DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA ASAL)

RAYUAN SIVIL NO: 06(RS)-1-03/2019(W)

ANTARA

DATUK SERI ANWAR IBRAHIM	**…**	**PERAYU**
DAN		
1. KERAJAAN MALAYSIA		
2. MAJLIS KESELAMATAN NEGARA	**…**	**RESPONDEN-RESPONDEN**

CORAM:

VERNON ONG LAM KIAT, FCJ
ZALEHA YUSOF, FCJ
ZABARIAH MOHD. YUSOF, FCJ
HASNAH MOHAMMED HASHIM, FCJ
MARY LIM THIAM SUAN, FCJ
HARMINDAR SINGH DHALIWAL, FCJ
RHODZARIAH BUJANG, FCJ

PRESS SUMMARY

(Majority Decision)

[1] This special case was referred to this Court pursuant to section 84 of the Courts of Judicature Act 1964 (CJA) for the following constitutional questions to be determined by this Court; so that the appellant's Originating Summons (OS) may be continued and disposed of by the High Court in accordance with the judgment of this Court:

(1) Whether section 12 of the Constitution (Amendment) Act 1983 (Act A566), section 2 of the Constitution (Amendment) Act 1984 (Act A584) and section 8 of the Constitution (Amendment) Act 1994 (Act A885) (cumulatively referred to as "the amending Acts") are unconstitutional, null and void and of no effect on the ground that they violate the basic structure of the Federal Constitution (FC); and

(2) Whether the National Security Council Act 2016 (NSCA) is unconstitutional, null and void and of no effect on the following grounds:

(i) it became law pursuant to unconstitutional amendments;
(ii) it was not enacted in accordance with Article 149 of the FC; and
(iii) it violates the freedom of movement guaranteed by Article 9 Clause (2) of the FC.

[2] The constitutionality of the amending Acts was questioned because it was the appellant's contention that the amending Acts had taken away the requirement of the royal assent by the Yang di-Pertuan Agong (YDPA), an Executive act, which according to the appellant, forms part of the basic structure of the FC. Hence Article 66 as amended, violates the basic structure of the FC as the YDPA could now be taken to have given his assent; even though the assent had not been given. Article 66, as amended, is therefore unconstitutional and consequently the NSCA which

was enacted following its amended terms, that is, without actually receiving the royal assent is also unconstitutional.

[3] The YDPA is no doubt the Supreme Head of The Federation by virtue of Article 32 of the FC. However, Articles 39 and 40 of the FC provide that the YDPA shall act in accordance with the advice of the Cabinet or any Minister authorised by the Cabinet except for matters under the YDPA's discretion as stated in Clause (2) of Article 40 of the FC.

[4] It is our view that the royal assent is never part of the executive act of the YDPA. It is the final step of the legislative process before a Bill becomes law. The provision on royal assent is specifically housed under Chapter 5 of Part IV of the FC under the heading of "Legislative Procedure". This Chapter on Legislative Procedure explains the process and steps taken by the Legislature in enacting laws. So it is part of a legislative act. The amending Acts do not at all serve to remove royal assent, as a Bill must still be presented to the YDPA under Clause (4) of Article 66 of the FC for the purpose of royal assent. The amending Acts only sought to clarify and define the procedure involving the YDPA in the law making process; to expedite the passing of laws, a process which is part and parcel of the responsibilities of any democratically elected Legislature.

[5] Hence, our answer to the first question is in the negative. The amending Acts are not unconstitutional. Consequently the challenge on the constitutionality of the NSCA on the ground that it became law pursuant to unconstitutional amendments, also fails.

[6] The appellant further contended that since the NSCA is a law relating to security, it ought to have been enacted in accordance with Article 149 of the FC. However, it is pertinent to note that the laws that are enacted under Article 149 must contain a recital stating that "action has been taken or threatened by any substantial body of persons" to cause the acts described in the paragraphs of the said Article. The purpose of Article 149 of the FC, is not only to stop, supress or prevent subversion of any of the kinds described therein; but such act of subversions must be committed by persons, not only one person or individual but by a large or substantial number of persons or individuals acting together. This is the condition precedent which Parliament needs to fulfill in enacting any Act under this provision of Article 149. The Legislature must ensure that the purpose of an Act enacted under this Article 149 must be to prevent the subversive activities committed by a large number of persons.

[7] Section 4 of the NSCA describes the function of the National Security Council, *inter alia,* to formulate policies and strategic measures **on national security including sovereignty, territorial integrity, defence, socio-political stability, economic stability, strategic resources, national unity and other interests relating to national security**.

[8] Sections 43 and 44 of the NSCA provide that whatever directives or action issued or taken by the National Security Council before the commencement of the NSCA continue to remain in force. These sections are savings provisions which cannot be disregarded. In the special case before us, sections 43 and 44 of the NSCA reveal the existence of various directives, policy and committees which are already in place and will continue to be in force. Hence, the directive such as Directive No 20 and

the National Security Policy drawn remain and forms part of the policy and strategic measures as if formulated under section 4 of the NSCA. As can be seen from the contents of Directive No. 20 and the formulated National Security Policy, they do not indicate that the NSCA is meant to be the law against subversion. Clearly, it is meant to include protection and safety of people against situations of disasters like flood, earthquakes and other situations like the current Covid-19 pandemic. The Court cannot turn a blind eye but instead must take judicial notice of the magnitude and effect of the Covid-19 pandemic, all of which remains real and affects the security of this Nation. Surely, it cannot be suggested for a single moment that Covid-19 is due to the actions or threatened actions of subversion, organized violence, act and crime prejudicial to the public caused by a substantial body of persons, whether inside or outside the Federation. There is no evidence coming anywhere near close to the trigger in Article 149 and the Courts must not engage in speculation.

[9] Article 149 of the FC directs attention and focus on activities of persons. That is its restriction. Whereas the NSCA is much wider than that as it is also meant to cover other matters such as disasters and infectious diseases which definitely and undeniably affect national security. Hence, the NSCA can never be meant to be enacted under Article 149 of the FC.

[10] As for the complaint that the NSCA is unconstitutional because it violates the freedom of movement guaranteed in Clause (2) of Article 9, it must be borne in mind that Clause (2) of Article 9 in fact allows the freedom of movement to be restricted on four grounds, namely in the interest of security, public order, public health or the punishment of offenders. When a fundamental right is alleged to have been infringed, the concept of proportionality is used as a test to determine whether the action

of the State, Executive or Legislature which purportedly infringes the fundamental right is arbitrary or excessive. The infringement is said to be proportionate when it has an objective that is sufficiently important to justify limiting the right in question; the measures designed by the relevant State action to meet its objective must have a rational nexus with that objective and the means used by the relevant State action to infringe the right asserted must be proportionate to the object it seeks to achieve.

[11] As explained earlier on, the NSCA, is not a law against subversion but is law relating to national security which also encompasses *inter alia,* economic and environmental stability and public health. The circumstances in which an area is declared a security area are stringent, that it is only where the threat is grave and has potential to cause serious harm; where it would be imperative and necessary to exclude or evacuate persons from a security area. This is as provided in section 18 itself, that it is only where the security in any area in Malaysia 'is seriously disturbed or threatened by any person, matter or thing which causes or is likely to cause serious harm to the people, to the territories, economy, national key infrastructure of Malaysia or any other interest of Malaysia' and immediate national response to this disturbance or threat is required. Hence, the gravity of the threat and the urgency of response are key or paramount elements to any valid exercise and recourse to section 18. Section 18 implicitly recognises the doctrine of proportionality and has prescribed conditions before its aid may be resorted to.

[12] In the circumstances, we hold that the measures adopted in section 22 are justified as it has a rational nexus and is proportionate to the objective to be addressed, namely, national security. It must always be borne in mind that matters of security involve policy consideration which

are within the domain of the Executive. Where matters of national security and public order are involved, the Court should not intervene and should be hesitant in doing so as these are matters especially within the preserve of the Executive, involving as they invariably do, policy considerations and the like. Thus we are of the considered view that section 22 of the NSCA as well as section 18, do not run foul of Clause (2) of Article 9 of the FC. Based on the reasons set out above which are extensively discussed in the full grounds, the answer to both questions posed are in the negative.

[13] We ordered this case be remitted to the High Court for the final disposal of the OS in accordance with this judgment. We further ordered, pursuant to subsection 83(2) of the CJA, costs of the proceedings in this Court be determined by the High Court.

Zaleha Yusof, FCJ
Zabariah Mohd. Yusof, FCJ
Hasnah Mohammed Hashim, FCJ
Mary Lim Thiam Suan, FCJ
Rhodzariah Bujang, FCJ
Dated 6 August 2021