

THE NATIONAL SECURITY COUNCIL BILL: A COLORABLE EXERCISE OF POWER

by

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INTRODUCTION

The National Security Council Bill 2015 (the ‘Bill’) was moved by the Minister in the Prime Minister’s Department, Dato’ Seri Shahidan bin Kassim, on 1 December 2015, in the Dewan Rakyat. In moving the Bill, the Minister invoked art 74(1) of the Federal Constitution (‘the Constitution’) and positioned the Bill as concerning matters that were within the Federal List under the Ninth Schedule of the Constitution. The Bill was passed by the Dewan Rakyat on 3 December 2015 and was subsequently passed by the Dewan Negara on 22 December 2015. In the ordinary course, by virtue of art 66(4A) of the Constitution, the Bill would have become law on 21 January 2016. However, for reasons that are not immediately apparent, the Bill was placed before the Conference of Rulers, which has since remitted the Bill back to the Government for review. The nature of their review sought has not been made public.²

The passage of the Bill through Parliament was not without controversy.³ For immediate purpose the most relevant concerns raised by parties opposed to

1 The authors would like to extend their appreciation to Mr Pavendeep Singh, Mr Joshua Choong and Ms Wong Yen Wei.

2 See art 38(4) of the Constitution, read together with art 38(2)(c) of the Constitution.

3 Civil society organisations and the Federal Opposition questioned the need for the law and the manner and haste with which it was moved through Parliament (see <http://www.themalaymailonline.com/malaysia/article/fearing-abuse-critics-demand-putrajaya-justify-need-for-national-security-c> and <http://www.theguardian.com/world/2015/dec/04/malaysia-approves-security-law-amid-warning-it-could-lead-to-dictatorship>).

the Bill were whether the Bill was constitutional in light of provisions of the Bill allowing for the contravention of guaranteed fundamental liberties under Part II of the Constitution, and whether the Bill allowed for the usurpation of the exclusive powers of the Yang di-Pertuan Agong ('YDPA') under art 150 of the Constitution.

Close consideration of the Bill reveals that the said concerns are not misplaced. It further becomes evident that, additionally, the Bill violates the Constitution for having been enacted in a manner not countenanced by the same.

This article seeks to support these conclusions by demonstrating that the legislative power under art 74 of the Constitution could not have been justifiably invoked for the enacting of the Bill, or any law of a nature similar to it. It will be shown that key provisions of the Bill infringe Part II of the Constitution, and that Parliament could only enact a law containing such provisions as exceptional legislation under arts 149 or 150(5) of the Constitution. It will also be shown that the effect of the Bill is to unlawfully arrogate powers that are exclusively vested in the YDPA by art 150 of the Constitution to the Executive. Finally, in light of these matters, it will be argued that the Bill is the product of a colorable exercise of power by Parliament.

THE BILL

The Bill can be broadly compartmentalised into five main parts. These are briefly explained below under headings adopted from the Bill.

The National Security Council

The Bill establishes a statutory body called the National Security Council ('the Council').⁴ The Council comprises of the Prime Minister as Chairman, the Deputy Prime Minister as Deputy Chairman, the Minister charged with the responsibility for defence, the Minister charged with responsibility for home affairs, the Minister charged with the responsibility for communication and multimedia, the Chief Secretary to the Government, the Chief of Defence Forces and the Inspector General of Police.⁵

The Council is tasked with primarily the following functions:⁶

4 The Bill, cl 3.

5 *Ibid*, cl 6.

6 *Ibid*, cl 4.

- (a) formulating 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;
- (b) monitoring the implementation of the policies and strategic measures on national security;
- (c) advising on the declaration of security areas; and
- (d) performing any other functions relating to national security for the proper implementation of this Act.

The Council has the power to do all things necessary or expedient for or in connection with the performance of its functions including:⁷

- (a) controlling and coordinating Government Entities on operations concerning national security; and
- (b) issuing directives to any Government Entity on matters concerning national security.

Director General of National Security and Government Entities

The Director General of National Security (‘the DG’) is appointed by the Prime Minister upon recommendation of the Chief Secretary to the Government.⁸ The DG has such duties and powers conferred on him by the Council. Such powers may include the power to do any of the things listed below (though the list is not exhaustive):⁹

- (a) to implement the policies and strategic measures on national security formulated by the Council;
- (b) to coordinate and monitor the implementation of the policies and strategic measures on national security by the government entity;
- (c) to advise and make recommendations to the Council on strategic measures concerning national security;
- (d) to collect, evaluate, correlate and coordinate the information and intelligence from all government entities, and to disseminate the information and intelligence to the government entities as may be essential in the interest of national security;

⁷ *Ibid*, cl 5.

⁸ *Ibid*, cl 15(1).

⁹ *Ibid*, cl 16.

- (e) to supervise and monitor the implementation of the declaration of a security area and any executive order issued;
- (f) to issue directives to the government entities on national security measures; and
- (g) to perform such other duties as directed by the Council.

Any government entity or person must immediately make available information or intelligence in its or his possession which relates to national security upon direction by the Council.¹⁰

Declaration of Security Area

Clause 18(1) of the Bill is a critical provision. It provides:

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.¹¹

(pertinently, the Bill does not provide a definition of the term ‘national security’).

Once a security area is identified, the Council shall appoint a Director of Operations to be in charge of operations in the security area.¹² The Council can also issue an executive order to government entities or to deploy security forces in the security area.¹³

The Director of Operations and the security forces are granted wide powers in a security area.¹⁴ These powers are summarised in the next part.

Special powers of the Director of Operations and Security Forces

The powers vested in the Director of Operations and members of the Security Forces are as follows:

¹⁰ *Ibid*, cl 17(1).

¹¹ *Ibid*, cl 18(1).

¹² *Ibid*, cl 20(1).

¹³ *Ibid*, cl 19.

¹⁴ *Ibid*, Part V.

Table 1

Clause	Powers
22	Exclusion and evacuation of persons: evacuate any person or group of persons from the security area or any part of the security area, and resettle such person or group of persons to an area
23	Curfew: Director of Operations may order all persons or any part of the security area to remain indoors between such hours as may be specified
24	Power to control movement, road, etc: Director of Operations may direct Security Forces to control the movement of any person or any vehicle, etc
25	Power of arrest: any member of the Security Forces may, without warrant, arrest any person found committing, alleged to have committed or reasonably suspected of having committed any offence under any written laws in the security area
26	Power to search and seize: any member of the Security Forces may, without warrant and with our without assistance, stop and search any individual, vehicle etc, and enter and search any premise or place
27	<p>Power to search premise for dangerous things: any member of the Security Forces believes in reasonable grounds that there is a dangerous thing on any premise or it is necessary as a matter of urgency to make the dangerous thing safe or to prevent it from being used, the member of the Security Forces may:</p> <ol style="list-style-type: none"> 1. Enter into and search the premise; 2. Seize anything found on the premise if the member of the Security Forces believes on reasonable grounds that it is a dangerous thing; and 3. Search any person who is at or near the premises where the search is being carried out and seize any dangerous thing found on the person. <p>Any member of the Security Forces may also take such action as is reasonable and necessary to make the dangerous thing safe or to prevent it from being used. If the said member seizes a dangerous thing from a person and believes on reasonable grounds that the person used the thing in the commission of an offence against any written law, the said member may detain the person for the purpose of placing him in the custody of a police officer at the earliest practicable time.</p>
28	Power to search persons for dangerous things: Similar to cl 27
29	Power to seize vehicle, vessel, aircraft or conveyance: Similar to cl 26

30	<p>Power to take temporary possession of land, building or movable property:</p> <p>The Director of Operations or any person authorised by the him may, if it appears to him to be necessary or expedient to do so in the interest of national security, or for the accommodation of any Security Forces, take temporary possession of any land, any building or part of a building, or any movable property and may give such directions as appear to him necessary or expedient in connection with the taking of possession of that land, building or movable property.</p> <p>Any member of the Security Forces may use such force as appears to him to be reasonably necessary for securing compliance with directions given to any person mentioned in the foregoing paragraph.</p> <p>The Director of Operations or any person authorised by him may by order provide for prohibiting or restricting the exercise of rights of way over the land or building, and of other rights relating thereto which are enjoyed by any person, whether by virtue of an interest in the land or building or otherwise.</p>
31	<p>Demand for use of resources:</p> <p>If it is required in preserving national security in the security area.</p>
33	<p>Power to order destruction of certain unoccupied buildings:</p> <p>If any building or structure if left unoccupied by reason of the operation of any order made under this Part, the Director of Operations or any person authorised by him may if it appears to him to be likely that the building or structure will be used by persons who intend, or are about, to act or have recently acted in a manner prejudicial to national security, destroy or authorise the destruction of that building or structure.</p>
34	<p>Use of reasonable and necessary force to preserve national security including causing grievous bodily harm or death if deemed necessary. Causing such indignity as is reasonably and necessary in the circumstances is permitted.</p>
35	<p>Power to dispense with inquests in respect of the deaths of any member of the Security Forces on duty and any person who had been killed in the security area as a result of operations undertaken by the Security Forces for the purpose of enforcing any written laws</p>

General

The Bill further criminalises the disclosure of information obtained during the course of duty by any member of the Council or committee. Any person who has by any means access to any information or document relating to the affairs of the Council is also prohibited from disclosing such information and document.¹⁵

The Council, any committee, the Director of Operations, members of the Security Forces and personnel of other government entities, in respect of any act, neglect or default done or omitted by it or him in good faith are protected against suits and legal proceedings.¹⁶

Finally, the Prime Minister may make regulations for the purposes of carrying out or giving effect to the provisions of the Bill. Such regulations may be made (but not limited to):¹⁷

- (a) to control the movement of persons, vehicles, vessels, aircrafts and conveyance in any security area;
- (b) to prescribe any prohibited action and activities during the period of the security area declaration;
- (c) to prescribe the procedures for the taking possession of land, buildings and other movable property, and the procedures for demand for use of resources in any security area; and
- (d) to prescribe the procedures for the destruction of buildings and other structures in any security area.

Such regulations may also provide for any act or omission to be a criminal offence.¹⁸

CONTRAVENTION OF PART II OF THE CONSTITUTION

It is evident that the Director of Operations and members of the Security Forces have been conferred sweeping and wide-ranging powers. It is the opinion of the authors that key provisions of the Bill violate the fundamental liberties guaranteed under Part II of the Constitution. These contraventions are summarised in the table below.

15 *Ibid*, cl 37.

16 *Ibid*, cl 38.

17 *Ibid*, cl 18.

18 *Ibid*, cl 18(3).

Table 2

Article (FC) and case law	Clauses in the Bill
<p data-bbox="371 447 748 478">Article 5 — Life and personal liberty</p> <p data-bbox="342 512 781 737">1. To be given a broad and liberal meaning, incorporating all the facets that are an integral part of life itself and those matters which go to form the quality of life (see <i>Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor</i> [1996] 1 MLJ 261 at p 288 (CA))</p> <p data-bbox="342 783 781 940">2. When read together with article 8, it protects individuals from arbitrary and excessive legislative and executive actions (see <i>Lee Kwan Woh v Public Prosecutor</i> [2009] 5 MLJ 301 at p 313 (FC))</p> <p data-bbox="342 987 781 1211">3. Includes the right to access justice and to a fair trial. A law is unconstitutional if it prevents or limits access to the courts. Also incorporates the right to privacy (see <i>Sivarasa Rasiah v Badan Peguam Malaysia & Anor</i> [2010] 2 MLJ 333 at pp 340 and 344 (“Sivarasa”) (FC))</p>	<p data-bbox="800 512 1195 604">Clause 17 — Duties of Government Entities in relations to information or intelligence</p> <p data-bbox="800 646 1089 678">Clause 25 — Power of Arrest</p> <p data-bbox="800 720 1195 751">Clause 26 — Power to search and seize</p> <p data-bbox="800 793 1195 846">Clause 27 — Power to search premises for dangerous things</p> <p data-bbox="800 888 1195 940">Clause 28 — Power to search persons for dangerous things</p> <p data-bbox="800 982 1195 1035">Clause 34 — Use of reasonable and necessary force</p> <p data-bbox="800 1077 1195 1129">Clause 35 — Power to dispense with inquest</p> <p data-bbox="800 1171 1195 1224">Clause 38 — Protection against suits and legal proceedings</p> <p data-bbox="800 1266 1057 1297">Clause 42 — Regulations</p>

<p>Article 9 — Freedom of Movement</p> <p>1. This right was designed primarily to emphasise the factual unity of the Federation and to secure the right of a free citizen to move from one place in the Federation to another and to reside in any part thereof. It's object is to remove all internal barriers in the country and to make it as a whole the dwelling place of all citizens (see <i>Assa Singh v Menteri Besar, Johore</i>[1969] 2 MLJ 30 at p 47 (FC))</p> <p>2. However, the Immigration Act 1963 gives Sabah and Sarawak wide powers to control entry into and residence in those States (see <i>Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor</i> [1979] 2 MLJ 101 at p 106 (C))</p>	<p>Clause 22 — Exclusion and evacuation of persons</p> <p>Clause 23 — Curfew</p> <p>Clause 24 — Power to control movement, road and etc</p> <p>Clause 42 — Regulations</p>
<p>Article 10 — Freedom of speech, assembly and association</p> <p>1. Freedom of expression is one of the most fundamental rights that individuals enjoy. It is fundamental to the existence of democracy and the respect of human dignity. This basic right is recognised in numerous human rights documents such as art 19 of the Universal Declaration of Human Rights and art 19 of the International Covenant on Civil and Political Rights. Free speech is accorded pre-eminent status in the constitutions of many countries (see <i>Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors</i> [2011] 6 MLJ 507 at p 527 (CA))</p>	<p>Clause 23 — Curfew</p>

<p>2. The freedom of expression includes within its ambit the freedom of the press. In deciding whether a particular law falls under any permissible restriction in art 10(2) (a), consideration must be given to the question whether such law is directed at a class of acts too remote in the chain of relation to the subjects enumerated under art 10(2)(a). In other words, the objects of the impugned law must be sufficiently connected to the subjects enumerated under art 10 (2) (a). The connection contemplated must be real and proximate, not far-fetched or problematical (see <i>Public Prosecutor v Pung Chen Choon</i> [1994] 1 MLJ 566 at p 579 (SC))</p>	Clause 37 — Obligations of secrecy
<p>3. Includes the right to receive information (see <i>Sivarasa</i> at p 344)</p>	Clause 42 — Regulations
<p>4. The right to assemble peacefully is a guaranteed right in the constitution and there cannot be penal sanction legislated when citizens assemble peacefully without committing offences under the Penal Code (see <i>Nik Nazmi bin Nik Ahmad v Public Prosecutor</i> [2014] 4 MLJ 157 at p 197 (CA))</p>	

<p>Article 13 — Rights to property</p> <p>1. Property includes practically all valuable rights, the term being indicative and descriptive of every possible interest which a person can have in any and every thing that is the subject of ownership by man and including every valuable interests, it can be enjoyed as property and recognised as such equitable interests as well as legal interests and extending to every species of valuable rights or interests in either real or personal property or in easements, franchises and incorporeal hereditaments. The term comprises also all rights which are incidental to the use, enjoyment and disposition of intangible things, the bare possession, with colour or right of anything of value, the right to be protected in one's possession of a thing or in one's privileges belonging to him as an individual or secured to him as a member for the Commonwealth including the right to contest judicially any invasion of that which one possesses or owns. Property includes the right of acquisition, the right of dominion, the right of possession, the right of use and enjoyment, the right of exclusion and the right of disposition (see <i>Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor</i> [1997] 1 MLJ 418 at p 433 (HC))</p> <p>2. Under a law which enables the government to acquire or use compulsorily another party's property, the exercise of the right cannot be bad if there has been due process and adequate compensation offered or paid in accordance with the law. Courts of law will undoubtedly rule as ultra vires any enactment which deprives a person of his property without offering adequate compensation (see <i>Station Hotels Berhad v Malayan Railway Administration</i> [1977] 1 MLJ 112 at p 113 (FC))</p>	<p>Clause 29 — Power to seize vehicle, vessel, aircraft or conveyance</p> <p>Clause 30 — Power to take temporary possession of land, building or movable property in the interest of national security</p> <p>Clause 31 — Demands for use of resources</p> <p>Clause 33 — Power to order destruction of certain unoccupied buildings</p>
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PARLIAMENT'S POWER TO MAKE LAW

Constitutional supremacy

Constitutional supremacy has been a lodestar since Malaya's independence. The Constitution is the supreme law of the land. Article 4(1) of the Constitution declares:

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.

The implication of this is self-evident. This means that Parliament must conform to the provisions of the Constitution as a whole when exercising its power under art 74(1). As Suffian LP pithily observed in *Ab Thian v Government of Malaysia* [1976] 2 MLJ 112 at p 113:

The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

The Constitution is superior to the Legislature, Executive and Judiciary. As Suffian LP stated in *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383 at pp 382-383:

When we speak of government it must be remembered that this comprises three branches, namely, the Legislature, the Executive and the Judiciary. The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law.

Legislative framework

Introduction

As noted at the outset, the Bill was purportedly passed pursuant to art 74(1) of the Constitution. This is significant as, leaving aside the enacting of laws aimed at amending the Constitution, that instrument envisages three separate and distinct spheres of legislative process by Parliament. Broadly speaking, these are the legislative process under art 74(1), that under art 149 and lastly, under art 150(5).

In the first or ordinary sphere, Parliament makes such law that is necessary in the usual course. In the second and third sphere, due to extenuating circumstances, defined by arts 149 and 150 of the Constitution, Parliament is empowered to enact extraordinary legislation even where such legislation is inconsistent with certain fundamental liberties guaranteed under Part II of the Constitution. The rationale of these exceptional legislative powers is that extreme measures may be required to safeguard essential national interests such as where an emergency has been declared.

That these extraordinary powers were meant to be exceptional, and as such limited, is beyond doubt. In considering this aspect of the then draft Constitution, the Federation of Malaya Constitutional Commission ('Reid Commission') stated, at paras 172-175 of its report:

Neither the existence of fundamental rights nor the division of powers between the Federation and the States ought to be permitted to imperil the safety of the State or the preservation of a democratic way of life. *The Federation must have adequate power in the last resort to protect these essential national interests. But in our opinion infringement of fundamental rights or of State rights is only justified to such an extent as may be necessary to meet any particular danger which threatens the nation. We therefore recommend that the Constitution should authorise the use of emergency powers by the Federation but that the occasions on which, and so far as possible the extent to which, such powers can be used should be limited and defined. An emergency may arise in many ways. The most obvious examples are war and such serious internal disturbances as constitute an immediate threat to the life of the nation. But the history and continued existence of the present emergency show that organised attempts to subvert constitutional government by violence or other unlawful means may have to be met at an early stage by the use of emergency powers if they are to be prevented from developing into serious and immediate threats to the safety of the State. We recommend different provisions for dealing with these different situations.*

...

To deal with any further attempt by any substantial body of persons to organise violence against persons or property, by a majority we recommend that *Parliament should be authorised to enact provisions designed for that purpose notwithstanding that such provisions may involve infringements of fundamental rights or State rights. It must be for Parliament to determine whether the situation is such that special provisions are required but Parliament should not be entitled to authorise infringements of such a character that they cannot properly be regarded as designed to deal with the particular situation. It would be open to any person aggrieved by the enactment of a particular infringement to maintain that it could not properly be so regarded and to submit the question for decision by the Court. We see no need to recommend that the executive should have any emergency powers to act in such a situation before Parliament enacted legislation to deal with it: we think the emergency powers should not be used in this connection until the whole matter has been debated in Parliament.* Mr Justice Abdul Hamid does not agree with the recommendation in this paragraph and his reasons are given in his note appended to this Report.

Emergencies, such as war, or internal disturbance, which constitute an immediate threat to the security or economic life of the country or any part of it, may have to be dealt with more promptly. In such cases we recommend that there should be a Proclamation of Emergency, and that the Federal Government should then have power to give directions to any State Government or State officer or authority. *In such an emergency we recommend that Parliament should have power to enact any provision notwithstanding that it infringes fundamental rights or State rights.* We do not think that it is possible or desirable to set general limits to this power, and we think that it is even necessary to authorise Parliament to extend its own duration for a year, or, if the emergency should last so long, from year to year. If Parliament is not sitting when the Proclamation is made the Government can make ordinances having. (Emphasis added.)

The legislative power and process in each sphere should as such be considered more closely to determine whether the Bill was properly enacted and passed.

The first sphere — Article 74(1)

Article 74(1) empowers Parliament to make laws for the Federation with respect to any of the matters enumerated in the Federal List or the Concurrent List. The said article provides:

- (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

That this power is circumscribed by the other provisions of the Constitution is made clear by art 74(3) which provides:

(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.

Considering the intention of the Reid Commission noted above,¹⁹ it is plain that art 74(3) was intended to confine the legislative power of Parliament under art 74(1) to matters in the Federal and Concurrent Lists, and to disentitle it from legislating on matters falling within the ambit of arts 149 and 150, save as permitted by those provisions. This reading of art 74(3) is further reinforced by the principle that fundamental liberties guaranteed by the Constitution can only be abridged in the manner provided for by the Constitution.²⁰ At the risk of repetition, in *Lob Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (*Lob Kooi Choon*), Raja Azlan Shah FJ (as he then was) said at p 189:

As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution.

As made plain by the Minister who moved the Bill, it was moved pursuant to art 74(1) of the Constitution. However, as demonstrated above, the Bill is aimed at denying key fundamental liberties guaranteed under Part II of the Constitution, albeit in the so-called national interest. Understood in the light of art 74(3) and dicta of Raja Azlan Shah FCJ (as he then was) in *Lob Kooi Choon*, it is the authors' respectful view that Parliament did not have the power to enact the provisions of the Bill in issue. For reasons that are explained later in this article, other provisions of the Bill are similarly unconstitutional.

Second sphere — Article 149

Though the government has not sought to justify the Bill by reference to art 149 of the Constitution, it would be nonetheless be useful to consider whether the Bill could be defended on the basis of art 149. That provision allows for the enacting of legislation against subversion and actions prejudicial to public order. Such laws are permitted to contravene arts 5, 9, 10 and 13 of

19 *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243 (*Merdeka University*), see pp 247-249.

20 See also *Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri' Ayatuddin Al Mu' Adzam Shah* [1996] 1 MLJ 617, at pp 624-625. Eusoff Chin CJ observed that art 155(1) of the Constitution necessarily circumscribed Parliament's legislative power under art 74(1) of the Constitution by virtue of art 74(3).

the Constitution. The article however lays out a special procedure for the enacting of such laws. For completeness, art 149 provides:

149 Legislation against subversion, action prejudicial to public order, etc.

- (1) If an *Act of Parliament* recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation—
- (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
 - (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
 - (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
 - (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
 - (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
 - (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is *inconsistent with any of the provisions of article 5, 9, 10 or 13*, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) *A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article. (Emphasis added.)*

Article 149(1) of the Constitution requires that any law enacted under art 149 contain a recital of those actions taken or threatened to be taken against the Federation of Malaysia, such actions being one or more of those enumerated in art 149(1). This requirement is a condition precedent to the exercise of such power by Parliament. In *Teh Cheng Poh v The Public Prosecutor* [1979] 1 MLJ 50 Lord Diplock observed, at p 54:

The Article is quite independent of the existence of a state of emergency. On the face of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something had happened in the past viz that action of the kind described 'has been taken or threatened'.

The requirement of the recital is not a mere technicality. It serves to establish the basis of extraordinary power that Parliament seeks to vest in the delegate of such power, more usually the Executive, to take steps in aid of the essential national interest. The recital stands as a pre-condition to the existence of such power.²¹

The failure to include a recital is therefore fatal. The Irish High Court in *The King (O'Brien) v The Military Governor of the Military Interment Camp, North Dublin Union, and the Minister of Defence* [1924] 1 IR 32 struck out a Bill that was passed by both Houses of Oireachtas as it did not include a recital as required by art 47 of the Irish Free State Constitution.²² Molony CJ (as he then was) observed at p 48:

We now come to the contention of Mr Sullivan, that the third recital in the Act amounts to a declaration within the concluding words of Article 47, and the third recital is as follows: 'Whereas it is desirable that the civil authorities should be endowed with such powers as will enable them lawfully to co-operate with the military forces in the work of restoring and maintaining order and of re-establishing the supremacy of the law and civil government with or without military co-operation as may be possible as soon as the success of the military operations and circumstances of each district will permit.' Now, that says that it is desirable that the civil authorities should be endowed with certain powers for the purpose of enabling them to co-operate with the military forces in the work of restoring and maintaining law and order. Does that comply with a provision of this clause of Article 47, which is that 'these provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health, or safety'.

One has only to put side by side the recital and the concluding words of Article 47 to see that that recital does not comply with the provisions which, according to the Constitution, the declaration should contain if it is to be held that immediate operation is to be given to the measure. In these circumstances I am satisfied that the sixth clause of this return must follow the same fate as the other five. This is a grave question — an important question. Once it is raised it must be decided. We decide it according to the best of our ability, and in this case in favour of the liberty of the subject. The result is that the entire return must be quashed, and we must order the release of this prisoner.

21 See *Raja Petra Raja Kamarudin v Menteri Hal Ehwal Dalam Negeri* [2008] 1 LNS 920 at pp 8-14; *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 at p 353; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at p 182.

22 Article 47 of the Irish Free State Constitution is a similar provision to art 149 of the Constitution which relates to laws on public peace, health and safety.

The Bill does not contain a recital as required under art 149(1). This not only means that the said provision has not been complied with, it also means that Parliament had not satisfied a condition precedent to the exercise of its extraordinary legislative powers under that constitutional provision. It further implies that Parliament was not made aware of any threat of a nature enumerated under art 149(1) of the Constitution.

Third sphere — Article 150(5)

Article 150(5) of the Constitution allows for the enacting of laws by Parliament during an emergency declared under art 150. Such laws are permitted to be inconsistent with any provision of the Constitution except for any matter on Islamic law, custom of the Malays, customs in the State of Sabah and Sarawak, religion, citizenship and language. The relevant clauses of art 150 of the Constitution read:

150 Proclamation of emergency

(5) Subject to Clause (6A), *while a Proclamation of Emergency is in force*, Parliament may, notwithstanding anything in this Constitution make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, *shall be invalid on the ground of inconsistency with any provision of this Constitution*.

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or customs in the State of Sabah or Sarawak; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language. (Emphasis added.)

Parliament's power to make law under art 150(5) of the Constitution exists only while a proclamation of emergency is in force. In *Osman & Anor v Public Prosecutor* [1968] 2 MLJ 137, Viscount Dilhorne said at p 138:

By art 150 of the Constitution the Yang di-Pertuan Agong was given power in certain circumstances to issue a proclamation of emergency, and, while such a proclamation was in force, Parliament was given power by art 150(5) notwithstanding anything in the Constitution, to make laws with respect to any matter if it appeared to Parliament that the law was required by reason of the emergency. Article 150(6) provided that subject to art 150(6A) (which is not relevant to this case), no provision of any Act of Parliament so passed should be invalid on the ground of inconsistency with any provision of the Constitution. (Emphasis added.)

No proclamation of emergency was in force at the time of the passing of the Bill.

USURPATION OF YDPA'S POWER

There is a further aspect to the discussion. The Bill purports to vest powers that are in the exclusive domain of the YDPA in the Prime Minister. The relevant provisions, and their legal effect, are summarised in the table below.

Table 3

The Bill	YDPA's power under Constitution
Clause 18 allows the Prime Minister to declare any area as a security area in the interest of national security	Under art 150(1), the YDPA may issue a Proclamation of Emergency if the security of the Federation or any part thereof is threatened
Clause 42 allows the Prime Minister to make regulations for the purposes of carrying out or giving effect to the provisions of this Act	Under article 150(2B), the YDPA may, except when both Houses of Parliament are sitting concurrently, promulgate any ordinances as circumstances appear to him require
Clauses 5 and 19 allows the Council to control, coordinate and issue directives to the armed forces	Under Article 41, the YDPA shall be the Supreme Commander of the armed forces of the Federation

The powers conferred on the YDPA under art 150 of the Constitution are exclusive to his royal highness. This was made clear by the Federal Court in *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor; Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66. That question that arose was whether the YDPA could delegate his legislative function under art 150(2) of the Constitution to the Attorney-General. The court ultimately found that the YDPA was only entitled to confer authority or discretion as to the execution of law enacted by the YDPA. Raja Azlan Shah FCJ (as he then was) said, at p 76:

The true distinction therefore, is, between the power to make the law, ie, altering the mode of trial, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion upon the Attorney-General as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; that would involve a delegation by His Majesty of his legislative power which is invalid as going too far and amounting to an abandonment of his function and duty. There is no valid objection to the second. His Majesty has not delegated to the Attorney-General any authority or discretion as to what the law shall be — which would not be allowed — but has merely conferred upon him an authority or discretion, to be exercised in the execution of the law, and under and in pursuance of it, which is permissible. His Majesty himself has passed upon the expediency of the law, and what it shall be. The Attorney-General is entrusted with no authority or discretion upon these questions. (Emphasis added.)

This is in line with the doctrine of separation of powers²³ as well as the basic structure doctrine.²⁴

It stands to reason that Parliament had encroached upon the exclusive powers of the YDPA in enacting those provisions identified in the Table 3 above. It had purported to arrogate to the Prime Minister such powers of the YDPA in a manner that goes beyond what the YDPA is permitted to do. The Bill places no limits on the Prime Minister's power to declare an area as a security area. As shown by Tables 1 and 2, it further seeks to allow for those powers to be exercised in an unlimited and unaccountable manner. As noted above, in doing so it had purported to exercise legislative power that only arose under art 150(5).

It had further effectively amended the Constitution by creating an authority that was parallel in status to the YDPA, vesting in its powers that transcended those vested in the YDPA under art 150. A law amending the Constitution requires the vote of not less than two-thirds of the members in either House of Parliament,²⁵ and must be enacted by way of the process set down in art 159(3) of the Constitution.²⁶

23 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (*Loh Kooi Choon*) at p 188; Merdeka University, supra n 19 at p 252; *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 at p 16; *Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo* [2014] 6 MLJ 812 at p 826.

24 *Sivarasa Rasiab v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 at p 342.

25 Article 159(3) of the Constitution.

26 *Loh Kooi Choon*, n 23 at p 190.

It is reasonably argued that in light of the intention of the framers of the Constitution, the power of the YDPA under art 150 is a basic feature of the Constitution. In *Sivarasa*, Gopal Sri Ram, FCJ said, at p 342:

Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461. (Emphasis added.)

COLORABLE EXERCISE OF POWER

Bhagwati J in the Indian Supreme Court decision of *Dr DC Wadhwa & Ors v State of Bihar* AIR 1987 SC 579 said at pp 589-560:

But otherwise, it would be a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of repromulgation. *It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an Act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision. This is precisely what was pointed out by Mukharji, J speaking for the Court in KCGajapatiNarayanDeo&OrsVStateofOrissa, [1954] 1 SCR 1:*

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method.

So also in *PVajravelu Mudaliar v Special Deputy Collector, Madras & Anr* [1965] 1 SCR 614 a Constitution Bench of this Court observed that *when it is said that Legislation is a colourable one, what it means is that the Legislature has transgressed its legislative power in a covert or indirect manner, if it adopts a device to outstep the limits of its power.*

...

Such a strategem would be repugnant to the constitutional scheme as it would enable the Executive to transgress its constitutional limitation in the matter of law making

in an emergent situation and to covertly and indirectly arrogate to itself the law making function of the Legislature. (Emphasis added.)

The implication of the foregoing discussion is that the passing of the Bill by the Dewan Rakyat and Dewan Negara was a colorable exercise of power. This was not lawful. In *KC Gajapati Narayan Deo v State of Orissa* AIR 1953 SC 375, Mukherjee J said at p 379:²⁷

If the constitution of a state distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination to be a mere pretence or disguise.

CONCLUSION

Having regard to the views expressed above, it is the authors' respectful view that the Bill is wholly unconstitutional having regard to the colorable exercise of legislative power. Though there may be some value in the establishment of a council playing an advisory role, the establishment of the National Security Council as contemplated under the Bill goes well beyond that. Its role and powers, and those of the Prime Minister under the Bill, violate the Constitution. The Bill also serves to concentrate untrammelled powers in the hands of the Prime Minister in a manner that can in no way be reconciled with democracy and the Rule of Law, not least for it suppressing, if not wholly obliterating, the necessary limits and checks and balance that such vast powers require. As Raja Azlan Shah FCJ (as he then was) said in *Loh Kooi Choon* at p 188:

The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the

²⁷ Cited with approval by the Supreme Court in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 at pp 123-124.

individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.