SEPARATION OF POWERS AFTER THE MALAYSIAN *NATIONAL SECURITY COUNCIL ACT 2016*

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Abstract

Since the enactment of the *National Security Council Act 2016* ('*NSCA 2016*'), there have been concerns that the *NSCA 2016* potentially usurps the *Federal Constitution* of Malaysia. The *NSCA 2016* introduces a series of exceptional security measures that bypasses certain constitutional safeguards and lifts constitutional restrictions on the infringement of the liberty of the people. In *Datuk Seri Anwar Ibrahim v Government of Malaysia* ('*NSCA No.1*'), the Federal Court refused to rule on a challenge brought against the constitutionality of the *NSCA 2016* except to express doubts on its constitutionality. The Federal Court's refusal was premised on the reasoning that the challenge was mounted in the absence of a specific exercise of powers under the *NSCA 2016*. As the case was 'abstract, academic or hypothetical' in nature and after considering Article 128(2) of the *Federal Constitution* and s 84 of the *Courts of Judicature Act 1964*, the Federal Court held that the case was non-justiciable. This case note critically evaluates this decision in light of the separation of powers principle.

Keywords: Separation of powers, *National Security Council Act 2016*, Malaysia.

I INTRODUCTION

Lord Acton's often quoted warning that '[p]ower tends to corrupt and absolute power corrupts absolutely'[1] is a poignant reminder of the real possibility of the arbitrary misuse of concentrated powers. This statement continues to be relevant in understanding questions on the exercise of the constitutional powers under the Malaysian *Federal Constitution* ('*FC*'). Considering the current threats that international and domestic terrorism pose to national security, the concentration and expansion of powers in the hands of the executive government becomes all the more prevalent and acceptable. Total arbitrary abrogation of personal liberty has and will always be 'the favourite and most formidable instruments of tyranny'.[2]

The *National Security Council Act 2016* ('*NSCA 2016*') is one such federal legislation that allows the exercise of executive powers beyond constitutional limits but is deemed

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1 John Dalberg-Acton, Acton-Creighton Correspondence (Liberty Fund, 1887).

2 Alexander Hamilton, 'Federalist No. 84' in Alexander Hamilton, John Jay and James Madison (eds), *The Federalis*t (Liberty Fund, 2001) 444 ('Hamilton').

necessary in combating the war against terrorism. The *NSCA 2016* appears to be an attempt to constrain the authority of the *FC*, as it may be argued that the whole process of enacting the *NSCA 2016* and its provisions was unconstitutional. If the *NSCA 2016* is in fact unconstitutional, it should be deemed to be so by virtue of Article 4 of the *FC* and it is for the judiciary to pronounce on the constitutionality of an impugned law. Arguably, if the courts refuse to rule on its constitutionality, this may create a lacuna in the *FC* concerning the enforceability of Article 4 and thereby raise concerns about separation of powers issues between executive and judiciary.

In *Datuk Seri Anwar Ibrahim v Government of Malaysia*[3] (*'NSCA (No. 1)'*),[4] a specific question which was central to the case related to the proper jurisdiction of the Federal Court to adjudicate on any constitutional questions that are referred to it from the High Court. A secondary issue was whether the *NSCA 2016* was unconstitutional. The Federal Court in a vote of five to two[5] declined to exercise its jurisdiction to answer the constitutional questions referred to it, due to their 'abstract, academic or hypothetical' nature. This was because there was absent a specific exercise of powers under the challenged *NSCA 2016*. The constitutionality of the *NSCA 2016* was therefore left unanswered by the majority of the Federal Court. This decision has not attracted broad public scrutiny as the *NSCA 2016* is less than four years old at the time of this writing and possibly due to the fact that the Act has never been invoked since its commencement. However, the decision is a significant one as it could (or begin to) potentially shape the dynamics between executive and judicial powers in Malaysia.

The aim of this case note is to provide some general observations on the relations between the executive and the judiciary, particularly concerning the proper role of the Federal Court in adjudicating on important constitutional questions, and its implications on the separation of powers principle in Malaysia. In the main, the author expresses a concern that the Federal Court's reasons in refusing to exercise its jurisdiction in the *NSCA No. 1* case might have indirectly expanded the nature and scope of executive authority at the expense of the judiciary. This decision might have marked a shift towards an expansion of the executive power. The discussion in this case note will proceed as follows. After the Introduction in Part I, Part II provides a brief overview on the separation of powers principle under the *FC*. Part III then evaluates the Federal Court's judgment in *NSCA (No. 1)* and provides some observations, specifically on its impact on the separation of powers between the executive and judiciary. Finally, Part IV set outs the author's concluding remarks.

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3 [2020] 3 CLJ 593.

4 This case shall be referred to in this case note as *NSCA (No. 1)* as one could expect that there might be future challenges on the constitutionality of the *NSCA 2016*.

5 The majority judgment was delivered by Nallini Pathmanathan FCJ, with whom Azahar Mohamed CJM and Zawawi Salleh, Abang Iskandar Abang Hashim and Idrus Harun FCJJ expressed their agreement. David Wong Dak Wah CJSS and Tengku Maimum CJ dissented.

II SEPARATION OF POWERS IN MALAYSIA

The *FC* heralds the practice of a constitutional government by assigning governmental powers among several branches and departments. These governmental branches and departments exercise their powers on the lines of the Westminster tradition of a parliamentary government based on the principle of separation of powers.[6] The very purpose of separating the powers and functions of the government is to avert a potentially tyrannical or repressive regime. As noted Publius, '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands… may justly be pronounced the very definition of tyranny'.[7] The principle of separation of powers is not presupposed but can be logically inferred from the manner in which the functions of the executive, legislature and judiciary is administered and distributed under the *FC*.[8] Most importantly, the supremacy of the *FC* provides a strong assurance that the powers of the government cannot be above the highest law of the land.[9] Within the socio-political and juridical context of the process towards achieving separation of powers in Malaysia, the interrelation of judicial power with executive power has been a foremost concern.

Chapter 3 of the *FC* is the primary repository of the executive power of the Federation. The constitutional structural framework of executive power consists of 'a constitutional monarchy, a Westminster style parliamentary executive, and a prime-ministerial system of government'.[10] Additionally, the Federal executive consists of 'the conference of rulers, the *Yang di-Pertuan Agong* (the Federal King), the Prime Minister

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6 Shad Saleem Faruqi, *Our Constitution* (Sweet and Maxwell, 2019) ('Shad Saleem Faruqi, *Our Constitution*'); and Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, 2012) 19-21 ('Harding, *The Constitution of Malaysia*').

7 Hamilton (n 2) 249.

8 Chapter 3 and Chapter 4 are dedicated to the executive and federal legislature respectively, whereas Part IX is dedicated wholly to the judiciary. See HP Lee, 'The Judicial Power and Constitutional Government - Convergence and Divergence in the Australian and Malaysian Experience' (2005) 32(1) *Journal of Malaysian and Comparative Law* 5.

9 *Federal Constitution* (Malaysia) art 4. Article 4 reads as follows,

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.
(2) The validity of any law shall not be questioned on the ground that—
(a) it imposes restrictions on the right mentioned in Clause (2) of Article 9 but does not relate to the matters mentioned therein; or b) it imposes such restrictions as are mentioned in Clause(2) of Article 10 but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.
(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.
(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

10 Harding, *The Constitution of Malaysia* (n 6) 59.

(PM), the Cabinet, the civil service, the police and the armed forces'.[11] Article 39 of the *FC* vests the 'executive authority of the Federation' in the *Yang di-Pertuan Agong* and is exercisable by him or by the Cabinet or any Cabinet minister. Article 40(1) of the *FC* however limits the *Yang di-Pertuan Agong's* function by requiring him to act on the advice of the Cabinet. Article 80(1) which concerns the distribution of executive powers in the Federation provides that 'the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws'. Since the Malaysian Independence of 1963,[12] it is an undeniable fact there can hardly be a 'pure' separation of powers in which the practice of the separation of powers can remain 'absolutely separate and distinct'.[13] Under the *FC*, while the *Yang di-Pertuan Agong* is part of the executive government, the *Yang di-Pertuan Agong* also exercises a share of legislative power as the *Yang di-Pertuan Agong's* assent is required for a bill to come into force.[14] Additionally, the members of the Cabinet are either drawn from Federal Parliament or the Senate,[15] with the result that both the dominance of executive and legislative powers in the possession of the ruling coalition party that has garnered more seats in Parliament.

The judiciary is one of the 'checks and balances' mechanisms incorporated into the Malaysian constitutional framework. The framers of the *FC* feared a dictatorial executive which was not subject to the constitutional democracy and the rule of law. Therefore, they provided by way of Article 121 of the *FC* the '[j]udicial power of the Federation'. The original clause 1 of Article 121 read: '…the judicial power of the Federation shall be vested in the High Court'.[16] However, the original clause was substantially changed and it now provides that the High Court 'shall have such jurisdiction and powers as may be conferred by or under federal law'.[17] While the notion of 'judicial power' is amorphous, a classic definition was formulated by the High Court of Australia in the case of *Huddart Parker v Moorehead*[18] where it was described as 'the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property.'[19] The judicial power of the Federal Court is illustrated in Article 128(1) of the *FC* which vests the sole jurisdiction in the Federal Court to determine the following two kinds of cases, to the exclusion of the rest of the courts:

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11 Shad Saleem Faruqi, *Our Constitution* (n 6) 4.

12 Officially, August 31, 1957 marks Malaya's independence from the British, while September 16, 1963 was when the Peninsular Malaysia allied with Sabah, Sarawak and Singapore to create Malaysia. Singapore formally left Malaysia in 1965.

13 Hamilton (n 2) 252. Publius stated that it would be a misconception of the pure theory of separation of powers by requiring the functions and powers of each branch of government to be kept totally distinct from one another. The separation of powers principle is to be adapted and adjusted to fit with local circumstances.

14 *Federal Constitution* (Malaysia) art 66.

15 *Federal Constitution* (Malaysia) art 43(2)(b).

16 HP Lee (n 8) 5.

17 *Federal Constitution* (Malaysia) art 121(1).

18 (1909) 8 CLR 330.

19 Ibid 357.

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
(b) disputes on any other question between States or between the Federation and any State.

Despite the heading of Article 121 of the *FC* that reads: 'Judicial Power of the Federation', Article 128(3) of the *FC* provides that 'the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law'. The *Courts of Judicature Act 1964*[20] ('*CJA 1964*') as a federal law is effectively relevant in this respect. Under s 81 of the *CJA 1964*, the Federal Court is vested with the same jurisdiction as is exercisable by the High Court which in turn derives its judicial power from federal law.[21] It can be said that the *CJA 1964*, which was passed in the same year as the *FC*, had in some way deprived the Federal Court of its inherent powers originally vested in Article 121 of the *FC*. Yet, Rule 137 of the *Rules of the Federal Court 1995* specifies that the Federal Court enjoys inherent powers to hear any application or to make any order so as to prevent injustice.[22]

Prior to the amendment of the original clause in Article 121, the system of checks and balances was generally premised on constitutional supremacy and suggested a strong judicial commitment at the time to ensure that the boundaries of powers set forth in the *FC* are maintained. Suffian LP's pronouncement in the seminal case of *Ah Thian v Government of Malaysia*[23] is worth noting:

> … [t]he doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written Constitution. [t]he power of Parliament and of state legislatures in Malaysia is limited by the Constitution; and they cannot make any law they please.[24]

This pronouncement is elucidative and reflective of the judiciary's will at that time to hold the government to a high level of accountability. Another interpretation of the distribution of governmental powers was given by Raja Azlan Shah FCJ when His Lordship expressed that '[p]arliament is endowed with plenary powers of legislation' and it is therefore not the proper role of the courts to interfere with Parliament's right to amend the *FC*.[25] The beginning of the present amended Article 121(1), however, correlates to an expansion of the influence of executive power and a substantial decline of the judiciary's past

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20 Act 91 ('*CJA 1964*').

21 Section 81 of the *CJA 1964* reads: 'the Federal Court for the purposes of its jurisdiction under Article 128(1) and (2) of the Constitution (herein called the ―original jurisdiction‖) shall have the same jurisdiction and may exercise the same powers as are had and may be exercised by the High Court'.

22 Rule 137 states: 'Nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court'.

23 [1976] 2 MLJ 112.

24 Ibid 113.

25 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

assertiveness in the protection of an individual's rights. This can be discerned from a number of cases, with the exception of recent pronouncements in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[26] and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak.*[27] The latter case in particular, established the judiciary's role in defending fundamental principles such as judicial independence, separation of powers and protection of minorities, and confirmed the existence of the basic structure doctrine in Malaysia.[28]

Against this backdrop, it can be said that the Federal Court in the *NSCA No.1* case was handed an opportunity to maintain a fair balance of powers in its determination of the question of the constitutionality of the *NSCA 2016*. This, however, comes with a legislative constraint on the Federal Court to decide on constitutional questions. Whilst s 84 of the *CJA 1964* does not expressly prohibit the adjudication of constitutional questions, but as in any exercise of powers, based on the questions of 'which powers, how much of them, and how they can be effectively limited' which are essential to the objective of the realisation of the idea of a limited government,[29] some limits must still be there as a guide for the Federal Court to decide the appropriate circumstances that it has the jurisdiction to adjudicate on a controversy. This demonstrates why a balancing act that attempts to achieve an acceptable balance between the exercise of executive power and judicial power remains a delicate matter. In Malaysia, it is the judiciary that is the most vulnerable amongst the departments of power, as the power of the executive government has always been on the rise.[30] Publius, writing on the American constitutional government, had foreseen the situation in which the judiciary would be placed when it was expressed that the judiciary 'will always be the least dangerous to the political rights of the Constitution'[31] and 'beyond comparison the weakest of the three departments of power'.[32]

In Publius' view, under a limited constitution, it is constitutionally legitimate for the judiciary to declare as void any legislative act which is contrary to the constitution.[33] The concept of a limited constitution, as used by Publius, implies constitutional limitations on the legislative authority to enact laws that are beyond the scope of the constitution. The courts therefore act as the 'bulwarks of a limited constitution'.[34] The *FC* through Article 4, likewise places limitations upon the legislative and executive authority to implement laws that are inconsistent with the authority of the *FC*, and intrinsically, the peoples' authority. Where it is plain that Article 4 has been triggered, the courts are therefore required to make a declaration of unconstitutionality. That said, assuming that a law should be declared void for unconstitutionality, such a declaration of unconstitutionality is by no

26 [2017] 5 CLJ 526.

27 [2018] 3 *CLJ* 145.

28 It is not the aim of this case note to discuss both these cases but suffice it to say that both are landmarks cases on the area of constitutional supremacy in Malaysia.

29 MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 2nd ed, 1998) 12.

30 See generally HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford University Press, 2nd, 2017).

31 Hamilton (n 2) 402.

32 Ibid.

33 Ibid 403.

34 Ibid 405.

means a straightforward effort for the courts. The courts, in hinging its decision on Article 4, would need to establish its interpretation on the circumstances or reasons intrinsic to the text of the *FC* itself. In some ways, as will be discussed in the next part, the Federal Court's attempt in maintaining the divisions of powers could either constrain or unbound the capability of its judicial power to interfere with the exercise of the executive power.

III LOCATING AN ACTUAL CONTROVERSY

A *The Background of the NSCA. No. 1 decision*

Pursuant to Article 66(4A) of the *FC*, which enables bills to become laws automatically without the assent of the *Yang di-Pertuan Agong* after 30 days,[35] the *NSCA 2016* was enacted and came into force on August 1, 2016. The *NSCA 2016* establishes a National Security Council with the Prime Minister as its Chairman.[36] The Prime Minister is empowered to declare security areas if this is necessary in the interests of national security.[37] Part V of the *NSCA 2016* vests special powers in the executive authority which includes, *inter alia*, the power to control movement, arrest, seizure and search, and the use of reasonable and necessary force.[38]

Though the *NSCA 2016* has never been invoked by the Federal government, its constitutionality was immediately challenged by Anwar Ibrahim, the leader of the opposition coalition party *Pakatan Harapan*. The challenge failed at the High Court and the Court of Appeal for the reason that it was related to the legislative competence of the Federal Parliament to make laws, and as such, the High Court lacked jurisdiction to adjudicate on the case. Both the High Court and the Court of Appeal held the view that only the Federal Court could determine the challenge as it fell within the scope of Articles 128(1), 4(3) and (4) of the *FC*.[39]

The Federal Court was therefore called upon to decide on two constitutional questions. The first question was whether s 12 of the *Constitution (Amendment) Act 1983*, s 2 of the *Constitution (Amendment) Act 1984* and s 8 of the *Constitution (Amendment) Act 1994* were null and void as they abolished the requirement of royal assent, thereby infringing the basic structure of the *FC*. The second question was whether the *NSCA 2016* was unconstitutional on the grounds that it was enacted pursuant to these unconstitutional amendments, it was not enacted based on Article 149 and it infringed the freedom of movement in Article 9(2) of the *FC*. These questions raised important issues relating to the Federal Court's proper jurisdiction to adjudicate on referred constitutional questions which challenged the legislative competence of the Federal Parliament. Thus, reference must be made to the relevant provisions in the *FC* and the *CJA 1964*. Only where there

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35 *Federal Constitution* (Malaysia) art 66 (4)(a) reads: '[i]f a Bill is not assented to by the Yang di-Pertuan Agong within the time specified in Clause (4), it shall become law at the expiration of the time specified in that Clause in the like manner as if he had assented thereto'.

36 *NSCA 2016* (Act 776) (Malaysia), ss 3 and 6.

37 Ibid s 18.

38 Ibid ss 22 to 36.

39 *Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia & Anor* [2017] 6 CLJ 311 (High Court) and *Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia & Anor* [2019] 1 CLJ 445 (Court of Appeal).

was an affirmative yes to the existence of jurisdiction, could the unconstitutionality of the *NSCA 2016* be decided by the Federal Court. From the point of view of Malaysian constitutional law, the Federal Court's decision on this issue is significant in the sense that the constitutional status of the Federal Court *vis-à-vis* the other branches of the government would be further clarified.

B *The Federal Court and Constitutional Questions in NSCA No.1*

The question of whether the Federal Court could determine any constitutional question referred to it was central to the case. There are two general points of view on this. One view is that the Federal Court's jurisdiction is limited to the adjudication of non-abstract cases or controversies which arise only from concrete, real and actual disputes[40] This viewpoint reflects the decentralised or diffused model of judicial review.[41] On the other hand is the argument that the Federal Court is capable of adjudicating on any constitutional case including those of abstract nature, essentially resembling but not identical to that of a constitutional court.[42]

In *NSCA (No.1)*, all judges agreed that the Federal Court practises a decentralised scheme of constitutional review. The decentralised constitutional review was described as the common law model which essentially indicates that 'constitutional questions are not determined in the abstract but by reference to the factual disputes from which they arise'.[43] Thus, while the Federal Court is the final appellate court for all questions of law and constitutional issues, it is not a constitutional court. On this basis, Pathmanathan FCJ, in her Ladyship's written judgment for the majority of the Federal Court, rejected the view that the constitutional questions referred to in the challenge could be determined without infringing the Malaysian constitutional scheme. In arriving at this conclusion, Pathmanathan FCJ referred to Article 128(2) of the *FC* and s 84 of the *CJA 1964* as a basis that the Federal Court's jurisdiction is solely confined to a concrete case or controversy and such was not the case here.

The heading of s 84(1) of the *CJA 1964* states as follows – '*Reference of constitutional question by High Court*'. The section establishes the referral jurisdiction of the Federal Court by enabling the High Court to refer to the Federal Court any question which pertains to the *FC*. Where the High Court refers such questions to the Federal Court, the High Court 'may stay the same on such terms as may be just to await the decision of the question by the Federal Court'. In such a situation, the Federal Court *shall* determine the case 'subject to any rules of the Federal Court'.[44] Article 128(2) of the *FC* contains

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40 Andrew Harding, 'The Fundamentals of Constitutional Courts', *International Institute for Democracy and Electoral Assistance* (Web Page, 18 April 2017) <https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf>.

41 Ibid.

42 The Federal Court is not a constitutional court but it is suggested here that the Federal Court's inherent Article 121 judicial power coupled with Rule 137 of the Rules of the Federal Court 1995 may allow the Court to determine constitutional questions of any kind as the Court sees fit.

43 *NSCA (No. 1)* (n 3) [33].

44 *CJA 1964* (n 20) s 85(1).

a similar provision.[45] While these provisions point to the exclusive jurisdiction of the Federal Court in the adjudication of constitutional cases, Pathmanathan FCJ held that the Federal Court is not bound to determine any constitutional question referred to it under s 84(1) of the *CJA 1964*, citing *Mark Koding v Public Prosecutor* ('*Mark Koding*')[46] and previous authorities on the powers available to the Federal Court in the disposal of cases.[47] In *Mark Koding* the Federal Court declined to answer whether the *FC* could be amended to affect its basic structure. Pathmanathan J used this example of refusal to answer as a basis of her Ladyship's view that it is not compulsory for the Federal Court to answer any constitutional question referred to it, and saying otherwise would be 'misguided'. Although there is no indication in s 84(1) of the *CJA 1964* that the Federal Court could decline to answer a constitutional question, Pathmanathan FCJ observed:

> Section 84 does not fundamentally change the nature of the Federal Court into a constitutional court. It is not a carte blanche for all constitutional questions to be referred to and determined by the Federal Court in every case.[48]

Against this backdrop, Pathmanathan FCJ held that the Federal Court could refuse to answer referred constitutional questions of abstract, academic, or hypothetical character as the common law model of constitutional review is only concerned with factual disputes. The learned Federal Court judge further quoted a passage from the judgment in the Hong Kong Court of Appeal case of *Leung TC William Roy v Secretary for Justice* ('*Leung TC William Roy*'):[49]

> One of the recognized dangers of dealing with hypothetical or academic cases is that the court may be asked to decide important principles without the benefit of a full set of facts. There is also to be considered a practical factor: - the administration of justice would hardly be served if the courts were regularly to entertain cases which were not real but only hypothetical.[50]

In determining whether the questions raised against the constitutionality of the *NSCA 2016* were concrete, Pathmanathan FCJ stated that there must be 'a real and actual controversy between the parties which will affect their rights and interests'.[51] As observed by Pathmanathan FCJ, there could be certain exceptions to this well-established principle, one of which was that 'a real threat to a party's rights can give rise to an actual controversy that

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45 The relevant part of Article 128(2) of the Federal Constitution reads: 'the Federal Court shall have jurisdiction (*subject to any rules of court regulating the exercise of that jurisdiction*) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.' (emphasis added).

46 [1982] 1 MLRA 477 ('*Mark Koding*').

47 *NSCA (No. 1)* (n 3) [29].

48 Ibid [32].

49 [2006] HKCU 1585 ('*Leung TC William Roy*').

50 Ibid [28].

51 *NSCA (No. 1)* (n 3) [43].

is not abstract or academic'.[52] In *Tan Eng Hong v Attorney-General* ('*Tan Eng Hong*')[53] (a Singapore Court of Appeal case cited with approval by Pathmanathan FCJ), the applicant was arrested and detained under s 377A of the Singapore *Penal Code* for the commission of an act of gross indecency. A challenge against the constitutionality of s 377A was later made. VK Rajah JCA disagreed with the Attorney-General's proposition that violations of constitutional rights only crystallise when a person is prosecuted under an allegedly unconstitutional law. Instead, the court held that such violations may occur earlier when a person is arrested and detained under an allegedly unconstitutional law. Nevertheless, in order to meet the *locus standi* test, the applicant must 'demonstrate a violation of his constitutional rights'.[54] However, 'a real and credible threat of prosecution'[55] suffices to demonstrate a violation of constitutional rights.

In *Leung TC William Roy*,[56] the Hong Kong Court of Appeal allowed the challenge of constitutionality brought against certain provisions in the Hong Kong Crimes Ordinance. The Court of Appeal held that a remote prospect of prosecution of the crimes was not fatal to the case where there exists ascertainable exceptional circumstances. Thus, the Court of Appeal remarked that although 'a prosecution is neither in existence nor in contemplation and there is no relevant decision which directly affects the Applicant… it is clear on the facts that he and many others like him have been seriously affected by the existence of the legislation under challenge'.[57]

Based on the general principles distilled from *Leung TC William Roy* and *Tan Eng Hong*, the majority in *NSCA (No.1)* then stated that there might be an exceptional case where the very existence of the law affects the rights or interests of the complainant. An example of an extreme scenario when the mere existence of a law would give rise to an actual controversy would be 'Holocaust-type laws' which specifically targeted against a minority group and this would warrant the Court to intervene. On the factual situation of *NSCA (No. 1)*, Pathmanathan FCJ found that applicant Anwar Ibrahim, in his affidavit in support of his challenge, had not shown that his rights had been affected by the *NSCA 2016* or the amending provisions. Unlike the facts in *Leung TC William Roy* and *Tan Eng Hong*, it was not shown that the *NSCA 2016* had interfered with the applicant's personal life, nor was it alleged that he would face a real and credible threat of action under the *NSCA 2016*. As such, it had not been demonstrated to the majority's satisfaction that the applicant had satisfied the *locus standi* test. Pathmanathan FCJ thus concluded:

> To answer the questions posed would be *a significant departure* from the deep-rooted and trite rule that the court does not entertain abstract or academic questions, and may even represent *a fundamental shift away* from the common law model of concrete review towards the European model of abstract review in constitutional adjudication. Exceptionally cogent reasons would need to be provided to persuade

[52] Ibid [57].
[53] [2012] SGCA 45.
[54] Ibid 109.
[55] Ibid 111.
[56] *Leung TC William Roy* (fn 49) [29].
[57] Ibid.

the Federal Court to undertake such a radical departure from established principle. In this case, the parties have not attempted to do so.[58]

C *The Middle Ground: The Minority's Approach*

Although the minority (consisting of Chief Justice Tengku Maimun and Chief Judge of Sabah and Sarawak Wong Dak Wah) held the same view as the majority on the substantive nature of the Malaysian constitutional review scheme, they adopted divergent approaches to the jurisdictional questions. With regards to the referral jurisdiction of the Federal Court, Tengku Maimun CJ expressed the view that the language in ss 84 and 85 of the *CJA 1964* are 'comparatively broader'.[59] Both provisions are accordingly to be construed as Parliament originally intended, by their original language and meaning, which clearly shows that their words are couched in the mandatory, and therefore the Federal Court is obliged to answer any special cases transmitted to it. Specifically, the words 'shall… deal with the case and hear and determine it' in s 85(1) implies that the Court cannot refuse to answer a case referred to it.

While Tengku Maimun CJ opined that cases of academic, abstract or hypothetical character are out of the ambit of the Federal Court's jurisdiction, her Ladyship also took a broader view by identifying if a case contains a 'live' issue, together with a broad reading of ss 84 and 85 of the *CJA 1964*. The significant point in Tengku Maimun CJ's judgment was when her Ladyship mentioned Article 4 of the *FC* which would render any law inconsistent with the *FC* to be void and her Ladyship's statement that only the courts are 'exclusively seized with the power to make declarations of unconstitutionality'.[60] This latter pronouncement is an apt restatement of the inherent judicial power of the Federal Court by claiming the declaration of unconstitutionality is the sole right of the judiciary. Tengku Maimun CJ also disagreed with the threshold of 'exceptional case' in *Leung TC William Roy* and *Tan Eng Hong* as the *FC* ought to be interpreted within its four walls. This is especially so when Article 4 of the *FC* is involved. The supremacy of the *FC* must take precedence over any foreign judicial analogies or precedents and thus 'judicial review over the validity of laws was intended to be as broad as possible'.[61]

In a slightly different approach but with similar findings, Wong Dak Wah CJSS opined that based on the wordings of Article 128(2) of the *FC* and ss 84 and 85 of the *CJA 1964*, the words 'any proceedings' appearing 'are not tied with any further requirements that there must exist a concrete dispute or actual controversy affecting the rights and interests of the parties before this Court can exercise its referral jurisdiction'.[62] In addition, his Lordship agreed with Tengku Maimun CJ on the mandatory requirement of the word 'shall' in s 85(1). Having stated that the Federal Court is duty bound to answer the referred questions, his Lordship stated that it is for the Federal Court to decide if the referred

58 *NSCA (No. 1)* (n 3) [64].
59 Ibid [75].
60 Ibid [87].
61 Ibid [90].
62 Ibid [124].

questions were valid in view of the provisions in s 84(1). The proper operation of ss 84 and 85 of the *CJA 1964* was neatly summarised by Wong Dak Wah CJSS as follows:

> The position of the law, as circumscribed by the Federal Constitution, provides that both the High Court and the Federal Court will have the concurrent jurisdiction to determine constitutional questions. It can be said that the High Court Judge controls which of those two Courts will make the determination as he or she is given the discretion whether to transmit or not subject to the only exception to this rule in any matter falling within Articles 4(3), 4(4) and 128(1) of the Federal Constitution whereby only the Federal Court will have the exclusive jurisdiction to determine such type of constitutional questions.[63]

The majority's proposition that the Federal Court could not determine the constitutionality of legislation in *vacuo* is 'tempting', but Wong Dak Wah CJSS rejected this view as there was no vacuum at all in the present challenge, since the primary issue was the unconstitutional amendment of the *FC* which enabled the enactment of the *NSCA 2016*. It is unclear if, based on Wong Dak Wah CJSS's interpretation, every abstract or academic question without factual dispute needs to be answered by the Federal Court. But it appears to be so, especially if constitutional rights are clearly implicated.

Wong Dak Wah CJSS similarly referred to Article 4(1) of the *FC*. The learned judge explained the effect of Article 4(1):

> It is patently clear from the language of Article 4(1) that any law inconsistent with the Federal Constitution is void. The word 'void' is self-explanatory - any law made in excess of the Federal Constitution once declared by a Court of competent jurisdiction to be null, void and of no effect ceases to exist as law. Any judicial declaration to that extent would effectively delete that law or the relevant portion of that law from existence. This is not judicial supremacy but constitutional supremacy. It is only the Courts that have the affirmative and final power to put beyond rest that the law was made in excess of Parliamentary power or within Parliamentary power but inconsistent with the Federal Constitution.[64]

A reading of the judgments of Tengku Maimun CJ and Wong Dak Wah CJSS shows that the principal reason for not finding the referred questions to be abstract, academic or hypothetical, was the fact of the unconstitutionality of the amendments by Parliament. The minority could not ignore this obvious fact as it directly implicates the constitutionality of the *NSCA 2016* under Article 4 of the *FC*. Further, it cannot be disregarded that where Article 4 is infringed, the Federal Court has a constitutional duty to intervene and that judicial review over the constitutionality of legislations is to be exercised in 'as broad as possible' manner.[65] Once the questions were found to be justiciable, the minority agreed that the courts cannot adopt 'a "wait and see" approach because a void law remains

[63] Ibid [135].
[64] Ibid [148].
[65] Ibid [90].

void'.[66] Particularly, Wong Dak Wah CJSS noted that if, the courts were to wait for the executive to invoke a void law, they would neglect their role as the guardian of the *FC*. This view stands in contrast to the majority's view that such a situation is rare and must be exceptional.

There are two more significant opinions expressed by the dissenting judges. The first was that this case was not an exercise of judicial supremacy, but rather that of constitutional supremacy rooted in Article 4 of the *FC*. In this regard, Tengku Maimun CJ stated, 'permitting challenges of this kind is not an affront to the sanctity of the Rule of Law and unbefitting of the judicial role but, on the contrary, it accords completely with the Rule of Law'.[67] Wong Dak Wah CJSS said that the overall thrust of constitutional supremacy is the courts' 'affirmative and final power' to hold that 'the law was made in excess of Parliamentary power or within Parliamentary power but inconsistent with the Federal Constitution'.[68] Secondly, the constitutional history surrounding Article 4 could provide a broader understanding of the courts' constitutional role and the intended effects of Article 4. Wong Dak Wah CJSS referred to the original draft in Article 4 which was eventually omitted:

> 4. Enforcement of the Rule of Law
> (1) Without prejudice to any other remedy provided by law-
>
> Where any person alleges that any provision of any written law is void, he may **apply to the Supreme Court for an order so declaring and,** if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and, in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void.
>
> Where any person affected by any act or decision of a public authority alleges that it is void because-
> (i) the provision of the law under which the public authority acted or purported to act was void, or
> (ii) the act or decision itself was void, or
> (iii) where the public authority was exercising a judicial or quasi-judicial function that the public authority was acting without jurisdiction or in excess thereof or that the procedure by which the act or decision was done or taken was contrary to the principles of natural justice,
>
> he may apply to the Supreme Court and, if the Court is satisfied that the allegation is correct, the Court may issue such order as it may consider appropriate in the circumstances of the case; [emphasis added].

[66] Ibid [90] [149].
[67] Ibid [95].
[68] Ibid [148].

To show that the framers of the *FC* had intended for the constitutionality or validity of legislation to be challenged, Wong Dak Wah CJSS suggested to look at draft Articles 4(1)(a) with draft Article 4(1)(b)(i). The learned judge observed that draft Article 4 was rejected in entirety and replaced by the current Article 4 'not because the drafters considered it repugnant to the very ethos of the Federal Constitution, but that they intended for that document to be even broader than what the draft itself proposed'.[69] The inclusion of the notion 'rule of law' would, in the framers' opinion, constrain the way in which the *FC* could be interpreted. In favouring the present provisions in Article 4, they intended 'the supremacy of the Federal Constitution to be stretched as widely as possible'.[70]

Does the minority's decision constitute a significant or radical departure from the position of the majority? For the dissenters, it is not. It is quite clear from their judgments that they had not refuted the majority's upholding of the decentralised constitutional review. Rather, their interpretation allows the courts to inquire into the constitutionality of legislation *ex-ante* and to rule it to be unconstitutional. Faced with a federal legislation of potentially repressive implications, it may be that both judges were trying to achieve a middle-ground, where Article 4(1) of the *FC* was invoked to justify their decision, and the risks of exceeding their judicial capacity are mitigated by not ruling out the possibility of them declining to answer an abstract, academic or hypothetical question in the absence of a live dispute after approaching the facts of the case holistically.

D *Separation of Power Issues*

The Federal Court's refusal to answer the referred constitutional questions in the *NSCA No.1* case was certainly uncontroversial if one were to consider the nature of constitutional review in Malaysia. In the course of their examination of ss 84 and 85 of the *CJA 1964*, the majority rightly stated that '[t]he referral jurisdiction in Article 128(2) FC and section 84 CJA forms part of the constitutional framework'.[71] Pathmanathan FCJ's narrow formulation of s 84 of the *CJA 1964* as rejecting the idea that it could give carte blanche for all constitutional questions to be determined by the Court in every case, and that it does not transform the Federal Court into a constitutional court is a correct proposition when examined within this context. Those who adopt the view that the Federal Court could determine any constitutional question arguably have failed to distinguish the constitutional role of the Malaysian judiciary in tandem with Article 128(2) and s 84 of the *CJA 1964* from that in other countries with a constitutional court of an entirely different origin.

But this understanding leaves much to be said, if its implications are considered. In some ways, in setting a high threshold of requiring a case to be 'exceptional', it might have expanded the sweep of executive and legislature powers. More hurdles are added for a review of constitutionality to be possible. An unintended consequence would be that Article 4 may be rendered redundant. This is troubling to those who reject a dictatorial leadership if the prospect of invoking the *NSCA 2016* is materialises. This concern is more so closely related to the basic idea of separation of powers. Depending how one measures

[69] Ibid [155].
[70] Ibid.
[71] Ibid [32].

the importance of the *NSCA 2016*, it could also be argued that the minority offended the separation of powers principles by truncating the powers of the executive and legislature to enact necessary laws. Thus, while there is a sense of rigidity in Pathmanathan FCJ's rationale, its outcome seems to be correct.

Putting aside the contrasting opinions, perhaps the majority had concentrated too much on the expectation for an 'exceptional case' or 'exceptional circumstances' to be present. This would have the unintended effect of sidestepping other relevant constitutional provisions that ought to be considered, and in this connection, arguably *fell short of* utilizing judicial power of the Federal Court. In *NSCA (No. 1)*, it is Article 4 and Article 149 of the *FC* that could be considered. The primary issue, as pointed out by the dissenting judges was that there had been a clear-cut breach of Article 4 and Article 149 of the *FC*. Both judges stressed the paramount importance of the *FC* under which the Federal Court is its exercising judicial power. They were primarily concerned that the legislature had exceeded its power in enacting the *NSCA 2016* in breach of Article 149.

In response to the Senior Federal Counsel's argument that the *NSCA 2016* was not enacted pursuant to Article 149(1) of the *FC* as there is no referral to or mention of Article 149 in the *NSCA 2016*, Wong Dak Wah CJSS referred to the legislative powers of Parliament in Article 74(1) of the Federal Constitution. Article 74(1) empowers Parliament to make laws on matters enumerated in the Federal List or the Concurrent List and Article 74(3) requires Parliament to enact laws *'subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution'*. Applying the 'pith and substance' test,[72] the minority opined that the provisions of the *NSCA 2016* are strongly related to the subject-matter in Article 149(1)(f).[73] As the title of the *NSCA 2016* evidently implies, its provisions are no doubt directed at public order and security-related matters.[74] Thus, the minority held the view that the *NSCA 2016* did not comply with Article 74(3). Pertinently, Tengku Maimun CJ stated that '[a]rticle 149 is a safeguard of liberty'.[75] Rather than a provision imposing restraint on personal liberty, Article 149 is to operate as a limiting condition for any subversion or security-related offences that fall under its purview.

It is uncertain if the decision of the dissenting judges would have the effect of *enhancing* the constitutional balance pertaining to the executive, legislative and judicial powers. It is submitted that it is likely to be so. At least their judgments underline the importance of engaging with the *FC* as a whole as well as the proactive attitude towards the interpretation of a potentially drastic national security legislation, which would allow such type of laws to come under considerably more judicial scrutiny. This approach is a recurring expression of the prismatic approach to constitutional interpretation as applied in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* ('*Sivarasa Rasiah*').[76] In

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72 Quoting *Mamat bin Daud v Government of Malaysia* [1988] 1 MLJ 119.

73 Article 149(1)(f) reads: 'which is prejudicial to public order in, or the security of, the Federation or any part thereof ...'.

74 Wong Dak Wah CJSS specifically referred to ss 24, 25 and 26 of the *NSCA 2016*. Section 24, in particular, allows the security forces to control, restrict and prohibit the movement of any person or any vehicle within or into the security area.

75 *NSCA (No. 1)* (n 3) [105].

76 [2010] 3 CLJ 8.

Sivarasa Rasiah, Gopal Sri Ram FCJ pronounced a generous and liberal interpretation of fundamental rights in Part II of the *FC* which is now considered a part of the basic structure of the Constitution and it follows that any law that infringe this basic structure could be rendered unconstitutional under Article 4. In the absence of discussion on Article 4 and Article 149 of the *FC* in the majority's judgment, this left an impression that the constitutional capacity and power of the executive and legislature to enact severe laws is emboldened, whereas the central idea of the dissenting judges is that Parliament simply does not possess plenary authority to enact laws.

IV CONCLUDING REMARKS

The *NSCA No.1* is a case which illustrates a basic problem of government – the management of conflicts within the governmental administration of a democratic society. The case presented an opportunity for the Federal Court to define the relations between the main branches of government. The constitutional questions raised in the case, which concerned the constitutionality of the *NSCA 2016* would have required an interpretation of Article 4. The Federal Court faced a difficult task as the case involved a challenge to the government's right to secure national security and even its existence through the *NSCA 2016*. These questions were left undecided by the majority and unfortunately, there was no concern raised over this.

The issue, as this case note sought to analyse, was whether the majority was right to narrow the scope of its referral jurisdiction by refusing to answer the referred constitutional questions due to their 'abstract, academic or hypothetical' nature. The majority relied on previous authorities including *Mark Koding* and reasoned that the Federal Court's referral jurisdiction is to be discerned where it could be firmly based on the text of Article 128(2) of the Federal Constitution and s 84 of the *CJA 1964* rather than on the underlying notion of unrestricted judicial power and judicial review. This reasoning can be premised on an alternative view of a separated powers as an instance of the Federal Court respecting the legislative power of Parliament where a law concerned has not been invoked or exercised. In contrast, in holding the view that the *NSCA 2016* was in violation of Article 149, the minority's approach displayed a thorough, temperate and inventive use of judicial power that can be said to be imaginative and more receptive to constitutional challenges, as a greater significance was attached to Article 4 of the *FC* as well as to fundamental rights. It is submitted that the reasonings of the majority and the minority in the *NSCA No.1* case cannot be faulted for interpreting the *FC* inconsistently or incorrectly. In further regard to the minority's reasoning, it can be deduced that the Federal Court is able to exercise its judicial power to nullify an unconstitutional law to avert a *potential* calamity and therein lies the key difference between the two reasonings.

What is clear from the divergent opinions between the majority and the minority is that there would not be a dividing line in terms of the type of referred constitutional questions that can be classified as abstract, academic or hypothetical. The Federal Court in the *NSCA No.1* became divided when the questions raised a controversy that was not straightforward to be ascertained and can therefore be viewed as less abstract. Arguably, considerations of fundamental personal liberties and public interest do have a bearing

on whether there is a controversy that requires adjudication. It is suggested that the minority's view of a 'live' dispute under the guidance of Article 4 may be a suitable test in the discovery of a controversy and may represent a judicious use of judicial power.