-partite *Constitution*. Rather, the text—for example, by requiring ministers to be members of Parliament[85]—has modified the doctrine, as incorporated, into a particular *form*. In this instance, the doctrine's "separation of agencies" principle and "separation of persons" principle are both modified to the extent that the doctrine assumes the form familiar to all Westminster model constitutions[86]—the doctrine of responsible government evoked by that text has impinged upon and modified the "pure doctrine". In every instance, the text must be construed on its own terms to determine whether, and to what extent, it requires any derogation from the "pure doctrine". It would require "very *explicit* and *unmistakable* words to undo the effect of the dominant principle of demarcation".[87] Through this course of textual interpretation, the theoretical doctrine and the applied doctrine are reconciled.[88]

C. *Analysis*

While the orthodox approach recognizes that "[t]here is more to the constitutional text than the express words",[89] and incorporates the underlying concepts, doctrines or principles so as to also constitutionalize them,[90] the *Kok Wah Kuan* approach—both in holding that the separation doctrine was "incorporated" only through "specific provisions" and that an inconsistency with only a "specific provision" would render legislation unconstitutional—treats the *Constitution* as consisting only of its *express* text. Insofar as the doctrine is *not* re-enacted as "provisions", its operation is automatically excluded, even if such operation would *not* be inconsistent with the existing text. All its principles are *excluded unless expressly included* in "specific provisions". By contrast, in the orthodox approach, all its principles are *included unless "explicitly" and "unmistakably" excluded* by the text. Once it is established that a constitution has the tri-partite structure evidencing the doctrine's incorporation, *all* its principles will apply with force of constitutional law, *unless* in some specific instance—on a proper construction of the text—some principle must be excluded or modified to the extent necessary to remove an inconsistency with the text.

For instance, the doctrine's "separation of persons" principle would apply to impose a strict separation of the judiciary—supplying a constitutional prohibition

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84 *Supra* note 71 at 315 [emphasis added].

85 See *Constitution*, arts. 43-43B.

86 See text accompanying note 81. See also Geoffrey Sawer, "The Separation of Powers in Australian Federalism" (1961) 35 Austl. L. J. 177 at 184 [Sawer].

87 *Wheat Case*, *supra* note 72 at 90 [emphasis added].

88 See Saunders, *supra* note 72 at 10.

89 George Winterton *et al.*, *Australian Federal Constitutional Law: Commentary and Materials*, 2d ed. (Sydney: Lawbook Co., 2007) at 1213.

90 See generally Sir Anthony Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in Charles Sampford & Kim Preston, eds., *Interpreting Constitutions: Theories, Principles and Institutions* (Sydney: Federation Press, 1996) at 29.

against any legislator, minister or public official (even if otherwise qualified) being concurrently a superior court judge—even where there is no "specific provision" in the *Constitution* actually prohibiting that. Although it is true that Article 48(1)(c) would disqualify a member from Parliament if he or she were also appointed a judge,[91] that provision is really directed at a separation of the legislature,[92] not a separation of the judiciary. It stipulates a disqualification from Parliament if a member becomes a judge, but it does not disqualify from the bench an appointee who remains a legislator. Even within its terms, the member's disqualification from Parliament can only occur after an actual decision is taken by the relevant House, and if the House persists (even perversely) in not disqualifying the member despite the appointment, its decision would still be final and non-justiciable,[93] effectively stultifying the provision itself. Therefore, Article 48(1)(c) cannot be regarded as a "specific provision" sufficient to impose a strict constitutional separation of judges from legislators and ministers under any and all circumstances; one would have to rely on the embodied doctrine if there is to be any such separation. In any case, Article 48(1)(c) clearly cannot apply to officials—parliamentary or executive—so as to prohibit their concurrent appointment as a judge. Yet, it is quite unthinkable that, for example, the Attorney-General (one who is not a member of Parliament) or a public servant could concurrently become a judge—because, even in the absence of any "specific provision" in respect of them, the embodied doctrine's "separation of persons" principle would again provide the constitutional prohibition. In contrast to the earlier example where the text had modified that principle in order to accommodate responsible government, nothing in the text would modify or exclude it in these situations. Its operation here would not be inconsistent with any existing text. In fact, its exclusion would undermine the text. Part IX of the *Constitution* contains text which merely sets out—in relation to superior court judges—special procedures for their appointment, their security of tenure and remuneration, and certain immunities they enjoy; there is no "specific provision" actually requiring a judgeship to be held exclusively of any office in the other branches.[94] That kind of text—"usual in democratic Constitutions"[95]—is, nonetheless, "designed to maintain the independence of the Judiciary *from the executive and legislative authorities*",[96] and ultimately, to secure public confidence in the judicial system; although those objectives are also not expressed in any "specific provision". Obviously, then, any "mixture of persons" between the judicial and other branches would undercut those normative objectives underpinning that text, but a strict "separation of persons" would instead share the same objectives. So, even in the absence of any "specific provision" with which it could be said to be inconsistent, a law

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91 See also *Constitution*, art. 160(1), defining an "office of profit" as including a judgeship.

92 *Cf. Sykes v. Cleary* (1992) 176 C.L.R. 77 at 95-96 (H.C.A.).

93 See *Constitution*, arts. 53(1), 63(1); *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat* [1975] 2 M.L.J. 40 (H.C.); *Fan Yew Teng*, *supra* note 40.

94 See *Constitution*, arts. 122B, 123, 125, 127. Of course, the Article 122B consultative process may, in practice, produce exclusive judicial appointments, but that is different from actually having a constitutional requirement.

95 Colonial Office, *Report of the Federation of Malaya Constitutional Commission* (London: Her Majesty's Stationery Office, 1957) at para. 125 [*Reid Commission Report*].

96 *Federation of Malaya Constitutional Proposals* (Kuala Lumpur: Govt. Printer, 1957) at paras. 31, 33 [emphasis added] [*F.M. Constitutional Proposals*]. See also *Liyanage*, *supra* note 29 at 287.

appointing, for example, a minister or the Attorney-General or a public servant to be concurrently a judge would be inconsistent with that principle supplied by the embodied doctrine into the *Constitution*, thereby be "inconsistent with this Constitution", and therefore void under Article 4(1). That result—and thus, a strict constitutional separation of the judiciary—would not be at all possible under the *Kok Wah Kuan* approach, which would insist on finding an inconsistency with a "specific provision".

In effect, *Kok Wah Kuan* has read Article 4(1) down as if saying "inconsistent with *any provision of* this Constitution". In many other places, the *Constitution* does in fact use the phrase "provision [or provisions] of this Constitution" when it is clearly referring to its own text,[97] but in relation to the constitutional supremacy clause, parliamentary counsel had exchanged the Reid Commission's phrase—"any law which is repugnant to *any provision of* this Constitution"—for the present Article 4(1).[98] The principle of constitutional supremacy is maintained, but as a matter of wording, Article 4(1) has a wider scope of construction, with the capacity to avoid laws for any form of inconsistency with the *Constitution* beyond just inconsistency with its text. *Kok Wah Kuan* contradicts the settled rule that the *Constitution* should be construed not "in any narrow or pedantic sense"[99] but rather, "broadly …—'with less rigidity and more generosity than other Acts' ",[100] giving "effect to the full breadth and width of its great language".[101]

The Federal Court's peculiar approach resulted from its application[102] of the "four walls" principle.[103] The Court declined to discuss decisions from other jurisdictions,[104] agreeing with *Loh Kooi Choon* that the *Constitution* "stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other constitutions' ".[105] The separation doctrine, seen as "not a provision" of the *Constitution*,[106] was accordingly regarded as extraneous. But *Loh Kooi Choon* had

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97 See *Constitution*, arts. 3(4), 57(1A), 62(1), 71(3), 92(8), 97(1), 128(2), 130, 144(1), 144(8), 150(5), 150(6), 150(6A), 159(1), 159(4), 159A, 162(6), 166(3), 181(1), Fifth Schedule para. 5.

98 Compare draft *Constitution* Article 3(1): *Reid Commission Report*, *supra* note 95 at (Appendix II) 1 [emphasis added] with draft *Constitution* Article 4(1): *Federation of Malaya Constitutional Proposals Annexes* (Kuala Lumpur: Govt. Printer, 1957) at 2 [*F.M. Constitutional Proposals Annexes*]. For an explanation on the writing of the *Constitution*, see *infra* note 111.

99 *Mohammad Nizar bin Jamaluddin v. Zambry bin Abdul Kadir* [2010] 2 M.L.J. 285 at para. 46 (F.C.). See also *Public Prosecutor v. Harun bin Idris* [1976] 2 M.L.J. 116 at 120 (H.C.); *James v. Commonwealth of Australia* [1936] A.C. 578 at 614 (P.C.).

100 *Othman bin Baginda v. Ombi Syed Alwi bin Syed Idrus* [1981] 1 M.L.J. 29 at 32 (F.C.), adopting the principle in *Minister of Home Affairs v. Fisher* [1980] A.C. 319 at 329 (P.C.) and *Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds* [1980] A.C. 637 at 655 (P.C.). See also *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 1 M.L.J. 697 at 709 (S.C.).

101 *Repco Holdings Bhd. v. Public Prosecutor* [1997] 3 M.L.J. 681 (Gopal Sri Ram J.C.A. sitting in the High Court).

102 *Kok Wah Kuan*, *supra* note 38 at paras. 18-20.

103 See *The Government of the State of Kelantan v. The Government of the Federation of Malaya* [1963] 1 M.L.J. 355 at 358 (S.C.) where Thomson C.J. said that "the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries …"

104 *Kok Wah Kuan*, *supra* note 38 at para. 27.

105 *Loh Kooi Choon*, *supra* note 40 at 188–189, quoting Viscount Radcliffe in *Adegbenro v. Akintola* [1963] A.C. 614 at 632 (P.C.) [*Adegbenro*].

106 See text accompanying notes 59-60.

in fact accepted that the doctrine *was* embodied in the *Constitution*.[107] Although the "four walls" principle rightly upholds ultimate textual primacy over extraneous doctrine, it cannot adequately address the issue of whether or not the separation doctrine is actually extraneous. Its focus is on determining *textual* meaning, and as we have seen, the incorporation of the separation doctrine is evidenced not so much in the text as in the basic tri-partite constitutional structure. The "four walls" principle, correctly applied, would not have precluded the application of those orthodox decisions inferring the *fact* of the doctrine's incorporation *from the structure*, although it could well affect the *form* of the incorporated doctrine determined *by the text*.[108] The Federal Court deprived itself of Lord Diplock's prescient warning that:

> In seeking to apply to the interpretation of the Constitution of Jamaica what has been said in particular cases about other constitutions, care must be taken to distinguish between judicial reasoning which depended on *the express words used* in the particular constitution under consideration and reasoning which depended on what, though not expressed, is none the less *a necessary implication from the subject matter and structure* of the constitution and *the circumstances in which it had been made.*[109]

The *Constitution* was written in that twentieth-century era of British decolonization. All those new constitutions were "drafted by persons … familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom", and followed "a common pattern and style of draftsmanship which may conveniently be described as 'the Westminster model' ".[110] The Reid Commission was, unquestionably, composed of persons with "a vast knowledge and experience of constitutional law".[111] Jennings, in particular, who is said to have been the "prime mover" in conceptualising and drafting the document, had been involved in writing

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[107] *Supra* note 40 at 188.

[108] The "four walls" principle does not at all forbid any reliance on relevant foreign decisions: see *Merdeka University Bhd. v. Government of Malaysia* [1982] 2 M.L.J. 243 at 249, 251 (F.C.). *Loh Kooi Choon*, *supra* note 40 at 189, itself contemplates that "[w]e look at other Constitutions to learn from their experiences". Even in textual construction, the court may consider the interpretive aid of other constitutions: *Adegbenro*, *supra* note 105. See generally Li-ann Thio, "Beyond the 'Four Walls' in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore" (2006) 19 Colum. J. Asian Law 428.

[109] *Hinds*, *supra* note 72 at 211 [emphasis added].

[110] *Ibid.* at 212.

[111] Joseph M. Fernando, "Sir Ivor Jennings and the Malayan Constitution" (2006) 34 Journal of Imperial & Commonwealth History 577 at 581 [Fernando]. The *Constitution* was first written by a commission consisting of Lord Reid the Lord of Appeal in Ordinary, Sir Ivor Jennings the distinguished constitutional jurist, Sir William McKell the former Australian Governor-General, Mr. B. Malik the retired Chief Justice of the Allahabad High Court, India, and Mr. Justice Abdul Hamid from Pakistan: *Reid Commission Report*, *supra* note 95 at para. 2. The draft was then reviewed by the British Government and a "Working Party" of stakeholders in Malaya, and "scrutinised in the Office of the Parliamentary Counsel in the United Kingdom with a view to removing ambiguities and inconsistencies and, where necessary, improving its form": *F.M. Constitutional Proposals*, *supra* note 96 at paras. 1-5 (besides accommodating further substantive agreements reached during the ongoing constitutional negotiations).

other constitutions.[112] The Commission's remit was to "make recommendations for a federal form of constitution … based on Parliamentary democracy"[113]—including the requirement of responsible government[114]—and its work drew on the form and experience of other Westminster model written constitutions and on the common law of Commonwealth countries,[115] producing a constitution undoubtedly of the Westminster model.[116]

To that extent, the *Constitution* is not unique, and as we have seen, the Westminster model constitution features the *fact* of separation of powers in its tri-partite structure and a basic *form* of separation including what—for the purposes of construing such a constitution—may be regarded as presumptive aspects: the doctrine of responsible government "defining the full extent to which the legislative and executive functions are to be mixed",[117] leaving intact a strict separation of the judicial power from both the legislative and executive powers.[118] But just as its text has modified the "pure doctrine" to produce that basic Westminster character, any particular constitution may also—again by its own text—modify that presumptive form within itself and thereby differentiate itself even further; hence, the "four walls" principle. For example, in the case of the *Constitution*, Article 130 (which allows the executive to obtain the "advisory" opinion of the Federal Court as to the effect of any provision of the *Constitution*)[119] arguably constitutes one such intentional derogation from the presumptive strict separation of the judicial power.[120] Another instance is where Articles 132 and 138 designate members of "the judicial and legal service" as federal public servants under the control of a Judicial and Legal Service Commission that exercises executive authority;[121] yet, judges and magistrates of the inferior courts are appointed from the service.[122] The Reid Commission clearly also intended this particular derogation from the strict separation of the judicial power.[123] But it is just as clear that this "mixture of persons"[124] does not extend to superior court judges.

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112 Fernando, *supra* note 111 at 581, 584-585.

113 *Reid Commission Report*, *supra* note 95 at para. 3.

114 *Ibid.* at paras. 57, 68.

115 Fernando, *supra* note 111 at 581, 584, 590-591.

116 Abdul Hamid Mohamad P.C.A. agrees as much: *supra* note 38 at para. 16.

117 Sawer, *supra* note 86.

118 This basic form is certainly discernible in the *Constitution*: see Suffian, "Legal System", *supra* note 7 at 43; Lee, "Judicial Power", *supra* note 81.

119 See *e.g. Government of Malaysia v. Government of Kelantan* [1968] 1 M.L.J. 129 (F.C.), although it is difficult to distinguish that case from any *lis inter partes* which could have come within the Court's "original" jurisdiction under Article 128(1)(b).

120 *Cf. Re Judiciary and Navigation Acts*, *supra* note 72; *Attorney-General for Australia*, *supra* note 71 at 315-316. These were decisions on the Australian constitution. The Reid Commission decided to follow the position in Canada, India and Pakistan instead: *Reid Commission Report*, *supra* note 95 at para. 123. See also Suffian, "Legal System", *supra* note 7 at 63-64.

121 See *Reid Commission Report*, *supra* note 95 at paras. 153-154, 157; *Constitution*, art. 144.

122 See *Subordinate Courts Act 1948*, ss. 60, 78A. See generally *Cheak Yoke Thong v. Public Prosecutor* [1984] 2 M.L.J. 119 (F.C.) aff'g [1984] 1 M.L.J. 311 (H.C.).

123 While also saying, "[i]t will no doubt be necessary, at some future time, to apply the principle of separation of powers more strictly and thus deprive public officers of magisterial powers.": *Reid Commission Report*, *supra* note 95 at para. 128. More than 50 years later, this has not occurred.

124 The "separation of agencies" remains unaffected since the inferior courts are still exclusively within the judicature. The "separation of functions" is also unaffected since an inferior court judge *qua* judge exercises judicial power but *qua* public servant exercises no judicial power.

They are not public servants[125] and remain strictly separate.[126] Therefore, subject to such particular instances as may be discovered from *within* the text, the Westminster model's presumptive strict separation of the judicial power continues to apply. As such, the "four walls" principle is not incompatible with an orthodox analysis of the *Constitution*. Such an analysis would successfully reconcile the *Constitution* with its acknowledged Westminster origins and character, recognizing that the *fact* of the doctrine's incorporation is evidenced by its tri-partite structure and that the ultimate *form* of the incorporated doctrine is determined by the text within its "four walls"—and in fact, as so determined, that form still prescribes a strict separation of the judicial power from both the legislative and executive powers, save for those exceptional instances just described. On the other hand, *Kok Wah Kuan*, having refused to engage with orthodox authority and taken its own course, has used the wrong test for this purpose, and consequently, has been unable to reconcile even the most basic incorporation of the separation doctrine within a clearly Westminster model constitution.

V. The Judicial Power of the Federation

If, as shown, the separation doctrine is indeed incorporated—in the correct orthodox sense—in the *Constitution*, then has the deletion of the vesting formula from Article 121(1) divested the courts of "the judicial power of the Federation", such that statutory "jurisdiction and powers" is now the sole determinant of the judicature's power, as *Kok Wah Kuan* has supposed?[127] Abdul Hamid Mohamad P.C.A. said:

> 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. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests 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 the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend [sic] on what federal law provides, not on the interpretation [of] the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment …
>
> So, even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution provides, not what some political thinkers think 'judicial power' is. Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was

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[125] See *Constitution*, art. 132(3)(c). As one senior judge elsewhere pithily puts it: "[J]udges serve the public but they are not 'public servants'.": The Hon. Marilyn Warren, Chief Justice of the Supreme Court of Victoria, "Public Confidence in the Judiciary—A Response to the Announcement by the Honourable the Attorney-General" (Keynote Address at the Judicial Conference of Australia Colloquium, Windsor Hotel, Melbourne, 9 October 2009), online: The Judicial Conference of Australia <http://www.jca.asn.au/attachments/2009JCAColloquiumKeynoteAddress.pdf>.

[126] See *Reid Commission Report*, *supra* note 95 at paras. 124, 157.

[127] See also *Filotek*, *supra* note 37, where Abdul Hamid Mohamad J. said, "The amendment has removed the vesting of judicial power of the Federation in the courts."

> a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law.[128]

Joseph's conclusion from those passages—that Abdul Hamid Mohamad P.C.A. had "agreed … that … judicial power of the Federation vests in the courts even after the 1998 amendment"[129]—is inaccurate. In his references to judicial power pertaining after the amendment, the learned judge clearly was thinking not of "the judicial power of the Federation" granted by the *Constitution* itself (such as it was before the amendment) but, quite differently, of the courts' "powers" conferred by federal law. Those passages, like his earlier statement in *Filotek*, actually show that the judge treated the concept of "the judicial power of the Federation" as having completely disappeared from the *Constitution*. Accordingly, he regarded it as having become totally irrelevant in defining the judicature's power (in the sense of its competence to function), which he thought was now to be defined solely by reference to statutory "jurisdiction and powers". It was *those* "powers" which he felt "perfectly entitled" to also call "judicial". His idea of the "new" judicial power pertaining after the amendment was not "the judicial power of the Federation" at all, and he himself did not apply that label to it. He thought a "new" concept of *statutory* judicial power—different in "nature and extent"—was necessitated by the amendment.

There are three reasons why the above reasoning cannot be justified.

Firstly, despite the deletion of the express vesting formula, "the judicial power of the Federation" (such as it was before the amendment) would simply continue to vest in the courts because of the embodied separation doctrine. Such vesting is, in the first place, inescapable and it does not vanish merely because the vesting formula has been textually deleted. Because the doctrine quintessentially involves the division of functions to corresponding organs, the very establishment of an organ within the tri-partite structure must inevitably vest its function too. The "There shall be" formula, which replaced the vesting formula, does not merely mandate the establishment of the courts; it also carries the implicit vesting of the constitutional judicial power exclusively in them. While the vesting formula explicitly mentions both constitutional organ and function, the "There shall be" formula simply establishes the organ, relying on the doctrine (which it manifests) to implicitly supply its function. In *Hinds*, Lord Diplock observed that where a constitution structurally provides for the tri-partite organs, "[i]t 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".[130] Although sections 97(1) and 103(1) of the Jamaican constitution in that case employed only the "There shall be" formula, the Privy Council held that there was a "necessary implication" that the constitutional judicial power vested exclusively in the courts thereby established.[131] In fact, even if *neither* formula is used, the embodied doctrine will still vest the constitutional judicial power in such judicature as can be identified in the constitution. In *Liyanage*, the constitution

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[128] *Kok Wah Kuan*, *supra* note 38 at paras. 11, 22.

[129] A. L. R. Joseph, "The Doctrine of Separation of Powers Survives in Malaysia" (2007) Sing. J.L.S. 380 at 392-393 (even with the qualification that the judge agreed "not unconditionally").

[130] *Hinds*, *supra* note 72 at 212.

[131] *Ibid*. at 212, 220. See also text accompanying note 109. For the relevant text of s. 97(1), see Appendix; s. 103(1) is identical, except that "Court of Appeal" is substituted for "Supreme Court".

of Ceylon did not expressly establish any court nor vest the judicial power in any court but simply dealt with the appointment, tenure and remuneration of Supreme Court judges. Nonetheless, given its obvious tri-partite structure, the Privy Council held that the judicial power was indeed vested exclusively in the Supreme Court.[132] Clearly, so long as a constitution establishes the tri-partite *structure*, the embodied doctrine will cause the exclusive vesting of the constitutional power in each organ to automatically follow—*unless* the text "explicitly" and "unmistakably" modifies that in some way.[133]

Obviously, the amended Article 121(1) text cannot possibly have any such effect. In reality, the vesting formula and the "There shall be" formula are used either interchangeably or conjunctively in constitutional drafting for the same purpose of creating the tri-partite structure and vesting the functions. Some constitutions use the vesting formula exclusively.[134] Some use the vesting formula basically for all three branches but may also use the "There shall be" formula occasionally to first create an office in which a power is to vest[135]—Articles 32(1), 39, 44 and 121(1) of the pre-1988 amendment *Constitution* followed this form. Some others use instead the "There shall be" formula basically throughout but may also occasionally vest a power in an office created.[136] In yet others, the two formulae are simply alternatives used for different branches.[137]

The Reid Commission had originally used the "There shall be" formula for the separation of powers in Articles 36 (read with 32), 38 and 114 of their final draft,[138]

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[132] *Liyanage*, *supra* note 29 at 286-288. See also *supra* note 82; *Ceylon (Constitution) Order in Council 1946* (see Appendix). For other examples, see *infra* note 137 (constitutions of Grenada, *etc.*).

[133] See text accompanying note 87.

[134] See *e.g. Commonwealth of Australia Constitution*, ss. 1, 61, 71 (see Appendix); *Republic of South Africa Constitution* (1996), ss. 43, 85(1), 165(1); *United States of America Constitution*, (Article I Section 1, Article II Section 1, Article III Section 1).

[135] See *e.g. Constitution of the Republic of Singapore*, arts. 17(1), 23(1), 38, 93 (see Appendix).

[136] See *e.g. Constitution of India*, arts. 52, 53(1), 79, 124(1) (see Appendix); *Pakistan Constitution* (1956), arts. 32(1), 39(1), 43, 148, 165(1); *Trinidad and Tobago Constitution* (1976), ss. 22, 39, 74(1), 99. In these examples, it is obviously more desirable to also specify the executive power with an express vesting (although "There shall be" has already been used to create the relevant office), because by itself, the nature of a function attaching to a natural person or a newly-created office may not be as self-evident as that attaching to a "Parliament" or a "Court" merely by its establishment (although in the tri-partite context, there can be little doubt). Also, the person or office-holder may simultaneously have other constitutional functions (*e.g.* being a part of the legislature).

[137] See *e.g. Jamaica (Constitution) Order in Council 1962*, ss. 34, 68(1), 97(1) (see Appendix); *Ceylon (Constitution) Order in Council 1946*, ss. 7, 45 (see Appendix); *Kenya Constitution* (1963), ss. 34(1), 72(1), 171(1); *Barbados Independence Order 1966*, ss. 35, 63(1), 80(1); *The Bahamas Independence Order 1973*, arts. 38, 71(1), 93(1), 98(1); *Belize Constitution* (1981), ss. 36(1), 55, 94; *Grenada Constitutional Order 1973*, ss. 23, 57(1); *Saint Lucia Constitution Order 1978*, ss. 23, 59(1); *Saint Vincent Constitution Order 1979*, ss. 23, 50(1); *Antigua and Barbuda Constitution Order 1981*, ss. 27, 68(1); *Saint Christopher and Nevis Constitution Order 1983*, ss. 25, 51(1). In these examples, since the executive power is to vest in a national sovereign whose existence is already assumed, the "There shall be" formula is clearly unnecessary and only a vesting remains appropriate.

[138] *Reid Commission Report*, *supra* note 95 at 12-14, 40, following the *Federation of Malaya Agreement 1948*, Clauses 22, 36(1) and 77, which had provided that "There shall be" an Executive Council, a Legislative Council and a Supreme Court. The text of that colonial constitution (as a prelude to self-government) reserved ultimate legislative and executive powers to the British "High Commissioner", and therefore negated to that extent the exercise of those powers by the respective Councils: see Clauses 7-8, 17, 22, 30-32, 48, 52(1). However, the mere establishment of the Supreme Court had constituted a judicature which was exclusively vested with the judicial power: see Clauses 77, 81. For its description

but parliamentary counsel recast those provisions (rearranged as Articles 39, 44 and 121) with the vesting formula instead.[139] It was never an issue in the constitutional negotiations before independence whether the three powers should or should not *vest* in the three institutions—that they would was too basic a premise—and "the reviewing work of the draftsmen did not involve any alteration of principle or policy, but was concerned solely with wording".[140] Parliamentary counsel had simply, "for purposes of clarity",[141] preferred the more explicit formula. Just as the 1957 change in formula did not make any constitutional difference, the 1988 deletion of the vesting formula and reversion to the "There shall be" formula also made no difference to "the judicial power of the Federation" remaining vested exclusively in the Article 121 courts.[142]

Secondly, while both concepts—"the judicial power of the Federation" and "jurisdiction and powers"—act to define the courts' competence to function, they do so in very different senses and for very different purposes. Given that incongruence, one cannot replace the other as the sole determinant of the judicature's power. "The judicial power of the Federation" concerns the *characterization* of the judicature's constitutional power *within the tri-partite separation of powers*; its purpose is to differentiate that power from the other two basic constitutional powers of the sovereign State[143] by reference to its essential "judicial" attribute. The courts as a whole exclusively exercise the judicial constitutional power of the State, and no court may exercise the legislative or executive constitutional powers. In contrast, "jurisdiction and powers" concerns the *allocation* or *distribution* of the judicature's constitutional power *within the judicature*; its purpose is to differentiate that portion of "the judicial power of the Federation" exercisable by a particular court, especially within a hierarchy.[144] A court may exercise "the judicial power of the Federation" only within the limits of its assigned "jurisdiction and powers"[145] and no court may exercise it within "jurisdiction and powers" not assigned to it, or that assigned exclusively to another court.

In the *Kok Wah Kuan* passages quoted above, those two concepts have been confused, as if "jurisdiction and powers" could in place of "the judicial power of the Federation" perform the task of *characterizing* the judicature's constitutional power

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of that judicature, see *Reid Commission Report*, *supra* note 95 at paras. 122-123. For the provisions of Clause 77, see text accompanying note 170.

139 See *F.M. Constitutional Proposals Annexes*, *supra* note 98 at 18, 21, 57. See also *supra* note 111.

140 U.K., H.C., *Parliamentary Debates*, vol. 573, col. 636 (12 July 1957) (Mr. Alan Lennox-Boyd, Secretary of State for the Colonies) (while moving the *Federation of Malaya Independence Bill 1957*).

141 *F.M. Constitutional Proposals*, *supra* note 96 at para. 5.

142 Harding provides another argument, based on the construction of Part IX of the *Constitution* as a whole, for the same conclusion: Harding, "Law, Government", *supra* note 3 at 135-136. For a similar reasoning, see *Liyanage*, *supra* note 29 at 287. See also text accompanying note 179.

143 See *Liyanage*, *supra* note 29 at 288; *Huddart, Parker & Co. Pty. Ltd. v. Moorehead* (1909) 8 C.L.R. 330 at 357 (H.C.A.) [*Huddart, Parker*]; *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd.* (1918) 25 C.L.R. 434 at 441 (H.C.A.) [*Alexander's Case*].

144 *Cf. Hinds*, *supra* note 72 at 213; *Nicholas v. The Queen* (1998) 193 C.L.R. 173 at 185-186, 188 (H.C.A.) [*Nicholas*] where Brennan C.J. said: "The judicial power of the Commonwealth [of Australia] is vested in a court when the Constitution or a law of the Commonwealth confers jurisdiction to exercise judicial power in specific matters".

145 Besides its "inherent jurisdiction" which, of course, needs no assignment. See *e.g. Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 M.L.J. 143 (H.C.); *Rama Chandran*, *supra* note 40; *Ngan Tuck Seng v. Ngan Yin Groundnut Factory Sdn. Bhd.* [1999] 5 M.L.J. 509 at 520 (H.C.).

and alone fully determine the judicature's competence to function. The two concepts are distinct, even if they may be complementary. The amended *Constitution* may very well expressly permit federal law to impose limits when conferring the "jurisdiction and powers" within which a court may exercise "the judicial power of the Federation", but that is distinct from the *Constitution*'s own basic imperative that the judicial constitutional power must be exercised exclusively by the courts. Federal law may impose the limit that the High Court has no "power" to sentence a child to death but only the "power" to pass a sentence of indeterminate detention. However, that is distinct from the issue of whether the *executive* may—*subsequent* to such sentencing—determine the duration of that detention, if such power is also "judicial" in character and actually within the judicial constitutional power of the State.[146]

A separation of powers presupposes an ability to distinguish between functions which may be characterized as legislative, executive or judicial,[147] and the Article 121 *constitutional* vesting of "the judicial power of the Federation" (whether express, as previously, or now tacit) constrains the *legislative* vesting of power of a "judicial" character. Whenever legislation creates a governmental task which exercises power of a "judicial" character (*i.e.* a power falling within "the judicial power of the Federation"), that task must be given, if at all, to an Article 121 court and not any other entity.[148] Certain tasks are clearly not "judicial" but are either "legislative" or "executive". Certain other tasks such as adjudicating on criminal offences and civil disputes in contract or tort are intractably the "exclusive and inalienable exercises of the judicial power".[149] But in equivocal cases, it will be necessary to decide whether a task which has been legislatively assigned to some entity should properly be characterized as an exercise of "judicial" power or otherwise, so as to determine whether or not it has been assigned constitutionally. In order to make that distinction, an exhaustive conceptual definition of "judicial" power would be most useful, but the formulation of just such a definition has proved "virtually impossible".[150] Nonetheless, a substantial body of law exists[151] where the issue is decided by considering

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146 As it has been held to be; a determination of the measure of a punishment rightly forms part of the sentencing exercise in a criminal case: see *supra* note 53.

147 See *Boilermakers Case*, *supra* note 58 at 333; Saunders, *supra* note 72 at 13-14.

148 *Cf. Wheat Case*, *supra* note 72; *Alexander's Case*, *supra* note 143.

149 *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 C.L.R. 245 at 258 (H.C.A.) [*Brandy*]. See also *Federal Commissioner of Taxation v. Munro* (1926) 38 C.L.R. 153 at 175 (H.C.A.) [*Munro*]; *R. v. Davison* (1954) 90 C.L.R. 353 at 368 (H.C.A.) [*Davison*].

150 *Yap Peng*, *supra* note 26 at 317. See also *Davison*, *supra* note 149 at 366; *R. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd.* (1969) 123 C.L.R. 361 at 394 (H.C.A.) [*Tasmanian Breweries*]; *Brandy, supra* note 149 at 257. Even Griffith C.J.'s classic definition in *Huddart, Parker*, *supra* note 143—"the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects"—which has been approved as "one of the best definitions": *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* [1931] A.C. 275 at 295 (P.C.) [*Shell Co.*]—is said to have set out only "broad features": *Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.* [1949] A.C. 134 at 149 (P.C).

151 For Australian decisions on "the judicial power of the Commonwealth", see *e.g. Alexander's Case*, *supra* note 143; *British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation* (1925) 35 C.L.R. 422 (H.C.A.); *Shell Co.*, *supra* note 150; *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144 (H.C.A.); *Davison, supra* note 149; *Boilermakers Case*, *supra* note 58; *R. v. Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 C.L.R. 277 (H.C.A.); *R. v. Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union* (1960) 103 C.L.R. 368 (H.C.A.); *Tasmanian Breweries, supra*

instead a complex of features, including: whether the entity's determination decides any dispute; whether it decides existing rights and liabilities; whether it does so according to law or policy; whether it is authoritatively binding and enforceable; whether its making is the primary or an ancillary purpose of the entity; whether the power may take its character from its legislative context or from any long usage, *etc*.[152] However difficult it may be in any particular case, the issue is always one of *characterizing* the basic power of a task in order to pronounce upon the question: To which of the three constitutional powers of the State does it belong?[153] If a task is by that test held to be of a "judicial" character, it constitutes an exercise of and belongs to "the judicial power of the Federation", which is reserved exclusively to the Article 121 courts.[154]

The entirely different purport of "jurisdiction and powers" is obvious from legislation conferring "jurisdiction" and "powers" on courts. In *Lee Lee Cheng v. Seow Peng Kwang*, Thomson C.J. said:

> there is a distinction between the jurisdiction of a Court and its powers … the word 'jurisdiction' is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.[155]

If "jurisdiction" denotes the *subject matter* over which a court is authorised to perform its function (*i.e*. to exercise its constitutional power—"the judicial power of the Federation") and "powers" denotes the *specific actions* which a court is authorised to

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note 150; *R. v. Quinn; Ex parte Consolidated Food Corp.* (1977) 138 C.L.R. 1 (H.C.A.); *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501 (H.C.A.); *Precision Data Holdings Ltd. v. Wills* (1991) 173 C.L.R. 167 (H.C.A.) [*Precision Data*]; *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1 (H.C.A.); *Brandy, supra* note 149; *H.A. Bachrach Pty. Ltd. v. Queensland* (1998) 156 A.L.R. 563 (H.C.A.); *Nicholas*, *supra* note 144; *Albarran v. Companies Auditors and Liquidators Disciplinary Board* (2007) 231 C.L.R. 350 (H.C.A.); *Visnic v. Australian Securities and Investment Commission* (2007) 231 C.L.R. 381 (H.C.A.); *Thomas v. Mowbray* (2007) 233 C.L.R. 307 (H.C.A.); *Attorney-General (Commonwealth) v. Alinta Ltd.* (2008) 233 C.L.R. 542 (H.C.A.).

[152] The issue is compounded by the fact that it seems impossible to fix a particular feature as being always essential; that even "essential" features are not by themselves conclusive of the power being "judicial"; that a non-essential feature may nonetheless be strongly indicative; that the combination of features is not always the same in each case to determine the issue, and that some tasks, even having the same features, may yet be characterized differently if performed by different bodies in different contexts: see *Brandy*, *supra* note 149 at 257, 267, 268; *Davison*, *supra* note 149 at 368-369; *Precision Data*, *supra* note 151 at 188-189.

[153] See *Munro*, *supra* note 149 at 176.

[154] In contrast to the well-developed Australian law, *Yap Peng*, *supra* note 26, appears to be the only Malaysian case directly in point (besides the Court of Appeal's decision in *Kok Wah Kuan* itself). The issue arose in *Phang Chin Hock*, *supra* note 40, but was not dealt with directly.

[155] [1960] 1 M.L.J. 1 at 3 (C.A.) [*Lee Lee Cheng*]. See also *Majlis Peguam v. Mohamed Yusoff bin Mohamed* [1997] 2 M.L.J. 271 (S.C.) [*Majlis Peguam*]; *Malaysia Building Society Bhd. v. Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 M.L.J. 425 (C.A.); *Megat Najmuddin bin Megat Khas v. Bank Bumiputra (M) Bhd.* [2002] 1 M.L.J. 385 (F.C.); *United Malacca Bhd. v. Pentadbir Tanah Daerah Alor Gajah* [2003] 1 M.L.J. 465 (F.C.); *Kekatong Sdn. Bhd. v. Danaharta Urus Sdn. Bhd.* [2003] 3 M.L.J. 1 (C.A.); *Shamala Sathiyaseelan v. Jeyaganesh C. Mogarajah* [2004] 2 M.L.J. 648 (H.C.); *Abdul Ghaffar bin Md. Amin v. Ibrahim bin Yusoff* [2008] 3 M.L.J. 771 (F.C.).

take in dealing with those matters,[156] then those words must bear those meanings in the amended Article 121(1). Article 121(1) provides that the courts shall have such "jurisdiction and powers" as may be conferred by federal law, and that is precisely what those words mean in federal law which performs that function.[157] Parliament, having used the same words to concatenate constitution and legislation, must be taken to have intended the same meaning in both places.[158]

No issue arises from *Kok Wah Kuan* concerning "jurisdiction" as there was no real discussion of it, but in relation to "powers", it will be recalled that Abdul Hamid Mohamad P.C.A. continued to characterize the courts' "powers" *after* the amendment as "judicial".[159] But the word "powers" itself carries no necessary connotation that an entity's "powers" are "judicial" in character. A court's "powers" are certainly "judicial" but a minister's "powers" are "executive". Even the same "power" (such as the power to grant an extension of time) may in different constitutional hands assume a different character. Plainly, any characterization must rest on some basis beyond the word itself, and as we have just seen, the only basis for any *characterization* of a court's "powers" as "judicial" is, in fact, "the judicial power of the Federation". Even as the learned judge pronounces that the amendment has removed "the judicial power of the Federation" vested in the courts, he paradoxically continues to adhere to its distinctive *effect* by attributing an essential "judicial" character to the court's "powers" after the amendment. Why he felt "perfectly entitled" to make that characterization is not explained, but it is only explicable by assuming, firstly, some sort of separation of powers, and secondly, that of the three basic constitutional powers, that which is of a "judicial" character—"the judicial power of the Federation"—vests in the courts, such that consequently a court's "powers"—those *specific actions* which a court is authorised to take pursuant to and within the scope of its basic constitutional power—may then also be properly characterized as "judicial". So, in fact, the learned judge has instinctively, if unintentionally, confirmed the survival of "the judicial power of the Federation" within the amended Article 121. Confusion occurred in those quoted passages because he had assumed its disappearance with the mere deletion of the vesting formula, and then failed, firstly, to ascertain the true meaning of "jurisdiction and powers" (particularly "powers") in the new phrase, and secondly, to distinguish between "the judicial power of the Federation" as the judicature's basic constitutional power in the separation of powers and a court's specific "powers" in the *Lee Lee Cheng* sense. An analysis in those terms would have revealed that his continued characterization of a court's "powers" as "judicial" was in reality dependent on "the judicial power of the Federation" still being vested in the courts generally, and that in fact,

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[156] For example, the adjudication of criminal cases is—in character—an exercise of "the judicial power of the Federation" and a High Court has "jurisdiction" to try *all* criminal offences and "power" to pass *any* lawful sentence: *Courts of Judicature Act 1964*, s. 22, whereas a Sessions Court (an inferior court) has "jurisdiction" to try all criminal offences *except* capital offences and no "power" to pass any death sentence: *Subordinate Courts Act 1948*, ss. 63-64. The adjudication of civil disputes is also an exercise of "the judicial power" and in *Lee Lee Cheng*, the issue was whether the court had the "power" to extend time for the commencement of a negligence action, a matter within its "jurisdiction".

[157] *Lee Lee Cheng* was dealing with exactly that type of legislation: see *infra* note 172.

[158] Parliament is taken to *know* the meaning of each of the words: see *Majlis Peguam*, *supra* note 155 at 288.

[159] See text accompanying notes 127-129.

there was no "new" concept of judicial power supposedly based on "jurisdiction and powers".

Thirdly, if "jurisdiction and powers" in the amended Article 121(1) has the *Lee Lee Cheng* meaning, then it is obvious that even *before* the amendment, the *Constitution* already empowered Parliament to enact federal law for the "Constitution and organization of all courts other than Syariah Courts" and the "*Jurisdiction and powers* of all such courts",[160] and in fact, such federal law already existed. Therefore, the newly inserted phrase which *also* stipulates that federal law shall determine the "jurisdiction and powers" of the Article 121(1) courts cannot actually introduce anything new. Yet, it is not entirely superfluous because the new *form* of Article 121 may render its presence quite appropriate—purely as a matter of drafting. Whether before or after the amendment, the words "jurisdiction" and "powers" have always been used in the *Constitution* for the purpose of constructing a coherent hierarchy within the judicature. It will be recalled that the prior drafting scheme within Article 121 specially reserved the Supreme Court's "jurisdiction" in Clause (2) but was silent about the "jurisdiction and powers" of the Clause (1) courts.[161] That was left to federal law under the operation of the Ninth Schedule and before the amendment, the *Courts of Judicature Act 1964* already conferred general "jurisdiction and powers" on the High Courts and likewise, the *Subordinate Courts Act 1948* on the inferior courts.[162]

In the amended scheme, as explained earlier, each Clause of Article 121 first *establishes* a court and then *expressly demarcates* its "jurisdiction and powers" or "jurisdiction", to differentiate it from the other courts. In keeping with that form, Clause (1) establishes the High Courts and inferior courts, and demarcates their "jurisdiction and powers"—in this case, determined by reference to federal law.[163] Similarly, Clause (2) establishes the Supreme (now Federal) Court and demarcates its "jurisdiction" to include both entrenched "jurisdiction" and additional "jurisdiction" which may be conferred by federal law. Clause (1B)—which was enacted later—follows the same form for the Court of Appeal.[164] Article 125A also gives the Supreme (or Federal) Court and the Court of Appeal all the "powers" of any lower court. However, with the insertion of Clause (1A), the "jurisdiction" conferred by federal law on the Clause (1) courts may now not include matters within the "jurisdiction" of the Syariah courts,[165] and consequently, the Court of Appeal and the Federal Court also can have no appellate "jurisdiction" in those matters. Furthermore, all

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[160] Ninth Schedule List I paras. 4(a)-(b) [emphasis added]. See also *Constitution*, art. 74 and *supra* note 49.

[161] See Part II, above.

[162] The *Courts of Judicature Act 1964* would be a federal law enacted pursuant to the Ninth Schedule List I para. 4(b); the *Subordinate Courts Act 1948* would be a federal law which was an "existing law" (see *supra* note 2) also subject to further modification pursuant to that Ninth Schedule provision: see *Constitution*, art. 162.

[163] As before, such federal law must necessarily differentiate (1) between the High Courts and the inferior courts (the same *Courts of Judicature Act 1964* and *Subordinate Courts Act 1948* continue to apply) and (2) between the two High Courts *inter se* (the same *Courts of Judicature Act 1964*, s. 3 assigns to each an exclusive territorial "local jurisdiction": see *supra* note 42); since those distinctions are implicit in Clause (1).

[164] Part III of the *Courts of Judicature Act 1964* confers the additional statutory "jurisdiction" and "powers" of the Court of Appeal and Part IV, those of the Federal Court.

[165] See text accompanying note 43.

the Article 121 courts may not have "jurisdiction" over matters within the exclusive "jurisdiction" of the Special Court, but the Special Court acting within its exclusive "jurisdiction" shall have all the "jurisdiction and powers" of the Article 121 courts.[166] Finally, of course, the Ninth Schedule continues to give Parliament the actual competence to legislate for the "[j]urisdiction and powers of all such courts",[167] reflecting the need for such federal law already expressed in each of Clauses (1), (1B) and (2). Such consistent use of the words "jurisdiction" and "powers" in the above provisions confirms that they have their *Lee Lee Cheng* meaning both before and after the amendment. This also reiterates that their true effect is not to create any "new" concept of judicial power after the amendment but is still merely to distribute authorised *subject matters* and *specific actions* to the particular courts within the hierarchy. Yet, however that distribution may be, the exclusive constitutional power of the whole judicature remains, in character, "the judicial power of the Federation".[168]

This form of constitutional provision—using "There shall be" to vest the judicial constitutional power and "jurisdiction and powers" to distribute it—is actually quite commonplace.[169] Clause 77 of the *Federation of Malaya Agreement 1948*[170] similarly provided that:

> (1) *There shall be* in and for the Federation a Court of unlimited civil and criminal jurisdiction to be called the Supreme Court of the Federation of Malaya.
> (2) The Supreme Court … shall consist of a High Court and a Court of Appeal.
> …
> (5) The constitution, *powers* and procedure of the Supreme Court … *may … be prescribed by Federal Ordinance*.[171] [emphasis added]

Although only "powers" was mentioned in sub-Clause (5), the distribution of "jurisdiction" between the High Court and the Court of Appeal was also dealt with by ordinary legislation. As Thomson C.J. explains:

> the Agreement itself makes no provision for the distribution of jurisdiction between the two constituent parts of the [Supreme] Court and therefore so much

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[166] See *Constitution*, arts. 181(2), 182. The Special Court was established in 1993 with the exclusive jurisdiction to try only criminal and civil cases involving the King or the Ruler of a State in his personal capacity: see *Constitution (Amendment) Act 1993* (Act A848). For accounts of the abolition of the royal immunity, see Lee, "Constitutional Conflicts", *supra* note 8 at 86-96; Wain, *supra* note 6 at 197-216. For simplicity, the Special Court is not mentioned elsewhere in this article, but obviously, it also exercises judicial power. Notwithstanding that the Special Court is not included within Article 121 and stands apart from its hierarchy of courts, it is apparent that "the judicial power of the Federation" is constitutionally vested exclusively in the Article 121 courts *and* the Special Court, which altogether constitute the judicature.

[167] *Supra* note 160.

[168] *Cf. Hinds*, *supra* note 72 at 213.

[169] See *e.g. Jamaica (Constitution) Order in Council 1962*, s. 97(1) (see Appendix); *Kenya Constitution* (1963), s. 171(1); *Trinidad and Tobago Constitution* (1976), s. 99; *Barbados Independence Order 1966*, s. 80(1); *The Bahamas Independence Order 1973*, arts. 93(1), 98(1); *Belize Constitution* (1981), ss. 94, 95(1), 100(1). *Cf. Constitution of the Republic of Singapore*, arts. 93, 94(1) (see Appendix), which uses the *vesting* formula instead to vest the judicial power and "jurisdiction and powers" to distribute it.

[170] See also *supra* note 138.

[171] "Federal Ordinance" means a law passed by the legislature under Part V of the Agreement: *Federation of Malaya Agreement 1948*, Clauses 2, 51.

> of its constitution as affects that distribution is a question of constitution which is left to be dealt with by the Legislature.[172]

As such, the 1988 amendment has merely made an unwitting return to the *form* of the 1948 Agreement, and nothing more.

Finally, for completeness, it must be said that the 1988 amendment cannot possibly deprive the Article 121 courts of their exercise of the common law. If the courts—in exercising "the judicial power of the Federation" and within their individual "jurisdiction and powers"—previously had use of the common law, then the above discussion shows that nothing has been changed by the 1988 amendment. Even federal law continues to recognize the applicability of the common law,[173] and as the law reports attest, the courts continue to use it in their daily business.

VI. Conclusion

The 1988 amendment has therefore been completely inefficacious in achieving its intended, or indeed any, effect.[174] It has no capability whatsoever to shift the source of the judicature's basic power from the *Constitution* to Parliament, and consequently, it is still the *constitutional* judicial power (and not some "new" statutory judicial power) which is vested in the Article 121 courts. Incredible as it may seem for such an important constitutional amendment,[175] all three drafting devices applied to Article 121(1) by the draftsman—the deletion of the vesting formula, its substitution with "There shall be", and the insertion of the "jurisdiction and powers" provision—have failed to produce any substantive change. And clearly, apart from them, there is nothing else in the textual changes to Article 121 which could possibly produce any other effect. As Part V above shows, it was simply inept drafting without due regard to established law and precedent. If so, there is a certain comic irony in the amendment's failure. What had so irked the Prime Minister in the first place was the fact that the courts had decided against him—in the face of legislation, he claimed, when in fact "faulty or slipshod laws made by Parliament"[176] had failed "to translate into law the policies and aims of the administration",[177] and legislation had not always been adequate to justify his governmental actions. Unimpressed by that reality, he had instead sought to disable the judicial power by introducing this amendment. But the amendment itself has turned out to be another "slipshod" law, unable to achieve its intended aim!

Instead of recognizing that inefficacy, the Federal Court has all but discarded a fundamental doctrine of the *Constitution*, denied the very existence of a constitutional judicial power which can vest in the judicature, and asserted that the judicature's "new" judicial power is not exclusive and that others may also exercise the judicial

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[172] *Lee Lee Cheng*, *supra* note 155 at 3. That distribution of "jurisdiction" and "powers" was effected by the *Courts Ordinance 1948* (which preceded the current *Courts of Judicature Act 1964*).

[173] *E.g.* the same *Civil Law Act 1956*, s. 3 (concerning the applicability of English common law and variance between common law and equity) applies both before and since the 1988 amendment.

[174] Leaving aside any effect from Article 121(1A): see *supra* note 43 and text accompanying note 165.

[175] See *Kok Wah Kuan*, *supra* note 38 at para. 11.

[176] A remark by Harun J. while hearing *Mahathir*, *supra* note 18: see "Mahathir's Dilemma" *The Star* (29 November 1986) 1 cited in Salleh Abas, *supra* note 8 at 10.

[177] *Mahathir*, *supra* note 18 at 386.

power of the State (while ironically, the legislature and executive themselves still retain exclusive constitutional powers, within the Westminster context). If all this is true, what then would be the purpose of the Part IX provisions which still seek to secure apolitical appointment, tenure, remuneration and independence uniquely to judges?[178] The constitutionally separate judiciary intended by those provisions only becomes necessary if there is, in the first place, a strict separation of a constitutional judicial power (*i.e*. there must first exist a *constitutional* power which is to be exercised by that judiciary,[179] and that power is to be exercised exclusively and independently of the legislature and executive).[180] Its very purpose is to *reinforce* the strict separation of the constitutional judicial power. It makes the point that only a judiciary which has a constitutionally protected separateness is in a position to exercise its constitutional power in the intended separate manner. What then is the point of still requiring a constitutional separateness in the judiciary, if there no longer exists any constitutional power to be vested in them, or if judicial power is no longer exclusive to them? Why create a constitutionally independent judiciary if it can simply be bypassed, when others without the same independence are also permitted to perform the same functions? If *Kok Wah Kuan* is correct and taken to its logical conclusion, Parliament may now freely vest judicial functions in any entity which is not an Article 121 court, remove any present function of an Article 121 court to non-judicial entities, or even direct that any apparently entrenched function may also be performed by non-judicial entities. Conversely, if indeed the courts no longer have any constitutional power whatsoever which *must* be "judicial" in character, then Parliament may now also subordinate them to the other branches to perform *non*-judicial functions, without this being unconstitutional either. The acknowledged embodiment of the separation of powers doctrine within the *Constitution*—with "the judicial power of the Federation" firmly and exclusively vested in the Article 121 courts—was the bulwark against all such incursions. But once these basic principles are denied—sadly, by even the judiciary itself—then it may cogently be said that the Article 121 courts have lost not merely their structural independence, as initially feared,[181] but all constitutional significance.

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[178] See text accompanying notes 94-96.
[179] See Harding, "Law, Government", *supra* note 3 at 135-136.
[180] *Cf. Liyanage*, *supra* note 29 at 287.
[181] See text accompanying note 6.

Appendix
Separation of Powers—Comparative Constitutional Provisions

	Legislative	**Executive**	**Judicial**
Commonwealth of Australia Constitution	Section 1: The legislative power of the Commonwealth ***shall be vested in*** a Federal Parliament …	Section 61: The executive power of the Commonwealth ***is vested in*** the Queen …	Section 71: The judicial power of the Commonwealth ***shall be vested in*** … the High Court of Australia …
Constitution of the Republic of Singapore	Article 38: The legislative power of Singapore ***shall be vested in*** the Legislature …	Article 17(1): *There shall be* a President … Article 23(1): The executive authority of Singapore ***shall be vested in*** the President …	Article 93: The judicial power of Singapore ***shall be vested in*** a Supreme Court … Article 94(1): The Supreme Court shall consist of the Court of Appeal and the High Court with such **jurisdiction and powers** as are conferred on those Courts by this Constitution or any written law.
Constitution of India	Article 79: *There shall be* a Parliament for the Union …	Article 52: *There shall be* a President … Article 53(1): The executive power of the Union ***shall be vested in*** the President …	Article 124(1): *There shall be* a Supreme Court of India …

(*Continued*)

	Legislative	**Executive**	**Judicial**
Jamaica *Jamaica (Constitution) Order in Council 1962*	Section 34: *There shall be* a Parliament of Jamaica …	Section 68(1): The executive authority of Jamaica ***is vested in*** Her Majesty.	Section 97(1): *There shall be* a Supreme Court for Jamaica which shall have such **jurisdiction and powers** as may be conferred upon it by this Constitution or any other law.
Ceylon *Ceylon (Constitution) Order in Council 1946*	Section 7: *There shall be* a Parliament of the Island …	Section 45: The executive power of the Island shall continue ***vested in*** His Majesty …	Sections 52–56: [No provision in terms establishing any court or vesting the judicial power.]