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

Summary

[1] This is a rehearing of the special case relating to the constitutionality of the National Security Council Act 2016 ('**NSCA 2016**') pursuant to s 85 of the Courts of Judicature Act 1964. This special case was originally heard by another panel of this Court which gave its decision on 11.2.2020, by which the majority declined to answer the two constitutional questions posed on the grounds that the questions are abstract, academic and hypothetical (***Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor*** [2020] 3 CLJ (FC) 593) ('***DSAI No. 1***'). Subsequently, the appellant filed an application under rule 137 of the Rules of the Federal Court 1995 and the inherent jurisdiction of the court to set aside that decision. The appellant's complaint was that there was a breach of natural justice because: (i) the appellant was not given the opportunity to be heard on the issue of whether the constitutional questions were abstract, academic and hypothetical, and (ii) the breach has resulted in a grave injustice for the appellant. The ***DSAI No. 1*** decision was subsequently set aside on 10.9.2020 on the grounds that there was a breach of the right to be heard which had resulted in a grave injustice to the appellant.

[2] In essence, the two constitutional questions in this special case relate to:

(I) the constitutionality of three Constitution Amendment Acts viz., **Acts A566, A584** and **A885** affecting the royal assent under art 66(4) of the FC on the ground that they violate the basic structure of the FC; and

(II) the constitutionality of the **NSCA 2016** on the grounds that (a) it became law pursuant to unconstitutional amendments; (b) It was not enacted in accordance with art 149 of the FC; and (c)

It violated the freedom of movement guaranteed by art 9(2) of the FC.

[3] Learned Senior Federal Counsel (SFC) appearing for the respondents reiterated their position that the matter is not academic, abstract or hypothetical and that they were prepared to defend the three amendment Acts and the NSCA 2016 at the hearing. I am mindful of the fact that notwithstanding that the respondents took the same position in ***DSAI No. 1***, the majority declined to answer the constitutional questions posed on the said grounds. In this respect, I have had the benefit of perusing both the majority and the minority judgments in ***DSAI No. 1*** on this point. After careful consideration, I am of the view that the constitutional questions are not academic, abstract or hypothetical. Suffice it to say that on this issue, I associate myself wholly with the erudite opinion of Tengku Maimun Tuan Mat CJ in ***DSAI No. 1*** at paras. [72] - [101].

[4] In my opinion, any Court, and in particular the Federal Court as the apex court in this country should always proceed with special caution before deciding on a point on which the parties were not heard. This is especially so as the Federal Court would thereby be acting without the benefit of adversary argument. As such, counsel who argued this case would probably not recognise any part of the judgment as having any relation to the arguments they addressed to the Court. It is sometimes a difficult question for a Court to decide whether to ask for further submissions on a point on which there has been no argument. Where the point is relatively peripheral, there is no need to ask for further submissions. Certainty, natural justice does not require the Court to do so. But where the point is important and,

particularly where it is decisive, to deny the parties the opportunity to make submissions on it is not only to deny natural justice. It is also to discard one of the advantages of our common law adversarial system as a means of propounding and developing the law.

SUBMISSION OF PARTIES

[5] The arguments of both learned appellant counsel and SFC have already been covered in the summary read out by my sister Justice Zaleha.

ANALYSIS AND FINDINGS

[6] In my full judgment I have for context, reappraise the fundamental tenets of our Constitution, the institution of the Yang di-Pertuan Agong (**YDPA**), and the legislative power of Parliament to make laws.

First Constitutional Question: Are Acts A566, A584 and A885 unconstitutional?

[7] I have also examined the three amendment Acts and the effects of the three amendments on art 66 of the FC in my full judgment. On this point, this panel is unanimous in holding that the giving of the royal assent to Bills is an integral part of the legislative process and is therefore in the nature of a legislative act and not an executive act. As such, the three amendment Acts did not introduce any material changes to the role and function of the YDPA in the giving of the royal assent to Bills under art 66 of the FC. Therefore, the issue of the three amendment Acts offending the basic structure does not arise. Accordingly, the first constitutional question is answered in the negative.

Second Constitutional Question: Is the NSCA 2016 unconstitutional, null and void?

[8] The challenge against the constitutionality of the NSCA 2016 is mounted on three fronts. The first is that it became law pursuant to the three unconstitutional amendment Acts since the NSCA 2016 came into force without the royal assent. However, in the light of my aforesaid ruling, it follows that the first point is without merit. I will now address the two points which relate to art 149, and the violation of the freedom of movement under art 9(2).

[9] The principles on the presumption of the constitutionality of statutes are well settled. The onus is therefore on the appellant to satisfy this Court that there has been a clear violation of art 149. To recap, the appellant's argument is that the NSCA 2016 is a security law which comes within the ambit of art 149. That the NSCA 2016 arms the Executive with vast powers which impedes on the fundamental rights under arts 5, 9, 10 and 13. That such basic rights can only be impeded if the NSCA 2016 was enacted under art 149. And that as the NSCA 2016 was not passed under art 149, the NSCA 2016 is inconsistent with art 149 and is accordingly void under art 4(1).

Article 149 of the Constitution

[10] Article 149 confers Parliament with special powers to legislate laws to combat subversion, actions against public order or national security. The scope of such actions may be inferred by reference to the six situations

described under paras. (a) to (f) in art 149(1). The scope of such actions is wide-ranging. To realize this declared objective of stopping or preventing such actions, art 149 has empowered Parliament to pass laws which restrict the fundamental rights under art 5, 9, 10 or 13.

[11] To invoke the protection of art 149, it is only necessary for an Act of Parliament to include the prescribed recitals under Clause (1). An Act without the prescribed recitals ranks as an ordinary law. It is not protected by the shelter of art 149 and may be subject to judicial review on constitutional grounds.

National Security Council Act 2016

[12] Whether the NSCA 2016 is a security law falls to be determined by the application of the well-settled 'pith and substance' test – which enjoins the Court to investigate the object, purpose and design of an enactment in order to ascertain the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs (See ***Mamat Daud & Ors v The Government of Malaysia*** [1988] 1 CLJ 11).

[13] Apart from the long title, there is no preamble or recital in the NSCA 2016 to elaborate on the reasons for passing the NSCA 2016. Be that as it may, it is clear from the long title that the purpose of the NSCA 2016 is to provide for the establishment of the National Security Council ('**NSC'**), the declaration of security areas and the special powers of the Security Forces in the security areas.

[14] In this connection, I have also considered the Explanatory Statement to the NSCA Bill and the speeches of the Minister during the second reading of the NSCA Bill in Parliament. Excerpts of the Minister's speeches and Explanatory Statement are in my full judgment.

[15] It can be surmised from the Minister's speeches and the Explanatory Statement that the legislative purpose of the NSCA 2016 is the establishment of the NSC: (i) to strengthen the measures to guard and maintain the sovereignty of the country, (ii) to preserve national security, (iii) to declare security areas, and (iv) to control and coordinate Government entities on operations concerning national security.

[16] Although the words 'national security' ('keselamatan negara') are not defined in the NSCA 2016, national security appears to have been given a wide scope such as to encompass the range of matters included under para. (a) in s 4 – '**sovereignty, territorial integrity, defence, socio-political stability, economic stability, strategic resources, national unity and other interests relating to national security'**. Given the wide range of factors falling under national security, it is not inconceivable that national security would also include situations such as natural disasters like floods, landslides, earthquakes and pandemics.

[17] Two important features stand out in the NSCA 2016. The first is the power of the YDPA under s 18(1) of the NSCA 2016 to make a declaration of an area as a security area in the event that there is a threat to national security as 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, or serious harm to the territories, economy, national key infrastructure of Malaysia or any other interest of Malaysia, and requires immediate national response'. This provision on the declaration of a security area on the grounds of threats to the security, social and economic life or public order is not unlike that for the invocation of an emergency under art 150(1) of the FC.

[18] The second important feature concerns the invocation of the special powers once a security area is declared. These special powers are housed under Part V of the NSCA 2016 bearing the heading '**Special Powers of the Director of Operations and Security Forces Deployed to the Security Area**'. Under the NSCA 2016, the Director of Operations ('**DOO'**) is empowered to: relocate or exclude any person from a security area (s 22); impose a curfew in a security area (s 23); control the freedom of movement in a security area (s 24); take possession of land, building or movable property in any security area (s 30); demand for use of resources (s 31); and order destruction of unoccupied buildings in any security area (s 33). The Security Forces have the power of arrest without warrant of any person alleged to have committed or reasonably suspected of having committed any offence in the security area (s 25); and power of search and seizure (ss 26-29). Equally significant is the power of the Director General ('**DG'**) of the NSC to decide on the compensation for properties taken under ss 30, 31, and 33.

[19] In the light of the foregoing, it is clear that the NSCA 2016 is a security law containing sweeping powers which restrict fundamental liberties.

Fundamental Liberties

[20] Are the fundamental liberties guaranteed under the FC inviolate? The nine articles on fundamental rights are not equal in the sense that some of these rights permit of no derogation in ordinary times whilst other fundamental rights may be limited on specified grounds. The former category are rights which are expressed in absolute language prohibiting Parliament from circumventing them by ordinary laws – they include the **art 6** right against slavery and forced labour, the **art 7** right against backdated criminal laws and repeated trials, the **art 8** right to equality before the law, freedom of religion under **art 11**, and right to education under **art 12**. The latter category rights are those rights which may be limited on specific grounds, otherwise described as permissible restrictions – arts 5, 9, 10 and 13.

Permissible Restrictions

[21] There are two discernible categories of permissible restrictions. The **first category** is quite broad as it permits of restrictions in accordance with law – see **arts 5(1)** Right to Personal Liberty and **13(1)** Rights to Property. In contrast, the **second category** is more specific in the sense that the grounds permitted are limited by the FC. **Article 9(2)** authorises Parliament to restrict freedom of movement on four grounds: national security, public order, public health, or the punishment of offenders. **Article 10(2)(a)** authorises Parliament to restrict freedom of speech on eight grounds: national security, friendly relations with other countries, public order, morality, incitement to any offence, defamation, contempt of court, or

privileges of Parliament. **Article 10(2)(b)** permits that the right of assembly may be restricted on two grounds: national security or public order. And **art 10(2)(c)** permits that the right of association may be restricted on three grounds: national security, public order, or morality.

[22] There is another important aspect of permissible restrictions relating to arts 5, 9, 10 and 13. As the word 'law' in the FC is defined to include the FC, Acts of Parliament, Ordinances and Enactments (see art 160(2); ss 3 and 66 of the Interpretation Acts 1948 and 1967), it follows that restrictions on art 5, 9, 10 or 13 may be imposed by (i) the provisions of the FC, or (ii) Acts of Parliament.

[23] In my main judgment, I have cited examples of permissible restrictions imposed by Acts of Parliament on: (i) **the art 13 rights to property** under the Land Acquisition Act 1960, Prevention And Control of Infectious Diseases Act 1988; (ii) the **art 5 right to personal liberty** under the Public Order (Preservation) Act 1958, Dangerous Drugs Act 1952; (iii) the **right to freedom of movement** under the Immigration Act 1959/63, Public Order (Preservation) Act 1958, Income Tax Act 1967; (iv) the art 10 rights on **freedom of speech** under the Sedition Act 1948, Official Secrets Act 1972, Defamation Act 1957; (v) the **right of assembly** under the Peaceful Assembly Act 2012 and Penal Code.

Is the NSCA 2016 a security law that must be enacted under art 149?

[24] This brings me to the key question of whether the NSCA 2016 is a security law that must be enacted under art 149. The use of the words

Summary

'Special Powers" in Part IV of the NSCA 2016 is not without significance or import. Firstly, these special powers are only exercisable under the exceptional circumstances described under s 18 NSCA 2016. Secondly, a perusal of these special powers - the power of arrest without distinction between seizable or non-seizable offences, the power to impose curfews and relocate persons, the power to control movement, the power to take temporary possession of land, building or movable property and the assessment of the compensation by the DG - clearly shows that the powers are sweeping and far-reaching and not unlike emergency powers.

[25] Be that as it may, does it automatically follow that since the NSCA 2016 is a security law which transgresses on fundamental rights, it is void for being inconsistent with the FC. In the light of the permissible restrictions discussed earlier, I do not think that the NSCA 2016 is automatically void under art 4(1). In my considered view, the constitutionality of the NSCA 2016 *vis a vis* art 149 may be determined by reference to true character and substance of the six Acts passed under the authority of art 149. They are:

i. Internal Security Act 1960 [Act 82], since repealed;
ii. Dangerous Drugs (Special Preventive Measures) Act 1985 [Act 316];
iii. Dangerous Drugs (Forfeiture of Property) Act 1988 [Act 340];
iv. Security Offences (Special Measures) Act 2012 [Act 747];
v. Prevention of Terrorism Act 2015 [Act 769]; and
vi. Prevention of Crime Act 1959 [Act 297].

[26] In my full judgment, I have also examined the purposes of the six art 149 Acts, the powers given to the Executive branch thereunder and the extent of the restrictions on fundamental rights.

[27] In my view, whether a security enactment comes under the ambit of art 149 falls to be determined by an examination of (i) the nature, character and extent of the powers given to the Executive under the enactment in question, and (ii) the purpose(s) of the enactment.

[28] In this regard, a close scrutiny of the ISA and the NSCA 2016 will shed light into the real nature of the NSCA 2016. There are provisions in the NSCA 2016 which bear close relation to the ISA in character and substance. In particular, there are similar provisions on the power of declaration of a security area (s 47 ISA; s 18 NSCA 2016), the powers relating to security area which include the power of arrest without warrant (ss 45 & 64 ISA; s 25 NSCA 2016), power to impose a curfew (s 52 ISA;s 23 NSCA 2016), power to control movement (ss 49-51 ISA; s 24 NSCA 2016), power to relocate persons (ss 48-51 ISA; s 22 NSCA 2016), power to take possession of property (s 53 ISA; s 29 NSCA 2016), power to destroy property (s 54 ISA; s 33 NSCA 2016), power to assess compensation for property taken (s 68 ISA; s 32 NSCA 2016), and power to make regulations (s 71 ISA; s 42 NCSA 2016).

[29] In the context of this special case, the power of the YDPA to make a proclamation of security areas under sub-s 47(1) of ISA is also significant. This is because the proclamation of a security area is predicated upon the

situations described under paras. (a) and (f) in art 149(1) which relates to organised violence and public order or national security.

[30] In addition, a scrutiny of the recitals contained in the six art 149 Acts show that except for POCA, all the other five art 149 Acts have cited threats or action against public order or national security as the *raison d'être* for the protection of art 149. The ISA adopts paras. (a), (d) and (f) in art 149(1), SOSMA contains paras. (a), (b), (d) and (f), DDSPMA, POTA and DDFOPA contain para. (f). These are almost identical to the criteria for the declaration of a security area described under s 18 of the NSCA 2016, words highly evocative of the opening paragraph of art 149(1) and fit closely within the situations described in paras. (a), (e) and (f) thereof.

[31] It is equally important to note that pursuant to art 149, only four fundamental rights may be violated – (i) the art 5 right to personal liberty, (ii) the art 9 freedom of movement, (iii) the art 10 freedom of speech, assembly and association, or (iv) the art 13 rights to property. Five of the six art 149 Acts contain restrictions on some but not all of these four fundamental rights. In particular, SOSMA, DDSPMA, POTA and POCA restrict arts 5 and 9 whilst DDFOPA restricts arts 5 and 13. The ISA stands out as it is the only art 149 Act which contains restrictions on not one, not two, but on all of the four fundamental liberties specifically permitted under art 149. In this light, it can be appreciated that the ISA is a very potent law because of its wide reach.

[32] In this connection, it is noteworthy that apart from the ISA, the NSCA 2016 is the only other Act that restricts all the four arts 5, 9, 10 and 13

fundamental liberties explicitly permitted under art 149. This singular feature fortifies my view that notwithstanding that the NSCA 2016 is only an ordinary piece of legislation, it is nevertheless a potent security law much like the ISA. In my considered view, any proposed national security enactment which permits of such serious violations of all four fundamental liberties guaranteed under arts 5, 9, 10 and 13 of the FC should have come under critical scrutiny and fully debated in Parliament, and properly enacted under the authority of art 149.

[33] Notwithstanding the foregoing the NSCA 2016 was only enacted as an ordinary law. During the reading of the NSCA Bill, the Minister informed Parliament that the proposed NSCA Act was a law on national security and public order. However, the Minister assured the House that it was not necessary to include the recital under art 149 in the NSCA 2016 because the Act does not infringe the fundamental liberties under arts 5, 9, 10 and 13 of the FC – "***Rang undang-undang ini tidak dibuat di bawah Perkara 149 Perlembagaan Persekutuan… Rang undang-undang ini juga tidak menjejaskan hak asasi yang dilindungi di bawah Perkara 5, Perkara 9, Perkara 10 dan Perkara 13, Perlembagaan Persekutuan. Oleh itu tidak ada keperluan supaya diadakan recital bagi menyatakan rang undang-undang ini dibuat di bawah Perkara 149, Perlembagaan Persekutuan.'***

[34] However, the Minister's statement that the NSCA 2016 will not impinge on the four fundamental liberties was not an accurate representation of the true nature and character of the NSCA 2016. I say this for two reasons. First, there are clear provisions in the NSCA 2016 which contravene the

fundamental rights under arts 5, 9, 10 and 13. Second, the Minister contradicted himself in a later part of his speech in the Dewan Negara when he said that the freedom of movement in a security area would be restricted - "*Rang undang-undang ini merupakan suatu peruntukan undang-undang yang digubal bagi maksud memelihara* ***ketenteraman awam*** *(public order) dan* ***keselamatan negara*** *(national security) seperti yang dimaksudkan oleh Perkara 9(2) Perlembagaan Persekutuan.* ***Maka, kebebesan bergerak dalam kawasan keselamatan yang diisytiharkan adalah tertakluk kepada rang undang-undang ini****. …*"

[35] I have also adverted to the role of the NSC as the designated lead agency and the Government's central authority during the Covid-19 pandemic and during the period of the Proclamation of Emergency which was issued by the YDPA on 11.1.2021 and which has since lapsed on 1.8.2021. In the context of para. (f) in art 149(1), the expressions 'public order' and 'the security of the federation' are synonymous and not mutually exclusive. 'Public order' means the tranquility and security which every person feels under the protection of the law, a breach of which is an invasion of the protection which the law affords (***Board of Commissioners of Peace Officers Annuity and Benefit Fund v Clay*** 102 SE second 575, 577). The maintenance of public order is equated with the maintenance of public tranquility, and that public safety is a part of the wider concept of 'public order. That 'public safety' ordinarily means security of the public or their freedom from danger and in that sense will include the securing of public health, that is to say, anything which tends to prevent dangers to the public health may also be regarded as securing public safety.' (In ***Re Application***

[36] For completeness, I will now address learned SFC's argument that legislation on national security like the NSCA 2016 involves policy considerations which are within the preserve of the Executive. Learned SFC submitted that (i) the courts in this country have always been circumspect in reviewing legislation dealing with national security, and (ii) the courts will defer to the judgment of the Executive on such issues as only the Executive may possess exclusive information on the matter. ***Kerajaan Malaysia & Ors v Nashruddin Nasir*** (supra), a case on preventive detention under the ISA was cited in support of that proposition. I have set out the salient facts, issues and opinion of the Federal Court in ***Nashruddin Nasir*** in my full judgment.

[37] In my considered view, learned SFC's argument is misconceived for the following reasons. First, unlike ***Nashruddin Nasir,*** this special case is not a *habeas corpus* proceeding. Second, this special case does not involve a review of an administrative decision under the NSCA 2016. There is no ministerial or administrative decision under the ISA to be reviewed in this special case. It follows that policy considerations for administrative decisions have no relevance and are wholly immaterial to these proceedings. Third, the ISA is an Act passed under art 149 whereas the NSCA 2016 is not. It was on the basis that the ISA was an Act 149 Act that the Federal Court decided that the ouster clause in s 8B was not unconstitutional. Accordingly, ***Nashruddin Nasir*** is clearly distinguishable on the facts and on the law. The

principles propounded in ***Nashruddin Nasir*** are therefore inapplicable in this special case.

[38] In the final analysis, this special case is about the **supremacy of law**. The expression "supremacy of law" is used in contradistinction to supremacy of Parliament. In England, where there is no written constitution, it is a constitutional fundamental that the British Parliament is supreme. As such, the British Parliament may pass any law it so wishes, subject to compliance with the necessary legislative procedure. This, it must be emphasised, is not the position in Malaysia. Malaysia is a federation constituted under a written constitution (see art 1 of the FC). It is based on a parliamentary system of Government with a constitutional monarchy. The FC itself provides that it is the Constitution, and not Parliament, which is supreme (art 4(1)). In this context, the expression "**supremacy of law**" is taken to mean that the Constitution as law is the supreme authority in Malaysia. Accordingly, it follows that under our constitutional scheme, the Constitution is supreme over Parliament, the Executive or even the Judiciary. Therefore, whatever may have been the policy considerations behind the tabling of the NSCA Bill in Parliament, any Bill which falls within the class of subject matter of legislation under art 149 must nevertheless be enacted under the authority of art 149. To enact otherwise would be *ultra vires* the legislative powers of Parliament (art 128). Consequently, such a law may be subject to judicial review on constitutional grounds (art 4(1)).

[39] The Judiciary is the third branch of Government and it is independent from the Executive and Legislative branches. The Judiciary is vested with

the powers and responsibilities of upholding and interpreting the provisions of the FC and other laws. It is the Courts' role to determine the constitutionality of any law passed by Parliament (art 4(3) and (4)). The review by the Courts on the constitutionality of legislation underscores the supremacy of the FC and not the supremacy of Parliament or the Judiciary. In the performance of this solemn duty the Courts have the power to determine and declare on the validity of any enactment. Any law found to be unconstitutional for being inconsistent with the FC is void and will be struck down. The task of determining the constitutionality of laws enacted by Parliament is a bounden duty which the Courts must always uphold.

[40] This brings to mind the judicious and illuminating insights of HRH Sultan Azlan Shah in his paper entitled '**Supremacy of Law in Malaysia**'. The paper was presented by HRH at the Tunku Abdul Rahman Lecture XI, Kuala Lumpur on 23.11.1984. I have reproduced excerpts from the paper in my full judgment. I will only read out the passages which bear particular significance in this special case.

> *'Based on the **doctrine of separation of powers**, the legislature makes the law, the executive administers the law, and the judiciary adjudicates on disputes which may result from the first and second processes. Basic to this doctrine is the **elaborate system of checks and balances** whereby it is ensured that power is not concentrated in any one body, but dispersed and mutually checked. Thus, for instance, **power reposed in the legislature is moderated by the power placed in the judiciary and vice versa**.*
>
> ***'The Constitution of Malaysia grants the power of judicial review to our courts. The courts are enabled to control and correct laws passed by Parliament** … **if such laws** … **violate the Federal Constitution**. **Article 4(1) is clear on this general power in relation***

to laws passed by Parliament. Where a law passed after Merdeka Day is inconsistent with any provision of the Constitution, that law is void to the extent of the inconsistency.

'The judiciary is singled out as the organ of government with this power of control. … ***Where an Act of Parliament is clearly repugnant to the Constitution, the choice is between upholding the Act or the Constitution. Under our Federal Constitution, the choice is made plain: the Act is void.***

…

'Even though the courts in Malaysia have the power to challenge laws passed by Parliament, they are not thereby positioning themselves in active completion with that representative body.

…

*'**Nevertheless, democracy means more than just simple majority rule, for even the majority has to abide by the dictates of the Constitution. There are some matters, notably fundamental rights, which are regarded as so paramount that they ought not be varied merely by the transient wishes of a majority in Parliament.** … **Courts, following from their function to declare what the law is, merely test the legality of an Act of Parliament when they exercise review power, and are thus reinforcing the supremacy of law and, ultimately, the democratic ideal. Upon this mantle of legality, difficult problems needing definitive judicial resolution will arise.***

…

*'Nevertheless, **parliamentarians, politicians and judges are all expected to take their cue from the Constitution. They have to act in accordance with the Constitution and are subject to the limitations placed on their actions by law, since ours is a government of laws, not men.**' [Emphasis added]*

Summary

[41] I am therefore driven to the conclusion that the NSCA 2016 is a security law equipped with sweeping emergency-like powers which transgress on all of the four fundamental rights specifically permitted under art 149. As such, the NSCA 2016 is an Act which belongs to the class of subject matter of legislation which comes within the ambit of art 149 of the FC. The abridgement of all of the four arts 5, 9, 10 and 13 fundamental rights in the context of a security area and the attendant emergency-like sweeping powers must therefore be mandated under the authority of art 149. *Sans* the protective shield of art 149, the NSCA 2016 ranks as an ordinary law. Accordingly, it is inconsistent with the Constitution, in particular, arts 5, 9, 10 and 13 of the FC. In the result, the NSCA 2016 is an Act which is clearly repugnant to the Constitution. The choice is therefore between upholding the NSCA 2016 or the Constitution. Under our FC, the choice is made plain: the NSCA 2016 is void.

[42] In conclusion, I answer Question (1) in the negative. That is to say, that the three constitutional Amendment Acts are not unconstitutional. The argument that the NSCA 2016 is unconstitutional because it became law pursuant to unconstitutional amendments is without merit. I would therefore answer Question (2)(i) in the negative. However, I answer Question 2(ii) in the affirmative in that the NSCA 2016 is unconstitutional as it was not enacted under the authority of art 149. As such, the NSCA 2016 is void for being repugnant to the FC. In the light of the foregoing, it is not necessary to answer Question 2(iii). Accordingly, I would allow the appeal and make no order as to costs herein. Pursuant to sub-s 85(2) of the CJA 1964, I remit

this matter to the High Court for disposal in accordance with the judgment of this Court and according to law.

[43] My learned brother Harmindar Singh Dhaliwal FCJ has read my full judgment in draft and has indicated that he is in complete agreement with my opinion.

Vernon Ong
Judge
Federal Court
Malaysia

Dated : 6th August 2021