

Review Article

Malaysia's National Security Council Act 2016: A Critical Review in Reference to the Federal Constitution and the Rule of Law Principles

Saroja Dhanapal* and Johan Shamsuddin Sabaruddin

Faculty of Law, University of Malaya, Kuala Lumpur 50603, Malaysia

ABSTRACT

The National Security Council Act 2016 (NSCA) came into force on the 1st of August 2016 and is a stringent security legislation that threatens Malaysian democracy because it has provisions that infringes fundamental rights as defined in the Federal Constitution (FC) of Malaysia and the principles of the Rule of Law. Currently, there are a number of laws such as the Security Offences (Special Measures) Act 2012 and the Prevention of Terrorism Act 2015 which were enacted to counter the threat of Malaysians joining the Islamic State of Iraq and Syria (ISIS). Despite the existence of these laws, the NSCA was enacted. Given the laws that already authorize detention without charge or trial, the need for the NSCA has raised questions. This study critically assesses the validity of the attacks that the NSCA contravenes or conflicts with the FC in two stages. First, it attempts to ascertain if the constitutional principles or rights said to be extinguished or eroded by the NSCA are really embodied in the FC and, if so, the extent to which they are a part the founding document. Next, it critically examines the provisions of the NSCA to determine the extent, if any, to which they represent a new assault on constitutional rights or principles.

In line with this, this study provides a comprehensive overview on the NSCA using a purely doctrinal research method where key documents comprising the NSCA, the FC and the principles of the Rule of Law are analysed.

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E-mail addresses:

saroja.dhanapal@um.edu.my (Saroja Dhanapal)

johans@um.edu.my (Johan Shamsuddin Sabaruddin)

* Corresponding author

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INTRODUCTION

*“Those whose give up essential Liberty,
to purchase a little temporary Safety,
deserve neither Liberty for Safety”*

~ *Benjamin Franklin (1755)*

Article 149 of the Federal Constitution (FC) permits the enactment of legislation to combat, inter alia, subversion and action prejudicial to public order in the form of detention without charge or trial purportedly to prevent any outrage against the security of the state (hereafter referred as preventive detention legislation). The oldest of preventive detention legislation since independence was the Internal Security Act 1960 (“ISA”) which was in operation for 52 years, from 1960 until its repeal in 2012. The ISA was used to stifle legitimate opposition and silence lawful dissent (Tikamdas, 2003). Since the repeal of ISA, a number of anti-terrorists’ statutes have been passed to address the threat of Malaysians joining the armed forces of the Islamic State of Iraq and Syria (ISIS). Among these are the Security Offences (Special Measures) Act 2012 (“SOSMA”), the Prevention of Terrorism Act 2015 (“POTA”), Prevention of Crime Act 2015 (“POCA”) and most recently, the NSCA.

The process by which the NSCA was enacted from its enactment under Article 74(1) of the FC instead of Article 149, its rapid passage in the legislature, to the Malaysian Council of Rulers abandoning its normal aloofness from the legislative process to suggest changes to the proposed

legislation (which suggestions were ignored by the government) to its being gazette without Royal assent is analysed. The National Security Council Bill was introduced in the House of Representatives on 1st of December 2015. The current Prime Minister (PM) had justified the passing of the law on the basis of the threats Malaysia was facing from the Islamic State (IS) and other terrorist activities (Alhadjri, 2016). In pursuance of this need, the National Security Council Bill 2015 was passed in Parliament after a six-hour proceeding taking two days to gain the majority vote, with 107 in favour and 74 against the bill. As we shall see, as a preventive detention legislation, the NSCA is of the same ilk as the ISA. For that reason, it should have been passed under Article 149 of the FC. But it was not. Instead, it was enacted under Article 74(1) of the FC which empowered the Parliament to legislate on matters “in the Federal List or the Concurrent List” that is, the normal legislation of the nation. It is not known if inadvertence caused NSCA not to be the passed under the aegis of Article 149 or whether the by-passing of Article 149 was an ineffectual attempt to veil the fact that NSCA was a preventive detention statute.

That the NSCA 2016 was not enacted under Article 149 and yet has provisions that contravene some of the provisions of the FC is the main criticism against it. Since the Act has been purportedly passed pursuant to Article 74(1) (Gartland, 2016), it must conform to the constitution as a whole and this is indicated in the case of *Ah Thian v. Government of Malaysia* (1976). In this

case, the applicant had been charged with committing armed gang robbery under sections 392 and 397 of the Penal Code, an offense punishable under section 5 of the firearms (Increased Penalty) Act 1971 as amended. The argument brought forth was that the amended Act was ultra vires the FC as it contravened Article 8(1) of the FC. The court held that its powers to declare any law invalid on the grounds of Article 4 clause (2 and 3) is not subject to any restriction. Suffian LP observed that the doctrine of supremacy of Parliament did not apply in Malaysia. He added that we had a written constitution by which the powers of the Parliament and States were limited where they were prohibited from enacting laws as they wished. This would apply in cases where the Acts are enacted on a matter that the Parliament has no power under those conferred in Article 74 or is inconsistent with the FC according to Article 4(1) and Article 75. This limitation is clearly found in Article 74(3), "The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution".

It must be borne in mind that the FC expressly declares the Constitution is the supreme law of the land (Art.4(1)) where it embodies three basic principles; fundamental liberties of individuals that cannot be encroached by the state, distribution of sovereign power between the Federation and the States, and that no power should be concentrated on one person (*Loh Kooi Choon v. Government*

of Malaysia, 1977) any law enacted by the state must adhere to these principles for it to be constitutional. Chief Justice Eusoff Chin also stated that Article 74 (3) of the Constitution limits the Parliament's law-making power under Article 74 (1) as seen in the case of *Faridah Begum bte Abdullah v. Sultan Haji Ahmad Al Mustain Billah Ibnu Almarhum Sultan Abu Bakar Ri' Ayatuddin Al Mu' Adzam Shatch* (1996). *Harding* (1996) distinguished Article 149 and 150 succinctly by stating that under Article 149, laws can only be enacted after it has been debated in the Parliament while under Article 150, it can be done by the executive without parliamentary debates. It must be noted that the National Security Act was enacted pursuant to Clause (4_A) of Article 66 of the FC where it allows an act to become law without royal assent. However, Article 66 refers to the process of law making which does not take away the fundamental rights provided in the FC. Any act that tampers with the fundamental rights under Part II of the FC can only be done via Article 149 and 150 and not under Article 66 as done in the case of NSCA 2016

The quoted words in effect mean that the fundamental liberties embodied by the FC may only be curtailed in the manner provided for by the Constitution under Article 149 (and Article 150 in an emergency). The NSCA 2016 itself does not recite the formula that Article 149 prescribes for a statute that provides for, inter alia, detention without charge or trial as does the NSCA 2016. Whether this makes the NSCA 2016 ultra vires the FC is an open question.

At this juncture, it is important to take note of Article 4 (1) and (3) of the FC which are quoted below:

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

Art. 4(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or—

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

This was discussed in length in the cases of *Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun* (1988) and *Minister for Home Affairs, Malaysia & Anor v. Jamaluddin bin Othman* (1989). Both these cases are related to contentions about detention where the parties had filed for habeas corpus. The differences in the decisions indicate discrepancies in how the

judiciary reviews Acts that contravene the FC. In the first case, it was held that ‘where the detaining authorities invoke national security as the grounds for non-disclosure of facts leading to the making of an order of detention, the test to be applied by the court in any proceedings for habeas corpus would be a subjective test. However, in the second case, it was held that the Minister had no power to deprive a person of his right to profess and practice his religion which is guaranteed under Article 11 of the Constitution. If the Minister acts to restrict the freedom of a person from professing and practicing his religion, his act will be inconsistent with the provision of Article 11 and therefore any order of detention would not be valid. Here, it appears that the test applied was an objective test. Since, the detentions were made under ISA 1960 which was enacted under Article 149 of the FC and it is a legislation essentially to prevent and combat subversions and actions prejudicial to public order and national security, the second can be said to have given the proper reading of Articles 149 and 150 of the FC.

The way in which the NSCA was rushed through the legislature also raised eyebrows. To become law, a Bill which has been passed by both Houses must be assented to by the Yang di-Pertuan Agong (or His Majesty the King) within 30 days after it is presented to him for his assent (Article 66(1) and (3)). If a Bill is not assented to by the Yang di-Pertuan Agong within 30 days, it becomes law (Article 66(4A)). The Bill was passed without any amendments by the House of Representatives and Senate on

3rd and 22nd of December 2015 respectively. The opposition had criticized the act as, “power grab” that would give the PM absolute powers to declare an “emergency” (Star online, 2015). The report went on to cite some of the comments made by the opposition such as those of Lim Guan Eng (DAP-Bagan) who urged the Bill to be withdrawn and referred to the Parliament’s Select Committee for proper consideration because the proposed laws would erode the power of the Yang di-Pertuan Agong and the states as it would allow the Government to declare an area as a security area and Datuk Seri Dr Wan Azizah Wan Ismail (PKR-Permatang Pauh) argument that the law would give absolute powers to the PM.

Although the Bill did not receive the royal assent as is the norm, the NSCA came into force on 1st of August 2016 pursuant to Article 66 (4A) of the FC. The Council of Rulers had requested for the NSC Bill that empowers the federal government to declare localized emergencies to be refined. However, their request was not taken into consideration. Lim Kit Siang told reporters during a walkabout in Sekinchan (Ruban, 2016) that the failure the government to *take heed* of this advice is clearly an act of disrespect and contempt towards the Conference of Rulers. According to Faruqi (2008), the Conference of Rulers has the power to veto federal legislation on several critical and sensitive issues as seen in Article 38(4) where it is stated that any amendment that directly affects the privileges, position, honors or dignities of the rulers shall not become law without their consent. However,

the amendment of Article 66 of the FC in 1984 has curtailed the powers of the Yang di-Pertuan Agong in the legislative process enabling the Parliament to bypass His Majesty if he does not consent to a bill 30 day after it is presented to him.

At this point, it is crucial to discuss the reactions of Council of Rulers to the amendment of Article 66 of the FC. It started in 1983 with the government’s proposed amendments to the Constitution which triggered open conflict for the first time between the rulers and government (Rawlings, 1986). The proposed amendments changed the provisions with respect to the King’s assent to bills where it is considered to have been assented to after 15 days from failure to assent (Constitution [Amendment] Bill, 1983). The proposed amendments would have also provided for a change in the power to declare an emergency. These amendments were not approved by the Conference of Rulers and led to political rallies by the PM and a media blitz (Gillen, 1995). Eventually a solution was found where the final amended version of the Constitution provided that the King, within 30 days of the passing of a bill by both houses, would either give his assent to the bill or, if it was not a money bill, return the bill to Parliament with a statement of reasons for his objection to the bill (Constitution [Amendment][No.1] Act, 1984). On the return of a bill, the bill will again be passed by both Houses and would again be presented to the King for his assent and the King would have 30 more days to assent to the bill after which time

the bill will be gazetted as law (Sulaiman, 2008). With regards to the amendment proposed in 1983 in respect of power to declare emergency, it appears to have been reinstated not in 1984 but only in 2016 under the NSCA 2016. Thus, it can be said that the role of the Council of Rulers and the King is being diluted slowly and this is something that the nation should be concerned about. This is supported by the view presented by Shad Salem Faruqi (2007) who has highlighted succinctly the important role played by the Council;

Scrutiny by the conference can supply some check and balance and promote some openness and transparency. There is some potential for influencing the nation's goals and policies. One must remember that even in the UK the constitutional monarch is not prevented from "advising, cautioning and warning".

Since the enactment of NSCA 2016, there are strong criticisms claiming that some of the provisions in the Act contravene the rights conferred by the Constitution. Further, there is criticism made that some of its provisions also contradict the principles of the Rule of Law and basic human rights upheld in the FC. This has become an area of concern and has triggered debates at various levels. The ongoing debate on the Act has prompted the researchers to conduct this research. The aim of this research is two-fold; firstly, it attempts to ascertain if the constitutional principles or basic human rights said to

be extinguished or eroded by the NSCA 2016 are really embodied in the FC and, if so, the extent to which they are a part of the founding document and secondly, it critically examines the provisions of the NSCA 2016 to determine the extent, if any, to which they represent a new assault on constitutional rights or principles. To achieve this, the three basic the principles of Rule of Law highlighted by Dicey (1985); the need to curb the conferral of discretionary power on government officials in the interests of certainty and predictability; the ability to seek a remedy in independent courts should the government act illegally and the importance of equality before the law were used. In essence, the study provides a comprehensive overview of the NSCA 2016 by adopting a doctrinal research method where key documents comprising the NSC Act, the FC and the principles of Rule of Law are analysed.

LITERATURE REVIEW

The NSCA's main objective is to endorse the National Security Council (NSC) which is a federal agency under the PM's Department responsible for managing and coordinating the implementation of policies related to the security of Malaysia. It was established on 23rd of February 1971 after the 13th of May 1969 racial riot. There was a number of changes in its name and composition over the years. Currently, it is chaired by the PM of Malaysia and comprises eight executive members including the Deputy Prime Minister as Deputy Chairman, NSC Director General, three ministers (Minister

of Defence, Minister of Foreign Affairs and the Minister of Communications and Multimedia), the Chief Secretary to the Government, Chief of Defence Forces (CDF) and the Inspector-General of Police (IGP). The NSC as it exists today was established to specifically co-ordinate policies related to the nation's safety and to provide instructions on safety including security movements, public peace and all matters related to safety. It must be noted that originally, the source of the NSC's authority (previously identified as MAGERAN and National Security Division) was Emergency (Essential Powers) Act 1969 and Emergency (Public Order and Prevention of Crime) Act 1969. However, with the abrogation of these ordinances, the role of the Council became purely administrative in nature and according to the current PM, this has raised the need for an Act that will formalize and strengthen its role to be more efficient in formulating new policies to ensure the safety of the nation (Najib, 2015). He further elaborated that the formal establishment of the NSC via a legislation is not something new and has been done in countries like the United States, United Kingdom, Germany, and most recently, Japan. The Act which was enacted to endorse the NSC has specific provision to regulate the council's role and function. In line with this, section 3 of the Act lists 4 primary functions of the NSC which includes formulating policies and strategic measures on national security, monitoring the implementation of the policies and strategic measures on national security, advising on the declaration of

security areas and performing any other functions related to the national security.

At this juncture, it is important to note that the last two functions are the ones which are being heavily criticized for infringing the doctrine of separation of powers. Giving the power to NSC to advise the PM on the declaration of security areas while an emergency is in force is equal to giving the power to one single person (PM) to decide the fate of a nation as the NSC is headed by the PM himself. Further, Section 3 also gives unlimited power to the NSC as seen in the broad phrase "perform any other functions related to national security" which can be open to abuse.

The passing of the NSCA has generated strong criticisms among various sectors of the community. Thiru (2015) raised several contestable arguments about the Act on the basis that it provided enormous powers to a single body, the passing of the Act itself not being under Articles 149 or 150 and the usurpation of the constitutional powers of the YDPA. Ananth (2016) supplemented this criticism by asserting that the passing of the NSCA was a colourable exercise of power and was therefore unlawful. The Act denies key fundamental liberties guaranteed under Part II of the constitution which can only be done under Articles 149 (pre-condition of identifying a threat to national security and including the same in a recital) and Article 150(5) (as emergency law during an emergency period). He went on to add that a constitutional authority could not do indirectly what it was not permitted to do directly and this could be considered as a

fraud for a Parliament cannot contravene its legislative power in a surreptitious or indirect manner as in the case of *D.C. Wadhwa & Ors v. State of Bihar & Ors* (1987). In Malaysia, a similar view was adopted in the case of *Public Prosecutor v. Teh Cheng Poh* (1979). This clearly shows that the act is unconstitutional as the basic human rights of Malaysians are being compromised.

Further, there is also concern that the Act contravenes some of the principles of the Rule of Law which is the essential key to establish a democratic state that provides legal guarantees for citizens' rights where the dignity of the individual is given utmost importance. If a nation upholds the principles of the Rule of Law, it means that the extant laws can restrain governmental excesses by promoting certain liberties and creating order and predictability on how a country function. Thus, it can be summed that the Rule of Law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power. According to Hachez and Wouters (2013), the Rule of Law is a beacon for those who promote better-functioning legal systems for improving the interactions between the members of a social order. According to Dhanapal and Shamsuddin (2016), the most important application of the Rule of Law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with the established procedural steps that are referred to as due process. Besides this,

there are other principles of the Rule of Law which the Act disregards. This comprises the breach of the three principles of the Rule of Law stressed by Dicey (1985): the need to curb the conferral of discretionary power on government officials in the interests of certainty and predictability; the ability to seek a remedy in independent courts should the government act illegally and the importance of equality before the law. These principles are clearly disregarded by Part IV and V of the NSCA. An example of how the act contravenes these key principles of the Rule of Law can be seen in section 38 which vetoes judicial review.

It can be stated that the Reid Commission actually intended to frame the Malaysian Constitution based on the principles of Rule of Law. The fundamental liberty provisions prepared by the Commission in reference to the principles of the Rule of Law are embedded in Part II of the Federal Constitution. This can be supported with the argument that if the original renditions of Articles 3, 4, & 10 of the Reid Commission recommendations in regards of fundamental liberties had been accepted altogether, Malaysia would now be more officially rooted in the principles of the Rule of Law than it is at present. An example can be seen in the words used in Article 3(1) and 3(2) of the draft proposal which asserts that:

Art.3(1) The Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any

State or of any law which is repugnant to any provision of this Constitution shall, to the extent of repugnance, be void.

Art.3(2) Where any public authority within the Federation or within any State performs any executive act which is inconsistent with any provision of this Constitution or any law, such act shall be void.

However, the final Constitution did not reflect this call to ensure the principles of the Rule of Law are upheld. As such it cannot be said emphatically that the principles of the Rule of Law are comprehensively preserved in the Constitution. According to Ahmad Masum (2009), the Malaysian Constitution does embody the principles of the Rule of Law in many of its provisions. However, he went on to claim in close reference to Article 4 of FC that “it is still a moot issue as to whether the Federal Constitution embody this fundamental doctrine as part and parcel of our legal system”. Thus, it can be concluded that although the basic principles of the Rule of Law are found in some of the articles of FC, their applications are limited to a certain extent by the articles themselves or by other articles in FC which will be discussed further.

A recent case (*Public Prosecutor v. Gan Boon Aun*, 2017) has shed some light on

this issue. There is indication that the courts consider the principles of the Rule of Law as contained in Part II of the FC are real and not just a myth. In this case, the High Court found that the right of an accused person to be presumed innocent until proven guilty and the right of an accused person to have a charge proven against him beyond reasonable doubt are fundamental rights enshrined in Article 5(1) of the FC. Further, the High Court found that the deeming provision in section 122(1) of the Securities Industry Act 1983 (Act 280) strikes at the heart of Article 8(1) of the FC for the reason that the Public Prosecutor had discriminated against the respondent and Khiudin by charging them but not the other directors in the company.

ANALYSIS OF THE PROVISIONS OF THE NATIONAL SECURITY

COUNCIL ACT 2016

The NSCA has 44 sections and is divided into 7 parts as listed:

Part I : Preliminary (section 1 & 2)

Part II : National Security Council (section 3 to 14)

Part III : Duties of the Director General of National Security and Government Entities (section 15 to 17)

Part IV : Declaration of Security Area (section 18-21)

Part V : Special Powers of the Director of Operations and Security Forces Deployed to the Security Area (section 22 to 36)

Part VI : General (section 37 to 42)

Part VII: Savings (section 43 to 44)

An analysis of the key sections of the Act will show that there are extensive powers given to the NSC. Table 1 list some of the keys sections which many have viewed as contravening the rights upheld

under Part II of the FC which, according to them, comprises the principles of the Rule of Law.

An analysis of the sections listed in Table 1 shows that the NSC has been

Table 1

Selected provisions of NSC Act 2016

Sections	Powers Conferred
Section 18	“Declaration of security area - the Prime Minister may declare in writing if he considers it to be necessary in the interest of national security.”
Section 22	“Exclusion and evacuation of persons - Security forces can evacuate or resettle any person or persons from any part of the security area.”
Section 24 and 25	“Power to control movement, road, etc. - Provides the power to control the movement of any person.” “Power of arrest - Provides power to arrest anyone without the need of a warrant respectively.”
Section 26	“Power to search and seize - Security forces can evacuate or resettle any person or persons from any part of the security area.”
Section 27 and 28	“Power to search premises for dangerous things - Grants Security Forces the power to search premises.” “Power to search persons for dangerous things - Grants Security Forces the power to search the person for dangerous thing; and seize any such dangerous thing found in the search.”
Section 29	“Power to seize vehicle, vessel, aircraft or conveyance - Provides for the power to seize vehicles and other properties in the security area if he suspects that the vehicle, vessel, aircraft or conveyance is likely to be connected with the commission of an offence under any written laws.”
Section 30	“Power to take temporary possession of land, building or movable property - Provides for the power to take temporary possession of land, building or movable property in the interest of national security.”
Section 31	“Demand for use of resources - Permits the Government to demand the use of resources including utilities and assets.”
Section 34	“Use of reasonable and necessary force - Provides for the use of reasonable and necessary force to preserve national security.”
Section 35	“Power to dispense with inquests, etc. - power of a Magistrate or coroner to dispense with death inquiry or inquests on the dead body of any member of the Security Forces on duty in a security area or on the body of any person if the Magistrate or coroner is satisfied that the person has been killed in the security area as a result of operations undertaken by the Security Forces for the purpose of enforcing any written laws.”

given vague wide-ranging powers without any limitations imposed on them. This is clearly indicated in section 38 which confers conferring immunity upon the members of the NSC and Security Forces. The section clearly prohibits “any action, suit, prosecution or any other proceeding shall lie or be brought, instituted or maintained in any court against the Council, any committee, any member of the Council or committee, the Director of Operations, or any member of the Security Forces or personnel of other Government Entities in respect of any act, neglect or default done or omitted by it or him in good faith, in such capacity” Ismail (2016) denounced the absence of any mechanism to review any direction or order under the NSCA as providing ‘blanket immunity’ to the council. This clearly contravenes the principle of the Rule of Law that all people and institutions are subject to and accountable to law that is fairly applied and enforced; the principle of government by law (Bingham, 2011). Section 38 which forbids judicial review displaces the principle of the Rule of Law advocated by Dicey (1985) that the law should provide for a remedy in independent courts against government illegality. In addition, according to Ratnapala et al., (2007), the principles the Rule of Law has laid the basis for the legal protection of fundamental rights against political tyranny where there is a presupposition that rules exist to serve as an effective check on the exercise of government power. Leong (2014), had argued, in relation to the

SOSMA, the repeal of any provision that excluded judicial review as an infringement to the doctrine of separation of powers. This criticism applies to the NSC too. However, the validity of this criticism must be understood with reference to the views presented by the Federal Court in the case of *Pendakwa Raya (Public Prosecutor) v. Kok Wah Kuan* (2007). According to Tun Abdul Hamid Mohamad, delivering the majority judgment:

The Malaysian Constitution has features of the doctrine of the separation of powers and at the same time, contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. ... A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though it influenced the framers of the Malaysian Constitution.

His Lordship concludes that the separation of power is not part of the FC. However, in the same case, Richard Malanjum CJ (Sabah & Sarawak) held that:

if the courts in Malaysia can only function in accordance

with what has been assigned to them by federal laws, it would be contrary to the democratic system of government wherein the courts form the third branch of the government and function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law.

The authors are of the opinion that the doctrine of separation of powers is imbedded in the FC although it is not worded explicitly. This assumption is based on the fact that the FC is divided into distinctive parts which discuss the powers of the legislative, executive and judiciary separately. Ahmad Masum (2009) was concerned by the ouster clause in section 38 as judicial review was important in protecting individuals from arbitrary action of powerful bodies especially the government. Although the phrase "in good faith" in section 38 seems to be a safeguard, nowhere in the Act is there a definition of how the subjective phrase 'good faith' is to be determined. In order to ensure there is consistency in interpretation, the phrase 'good faith' must be defined as in the Malaysian Penal Code. The immunity is strengthened by section 40 providing that the Public Authorities Protection Act 1948 [Act 198] 'shall apply to any action, suit, prosecution or proceedings against the Council, any committee, any member of the Council or committee, the Director of Operations, or any member of the Security Forces or personnel of other Government Entities in respect of any act

or thing done or committed by it or him in such capacity'. It must be conceded here that such ouster clause is not exclusive to NSCA 2016 alone for it can be found in many Acts such as Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, Security Offences (Special Measures) Act 2012 and Security Offences (Special Measures) Act 2012.

The sections highlighted in Table 1 are objectionable for many reasons. First and foremost, once the PM declares an area as security area under section 18 (1), he has the "power to appoint a person from amongst the public officers to be the Director General (DG) of National Security" (section 15) at the advice of the Chief Secretary of the Government. As a safeguard, this is an inadequate in the light of the extensive powers conferred upon the DG. Section 16 empowers the DG to discharge a list of duties. The list may be supplemented with him having to "perform such other duties as directed by the council" (section 16 (2) (g)). If this meant to present the DG as an independent officer acting as he deems fit, it is defective. The office of the DG as a democratic safeguard lacks credibility because the Chief Secretary of the Government is an appointee of and holds office in reality at the pleasure of the PM and he is supposed to advise the PM; it is like the PM advising himself.

Further, there is also concern that the proclamation of an area as a security area is at the sole discretion of the PM. This power is seen to be a usurpation of the powers of

the YDPA (the King) as under Article 150 of the FC, it is only the King who has the power to declare a state of emergency. Under the NSCA, the PM has total discretion to declare an area as security area. According to Shad Saleem Faruqi, the King's power to declare emergency is not absolute because under Article 40(1) and 40(1A), all the powers under Article 150(1) are subject to ministerial advice and this has been affirmed in *Stephen Kalong Ningkan* (1968), *Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia* (Minister of Home Affairs Malaysia) (1969), *Madhavan Nair & Anor. v. Public Prosecutor* (1975), *Public Prosecutor v. Teh Cheng Poh* (1979), *Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia* (Director General of Public Service Malaysia) & *The Government of Malaysia* (1981) and *Abdul Ghani bin Ali Ahmad & Ors v. Public Prosecutor* (2001).. Thus, the PM's power to declare a security area in times of emergency is not a radical change. The NSCA 2016 does provide some check against this power which is said to be conclusive. This is seen in section 18(6) which provides that "a declaration made under subsection (1) and the renewal of declaration made under subsection (4) shall be published in the Gazette and laid before Parliament as soon as possible after it has been made, and if resolutions are passed by both Houses of Parliament annulling the declaration, it shall cease to have effect, notwithstanding subsections (3) and (4), but without prejudice to anything previously done by virtue of the declaration." This provision is another illusory safeguard

given the overwhelming majority that the current government has in both Houses of Parliament.

In reference to the powers that are related to the declaration of the security area, it must be noted that the powers given are extensive as indicated in the words and phrases quoted from various sections of NSCA 2016. These include the power to 'exclude, evacuate, resettle any person or groups of persons' (section 22), 'order people to remain indoors unless with permit' (section 23), 'control the movement of persons, vehicles, vessels, etc'. (section 42), 'to control or prohibit the use of any road, waterway or airspace' (section 29), 'to arrest any individual without a warrant' (section 25) and 'impose severe restrictions on the right to property' (sections 30-33). These powers can be said to violate basic human rights as conferred in the FC. This is affirmed by Malik Imtiaz Sarwar and Surendra Ananth (2016) who declared that some of the sections of NSCA were inconsistent with the FC and the key provisions of the Act illegitimately violated the fundamental liberties guaranteed under Part II of the FC. Khaira (2007) too agreed that the Act contravened Article 5, 9, 10 and 13 of the FC. Here it is important to note that the fundamental rights under Part II of the FC are not absolute as these rights can be cribbed by the articles in the FC. For example, Art. 9 which provides for the freedom of movement may be limited by 'any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of

offenders and Art. 10 which guarantees freedom of speech, assembly and association provides that Parliament may by law impose restrictions on these rights on various grounds including security and public order. Further, Article 149 and 150 provide for the infringement of the basic human rights upheld in the FC through special powers to be used against subversion, organized violence, acts and crimes prejudicial to the public order as well as emergency powers.

According to Robertson (2016), Deputy Asia Director, “[g]iven the Malaysian government’s recent track record of harassing and arresting government critics, the likely abuses under this new law are truly frightening” and there are serious “concerns that this law will be used as a back door to severe rights violations, using government claims that it only seeks to protect its citizens from terror threats.” It can become a reincarnation of ISA 1960 which was first introduced with assurance by the PM at that time, Tun Razak, that the Act will only be used to address communists’ terrorists but subsequently it was used for political victimization. In line with all these concerns, Human Rights Watch (2016) said that the NSCA 2016 should be repealed as the law could be used to impose unjust restrictions on freedom of opinion, expression and assembly and it is recommended that there is a need for the Malaysian government to review its laws to integrate international human rights standards into its effort to counter terrorism. Non-governmental organizations, including human rights groups such as SUARA Rakyat Malaysia

(SUARAM), Lawyers for Liberty, BERSIH, and Amnesty International Malaysia have also raised strong criticisms against the Act.

Josef Benedict, Amnesty’s Deputy Director for Southeast Asia and the Pacific claims that with the new law, the government has disdained checks and has assumed theoretically abusive powers (cited in Gartland, 2016). The country’s opposition coalition, Pakatan Harapan, also said that the coming into force of the NSCA has brought Malaysia “to the brink of dictatorship” (Gartland, 2016). According to Razali Ismail (2016), the Chairperson of the Human Rights Commission of Malaysia (Suhakam), the imposition of emergency-like conditions in security areas declared by NSC have ensued in the suppression of groups whose ideas are incompatible with the state. He cited the internal conflict in Nanggroe Aceh Darussalam, Indonesia where after the presidential decree declaring a ‘military emergency’ had led to the loss of thousands of lives, destruction of properties and suspension as well as violation of fundamental rights as an example. The example cited can very well occur in Malaysia if a state of emergency is proclaimed under section. 18 of NSCA 2016 and security forces are deployed to the area under section 22 of NSCA 2016.

Another important criticism raised against the Act by various parties is summarized succinctly by Sarwar and Ananth (2016). They argued that the provisions of the Act contravene Article 5 (Life and Personal Liberty), Article 9 (Freedom of Movement), Article 10

(Freedom of Speech, Assembly and Association) and 13 (Rights to Property) of the FC. It has also been claimed that the enactment of the Act is unconstitutional as the provisions within the Act overrides rights conferred by the Constitution. It must be noted that Article 149 empowers the Parliament to enact legislation against subversion and action prejudicial to public order but it lays out a special procedure for the enacting of such laws while Article 150 (5) confers the same power to the Parliament but such power is only available during a state of emergency (Osman & Anor v Public Prosecutor, 1968). Thus, for a law to legitimately override Articles 5, 9, 10, and 13 of the FC, it must be purported to be made under either Article 149 or 150 but the enactment of NSCA does not fall within these ambits. According to Sarwar and Ananth (2016), the provisions of the Act deny fundamental liberties guaranteed under Part II of the FC and the Parliament does not have the power to enact an Act with such provisions unless certain conditions prevail.

In moving the second reading of the Bill that became the NSCA, Shahidan bin Kassim Bill 61 (2015) argued that the enactment of the NSCA was crucial as an increasing number of terrorists' activities were threatening Malaysia's sovereignty. To counter these threats, it was crucial to enhance intelligence gathering and sharing and this is provided for under section 17(3) of NSCA 2016, and to have a more unified security force that will respond expeditiously to unfolding events to minimize loss. Parameswaran (2015) reports

that the NSCA 2016 has a positive outcome in that it validates the existing NSC to ensure that it is able to act in a more efficient and effective manner to streamline policies and the country's security strategies but he adds that this does not eradicate the fact that the Act also affords the government wide powers of arrest, search and seizure without a warrant in the so-called "security zones". According to Steven Thiru, "the extensive powers under the Act effectively resurrect the powers granted to the Government under the Emergency Ordinances, which were repealed by Parliament in 2011". Thus, it appears that the act was enacted to reinstate the power of arrest without warrant in times of emergency which is not justified for the current situation in Malaysia does not require such drastic measures. Najib Razak, Malaysian PM (cited in Parameswaran, 2015) claims that the NSCA is necessary to ensure Malaysia's NSC is on par with similar agencies in the United States (The United States NSC, 1947), Japan (NSC, 2013), Britain (NSC, 2010) and other countries. An analysis of the councils of the various countries show clear indication that the powers inherent in those councils are for more extensive as compared to the Malaysian council for example, the US NSC has authority to kill terrorists that have been identified and placed on a kill or capture list by a secretive panel of senior government officials, which then informs the president of its decisions for necessary action (Hosenball, 2011). In comparison, Malaysia's NSCA 2016 does not provide such extreme powers to the NSC. With this

argument, the authors are not condoning such extremism but are merely showing evidences as to how other nations treat terrorists without mercy.

The criticism that the NSCA 2016 usurps the power of the YDPA has been answered by Paxton (1978) and Harding (1996) long before the enactment of the NSCA 2016. The short answer is that when the YDPA functions as the supreme commander of armed forces, he has to act on the advice of the Cabinet (Paxton 1978). Harding’s (1996) comment that although the armed forces are acting directly under the YDPA and the Cabinet, the YDPA’s role

as the Supreme Commander of the armed forces is purely ceremonial and that it is the government which has control over the armed forces.

Another point which most critics of the NSCA 2016 have not given adequate attention is the difference in the extent of powers conferred by Article 150 of the FC and section 18 of the NSCA 2016. A linguistic analysis reveals a major distinction between the two. Article 150 of the FC and section 18 of NSCA 2016 are quoted in Table 2 (words are bolded for emphasis) to show the distinction:

Table 2

Comparison between Article 150 of FC and Section 18 of NSCA 2016

Article 150 Federal Constitution	Section 18 NSCA 2016
<p>150. (1) “If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.” (2c) “An ordinance promulgated under Clause (2b) shall have the same force and effect as an Act of Parliament and shall continue in full force and effect as if it is an Act of Parliament until it is revoked or annulled under Clause (3) or until it lapses under Clause (7);”</p> <p>(3) “A Proclamation of Emergency and any ordinance promulgated under Clause (2b) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance....”</p> <p>(7) “At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.”</p>	<p>18. (1) “Where the Council advises the Prime Minister that 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, the Prime Minister may, if he considers it to be necessary in the interest of national security, declare in writing the area as a security area.”</p> <p>(2) “A declaration made under subsection (1) Shall - (a) apply only to such security area as specified in the declaration; and (b) cease to have effect upon the expiration of the period specified in subsection (3) or upon the expiration of the period of renewal specified in subsection (4), or in accordance with subsection (6).</p> <p>(3) “A declaration made under subsection (1) shall, but without prejudice to anything previously done by virtue of the declaration, cease to have effect upon the expiration of six months from the date it comes into force”.</p> <p>(4) “Notwithstanding subsection (3), a declaration in force may be renewed by the Prime Minister from time to time for such period, not exceeding six months at a time, as may be specified in the declaration.”</p>

Two important things must be considered here. Firstly, under Article 150, the YDPA has the power to issue a proclamation of emergency to cover the whole federation but under section 18 of the NSCA 2016, the PM can only declare a specific area or number of areas and not the whole Federation as a security area. This conclusion flows from the section 18 of the NSCA 2016 replacing the word 'Federation' in Article 150 (1) of the FC with the phrase 'the area'. Section 4(3) the Malaysian Interpretation Acts 1948 and 1967 states that "words and expressions in the singular include the plural, and words and expressions in the plural include the singular." However, the phrase, 'the area' in section 18 of NSCA 2016 reflects the intentional limiting of the power conferred by the NSC on the PM to a specific geographical area or a number of such areas but not the Federation as a whole. Thus, under the NSCA 2016, the PM has lesser power than that conferred by Article 150 upon the YDPA. Despite this, it must be concurred that the greater extent of the King's power in this context is illusory as under Article 150 read with Article 40(1A), his Majesty has to act on the advice of the Cabinet. Another difference in the power conferred by NSCA 2016, is that the PM has the power to renew the declaration of a security area for periods not exceeding 6 months at a time without limit. However, under the FC, the proclamation of an emergency has full force and effect as if it is an Act of Parliament until it is revoked or annulled under Clause (3) or until it lapses under Clause (7). Hence, there is a limitation

to the duration of the proclamation under Article 150. This may seem to be a hitherto unrecognized important distinction between Article 150 and section 18 of the NSCA 2016. Although some claim that the power to declare emergency under NSCA 2016 does not really transform the scenario which existed in the past with the power being in the hands of YDPA under Article 150 of FC, the authors personally feel that there is a difference between the two. The YDPA acting on the advice of the PM to declare emergency of the federation is definitely different from the PM deciding on the advice of NSC to enforce an emergency on a specific area or areas.

The NSCA 2016 is mired, largely in the popular press, in a debate about the need and implications of the statute. The conflicting opinions of the different stakeholders are supported with convincing justifications of different levels as the perspectives come from different angles of either upholding human rights or the national security of the nation at the cost of human rights. Further, the concern is intensified due to some of the provisions of the Act which abrogate the principles of the Rule of Law and basic human rights.

CONCLUSION

The NSCA is a harsh legislation described by some as a draconian law which threatens democracy. This is mainly due to a number of its provisions which infringe the fundamental rights as defined under the FC itself. It is claimed that NSCA is beneficial in that it strengthens the pre-existing

NSC in endowing it with an advisory role in security related matters. However, it cannot be denied that the NSCA gives unrestricted powers to the Council and in being enacted like any other ordinary law, and in violating the fundamental human rights, it is unconstitutional and unlawful. Further, we close by drawing attention to the fact that for the first time since 1948, a state of emergency does not exist in Malaysia. Yet, the NSCA, a statute conferring powers meant to deal with an emergency has been enacted. Proponents of the NSCA may scream that the NSCA is a preventive legislation meant to prevent unthinkable terrorists' atrocities, it has to be pointed out that a slew of emergency legislation (such as the SOSMA, the "POTA", the POCA are already in place with similar provisions. In short, the NSCA is unjustified, unnecessary and unconstitutional in being enacted under Article 66(4) of the FC which does not permit the abrogation of basic human rights. Thus, we conclude that the NSCA 2016 is redundant and also antithetical to the concept of constitutional democracy.

Finally, the big elephant in the room in all matters related to emergency legislation in Malaysia has to be identified. This is in the fear that the government will, as it has in the past, misuse this emergency/security legislation to suppress dissent and political opponents. Most statutes are not perfect and even which seem to be at the time they are "born" can be improved. The NSCA is, as should be apparent, perfect. Yet, it is hard to foresee the government repealing it. The best that can be hoped for is that it will be

reviewed. In any review of the NSCA, it is crucial to restore judicial review which operationalizes the principles of the Rule of Law. Without the judicial review, the democratic state will be short of the legal mechanism necessary for a civilized society to flourish. There is no doubt that there is a need for internal security legislation to protect the nation from terrorist atrocities. However, such laws should strike a balance between the need to protect national security and the protection of basic human rights. Given the other internal security laws in Malaysia, the superfluity of the NSCA is glaring. We conclude with the words of Benjamin Franklin's quoted at the beginning of this paper "Liberty without Safety and Safety without Liberty is meaningless".

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