THE DOCTRINE OF SEPARATION OF POWERS IN MALAYSIA AND THE CONSTITUTIONALITY OF THE MALAYSIAN CHILD ACT 2001

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Abstract
Section 97(2) of the Child Act 2001 was challenged as being unconstitutional following a 2003 case in which a twelve-year old boy was found guilty of killing an eleven-year old girl by stabbing her twenty times and slashing her four times with a sharp object, and was ordered to be held at the King's pleasure. In 2007, the Court of Appeal[1], while upholding the finding of guilt, ruled that the sentencing was "unconstitutional" and decided that the section violated the doctrine of separation of powers by consigning to the Executive the judicial power to set the term to be served by a juvenile offender punishment. This article examines to what extent the doctrine of separation of powers is applied in Malaysia. The paper also seeks to ascertain the constitutionality of section 97(2) of the Child Act. The Court of Appeal unanimously declared that the punishment of juveniles for murder under the Child Act 2001 was unconstitutional because it confers the power to the executive to determine the measure of 2001.

Keywords: punishment of juveniles, unconstitutional, violates, doctrine of separation of powers

Introduction

According to Deputy Internal Security Minister Datuk Fu Ah Kiow, in 2007 there were 30 boys and men convicted of murder and drug trafficking, being detained at the pleasure of the Yang di-Pertuan Agong in various prisons nationwide. (Peng & Cheah, 2007). Of these, eleven were still under eighteen years old, while fourteen had been convicted when they were below eighteen years old but are now over that age. The remaining five were adults who escaped the gallows on the grounds of insanity. Fu said that ten of the eleven were detained for murder under section 97 (2) of the Child Act 2001, which was declared unconstitutional by the Appeal Court on July 12, and the other one case was tried under section 16 of the Juvenile Courts Act 1947 (repealed by the Child Act in 2001). Consequently, the effect from the decision of the Court of Appeal was that all the offenders were freed from the charges. Later, the decision was reversed by the Federal Court.[2] This article examines the following issues that had been raised by the Federal Court: firstly the ruling in declaring that the doctrine of separation of powers is a part of Malaysian law but

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it is not a part of Malaysian Constitution; secondly the power to impose punishment in a criminal case is a judicial power and this judicial power of punishment is not in the executive arm of the federation; thirdly the constitutionality of the section; and lastly the related issues.

The doctrine of the separation of power under Malaysian law

The doctrine of separation of powers is a political doctrine under which the legislative, executive and judicial branches of the government are kept distinct, to prevent abuse of power. The doctrine traces its origins as far back as Aristotle's time (Aristotle, 1885). During the Age of Enlightenment, several philosophers, such as John Locke (1764) and James Harrington (1977), advocated the principle in their writings, whereas others such as Thomas Hobbes strongly opposed it (Hobbes, 1839). Montesquieu was one of the foremost supporters of the doctrine. His writings considerably influenced the opinions of the framers of Constitution of the United States (Montesquieu, 1777). There, it is widely known as the "checks and balances" system.
Walker, in his encyclopaedic *The Oxford Companion to Law*, offers the following definition of separation of powers:

A doctrine, found originally in some ancient and medieval theories of government, contending that the processes of government should involve the different elements in society -- the monarchic, aristocratic and democratic elements. Locke argued that legislative powers should be divided between the king and the parliament, but the great modern formulation of the doctrine was that by Montesquieu in *L'Esprit des Lois* (1748), who contended that liberties were most effectively safeguarded by the separation of powers, namely the division of the legislative, executive and judicial functions of government between separate and independent persons and bodies. His view was founded on that of the British Constitution although his understanding of British politics was not wholly accurate. In fact, in the British Constitution there is no complete separation of powers, then or now; the Lord Chancellor is the chairman of the House of Lords, an important minister and head of the judiciary; the Cabinet and the other ministers who comprise the heads of the executive departments are also members of the legislature; the judiciary has delegated legislative powers, and judges who are peers are members of the House of Lords, even in its capacity as a legislative chamber (Walker 1980, p. 1131-1132).

Professor Vile in his book defined it as:

A pure doctrine of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of the government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of other branches. Furthermore, the persons who compose these three agencies

of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way, each of the branches will be check to others and no single group of people will be able to control the machinery of the state (Vile, 1998).

The notion 'separation of powers' took root in 1789, when the Constitution of the United States of America vested all legislative powers in the Congress (the Senate and the House of Representatives), executive power in the President, and the judicial power in the Supreme Court and the inferior courts.[3] The essence of the doctrine of separation of powers is thus based on the idea of checks and balances. In the United States, the separation of powers operates in its most total sense. No member of the legislative, executive or judicial arms may simultaneously be a member of one of the other arms. However, under the Westminster system this separation does not fully exist. The three branches exist but Ministers, for example, are both executives and legislators (Wade & Bradley 1994, p. 3). Although the strict separation of powers has never actually occurred, the basic principles of this doctrine emphasise that every exercise of power must take place through the proper channels and must be in accordance with the law. Unlike the system in the USA where the President and the Congress are totally separated, in Malaysia the Cabinet is part of the Parliament. The Malaysian system calls more for check and balance rather than separation because at the level of the executive and the legislature, there was always an overlap because the Prime Minister and members of his cabinet sit in the Parliament and, therefore are part of it, are answerable and accountable (Shad Faruqi, 2006) unlike in the USA where the president and his cabinet are totally separate from the legislature. Hence, to summarise, in Malaysia, structurally, there is still some separation, especially at the level of the judiciary.

Following the decision of the Federal Court it is submitted that the doctrine is a part of Malaysian law but it is not a part of Malaysian Constitution. The Federal Court in the case *Public Prosecutor v. Kok Wah Kuan*[4] held that Malaysia does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. The extent to which the doctrine applies depends on the provisions of the Constitution.[5] The Federal Court pointed out that a provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. At the same time, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, although it may be inconsistent with the doctrine. The doctrine of the separation of powers is not a provision of the Malaysian Constitution although it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. However, it does not make democracy a provision of the Constitution, such that where any law is undemocratic, it is inconsistent with the Constitution and therefore null.[6] In other words, the doctrine of strict separation of powers as propounded by the French philosopher Montesquieu has no application in Malaysia.

Yet it is this doctrine that judges often rely upon to justify their refusal to review executive and legislative acts. It is obvious for example, in the case of *Mohd Yusof Mohamad v. Kerajaan Malaysia*.[7] The learned judge said: "Any judicial interference, in matters where the executive had exclusive information and upon which it had acted, could be readily construed as judicial encroachment upon the independence of the executive". Most respectfully, it is submitted by Shad Faruqi (2005) that "the motive force of the Malaysian Constitution is not in strict separation of, but in a balance amongst the various organs of the State. Power of one organ was meant to check the power of another". Further, it can be argued that the foundation of the entire constitutional structure of Malaysia resides in the separation of powers set out in articles 39,[8] 44[9] and 121[10] of the Federal Constitution of Malaysia. These articles deal with executive, legislative and judicial powers respectively. Although the existing provision on judicial power has been amended to make it less certain, the Constitution still subscribes to the idea of separation of powers and hence, giving the judiciary the power to review legislative and executive actions. Abdul Aziz Bari also disagreed with the apex court that the application of the doctrine of separation of powers was not definite and absolute. Separation is underlined by the nature of government; namely that the Cabinet must be responsible to the Legislature. Without this separation how can we protect liberties? "Separation of powers is implicit and functional in a Westminster constitution like ours. The Privy Council said this long time ago in *Hinds v R*[11] and *Duport Steel v Sirs*[12]. If we accept this judgment, what about the principle of judicial review? Judicial review is another proof that there actually is separation of powers in a Westminster democracy like ours" (Koshy, 2007). Decisions of the Privy Council and the High Court of Australia have long settled that, although it does not subscribe to a "pure" separation of powers, a Westminster-model constitution can and does in fact incorporate the separation of powers (Foo, 2011).[13] The doctrine in other words signifies that the legislative bodies makes the law, the executive agencies implement and perform their duties as prescribed by those laws and the judicial branch supervise the implementations of those laws, and where necessary, force the other agencies to abide by the laws if there is a violation or inconsistency.

Judicial power vests on the judiciary

The judiciary is the third organ of government, the other two being the legislature and the executive. The judiciary enjoyed the same constitutional standing as the other two organs of government. Judicial power is vested in it,[14] in the same way that legislative power was vested in the Parliament[15], and executive power is vested in the executive body.[16] Prior to 10th June 1988, Article 121 of the Constitution opened with the words "the judicial power of the Federation shall be vested". The critical part of the amendment was the substitution of the phrase "the High Court and inferior courts shall have such jurisdiction as may be conferred by or under federal law" for the phrase "the judicial powers of the Federation shall be vested in". The phrase judicial power is taken by the framers of Malaysian Constitution from section 71 of the Australian Constitution. It was interpreted by Griffith CJ in *Huddart, Parker and*

Co Proprietary Ltd v. Moorehead [17] to mean the power which every sovereign authority must necessarily have to decide on controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has the power to give a binding and authoritative decision is called upon to take action. This definition was cited with the approval by the Privy Council in *Shell Co of Australia Ltd v. Federal Commissioner of Taxation.*[18]

However, via Act A704, Article 121 was amended with effect from 10th June 1988 and the expression "judicial power" was deleted. There is no challenge to the constitutionality of Act A704 was ever taken before any court. It was held in the case *Kok Wah Kuan v Public Prosecutor:*[19]

To our minds such a challenge, even if taken, would have failed because the amendment did not have the effect of divesting the courts of the judicial power of the Federation. There are two reasons for this. First, the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or the Parliament or both those arms of Government. Second, the marginal note to Article 121 was not amended. This clearly expresses the intention of the Parliament not to divest the ordinary courts of the judicial power of the Federation and to transfer it to or share it with either the Executive or the Legislature.

In the case *Public Prosecutor v Kok Wah Kuan*[20] the Federal Court has thoroughly discussed the effect of the amendment. It is said that prior to the amendment, Article 121(1) of the Constitution reads: "... the judicial power of the Federation shall be vested in the two High Courts... and the High Courts... shall have such jurisdiction and powers as may be conferred by or under federal law." There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. If a question is asked "Was the judicial power of the Federation vested in the two High Courts?" The answer has to be "yes" because that was what the Constitution provided. Whatever the words "judicial power" means is a matter of interpretation. Having made the declaration in general terms, the provision went on to say "and the High Courts ... shall have jurisdiction and powers as may be conferred by or under federal law." In other words, if one wants to know what are the specific jurisdiction and powers of the two High Courts, one will have to look at the federal law. 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. But, to what extent such "judicial powers" are vested in the two High Courts depend 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. Thus, to say that the amendment has no effect does not make sense. There must be some effects. The only question is to what extent? The extent of the powers of the courts depends on what is provided in

the Constitution. In the case of the two High Courts, they "shall have such jurisdiction and powers as may be conferred by or under federal law." So, we will have to look at the federal law to know the jurisdiction and powers of the courts.[21] 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 what "judicial power" is. In this case, the federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of commission of the offence. That is the limit of judicial power of the court as imposed by the law. In other words, the legislature provides the sentences; the court imposes it where appropriate.[22]

Judge Richard Malanjun CJ in the above case said that he was unable to accede to the proposition that with the amendment of Article 121(1) of the Federal Constitution, the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice in accordance with the law for those who come before them. The amendment which states that "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law" should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. He does not agree that as a result of the amendment Malaysian courts have now become servile agents of a federal Act of Parliament and that the courts now function only to perform mechanically any command or bidding of a federal law. He emphasises on the fact that Malaysian courts, especially the Superior Courts, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature. They perform numerous roles including interpreting and enforcing a myriad of laws.[23] Accordingly, he asserts that Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in Malaysia for the following reasons:

i. The amendment seeks to limit the jurisdiction and powers of the High Courts and inferior courts to whatever "may be conferred by or under federal law". The word "federal law" is defined as follows: (a) any existing law relating to a matter with respect to which the Parliament has power to make laws, being a law continued in operation under Part XIII; and (b) any Act of Parliament;[24]

ii. The courts cannot obviously be confined to "federal law". Their role is to be servants of the law as a whole. Law as a whole in this country is defined in Article 160(2) to include "written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof". Further, "written law" is defined in Article 160(2) to include "this Constitution and the Constitution of any State". It is obvious, therefore, despite the amendment; the courts have to remain involved in the interpretation and enforcement of all laws that operate in

this country, including the Federal Constitution, State Constitutions and any other source of law recognized by our legal system. The jurisdiction and powers of the courts cannot be confined to federal law;[25]

iii. Moreover, the Federal Constitution is superior to federal law. The amendment cannot be said to have taken away the powers of the courts to examine issues of constitutionality. In his view it is not legally possible in a country with a supreme Constitution and with provision for judicial review to prevent the courts from examining constitutional questions. Along with Articles 4(1), 162(6), 128(1) and 128(2), there is the judicial oath in the Sixth Schedule "to preserve, protect and defend (the) Constitution"[26] and ;

iv. The amendment should not be read to destroy the courts' common law powers. In Article 160(2) the term "law" includes "common law". This means that, despite the amendment, the common law powers of the courts are intact.[27] The inherent powers are a separate and distinct source of jurisdiction. They are independent of any enabling statute passed by the legislature. Obviously, it was agreed that, on Malaysia Day when the High Courts came into existence by virtue of Article 121, "they came invested with a reserve fund of powers necessary to fulfil their function as Superior Courts of Malaysia".[28]

It is submitted that the amendment does not take away the judicial power from the court. Foo says (2010,9) that this amendment makes no difference whatsoever because, actually, these are merely drafting styles which are used to achieve the same result. For example, the Constitution of Sri Lanka (formerly Ceylon) does not even mention the expression judicial power. Yet, it has been claimed by Lord Pearce:

That despite the omission, the provisions in that document manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly proper in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.[29]

Meanwhile, the Indian Constitution also has no mention of judicial power being vested in the judiciary. Yet, the same position obtains there as in Sri Lanka.[30] Like the Constitutions of Sri Lanka and India, the Federal Constitution preserves the separation of powers between the three arms of Government and demonstrates no intention that the judicial power of the Federation shall be passed to or shared with the Executive or the Legislature. It follows that the judicial power of the Federation remains where it has always been, namely, with the judiciary.[31] In 1957, the Reid Commission originally used the "There shall be" formula in their draft Constitution, but the UK parliamentary draftsman who

reviewed the draft changed this to the vesting purely for purpose of clarity (Foo 2010, p.10). Just as the 1957 change in formula made no constitutional difference, so did the 1988 reversal (Foo 2010, p.10). Ultimately, article 121 read with the other provisions of part IX of the Federal Constitution shows that the judicial power still vests in the ordinary courts. The Parliament nevertheless should consider the importance of vesting judicial power explicitly in the judiciary to ensure that the independence of judiciary is maintained.

Furthermore, the courts, despite the said amendment, still retain its inherent power similar to that of the High Courts in the United Kingdom. It is a fact that the supervisory jurisdiction of the courts is a creature of common law and such inherent power may be extended through judicial development and legislative intervention as for instance paragraph 1 of the Schedule read with section 25 of the Courts of Judicature Act 1964.[32] Ahmad Fairuz said (2006) that one possible reason for the need to insert article 121 (1) was to accommodate article 121 (1A). He further asserted that had the previous remained, article 121 (1A) would be meaningless as the Syariah Courts would have no exclusive jurisdiction as envisaged by that article since the civil courts could rightly be entitled to rely on the fact that judicial power of the Federation is vested with them and thereby enabling them to exercise their inherent power to scrutinise the decisions of the Syariah Courts. With the amended article 121 (1) it requires more than a liberal interpretation to say that civil courts today retain their residual inherent power to oversee decisions of Syariah Courts. Ironically, Ahmad Fairuz is also one of the Federal Court judges who decide that judicial powers are as provided by the Parliament.

Section 97(2) of the Child Act 2001 is unconstitutional?

Abdul Aziz Abdul Rahman (2007) argued that section 97(2) of the Child Act 2001 does not contravene any provision of the Federal Constitution and is therefore valid. Any provision of any act of the parliament can be declared invalid only if it *ultra-vires* the Federal Constitution. The doctrine of separation of powers is by itself not a law. It is a legal principle which has been taken into consideration in formulating the Federal Constitution. The applicable law is the content of the Constitution. The doctrine of the separation of powers in its application to modern government does not mean that a rigid threefold of legislature, executive and judiciary classification of their functions is possible. There is for instance no separation of powers in the strict sense between the executive and the legislature. The practical necessities of a parliamentary government demand a large measure of delegation to the executive the powers to legislate by rules, regulations and orders. The independence of the judiciary has been strictly preserved, but many justifiable issues are referred to the administrative authorities instead of the ordinary courts. Further he suggested that section 97(2) of the Child Act 2001 has not disregard the doctrine of separation of powers. It is because under that section, the court, not the executive, orders for the convicted child to be detained at the pleasure of the Yang di-Pertuan Agong, who under Article 42 of the Federal Constitution is given the power to grant pardons, reprieves and respites in respect of all

offences committed in the Federal Territory. There is no issue of the doctrine of separation of powers in this case. It should be noted that section 97 is the old section 16 of the Juvenile Courts Act 1947 (Revised 1972). Section 97(4) is an additional provision which gives the power to the Board of Visiting Justices to review the case every once a year and the board can make recommendations to the Yang di-Pertuan Agong accordingly. The section is actually is a provision that protects and upholds the right of the child. It does not contravene with any provision of the Federal Constitution.

Related issue and solutions

Firstly: Section 97(1) of the Child Act states that a minor found guilty of murder cannot be sentenced to death. It has for so many years been considered a settled law in Malaysia that a child convicted of serious and grave offences such as murder to be detained at the pleasure of the King, which basically means that the child would be detained indefinitely, until a day comes when the Yang Di-Pertuan Agong grants him pardon. The punishment prescribed for such an offence will not be applicable to the child, so long as at the time of the commission of the crime, the offender is under the age of eighteen years old. The Parliament should revisit the said provision of the Child Act and come up with a more objective solution - a solution that would be fair to be imposed on a child while at the same time will be able to smoothly assist the courts in arriving at a decision. It follows that only the judiciary should be allowed to decide on the punishment to be imposed on the child *in lieu* of the death penalty. As there is no law which prescribes the alternative punishment, the court unanimously decided that it had no choice but to release the boy, albeit the conviction. At the Court of Appeal, a seventeen year-old boy who was convicted of murdering his tuition teacher's daughter escaped death sentence after a three-member panel, headed by Justice Datuk Gopal Sri Ram ordered for his immediate release. Accordingly, it is not within their jurisdiction to pass a sentence of death on the appellant. They found that there was no sentence available to the convicted appellant. Sitting with him were Justices Datuk Zulkefli Ahmad Makinudin and Datuk Raus Md Sharif. Describing it as the most unfortunate case, Sri Ram made the order after the court agreed with the appellant's argument that the boy should be freed since there was no provision in any law for the punishment of a murder offence committed by a juvenile. Under Section 97(1) of the Child Act, a sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was a child. "There is no punishment (in this case). There is no other way out except for the Parliament to do the necessary". He said it was entirely constitutional for the Parliament to enact a law directing the judicial arm of government to impose or not to impose particular types of punishment. Citing the Dangerous Drugs Act 1952 as an example, he said that the courts were initially given discretion in trafficking cases to impose either life imprisonment or death sentence. However, the discretion was removed by an amendment and death sentence was made the mandatory punishment for trafficking drugs. Similarly, there are provisions in our written law which direct that particular types of punishment

cannot be administered on particular categories (of persons). Therefore, it was entirely proper for the Parliament to direct the judicial arm not to impose the death penalty on a child.

Secondly: It is time that the legislature put some serious attention to the matter and makes the necessary amendments to the Malaysian Child Act 2001 to ensure a fairer and constitutional solution to such an occurrence. A lot of groups have voiced out their opinion on how the matter should be addressed. Some suggested community service, probation or parole. Others have suggested that the child be treated like an adult, depending on the seriousness of the offence. However, it seems that a majority of those who have expressed their concern seem to suggest that prison is not a place for children. It is not their intention to say that juvenile offenders should not be punished; only that prison is not the best solution. This is also due to the fact that juvenile law is believed to operate on the basis that a child can be rehabilitated. And prison, as it is now, does not provide for a suitable environment for a child's rehabilitation. Likewise, in most parts of the world, the age of responsibility would be ten years old, meaning that a child under ten could not be held liable no matter how serious the crime is, as they are considered to be *doli incapax*, or incapable of committing a crime, as they do not understand the consequences of their actions. Above that age, a convicted child would generally be sent to prison. As mentioned earlier, the prison system in Malaysia is not meant to cater for a child's rehabilitation needs. Another point is that being a child, to be punished with a severe punishment would have a lifelong effect on the child and thus does not serve the purpose of a rehab process. Whatever the solution may be, the general sentiment seems to be that some element of punishment must be present, alongside the main focus of rehabilitation. What is wanted, after the Court of Appeal meted out its decision, is for some form of specific punishment to be laid down to deal with the matter, rather than what seems to be ambiguous.

Thirdly: Some people urged the Parliament to amend the Federal Constitution to explicitly state that Malaysia practises a separation of powers between the executive and the judiciary and such an amendment was necessary following the decision by the Federal Court that separation of powers was not explicit in the Constitution. Some suggests that the Parliament must amend article 121 and restore judicial power in the courts. The express pronouncement of the vesting of judicial power in the Judiciary is necessary not only for the convenience of the Judiciary, it is a way of giving a constitutional guarantee that the courts are empowered with an overriding authority to adjudicate on any matter involving our rights, property and liberty (Balakrishnan, 2010). However, it should be noted that judicial review as a concept is considered as one of the ingredients or indicators of the operation of the separation of powers in any given legal system. Judicial review is another indicator or proof that there is actually separation of powers in Malaysia. Further, what the Federal Court actually said was that while the Constitution did not explicitly provide for the operation of separation of powers, the major elements of the doctrine can be found in the Constitution and that it operates

uniquely in Malaysia and is not identical to the way it operates in other countries. The point that the court was trying to make is that no legislation can be struck down for being a violation of that doctrine but only if it conflicts with a provision of the Constitution (LJ, 2007). Hence, separation of powers is implicit and functional in a Westminster constitution like ours.

Lastly: The public should be aware of their rights and make good use of judicial review to protect their rights. Judicial review is an important element in a democratic system. According to the watchdog conception of judicial review, the function of judicial review is to guard against the legislature's inclination to overstep the boundaries of its authority. The institution of judicial review supervises the decisions made by political branches. In this regard, judicial review serves as a necessary and proper check on the legislature, which has a tendency to exceed the authority granted to it by the constitution (Wan Azlan & Nik Ahmad Kamal, 2006, p.7). Thus, the function of judicial review is designed to correct and improve decisions reached by the decision-making authorities. It is a mechanism that facilities popular control over government by conveying information and shaping their beliefs about how the government behaves and how the people are likely to respond, (Law, 2008). Therefore, one of the important mechanisms to protect a child's right is through the application of judicial review. An example case which involves a minor's application of judicial review is *Meor Atiqulrahman Ishak v Fatimah binti Sihi*[33] on considering the students right to wear serban. The issue is whether "the right to wear a "serban" is an integral part of the religion of Islam". The Federal Court was in view that whether or not a practice is an integral part of a religion is not the only factor that should be considered. Other factors are equally important in considering whether a particular law or regulation is constitutional or not under Article 11(1) of the Federal Constitution. Abdul Hamid Mohamad FCJ said:

I would therefore prefer the following approach. First, there must be a religion. Secondly, there must be a practice. Thirdly, the practice is a practice of that religion. All these having been proven, the court should then consider the importance of the practice in relation to the religion. This is where the question of whether the practice is an integral part of the religion or not becomes relevant. If the practice is of a compulsory nature or "an integral part" of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it. In the Islamic context, the classification made by jurists on the "hukum" regarding a particular practice will be of assistance. Prohibition of a practice which is "wajib" (mandatory) should definitely be viewed more seriously than the prohibition of what is "sunat" (commendable). The next step is to look at the extent or seriousness of the prohibition. Then, we will have to look at the circumstances under which the prohibition is made. In other words, in my view, all these factors should be considered in determining whether the "limitation" or "prohibition" of a practice of a religion is constitutional or unconstitutional under article 11(1) of the Federal Constitution. School Regulations 1997 in so far as it prohibits the students from wearing turban as part of the school uniform during school hours

does not contravene the provision of Article 11(1) of the Federal Constitution and therefore is not unconstitutional.

In the above case, the decision of the court determined and solved the issue wisely. As a whole, the role of judicial review is to systematically review the government's policies, the existing and proposed legislation in order to detect shortcomings and dangers in violation of fundamental liberties and scrutinising the execution of powers by the authorities. This would include recommending its improvement especially in protecting the legal and constitutional rights of children.

Conclusion

Malaysian law does not consider for the welfare aspect of the children offender especially as evidenced by the indefinite duration being set for the detention of juveniles at the pleasure of the King. The only provision that possibly addresses the welfare of the child is section 97 (4) of the Child Act which states that a Board of Visiting Justices must review the cases of those convicted under section 97 (2) annually and decide if the child should be detained or released. However, there are no predetermined procedures on how the board should carry out its duties. There had to be uniform guidelines on how this board operates. The court should also be allowed to pass sentences of a definite duration under section 97 (2) with the case to be reviewed every year. Look into the English law in the case *Bulger*[34]; the two boys were eventually released after serving the time that was determined by a tariff system that exists in Britain. The term "at Her Majesty's pleasure" was merely cosmetic and that by having a tariff system, it would give a child some hope of being released. Since there are no proper procedures in Malaysia, the clear guidelines present in England on deciding similar cases are very helpful. As for those convicted as juveniles and are now over eighteen, the Pardons Board that reviews an individual's case every four years is the only possibility for freedom. Again, one would need a lot of help in applying for the pardon. In the end, it is worthwhile to refer to article 40 of the Convention on the Rights of the Child.[35] It said that whenever appropriate and desirable, there has to be measures for dealing with a juvenile offender without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected. A variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and to the offence. It has become necessary, because there are also cases where juveniles are manipulated by adults to commit crimes because they know that there will be immunity given by law to minors.

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[1] *Kok Wah Kuan v. Public Prosecutor* [2007] 4 CLJ 454

[2] *Public Prosecutor v. Kok Wah Kuan* [2007] 6 CLJ 341

[3] The Constitution of the United States of America states in the following articles that:

Article I, Section. 1:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article II, Section. 1:

The executive Power shall be vested in a President of the United States of America.

Article III, Section. 1:

The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article I, Section. 7:

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall

agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law....If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[4] [2007] [6 CLJ 341

[5] Ibid.

[6]Ibid., p. 355.

[7] [1999] 5 MLJ 286

[8] Article 39 reads, 'The executive authority of the Federation shall be vested in the Yang di Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons.'

[9] Article 44 reads, 'The legislative authority of the Federation shall be vested in a Parliament, which shall consist of the Yang di Pertuan Agong and two Majlis (Houses of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives).'

[10] Article 121(1), whose marginal note reads 'Judicial Power of the Federation' now reads, inter alia, 'There shall be two High Courts of coordinate jurisdiction and status namely...'. Unlike arts 39 and 44, which mention executive and legislative powers, art 121(1), following the 1988 amendment, no longer contains the term 'judicial power', which was previously mentioned by the original version of the provision.

[11] *Hinds v. R* [1977] A.C. 195

[12] *Duport Steel v.* Sirs [1980] 1 W.L.R. 142

[13] See *New South Wales v Commonwealth* (1915) 20 CLR 54 at 88-90: *AG* for *Australia v the Queen* [1957] AC 288 (PC) p. 311-315, *Liyanage v the Queen* [1967] 1 AC 259 p. 287-288; *Hinds v the Queen* [1977] AC 195 p.212-213 (PC).

[14] Article 121(1)

[15] Article 44

[16] Article 39

[17] [1908-1909] 8 CLR 330.

[18] [1931] AC 275.

[19] [[2007] 4 CLJ 454

[20] [2007] 6 CLJ 341 FC

[21] In the case of the Federal Court and the Court of Appeal, part of their jurisdiction is specifically provided in the Constitution itself - see Article 121(1B) and (2) respectively

[22] [2007] 6 CLJ 341 FC at pp 352-353.

[23] Ibid, p. 359

[24] Article 160(2)

[25] *PP v Kok Wah Kuan* [2007] 6 CLJ 341 FC at 360

[26] Ibid, p.361
[27] Ibid.
[28] Ibid.
[29] per Lord Pearce in *Liyanage v. The Queen* [1967] 1 AC 259 at p 287.
[30] See *Minerva Mills Ltd v. Union of India* AIR [1980] SC 1789.
[31] *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 CLJ 85.
[32] *See R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145
[33] [2000] 5 MLJ 375
[34] *Reg. v. Secretary of State for the Home Department, Ex parte V. and Reg. v. Secretary of State for the Home Department, Ex parte T.* (HOL). Retrieved 21 July, 2010 from http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd970612/vandt03.htm
[35] See http://www2.ohchr.org/english/law/crc.htm