

SECTION 68A, LAND ACQUISITION ACT, 1960 : A STUMBLING BLOCK TO JUDICIAL REVIEW?¹

I. INTRODUCTION

Section 68A of the Land Acquisition Act, 1960² is of rather recent origin. It was inserted into the LAA by the Land Acquisition (Amendment) Act 1991.³ It reads as follows :

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.

The section in question is, it is submitted, intended to serve, other than conferring power, as a privative clause ousting *in toto* any application for judicial review questioning the legality or *vires* of an acquisition by reason of any subsequent disposal or use of, or dealing with, the land acquired by the State Authority or any other body mentioned therein. This interpretation⁴ is based on the following reasoning. Leaving aside the remedy under Part V of the LAA,⁵ the only mode of legal redress in a case where a landowner is dissatisfied with the acquisition of his land under section 3 of the LAA is to attack or challenge the validity or legality or *vires* of the acquisition through an application for judicial review. Furthermore, the word 'invalidate' in section 68A can only refer to or describe the consequence of a successful action or application for judicial review. *Exempli gratia*, if an unlawful or *ultra vires* land acquisition is quashed by an order of *certiorari* upon an application by a disgruntled

¹The writer wishes to express his sincere gratitude to Professor Dr S Sothi Rachagan for his help in the writing of this article. However, responsibility for the article remains his own.

²Hereinafter referred to as 'the LAA'.

³Act A804. This Act was gazetted on 12th September, 1991. Besides section 68A, section 3(b) of the LAA was also amended with a view to widening the powers of acquisition.

⁴The matter of conferring power will be dealt with later in Part II of this note.

⁵Under Part V, an applicant moves the High Court by way of reference with a view to reviewing, *inter alia*, the amount of compensation awarded by the Land Administrator. The reference under this Part is not aimed in any way to challenge the *vires* or legality of the acquisition.

landowner, it means that the unlawful acquisition is invalidated or nullified by a court order⁶. Based on this interpretation, section 68A is intended by Parliament to have a very drastic effect on judicial review as the Explanatory Statement to this section in the Amendment Bill stated that this section '*purports to save an acquisition of land from being rendered invalid by reason of any subsequent disposal or use of, or dealing with, the land*'.⁷ What is intended by Parliament is one thing, but what is the actual purport of a statutory provision ousting judicial review is another thing altogether as the latter is to be determined by judicial interpretation which by tradition has always subjected privative clauses to strict judicial scrutiny. Just one dictum will suffice to illustrate the strict judicial approach referred to:

... when words in a statute oust the power of the Court to review decisions of an inferior tribunal ... they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or "if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity".⁸

II. REVIEWABILITY OF LAND ACQUISITIONS UNDER THE LAA

A. The Purpose or Purposes of the Acquisition under Section 3

For purposes of considering the reviewability of land acquisition, a distinction has to be made between the purpose or purposes of acquisition and the subsequent disposal or use of, or dealing with, the land by reason of the provision of section 68A. Before delving into the question of *vires*, the provision of section 3 must first be reproduced *verbatim* below:

⁶For example, *Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors* [1986] 1 MLJ 362.

⁷Emphasis added.

⁸In a similar vein, an observation by an academic may also be cited. It reads as follows: Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the rule of law at will. (Wade, *Administrative Law*, 6th ed, p 720.)

3. The State Authority may acquire land which is needed -

- (a) for any public purpose;
- (b) by any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public; or
- (c) for the purpose of mining or for residential, agricultural, commercial or industrial purposes.

The initial purpose or purposes of acquisition must be made in accordance with the section 3 requirements. Section 3 prescribes and enumerates the statutorily sanctioned purposes which on the whole confers extremely wide powers on the State Authority to acquire alienated lands. Nevertheless, it must be stressed at the outset here that, in the light of the *ultra vires* doctrine and the constitutional concept of the rule of law, it is still theoretically possible for the court to impose some form of control over the State Authority's powers of acquiring alienated lands. An aspect of the *ultra vires* doctrine dictates that an administrative action or decision must be taken within the substantive limits expressly prescribed by a statute. Hence, if an action or decision falls outside the substantive limits expressly demarcated by law, that action or decision can be invalidated by way of an application by the aggrieved party for judicial review seeking the appropriate remedy. Applying this premise of the *ultra vires* doctrine to land acquisition cases, it will mean that if the purported purpose of an acquisition does not fall within the scope of the enabling section 3 purposes, the purported acquisition will be *ultra vires* and hence null and void and of no effect in law. There is dictum in *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v Government of Johor*⁹ supporting this proposition. In fact, the same has been judicially accepted and applied in preventive detention cases.¹⁰ Another pertinent and related

⁹[1979] 1 MLJ 49.

¹⁰*Re Tan Sri Raja Khalid bin Raja Harun* [1988] 2 MLJ 182; *Minister of Home Affairs & Anor v Jamaluddin bin Othman* [1989] 1 MLJ 418. The general proposition accepted in these Supreme Court cases is that it is possible to review preventive detention cases if the ground of the detention as stipulated in the detention order does not fall within the scope of the enabling Act.

provision to refer to here regarding the section 3 purposes is section 8(3) which states that 'a declaration in Form D'¹¹ shall be conclusive evidence that all the ... land ... is needed for the purpose specified therein'. The clause '*shall be conclusive evidence*'¹² in section 8(3) should be interpreted in the same way as a finality clause saying that a decision '*shall be final and conclusive*'¹³ and therefore it does not shut out judicial review questioning the legality of the acquisition if the purpose of the acquisition does not come within any of the section 3 purposes.¹⁴

Furthermore, if there is any procedural impropriety in the acquisition process, the whole acquisition proceeding may be subsequently nullified through an application for judicial review. This can happen whenever there occurs a breach of a statutorily prescribed mandatory procedure in the LAA or whenever there is a failure of natural justice.¹⁵ Concerning the statutorily prescribed procedural requirements imposed by the LAA, it must be said that not all of them are of a mandatory nature. Only a breach of a mandatory procedure will prejudice the validity of an administrative proceeding.¹⁶

The section 3 acquisition is also subject to the implied substantive restrictions of, at least, *mala fides*,¹⁷ delay and probably, improper purpose, if these could be successfully proved to the satisfaction of the court. So far as the allegation of *mala fides*

¹¹Form D deals with the declaration of intended purpose of acquisition under section 8 of the LAA.

¹²Emphasis added.

¹³Emphasis added.

¹⁴See Wade, *supra* n 8 at, p 721, last para, on how to interpret the 'shall be conclusive evidence' clause.

¹⁵A good case on the failure of natural justice invalidating an acquisition so made is *Goh Seng Peow & Sons Realty Sdn Bhd v The Collector of Land Revenue*, WP [1986] 2 MLJ 395.

¹⁶In *Kulasingham & Anor v Commissioner of Land, Federal Territory & Ors* [1982] 1 MLJ 204, the Federal Court ruled that the procedural requirement of section 9 of the LAA is only directory in nature. Section 9 provides that upon the publication pursuant to section 8 of the declaration in Form D that any land is needed for the purpose specified in such Form, then the Land Administrator shall cause the areas affected by the acquisition to be marked out upon the land, and a note of the intended acquisition shall also be entered on the appropriate register document of title.

¹⁷Dictum in *Syed Omar & Anor supra* n 9 at p 50 clearly accepted this possibility although in practice it is difficult to prove this allegation.

is concerned, to date no local case law can be cited to show that such a ground of attack had ever succeeded. Besides *mala fides*, another very useful weapon in the armoury of the courts in striking down unlawful land acquisitions is improper purpose. Although there is no local case law on the same, this proposition is a well-established principle of administrative law and it will be an aberration if this implied restriction is not applicable to the LAA. A landmark case of the Privy Council, *Municipal Council of Sydney v Campbell*,¹⁸ can be cited to substantiate the point. In that case, two land acquisition resolutions passed by the Municipal Council of Sydney were invalidated on the ground that the acquisition was made for an improper purpose of enabling the council to reap some unlawful financial gain from an expected increment in the value of the land acquired as this purpose of acquisition was not statutorily sanctioned by the law¹⁹ in question. Malaysian case law has also established that unreasonable delay by the Land Administrator in making financial award on the land acquired resulting in an inadequate compensation to the landowner and thus also occasioning injustice to him is tantamount to an abuse of power rendering the inquiry and subsequent proceedings null and void. *Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors*²⁰ is an example *par excellence* supporting this proposition. The legality of an acquisition might also be questioned 'if the acquiring authority had misconstrued its statutory powers'.²¹

B. The Subsequent Disposal or Use of, or Dealing with, the Acquired Land under Section 68A

As has been pointed out in the foregoing that the Explanatory Statement to section 68A in the Amendment Bill stated in no

¹⁸[1925] AC 338.

¹⁹The Sydney Corporation Amendment Act, 1905. Section 16 thereof empowered the council to compulsorily acquire lands if they were required for the purpose of making or extending streets, and also lands required for carrying out improvements or remodelling any portion of the city.

²⁰*Supra*, n 6. See also *Pemungut Hasil Tanah Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35. In both cases the delay perpetrated was seven years.

²¹Dictum in *Syed Omar & Anor supra*, n 9 at p 50. This must refer to inisdirection in law.

uncertain terms that the section in question '*purports to save an acquisition of land from being rendered invalid by reason of any subsequent disposal or use of, or dealing with, the land*'.²² Section 68A thus emplaces the courts on the horns of a dilemma as, on the one hand, a literal interpretation thereof will not be well-received by the aggrieved landowners because such an approach will most probably run counter to the rule of law, the original policy of the LAA as well as article 13 and, perhaps, article 8 of the Federal Constitution,²³ and, on the other hand, a strict interpretation thereof will be contrary to the Parliamentary intent in enacting the said provision. Judicial interpretation of the said section is inevitable in the near future²⁴ in view of the increasing numbers of land acquisition being undertaken by the various State Authorities either at the present moment or in future and the intense displeasure and dissatisfaction with the preclusive provision of section 68A by groups which possess sufficient interest in the matter. Before delving into the possible judicial responses to the said section, it will be better to probe into the original policy of the LAA as well as the potential consequences and repercussions which the provision will bring about to established legal principles and also to the affected interests.

So far as the original policy and objectives of the LAA are concerned, a few pertinent propositions must be emphasised here. First, the State Authority is empowered by law to acquire alienated lands in line with the policy of article 13(1) of the Federal Constitution.²⁵ Secondly, the acquisition must be made in conformity with the section 3 purposes, the implied substantive restrictions and the requirements of article 13 of the Federal Constitution. Thirdly, it is submitted that, pursuant to the requirement of article 13(2) of the Federal Constitution, the term '*market value*'²⁶ as defined in the First Schedule to the LAA must, *inter alia*, refer

²²Emphasis added.

²³This provision guarantees adequate compensation in respect of the land acquired.

²⁴Even if the LAA is further amended in the near future by introducing more stringent preclusive provisions.

²⁵Article 13(1) provides that no person shall be deprived of property save in accordance with law. The word 'law' in article 13(1) must refer to and mean the LAA.

²⁶Emphasis added.

to and mean the true market value of the acquired land reflecting or representing the value of the real and ultimate purpose or purposes of the acquisition and certainly not that of 'any purported or sham purpose or purposes'²⁷ of the acquisition. Fourthly, in reviewing the *vires* of the acquisition, the subsequent disposal or use of, or dealing with the land cannot be severed from the section 3 purposes, the implied substantive restrictions and the requirements of article 13 of the Federal Constitution. Fifthly, any deprivation of land not in accordance with law will be in contravention of article 13 and therefore unconstitutional. This is a very well-established Administrative Law principle in Malaysia which is firmly manifested in land acquisition and preventive detention cases.²⁸ These appear to be the settled and accepted propositions before the insertion of section 68A. But, more importantly, of course, one has to consider whether the same still hold water in the face of section 68A. If a literal interpretation of section 68A is adopted, it will mean that the court is *in toto* precluded from enquiring into the *vires* of an acquisition by looking at and linking it with the subsequent disposal or use of, or dealing with, the land acquired to see especially if one of the implied substantive restrictions²⁹ on the exercise of discretionary powers has been violated and thereby invalidating an acquisition so made. The probability and desirability of adopting this approach is, therefore, relevant here. The first principle of Administrative Law relating to judicial control over discretionary powers is that the exercise of a discretionary power is always subject to, besides the restrictions expressly laid down in the statute conferring the discretion, certain implied substantive restrictions imposed by the courts.³⁰ The implied restrictions referred to are, *inter alia*, *mala fides*, improper purpose, relevant and irrelevant considerations and unfairness. Thus it is clear that the legislative intent of section

²⁷Emphasis added. This is because, it is submitted that, the definition in paragraph 1 of the First Schedule must refer to and mean the market value of the actual and lawful purpose or purposes of acquisition. Paragraph 1 has no application to a purported and unlawful purpose.

²⁸See *Goh Seng Peow & Sons Realty Sdn Bhd v The Collector of Land Revenue, WP supra*, n 15, *FP v Koh Yoke Koon* [1988] 2 MLJ 301.

²⁹Especially those of *mala fides* and improper purpose in land acquisition cases.

³⁰*Municipal Council of Sydney v Campbell, supra* n 18, is a classic illustration of this proposition where two resolutions acquiring land by the council were quashed on the ground that they were motivated by an improper purpose of unlawful profit-making.

68A is none other than to, *inter alia*, exclude the application of these implied restrictions thereto and to render ineffective the provision of section 3 which represents the only weapon left in the armoury of the courts in striking down an acquisition if the purported subsequent disposal or use of, or dealing with, the land is not in accordance with the original purpose or purposes of acquisition under section 3 and also violates one of the implied substantive restrictions causing prejudice to the aggrieved interests. Deference to legislative intent is, it is submitted, to court, condone and sanction possible abuses of power. Abuse of power is bound to occur in practice if the power conferred is too wide and unconfined and it will be most naive and ignorant to justify a conferment of a very wide power by promising or even guaranteeing that abuse of power will not happen because such a promise or guarantee can never be fulfilled in the long run. This will run counter to the original policy and objects of the LAA, and to the rule of law which underlies the foundation of our constitutional system as well as article 13 of the Federal Constitution. In order to illustrate and drive home the point more vividly, let us look at something more concrete. Let us assume that an acre of agricultural land was acquired at the then prevailing market value for agricultural land. However, a year later, when the dust kicked up by the acquisition has settled down and hoping that judicial review thereof will be barred because of the lapse of time, the State Authority conveniently and designedly converted the land into an industrial park and sold the same to a third party at a price seven times more or higher than the acquiring price and thus unfairly reaping a huge profit in the process. The example postulated is certainly not too far-fetched in practice. But the more important question is - will this sort²¹ of unfair advantage enjoyed by the State Authority be prohibited by section 3 and article 13 of the Federal Constitution in particular and the rule of law in general? If the answer is in the negative, then our law could be said to be very defective and powerless indeed if persons aggrieved in the manner postulated are denied the protection of the courts by a craftily and skilfully drafted preclusive provision in the LAA. Leaving aside the question

²¹Another good example will be if the acquisition was wholly motivated by *mala fides*.

of possible abuse of power, the example given also makes a mockery of article 13(2) of the Federal Constitution which guarantees adequate compensation in the case of land acquisition. Moreover, as a discretionary power must be exercised for the public good, it follows logically and rationally that if the exercise thereof causes injustice and prejudice to the public or a section thereof, judicial review thereof is not to be excluded even in the face of a most skilfully and elaborately drafted protective and preclusive provision in a statute.

Another important question to ask is - is it logically and legally sensible to sever the subsequent disposal or use of, or dealing with, the land from the section 3 purposes, the implied substantive restrictions and article 13 of the Federal Constitution? Before attempting to answer the question posed, it is necessary to advert to a couple of very important postulates of the rule of law which advocate that every legal power must have legal limits, be they express or implied, and that any unlawful exercise thereof is always subject to judicial scrutiny unless the nature of the power in question is one which can be classified as an unreviewable power.³² In other words, barring certain very limited exceptions, it is generally acceptable to say that there is no such thing as unfettered or absolute powers in a system based on the rule of law. Unfettered discretion is a contradiction in terms as such a notion cannot be promoted in a system where the rule of law reigns.³³ The rule of law also demands that the court should prevent any form of abuse of discretion by invalidating it if and when it finds that a discretion has been unlawfully exercised. This is particularly so in the case of the imposition of implied

³²For examples, regulation 2(2), ESCAR 1975 - the power given to the AG to classify a criminal offence as a 'security offence' - *Mohd Nordin Johan v AG Malaysia* [1983] 1 MLJ 68; art 145(3), Federal Constitution - the power given to the AG to institute criminal proceedings against an offender - *PP v Lau Kee Hoo* [1983] 1 MLJ 157; art 132(2A), Federal Constitution - the doctrine of pleasure - *Pengarah Pelajaran, WP v Loot Ting Yee* [1982] 1 MLJ 68; and art 42, Federal Constitution - the so-called prerogative of pardon - *Sim Kie Chon v Superintendent of Pudu Prison* [1985] 2 MLJ 385. It must be pointed out that the power to acquire, dispose of, or use or deal with, the land acquired has never been judicially categorised as an unreviewable power in this country.

³³Wade, *supra* n 8, pp 39 & 399. In almost identical terms, a dictum of the Federal Court in *Pengarah Tanah dan Galian, WP v Sri Lempah Enterprise* [1979] 1 MLJ 135, 148, also reiterated the same.

substantive restrictions on the exercise of discretionary powers as in the case of the example postulated above where the purported acquisition was wholly motivated by an improper purpose of unlawful profit-making which amounted to an abuse of power. Moreover, it is also constitutionally tenable in this country to argue that a conferment of an absolute or unfettered discretion may negate the equality clause entrenched in articles 8(1) and (2) of the Federal Constitution.³⁴ The reason underlying this proposition is that uncontrolled administrative discretion may easily degenerate into arbitrariness and may be exercised so as to discriminate between persons similarly situated. Therefore, a statute conferring a discretionary power on an authority would be valid only if it lays down the policy, standards or guidelines subject to which the discretionary power is to be exercised.³⁵ After having the fundamental postulates of the rule of law and the principle of excessive delegation of discretionary power stated in their proper respective perspective, we may now proceed to make a few observations on section 68A of the LAA which will also speculate on the possible judicial approaches to interpreting the section in question. One possible way of interpreting section 68A is to say that it purportedly attempts to sever itself completely from section 3, the implied substantive restrictions and article 13 of the Federal Constitution and in so doing attempts to confer upon the State Authority or any other body mentioned therein an unfettered discretion as the power of subsequent disposal or use of, or dealing with, the land is not subject to any policy or guideline or restriction and also it must be noted that this power does not come within the scope of any one of the judicially recognised unreviewable powers. This being the case, it falls foul of the rule of law and the doctrine of excessive delegation of power in particular and is thereby liable to be struck down by the court. This approach will certainly not find favour with the court as the court very rarely will embark on this course of action as it will put the court in a very awkward position of having to strike down a statutory provision in the manner prescribed. Alternatively, the most favoured solu-

³⁴MP Jain, *Administrative Law of Malaysia and Singapore*, 2nd ed p 335.

³⁵*Ibid.*

tion to the whole problem brought about by the amendment is for the court to construe section 68A as a section conferring a discretionary power which is still subject to section 3, certain implied substantive restrictions and articles 8(1) and (2) and 13 of the Federal Constitution. Moreover, it is illogical to sever section 68A from section 3 for, at least, a couple of reasons. First, an acquisition can only be sanctioned if the acquisition in question is to dispose of or use or deal with the land so acquired for any of the purposes enumerated in section 3. Secondly, more often than not, the real and ultimate purpose or purposes of an acquisition can only be known after the land acquired has been finally disposed of, or used or dealt with by the acquiring authority.

Finally, a couple of other related observations may also be made here. First, with particular reference to the section 3 purposes and by virtue of the *ultra vires* doctrine, it must be emphasised that alienated lands can only be acquired, disposed of or used or dealt with in accordance with the section 3 purposes and that section 68A cannot and does not empower any acquisition, disposal or use of, or dealing with, the land outside and beyond the section 3 purposes without enlarging and amending further the present section 3 purposes. Secondly, one may also ask - if the original purpose of acquisition turns out subsequently to be infeasible or impossible of implementation, can the State Authority then dispose of or use or deal with the land for another permitted section 3 purpose? The answer should be, it is submitted, in the affirmative provided that the Part II and Part III formalities are observed all over again.

III. CONCLUSION

To sum up and to recapitulate, this note is intended to drive home a number of vital propositions. First, section 68A is a provision which confers a limited power which is subject to judicial review and its purported attempt to oust judicial review will not succeed if the power of acquisition, disposal or use of, or dealing with the land acquired is abused by the State Authority. Secondly, alienated lands can be acquired, disposed of or used or dealt with by the State Authority provided that the acquisition, disposal, use or dealing thereof are made in line with the section

3 purposes, the implied substantive restrictions,³⁶ and the fetters imposed by articles 8(1) and (2) and 13 of the Federal Constitution. Thirdly and incidentally, any further attempt to undermine the rule of law and certain entrenched provisions in the Federal Constitution should be resisted and avoided at all costs. All efforts must be made to preserve, protect and defend the rule of law and the Constitution in our system. Parliament should not expect that the courts will give effect to statutory provisions which seek to undermine the rule of law and certain fundamental provisions of our Constitution.

Gan Ching Chuan*

*Lecturer,
Faculty of Law,
University of Malaya.

³⁶In particular, *mala fides*, improper purpose, relevant and irrelevant considerations.