

Compulsory Acquisition of Land in Malaysia

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Introduction

The right to own property is a fundamental right of every person who can afford to do so. A person cannot be deprived of his property unless the law provides for it. The right of the state to take a person's property is usually entrenched in the constitutions of various countries. This article examines the acquisition of land under the law and the principles to be considered when assessing compensation before an award is made to the landowner.

Property Rights in Malaysia

The rights of a property owner in Malaysia are governed by provisions contained in the Federal Constitution (the Constitution), the National Land Code 1965 (the Code) and the Land Acquisition Act 1960 (the Act). Property rights, as far as the Constitution is concerned, are similar to other jurisdictions. In the United States, the sovereign right to acquire private property at a fair price for a public use, is known as "eminent domain". The Fifth Amendment to the United States Constitution states that "no person shall ... be deprived of life or property without due process of law; nor shall private

property be taken for public use without just compensation". In India, the rights of the property owner is recognised under Article 31 of the Constitution of India which provides that "no person shall be deprived of his property save by authority of law" and that "no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for compensation for the property so acquired".

Closer to home, in Singapore, the preamble to the Land Acquisition Act, Cap 272¹ states that the Act is "An Act to provide for the acquisition of land for public and certain other specified purposes, the assessment of compensation to be made on account of such acquisition and for purposes connected therewith". In Malaysia, the Land Acquisition Act 1960 complements the Federal Constitution. Section 3 of the 1960 Act provides that the land is only to be acquired for any public purpose;² or for any work or an undertaking which, in the opinion of the Minister, is of public benefit or of public utility or in the public interest;³ or for any residential, commercial or industrial purpose.⁴

¹ As amended by the Land Acquisition (Amendment) Act, (Act No 66. of 1973)

² Section 3(1)(a)

³ Section 3(1)(b)

⁴ Section 3(1)(c)

The Land Acquisition Act 1960

The Land Acquisition Act was passed in 1960 and came into force on 13 October 1960. It repealed a number of existing enactments that had been in use previously.⁵ The purpose of the enactment was to provide a clear, unambiguous and simple system of acquisition supported by a uniform procedure of essential forms. Uniformity of procedure is essential to ensure that each acquisition is carried out without any prejudice. Since its inception, the 1960 Act has undergone a number of amendments subsequently. One amendment was not well received, namely the Land Acquisition (Amendment) Act 1991 (the 1991 amendment).

The Land Acquisition (Amendment) Act 1991

The 1991 amendment came into force on 12 September 1991. It amended section 3 of the principal Act and inserted a new section 68A. The original section 3 allowed the State Authority to acquire any land needed for any public purpose or for any person or corporation undertaking a work which in the opinion of the State Authority, was a public utility. The State Authority could also acquire land for purposes of mining, housing, agriculture, commerce or industry. Under these provisions, land could be acquired for public utility works.

Under the 1991 amendment, however, section 3 added another purpose for which land

could be acquired. The State Authority was empowered to acquire land for any person or corporation for any purpose which in the opinion of the State Authority was beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public. The discretion accorded to the State Authority extended the power of the state to acquire land for economic development. Members of Parliament voiced their fears when the 1991 Bill was being debated. The fears included:

1. The uncertainty of the test, which determines the award of the compensation - the State Authority may acquire any land, which is needed for any purpose, which is beneficial to the economic development of Malaysia. The word "public utility" that was present in the original section 3 is removed. Does this mean that the test of "public purpose" is removed?
2. The amendment allows the State Authority to acquire private land and this power may be abused. It is possible for acquisition proceedings to be carried out and later, the acquired lands may be disposed of to other individuals or to groups of persons or to favoured companies or to those companies with strong political ties.

Of even greater importance, and the cause of much dissatisfaction to many landowners, was the addition of a new provision, section 68A⁶. Section 68A provides that the

⁵ Section 70. The repealed enactments were The Land Acquisition Enactment of the Federated Malay States, the Land Acquisition Enactment of the State of Johore, 1936, the Land Acquisition Enactment (No. 57) of the State of Kedah, the Land Acquisition Enactment of the State of Kelantan, the Acquisition of Land for Railway Purposes of the State of Perlis, the Land Acquisition (Extension to Perlis) Enactment, 1958, of the State of Perlis, the Land Acquisition (Extension to Trengganu) Ordinance, 1952, and the Land Acquisition Ordinance of the Straits Settlements.

⁶ "Where any land has been acquired under this Act, whether before or after the commencement of this section, no subsequent disposal or use of, or dealing with, the land, whether by the State Authority or by the Government, person or corporation on whose behalf the land was acquired, shall invalidate the acquisition of the land".

subsequent disposal of the acquired land shall not invalidate the acquisition. However, the section does not mention that the subsequent disposal should only be for a similar purpose to the original acquisition. The section allows the acquiring body to dispose of the land, which for some reason or other, is no longer needed for the purpose it was acquired. But is this provision fair to the landowner? Can someone be deprived of his land, and then find that the land is used for another purpose different from the purpose that it was acquired for? The effect of section 68A is that it gives the right to the acquiring authority to acquire lands for economic development, re-sell the lands to any private body or corporation for any development to be carried out, and even if there is a vast difference in the price between the acquisition price paid to the original and subsequent resale to the said body or corporation, the original landowner is prevented from questioning the issue or challenging the matter in court.⁷ This is another fear that was voiced in Parliament:

... "that the jurisdiction of the court would be curtailed or even removed in land acquisition matters. The court may not have the power to declare null and void any acquisition even if mala fide (bad faith) could be attributed to the acquisition".

Does this then mean that the State Authority is vested with absolute powers in relation to acquisition of land and subsequent disposal of the said land? The State Authority may

not have absolute powers. In **Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd**⁸ the powers of the Executive were discussed. Suffian L.P.⁹ referred to a number of English decisions regarding the powers of the local authorities and came to the conclusion that whatever powers were given to the authorities, these powers had to be exercised fairly and reasonably. The authorities were not at liberty to use their powers for an ulterior object, *however desirable that object may seem to them to be in the public interest*.¹⁰

A discussion of the above case will not be complete without a quote:¹¹

"... Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of Pyx Granite (ante) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject

⁷ Section 68A - Where any land has been acquired under this Act, whether before or after the commencement of this section, no subsequent disposal or use of, or dealing with, the land, whether by the State Authority or by the Government, person or corporation on whose behalf the land was acquired, shall invalidate the acquisition of the land.

⁸ [1979] 1 MLJ 135.

⁹ Ibid, p. 145.

¹⁰ Emphasis is mine.

¹¹ As per Raja Azlan Shah Ag. C.J. (Malaya) in the same case cited above, at p.148.

*against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasize what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Dankwerts L.J. in **Bradbury v London Borough of Enfield**¹²)".*

It is concluded, at this point, that the State Authority must exercise its discretion judicially in the acquisition of land. The next question is that of adequate compensation.

Adequate Compensation

Adequate compensation is not defined in the Act but the principles to be adopted in assessing the determination of compensation are stated in the First Schedule to the Act.¹³ But what is adequate compensation for a person who has been deprived of his property?

Principles of Compensation under the Land Acquisition Act 1960

The First Schedule to the Act lists three principles for determining the amount of

compensation to be awarded. Briefly, the first is the basis of determining market value of the land; second is any contemplated increase in the value of the land acquired likely to accrue from the use to which the land acquired is put to and any damages which are likely to be sustained through the process of acquisition; and third, a list enumerates the factors that ought to be neglected in determining the award.

(a) Market value

In the First Schedule, market value of the land is stated as the market value of the land at the date of publication in the Gazette of the notification of proposed acquisition or a declaration of such an acquisition.¹⁴ The effect of any express or implied condition of title restricting the use to which the scheduled land may be put shall also be considered in assessing the market value of the land.¹⁵

- **Willing vendor and willing purchaser criteria**

Market value of the land has also been described as the price that an owner willing, and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for sale and purchase of the land.¹⁶ Three recognized methods for arriving at this price are: (1) opinion of experts; (2) the price paid, within a reasonable time, in bona fide transactions of purchases of lands acquired, or of the lands

¹² [1967] 3 All ER 434, 442.

¹³ See sections 12, 35, 46 and 47 of the Act and also the First Schedule which lays down the principles and factors to be considered and ignored when determining the amount of compensation payable.

¹⁴ Section 1, First Schedule to the Act.

¹⁵ Section 1(2) of the First Schedule to the Act.

¹⁶ This was stated in the case of **Nanyang Manufacturing Co v Collector of Land Revenue, Johore** [1954] MLJ 69.

adjacent to the land acquired and possessing similar advantages; and (3) a number of years' purchase of the actual, or immediately prospective, profit from the lands acquired.¹⁷

- **Comparable and similar lots**

Cases have held that in relation to the determination of compensation as spelt out in the First Schedule to the Act, the most reliable guide in determining fair market value is evidence of sales of the same or similar land in the neighbourhood, due allowance being made for the particular circumstances of each case.¹⁸

Principles for the correct method of assessment of fair market value arose in **Pentadbir Tanah Daerah Petaling v Glenmarie Estate Ltd.**¹⁹ In determining the market value of certain portions of land acquired in the 1980s, the learned judge had solely relied on an earlier award made by the High Court concerning a portion of the same estate made in 1979. For the purpose of assessing the value of the lands the learned judge doubled the award per acre but in some cases gave due allowances for the location of the lands, size and time of acquisition.

The Supreme Court held that the learned judge had not applied the correct principle in making the award. Although it was not wrong for the learned judge to accept the evidence of a previous acquisition award of the same

estate as relevant consideration indicative of the market value of the property, it would be more reliable to follow the normal and accepted guide in determining the fair market value of the lands by considering the sales of similar lands in the neighbourhood after making due allowances for all circumstances, when such evidence is available.

- **Bona fide transactions**

Where the court is using similar pieces of land or property that have been acquired or sold earlier as a comparison, it must be satisfied that the transactions were bona fide. The sale must be a genuine sale and the price paid must be a realistic figure when all the circumstances of the case and the current market value of property are taken into account as was held in **Che Pa bin Hashim & 3 Ors. v The Collector of Revenue, Kedah.**²⁰

(b) Potential development

Potential development of the land in question is not to be taken into consideration²¹; neither any increase in value due to improvement made by the owner within two years before the declaration of the acquisition unless it can be proved that the improvement was made bona fide and not in contemplation of proceedings for the acquisition of the land²²; nor an increase by reason of the use of the land where it is shown to be contrary to law,

¹⁷ Ibid.

¹⁸ **Bertam Consolidated Rubber Co Ltd v Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth** [1989] 2 MLJ 178. See also **Ng Tiou Hong v Collector of Land Revenue Gombak** [1984] 1 CLJ 350.

¹⁹ [1992] 1 MLJ 331; [1992] 2 SCR 29.

²⁰ [1993] 1 CLJ 193.

²¹ Section 1(2B) of the First Schedule to the Act.

²² Section 1(3)(a), First Schedule to the Act.

or is detrimental to the health of the inmates of the premises or to the public health.²³

However, cases have taken potential development into account when determining the amount of compensation to be awarded. The court recognises that the value of the land must be considered as it stands in its actual condition at the material date with all its existing advantage due to the carrying out of any scheme by the government for which the land is compulsorily acquired. In this regard, the fairest and most favourable manner to consider compensation is to take into account the most lucrative and advantageous way in which the owner could dispose of the land with reference to its future utility.²⁴ However, potential development may only be taken into consideration if it is not too remote as held in **Siah Brothers Plantation Sdn Bhd v Pentadbir Tanah dan Daerah Kuantan**²⁵.

(c) Factors to be disregarded

The various factors to be disregarded in computing the compensation award are the degree of urgency which led to the acquisition, reluctance of the landowner, damage sustained, either depreciation of or increase in value of the land from the proposed use after acquisition and outlay on additions or improvements made to the land after the landowner had been notified of the proposed acquisition (para 3 of the First Schedule).

In 1997, considering the dissatisfaction that prevailed since the 1991 amendment, Parliament decided to make a further amendment to land acquisition procedures. The Land Acquisition (Amendment) Act 1997 (Act A999)(the 1997 amendment) was published in the Gazette on 31 July 1997. The article now explores the salient provisions of the 1997 amendment.

The Land Acquisition (Amendment) Act 1997

(a) Purpose of acquisition

One further category under which land may be acquired is added. Land may now be acquired for recreational purposes.²⁶ It must be noted that recreation is not defined, neither is it clear whether recreational purposes are for the use of the general public. It is suggested that in order not to depart from the original purpose of the acquisition enactment, i.e. that land is to be acquired for public purposes, recreation should be confined to the types of recreation that may be enjoyed by the general members of the public e.g. public parks. In this regard, land ought not to be acquired if the intended recreation is a golf course. A golf course would cater only to a select class of the public and not to the general public.

²³ Section 1(3)(b), First Schedule to the Act.

²⁴ See **Khoong Peng Loong & Ors. v Superintendent of Lands and Surveys, Third Division** [1966] 2 MLJ 156. In this particular case, the Court increased the award. See also **Bukit Rajah Rubber Co Ltd v Collector of Land Revenue, Klang** [1968] 1 MLJ 176, where the court held that the property must be valued not only with reference to its condition at the time of acquisition but also its potential development value.

²⁵ [1993] 3 CLJ 435 - the judgement is in Bahasa Malaysia but there is an English translation of the headnotes.

²⁶ Section 3(c)- The State Authority may acquire any land which is needed ... for the purpose of mining or for residential, agricultural, commercial, industrial or recreational purpose or any combination of such purposes.

(b) Establishment of “Jawatankuasa Khas Pengambilan Tanah”

A “Jawatankuasa Khas Pengambilan Tanah” is made up of the State Secretary, State Director of Lands and Mines, the Director of the State Economic Planning Unit, the State Director of Town and Country Planning and representatives of other related Government departments or agencies. While this is commendable in that a number of experts would now study all applications for acquisition of land, it is submitted that public participation should be included. To ensure that this is done, the membership of the Committee should include representatives from non-government organisations and private agencies. This would reflect a more balanced representation.

(c) Principles relating to assessment of compensation

In relation to assessment of compensation, a new section, section 9A provides that the Land Administrator ought to check whether the scheduled land is within a local planning authority area and whether any development had been proposed in relation to town and country planning. If yes, then the category of land use for the proposed development will be an important factor in assessing the amount of the valuation for the scheduled land. Where such land is the scheduled land, then the valuer should consider the specific land use indicated in the development and uses this information to assess the market value (para 1A of the First Schedule).

Another additional factor to be considered is the recent sales of lands with similar

characteristics (para 1A). This principle applies specifically to the sales that had taken place within two years preceeding the date of the proposed acquisition.

(d) Factors to be disregarded

The 1997 amendment has added in a new category (para 3A) that the value of any building on the scheduled land, if the building is not permitted by virtue of the category of land use or due to any restriction on the title, shall be disregarded.

(e) Appeals against awards of compensation – Judge and two Assessors

A Judge previously heard appeals against awards of compensation. Under section 40A of the 1997 amendment, the Court shall appoint two assessors, one of whom shall be a Government valuer, to assist the Judge in determining the validity of the objection and in arriving at a fair and reasonable amount of compensation. However, there is no further right of appeal against the decision of the Judge and the two assessors.

Conclusion

The article has examined the various problems linked to land acquisition in Malaysia. A number of uncertainties arose as a result of the 1991 amendment. Land could be acquired for economic development. But economic development was not defined. Landowners were unhappy that their lands would be acquired arbitrarily. The 1997 amendment appears to provide for a better-regulated procedure of acquisition of land. The establishment of a special committee is a good start. Recent sales of similar land

are to be taken into consideration. Two assessors and a judge would hear appeals against awards of compensation. But there is an added category of acquisition, for recreational purposes. It is still too early to decide on the effects of the 1997 amendment. There may be flaws and inadequacies, which may emerge with time.