

## **STRIKING A BALANCE BETWEEN PUBLIC AND PRIVATE INTERESTS IN LAND ACQUISITION: A CROSS- JURISDICTIONAL PERSPECTIVE**

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### **ABSTRACT**

The right to own property is an intrinsic human right that grants ownership and enjoyment to the landowners. The right to property is not absolute, however, because it is subject to the state's authority to acquire the private land. Land acquisition, as the term implies, is the power given to the state to acquire any privately owned land for a public purpose in consideration for adequate compensation. Land acquisition is a critical development tool for the state to overcome the land scarcity when it is required to establish railways, airports or any infrastructure for the public good. On the other hand, land acquisition is a labourious process affecting a wide range of stakeholders. It often involves competing interests between the state (representing the general public) and impacted persons towards their private property. As a result, the land acquisition regime is ostensibly a way of balancing competing interests. However, many countries, especially developing nations are having difficulties in striking a balance between public and private interests due to a lack of legal protection and a traditional top- down approach by the state's government branches. This article analyses the approaches taken by the United States, Australia and Malaysia in maintaining the balance in land acquisition. The methodology employed in this study is primarily focused on comparative legal analysis. Present research has shown that, there is little attention given to the balance of rights between the public and private interests in Malaysian land acquisition laws.

**Keywords:** Land acquisition, state's power, public private interests, procedures, compensation

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## **MENCAPAI KESEIMBANGAN DI ANTARA KEPENTINGAN AWAM DAN HAK PERSENDIRIAN DALAM PENGAMBILAN TANAH: PERSPEKTIF MERENTAS BIDANG KUASA**

### **ABSTRAK**

Hak untuk memiliki harta adalah hak asasi manusia yang memberikan pemilikan dan kenikmatan kepada pemilik tanah. Walau bagaimanapun, hak untuk memiliki harta tidak mutlak kerana ia tertakluk kepada kuasa negeri untuk memperoleh tanah persendirian. Pengambilan tanah, seperti yang dinyatakan dalam istilah, adalah kuasa yang diberikan kepada negeri untuk memperoleh mana-mana tanah milik persendirian untuk tujuan awam sebagai balasan untuk pampasan yang mencukupi. Pengambilan tanah adalah mekanisma pembangunan kritikal bagi negeri untuk mengatasi kekurangan tanah apabila diperlukan untuk mewujudkan landasan kereta api, lapangan terbang atau sebarang infrastruktur untuk kebaikan awam. Pengambilan tanah, sebaliknya, adalah satu proses yang sukar yang menjejaskan pelbagai pihak berkepentingan. Ia selalunya melibatkan pelbagai kepentingan bersaing antara negari (mewakili orang awam) dan orang yang terjejas terhadap harta persendirian mereka. Akibatnya, rejim pengambilan tanah dianggap sebagai cara terbaik untuk mengimbangi kepentingan bersaing. Walaubagaimanapun, banyak negara terutamanya negara membangun menghadapi kesukaran untuk mencapai keseimbangan antara kepentingan awam dan swasta kerana kekurangan perlindungan undang-undang dan pendekatan tradisional dari atas ke bawah oleh kerajaan negeri. Artikel ini menganalisis pendekatan yang diambil oleh Amerika Syarikat, Australia dan Malaysia dalam mengekalkan keseimbangan dalam pengambilan tanah. Metodologi yang digunakan dalam kajian ini tertumpu terutamanya pada analisis undang-undang perbandingan. Kajian terkini menunjukkan bahawa terdapat sedikit perhatian diberi kepada keseimbangan hak antara kepentingan awam dan swasta dalam undang-undang pengambilan tanah Malaysia.

**Kata kunci:** Pengambilan tanah, kuasa negeri, kepentingan awam dan swasta, prosedur, pampasan.

## INTRODUCTION

Land is an important type of property which provides a sense of belonging and security, a source of economic and status symbol to its owner, as well as a vital source of social survival particularly in developing countries. Due to the significant value attached to land, private property rights, including individuals' property ownership and the right to peaceful enjoyment of land are considered one of the most fundamental rights recognised by the international treaties and are legally protected.<sup>3</sup>

In many jurisdictions, however, it is firmly established that the state requires land to meet national and public needs. Without the land acquisition, a country would struggle to establish infrastructure. If the land acquisition is done properly, it can be one of the most successful ways to bring together various interests in land. However, public land acquisition is a time-consuming process involving various concerns, including compulsorily obtaining land, paying just compensation, relocating, and so on. This is because it involves balancing the state's competing interests, i.e., public and private landowners. Many countries, especially developing nations, face problems and difficulties balancing public and private interests due to the lack of legal protection and a traditional top-down approach by state government branches.<sup>4</sup>

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<sup>3</sup> Examples of the conventions that provide protection for private property are Article 17 of the United Nations Universal Declaration of Human Right, Article 14 of the African Charter on Human and Peoples' Rights and Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>4</sup> See generally, Ghimire, Subash, Arbind Tuladhar, and Sagar Raj Sharma. *supra* note 1, 169-178; Rose, Hadley, Frank Mugisha, Andrews

This article analyses the approaches taken by the United States, Australia and Malaysia in maintaining the balance in land acquisition. Hence, this paper considers the question of how the balance between different competing interests should be addressed in land acquisition matters and what is the practice in the United States and Australia. The final section examines Malaysia's Federal Constitution and the Land Acquisition Act 1960's role in striking the balance between public and private land acquisition interests, focusing on Peninsular Malaysia.

The justifications for selecting the three jurisdictions are: the United States offers the most robust protection for individual private property interests against public acquisition. In contrast to its American counterparts, the Australian jurisdiction strikes a balance between the state's power to acquire property and the protection of private property. On the other hand, Malaysian jurisdiction places a greater emphasis on protecting the public interest. The methodology employed in this study is primarily focused on comparative legal analysis. Legal analysis is particularly significant in analysing and determining the essence of the law, which helps in understanding the concepts and principles of land acquisition as they exist today. In this article, the research primarily focuses on the analysis of case law and the relevant legislation, particularly emphasising the balance of rights between public and private interests. References to relevant books, journals, scholarly articles and conference papers are used to review the concepts and principles of land acquisition as they are understood internationally.

According to current studies, there is little attention given to balance the rights between public and private interests in the Malaysian land acquisition laws. As a result, it is hoped that state officials and responsible organisations will consider the best practices of Australia, as demonstrated in this study, and will initiate revising and amending of important land acquisition laws and procedures in Malaysia to achieve the necessary balance of public and private interests.

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Kananga, and Daniel Clay. "Implementation of Rwanda's Expropriation Law and Its Outcomes on the Population." In *Proceedings of the Annual World Bank Conference on Land and Poverty, Washington, DC, USA*, (2016): 14-18.

## PUBLIC INTEREST AND PRIVATE PROPERTY RIGHTS

From the legal perspective, property is often conceptualised as a bundle of rights and ownership over the things. As Rich J aptly stated in *Minister for Army v Dalziel*,<sup>5</sup> 'property is a bundle of rights exercisable to a property. Hence, in general, each right that the owners have over a thing is in itself a property.'<sup>6</sup> As the US Supreme Court Justice Stewart J rightly describes it, 'property does have rights as people do'.<sup>7</sup> As a result, many countries have constitutionally guaranteed private property rights, which must be observed to be completely enforceable.<sup>8</sup>

The right to own private property is an intrinsic human right that grants ownership and enjoyment to the landowners. However, this right to private property is not absolute because it is subject to the state's authority to acquire the private land. Land acquisition, as the term implies, is the power given to the state to acquire any privately owned land for a public purpose in consideration for adequate compensation.<sup>9</sup> This inherent power of the state is practised worldwide and is known by various terms depending on the country's legal terminology, such as 'eminent domain or takings' in the United States, whereas it is known as 'compulsory acquisition' in Australia and Malaysia.<sup>10</sup> Regardless of the names, land acquisition is a critical development tool for the state to overcome the land scarcity when it is

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<sup>5</sup> [1994] 68 CLR 269.

<sup>6</sup> Douglas Maxwell, "*Rights to property, rights to buy, and land law reform: applying Article 1 of the First Protocol to the European Convention on Human Rights*" (PhD diss., University of Cambridge, 2018), 20.

<sup>7</sup> *Lynch v Household Finance Corp* (1972) 405 US 538, 542 (United States).

<sup>8</sup> Gregory S. Alexander, Eduardo M. Peñalver, Joseph W. Singer and Laura S. Underkuffler, "A Statement of Progressive Property," *Cornell Law Review*, 94 (2009): 743.

<sup>9</sup> Keith, Simon, Patrick McAuslan, Rachael Knight, Jonathon Lindsay, Paul Munro-Faure, David Palmer, and L. Spannenberg, *supra* note 1, 7-8.

<sup>10</sup> Lindsay, John Mills. "Compulsory acquisition of land and compensation in infrastructure projects." *PPP insights* 1, no. 3 (2012): 1-10.

required to establish railways, airports or any infrastructure for the public good.

On the other hand, land acquisition is a laborious process affecting a wide range of stakeholders. It often involves competing interests between the state (representing the general public) and impacted persons towards their private property. As a result, the land acquisition regime is ostensibly a way of balancing competing interests. If done correctly, land acquisition can be one of the most effective ways to bring disparate private property interests together. A poorly designed or implemented land acquisition procedure, on the other hand, may undermine the balance and result in undesirable consequences such as the possibility of corruption and abuse of power as well as delays in projects. Furthermore, if displaced landowners and occupiers are not paid enough compensation, the lack of legal protection may aggravate their living conditions.

During the middle ages of the seventeenth century, property right was considered to be one of the fundamental rights.<sup>11</sup> At that time, while the Crown's prerogative powers enabled him to acquire property in certain circumstances, the Parliament also had a broad power to acquire land compulsorily. In this situation, although the state had the authority to acquire property, it could only do so with compensation and for public purposes. This idea of balancing such rights was propounded by William Blackstone.

According to Blackstone in his book 'Commentaries on the Laws of England',<sup>12</sup> the sanctity of property could be reconciled with Parliament's supremacy upon the two essential principles of compensation and public purpose. Although the compulsory acquisition of property was rare during Blackstone's time, in a situation where the acquisition of property occurs, Blackstone points out that it has to be carried out based on the two fundamental

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<sup>11</sup> See generally, Gough, John Wiedhofft, *Fundamental law in English constitutional history* (Clarendon Press: 1955); Mann, F. A. "Outlines of a History of Expropriation." *LQR* 75 (1959): 188; Stoebeuck, William B, "A general theory of eminent domain," *Wash. L. Rev.* 47 (1971): 553; Marshall, P. J., "Parliament and property rights in the late eighteenth-century British Empire," in *Early Modern Conceptions of Property*, ed. Brewer, J., & Staves, S. (Routledge, 2014), 530-544.

<sup>12</sup> Blackstone, William, *Commentaries on the Laws of England* (Collins & Hannay, 1830), Chapter I.

principles of property rights. First, by providing the landowners with full compensation and equivalent for the injury they have suffered. Second, the legislature must authorise that expropriation for the public interest.

Therefore, compulsory acquisition requires balancing public demand for land on the one hand and providing land tenure security and protecting private property rights on the other. In modern times, contemporary writers such as Keith, Auslan, Knight, Lindsay and others were of a similar view that in seeking the balance, countries should apply principles that ensure the use of state power to acquire private property rights in land is limited to public use, public purpose or in the public interest.<sup>13</sup>

They also argued that the legislation should define the basis of compensation for the land and safeguard the procedural rights of those impacted, such as the right to notice, the right to be heard and the right to appeal.<sup>14</sup> It should include procedures that are fair and transparent as well as equivalent compensation. A poorly designed procedure can have major economic, social, and political consequences. Therefore, if the land acquisition is not done properly, problems such as diminished tenure security, weakened land rights, the potential for corruption and abuse of power, delayed projects, and inadequate compensation for owners and occupiers may occur.

## **THE POSITION IN OTHER JURISDICTIONS: THE UNITED STATES AND AUSTRALIA**

In light of the nation's continuous development, countries have expounded themselves in more excellent discussions and documentation on property rights. This is because they are not only concerned with the legal philosophy but have to face the political realities of its repercussions. Thus, property rights and interests are protected in various constitutions, but Blackstone's long-standing principle that property should only be taken for a public purpose and

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<sup>13</sup> Keith, Simon, Patrick McAuslan, Rachael Knight, Jonathon Lindsay, Paul Munro-Faure, David Palmer, and L. Spannenberg, "Compulsory acquisition of land and compensation," *FAO Land Tenure Studies*, 10 (2008): 7-8.

<sup>14</sup> Ibid.

in exchange for compensation remained significant. It can be seen in practice particularly in land acquisition, that states have always attempted to strike a balance between private rights and public interests because ignoring such rights and interests will only result in political ill will and would be costly in the long run.<sup>15</sup>

Therefore, land acquisition is always about balancing the two competing interests of the state's power to acquire property rights and protecting citizens' private property interests. Many countries' constitutions and state laws have incorporated measures for balancing individual rights and public interests and ensuring they will be recognised and protected by the state. While states would usually lay down the requirements that must be fulfilled in acquiring private property rights as well as some kind of protection for such rights, each state may approach the question of how to keep the balance in different ways. Some nations place a larger emphasis on public interests, while others place a significant emphasis on private property rights, and yet others strike a balance between the two. Different interpretations and applications of the law by any of the executive, legislative, or judicial arms of each state might contribute to these divergences.

The practices of a few nations are discussed below due to their historical legacies, such as Australia's profound impact on the legal systems of Commonwealth countries around the world, as well as the practices of nations that best epitomise today's opposing ideologies, namely the free capitalist market as embodied by the United States and the parliamentary democracy with constitutional monarchy undertaken in Malaysia. The three countries' constitutions will be examined in the section below, followed by the exercise of one or more of the government's branches in balancing the need for the state to acquire property rights for public interests against the individual rights as established by the property laws of the country.

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<sup>15</sup> Hien, P. T. 2015. *Proceeding of the International Academic Conference: Land grabbing, conflict and agrarian-environmental transformations: perspectives from East and Southeast Asia*, Chiang Mai University, June 5-6, 2015. Website: [www.plaas.org.za/bicas](http://www.plaas.org.za/bicas): BRICS Initiatives for Critical Agrarian Studies (BICAS). Website: [www.iss.nl/mosaic](http://www.iss.nl/mosaic): | Land Deal Politics Initiative (LDPI). Website: <http://rcsd.soc.cmu.ac.th>: RCSD Chiang Mai University. Website: [www.tni.org](http://www.tni.org): Transnational Institute.



## A. The United States

The Fifth Amendment to the US Constitution contains the relevant clause regarding the power of compulsory acquisition of property, which states that 'no person shall be deprived of life, liberty, or property without due process of law nor shall private property be taken for public use without just compensation.' These two clauses are commonly referred to as the Due Process Clause and the Takings Clause.<sup>16</sup> The Due Process Clause prohibits the state from depriving someone of their property without following due process of law or, to put it in another way, enables the state to infringe on property rights only if it follows the requirements of due process.<sup>17</sup> The Takings Clause, in contrast, prohibits the state from taking private property for public use without just compensation, or, in other words, authorises private property acquisition but only for a public purpose and with just recompense.<sup>18</sup>

Due to its unique historical development, the American experience is unlike any other. With its vast virgin lands, insatiable drive for infrastructural development, and fierce individualistic capitalistic free economy, much of its sovereign powers of eminent domain had been delegated to private companies engaged in various infrastructural improvements since its independence in the eighteenth century.<sup>19</sup> However, its takings jurisprudence was propelled with great vigour during the nineteenth century, when vast stretches of land were acquired for the construction of the country's ambitious extensive railroad network, as James, a leading legal historian of American railroads, put it 'railroads provided much of the impetus for judges to fashion takings jurisprudence.'<sup>20</sup>

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<sup>16</sup> Ashok, Krithika, Paul T. Babie, and John V. Orth, "Balancing Justice Needs and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, and the United States." *Fordham Int. LJ*, 42 (2018): 1030.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

During the railroad era, the courts established most core legislation addressing just compensation.<sup>21</sup> The US Constitution guaranteed fair compensation but did not specify how much would be paid. Hence, the court decided the amount, which was frequently assisted by a jury rather than by the legislature.<sup>22</sup> Despite the delegation of development controls to private companies, the Constitution's guarantee of individual liberty<sup>23</sup> and the Declaration of Independence of the right to the pursuit of happiness<sup>24</sup> ensured an ever-vigilant watch on protecting the private individual's right to property.<sup>25</sup>

As a result, when the state's power of takings is exercised, the displaced are given 'just compensation' that put them 'in the same financial circumstances as if his property had not been taken.'<sup>26</sup> Individual property rights are protected in such a way that property owners can file a lawsuit against the government if they believe that the government has already acquired their property or an interest in it. That is a process known as 'inverse condemnation.'<sup>27</sup> A leading example would be the 1946 case of *United States v Causby*<sup>28</sup> in which property owners successfully recovered damages from the United States for the value of an easement taken by the military's regular

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<sup>21</sup> *Kelo v City of New London* 545 US 469 (2005).

<sup>22</sup> See for example, in *Olson v. United States* 292 U.S. 246, 255 (1934) the condemner is entitled to be placed 'in as good a financial situation as if his property had not been taken.

<sup>23</sup> The Taking Clause is found in almost every state constitution in the United States. For example, the New Jersey Constitution's Article 1 subclause 20 states that 'private property shall not be taken for public purpose without just compensation.' Similarly, subclause 19 of Article 1 declares that 'no person shall be deprived of his life, liberty, or property except by the law of the land.'

<sup>24</sup> In general, the Declaration of Independence 1776 states that people have some inherent rights, such as life, liberty, and the pursuit of happiness; that all men are created equal; and those individuals have a civic responsibility to defend these rights for themselves and others.

<sup>25</sup> *Murr v. Wisconsin* 137 S.Ct. 1933, 1943 (2017).

<sup>26</sup> Keith, Patrick, Rachael, Jonathan, Paul, David and Spannerberg, "Compulsory acquisition of land and compensation," 7-8.

<sup>27</sup> Kanner, Gideon, "Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York," *Wm. & Mary Bill Rts. J.* 13 (2004): 679.

<sup>28</sup> 328 U.S. 256 (1946).

low-altitude flights over their property. The military's action of conducting such flights were perceived as the government's action of taking their right of airspace over their land and prompting the lawsuit, which the courts acknowledged as an illegal government taking of the owners' property rights.

While it is usual to think of compulsory acquisition as merely the state's power to take property from private owners, in the United States, such protection extends to any state action that adversely affects the property. This includes protection against any regulatory actions that affect the value of the property. These are referred to as 'regulatory takings'.<sup>29</sup> The 1922 case of *Pennsylvanian Coal Co. V. Mahon*<sup>30</sup> was one of the earliest to recognise a regulatory taking. At that time, a regulation was passed prohibiting mining corporations from removing coal that could cause subsidence and damage structures on the surface. This effectively hampered the mining company's capability to fully extract coal from their mines fully and thus caused the property's value. The US Supreme Court struck down the statute and declared that when the diminution of a property's value drops by a particular amount, 'in most, if not all, circumstances, an Eminent Domain and compensation exercise is required to sustain the act.' Therefore, any regulatory actions that significantly impact a property's value must be accompanied by 'fair compensation.'

The protection of individual property rights even extends to conditions imposed by municipal authorities on the issuance of building permits. The court in *Armstrong v. the United States*<sup>31</sup> laid down the test to determine whether 'just compensation' is required when the regulation appears to force 'some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole.' In *Nollan v. California Coastal Commission*,<sup>32</sup> it was decided that a state agency's granting of a building permit conditional on the landowner's dedication of a public easement was a taking that required compensation.

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<sup>29</sup> Singer, Joseph William, "Justifying Regulatory Takings," *Ohio NUL Rev.* 41 (2014): 601.

<sup>30</sup> 260 U.S. 393 (1922)..

<sup>31</sup> 364 U.S. 40, 49 (1960).

<sup>32</sup> 483 U.S. 825 (1987).

The courts, however have struck a balance between individual ownership protection and public rights, as was demonstrated in the case of *Penn Central Transportation Co. v. New York*,<sup>33</sup> where the court upheld a municipal regulation prohibiting a landowner from modifying a building considered historic due to its aesthetic value which is deemed greater to the public than the owner's liberty to determine its use. Hence, most of the takings jurisprudence developed in the United States can be attributed to the principles of the country's establishment and historical development as a nation, which promote individualism while limiting government control as far as feasible.

## B. Australia

Australia, like the United States, is distinct due to its historical past. The Australian Commonwealth, i.e., its federal government, is different from any other jurisdiction in that it is 'not a sovereign State, but a federated society with numerous political powers is approaching, and elements resembling sovereignty but falling short of it.'<sup>34</sup> This is because its parliament can only exercise delegated powers by the sovereign Parliament of the United Kingdom and Ireland.<sup>35</sup> Therefore, it has no implicit power based on any conception of unexpressed latent sovereignty<sup>36</sup> and its constitution is what affords its legislative power to acquire property, as well as a restriction on that power. This is because it was once part of the British Commonwealth. As a result, the Australian Constitution is unique in that it solely applies to the federal government, not the states or territories. However, because it is impossible to cover all of the states' compulsory land acquisition laws, this chapter will focus solely on the interpretation and scope of the Constitution of Australian.

Section 51(xxxi) of the Australian Constitution allows the Commonwealth to acquire private land for a public purpose while protecting private property rights. According to the provision, 'the Parliament shall have the power to make laws for the peace, order, and good government of the Commonwealth, subject to the

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<sup>33</sup> 438 U.S. 104 (1978).

<sup>34</sup> Quick, John, and Robert Garran, *The annotated constitution of the Australian Commonwealth* (Angus & Robertson, 1901), 641-642.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

Constitution, for (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws.'

Section 51(xxxi) contains an express grant of Commonwealth legislative power to acquire property and a limitation on that power.<sup>37</sup> The High Court in *Bank of New South Wales v Commonwealth*<sup>38</sup> confirms this textual understanding by specifying the scope of both components of a grant of power and its limitation. To define the parameters of the grant of power to compulsorily acquire private property, the High Court focused on the definitions of property and acquisition. In terms of the former, the High Court has established a broad definition of property that the Commonwealth may acquire.<sup>39</sup> Property, according to the court in *Minister of State for the Army v Dalziel*,<sup>40</sup> is a broad phrase that refers to any tangible or intangible things that the law protects under the name of property.

The High Court, after establishing the parameters of the power to acquire the property, has further emphasised the words 'just terms and purpose' as a means of limiting Commonwealth legislative activity in land acquisition. According to Quick and Garran, the two sets of words are regarded as restrictions on the power of the Federal Parliament to appropriate private property for public purposes with just compensation.<sup>41</sup> This criterion is consistent with the English common law and general European law, which is intended to protect an individual's right to private property from federal government intrusion except on fair and equitable terms.<sup>42</sup> This property protection is a constitutionally entrenched norm that is placed beyond legislative control.<sup>43</sup> The link between the power conferred and the limitation imposed in Section 51(xxxi) was likewise considered by

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<sup>37</sup> *Lynch v Household Finance Corp* (1972) 405 US 538, 542 (United States).

<sup>38</sup> [1948] 76 CLR 1, 349; affirmed *JT International SA v Commonwealth* [2012] 250 CLR 1.

<sup>39</sup> O'Connor, Pamela, "The changing paradigm of property and the framing of regulation as a 'taking'," *Monash University Law Review* 36, no. 2 (2011): 50-79.

<sup>40</sup> [1944] 68 C.L.R. 261, 295.

<sup>41</sup> *Murr v. Wisconsin* 137 S.Ct. 1933, 1943 (2017).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

the High Court as a balancing act between society and individual interests.<sup>44</sup>

The court in *Nelungaloo Pty Ltd v Commonwealth*,<sup>45</sup> considered the nature of the just terms for the acquisition of property must either be 'fair' or at least such that a legislature could reasonably consider the arrangement for just terms to be 'fair'. The Court further emphasised that the term 'fairness' in this context must take into account the interests of all parties affected by the acquisition, not only the interests of the property owner.<sup>46</sup> Regarding the compensation, it can be in the form of non-monetary forms,<sup>47</sup> but it does not have to be limited to the value of the property seized at the time it was taken.<sup>48</sup> To strike a balance between the public's and individuals' interests, the courts also evaluate the purpose for which the property is obtained to determine if the just terms guarantee has been triggered, or more precisely, whether it is 'enlivened.'

In the case of *Griffiths v Minister for Lands, Planning, and Environment*,<sup>49</sup> the court examined the acquisition's purpose to determine the applicability of Section 51(xxxi). This case concerned the Minister's power to acquire land under the Crown Lands Act of Northern Territory which, it was argued, enlivened the operation of Section 43 of the Lands Acquisition Act of Northern Territory, which allows the Minister to acquire land for any purpose. The language of section 43 of the Northern Territory Lands Acquisition Act is quite similar to Section 51(xxxi). The appellants maintained that, despite the phrases 'for any purpose whatsoever,' the Minister was not authorised to acquire land from one person solely to enable the

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<sup>44</sup> Justice Kiefel, for instance, wrote in *J.T. International SA v Commonwealth* [2012] 250 CLR 1 that "Section 51(xxxi) serves a dual purpose to provide the Commonwealth with that power and to provide the individual or the state affected with protection against governmental interference with their proprietary rights without proper recompense".

<sup>45</sup> [1947] 75 CLR 495.

<sup>46</sup> Ibid.

<sup>47</sup> *Wurridjal v Commonwealth* [2009] 237 CLR 309; see also Winnett, Celia, "'Just Terms' or Just Money?: Section 51 (XXXI), Native Title and Non-monetary Terms of Acquisition," *University of New South Wales Law Journal*, The 33, no. 3 (2010): 776-807.

<sup>48</sup> *Grace Bros Pty Ltd v The Commonwealth* [1946] 72 CLR 269.

<sup>49</sup> [2008] 235 CLR 232..

Northern Territory to sell or lease the land to another person for private use.<sup>50</sup>

While the majority sided with the Northern Territory, Justice Kirby argued in dissent that 'all compulsory acquisitions under federal or territorial law have a constitutional genesis.'<sup>51</sup> Justice Kirby concluded that a compulsory acquisition for private purposes may fall outside the public purpose criterion of Section 51(xxxi). As such, in determining whether an exercise of the power of land acquisition triggers or enlivens the just requirements, the court will consider whether a public purpose requirement for a compulsory acquisition triggers or enlivens the just terms.

Thus, when a compulsory acquisition occurs, the courts must first examine if the just terms guarantee has been enlivened in order to balance the interests of the community with those of the individuals. The just terms guarantee is only considered if it is discovered to be enlivened. However, given the fact that the Commonwealth's power for such acquisition contained in Section 51(xxxi) is seldom resorted to but rather one that is excluded from the operation of the just terms guarantee for one reason or another, it is unusual for the High Court to decide that the guarantee is enlivened.

## POSITION IN MALAYSIA

The provisions concerning the principles relating to the balance of state's power of acquisition of property and the protection of property rights in the Malaysian Constitution are framed in comparable terms to those found in other Commonwealth constitutions.<sup>52</sup> Section 299 of the Government of India Act 1935 and Article 31 of the Indian Independence Constitution 1949 have the same basic structure as Article 13 of the Federal Constitution. Article 13(1) provides that 'no person shall be deprived of property save in accordance with law'. Article 13(2) requires that 'no law shall provide for the compulsory acquisition or use of property without adequate compensation'.

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Allen, Thomas, "Commonwealth constitutions and the right not to be deprived of property," *International & Comparative Law Quarterly* 42, no. 3 (1993): 523-552.

Blackstone's idea of balancing, as discussed above, is also replicated in Article 13. This Article provides some measures for balancing individual rights and public interests. Firstly, Article 13(1) guarantees that every person shall not be deprived of his property. Secondly, in the event that compulsory acquisition occurs, Article 13(2) mandates that adequate compensation be paid. Malaysia, like the United States, requires these twin requirements of public purpose and compensation in balancing between the society and individual interests in land acquisition.

The aim of this part is to examine how the aforementioned principles of balance find their expression in the courts and how they are maintained in practice, particularly in Peninsular Malaysia. This will be done by analysing judicial interpretations of Article 13 and the applications of the law by the states' executive or legislative branches. In cases where the balancing requirement is not embedded in Article 13, such as the public purpose criteria, it has to be inferred from the Land Acquisition Act 1960.

The state law for compulsory land acquisition in Malaysia is established by the Land Acquisition Act 1960. The Act is a piece of legislation that empowers the State Authority to interfere with a person's right to property for public interests. Therefore, provisions of the Act must be strictly followed in order to achieve the necessary balance of rights between the state to acquire land and the private rights of landowners, and to give meaning to the constitutional protection of a person's right to his property. Prior to independence, Malaysian land acquisition law was not uniformed, and different laws were enacted in different states. There were seven distinct enactments in existence in the Federation prior to the implementation of the Land Acquisition Act 1960<sup>53</sup> which were largely inspired by the Indian

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<sup>53</sup> The repealed Enactments were: The Land Acquisition Enactment of the Federated Malay States (FMS Enactment No. 22 of 1922), the Land Acquisition Enactment of the State of Johore 1936, the Land Acquisition Enactment (No. 57) of the State of Kedah 1936, the Land Acquisition Enactment of the State of Kelantan 1934, the Acquisition of Land for Railway Purposes of the State of Perlis, the Land Acquisition (Extension to Terengganu) Ordinance 1952 and the Land Acquisition Ordinance of the Straits Settlements.



Land Acquisition Act 1894.<sup>54</sup> As a result, Indian laws and cases are cited in this study wherever necessary because they are historically comparable to the Malaysian laws.

Compulsory land acquisition was viewed as a major issue in the 1950s, particularly during the communist insurrection<sup>55</sup> when it was required to establish new villages to house villagers who had been relocated from suspected communist-controlled communities.<sup>56</sup> The land administrators found that it was inconvenient to resort to numerous scattered statutes as the number of land acquisitions increased.<sup>57</sup> As a result, after Malaya's independence on August 31, 1957, the government saw the necessity for a consolidated land acquisition Act. The purpose of such consolidation through the Land Acquisition Act 1960, was to provide uniformity and eliminate the challenges of referring to different states' statutes.<sup>58</sup>

The Land Acquisition Act 1960 was enacted on October 13, 1960, before the Malaysia Day of September 16, 1963, and applies to Peninsular Malaysia's states only. Whereas two different legislations, namely, govern the laws of land acquisition in Sarawak and Sabah, the Land Code (Sarawak) (Cap. 81) and the Sabah Land Acquisition Ordinance (Cap. 69), respectively. However, this study is solely concerned with the Land Acquisition Act 1960 as it applies in Peninsular Malaysia.

The Land Acquisition Act 1960 contains substantive and procedural provisions, including the provisions of public purpose, the procedures of property acquisition, and the assessment of compensation. These components are imperative to ensure that there is no abuse of power regarding land and property acquisition.<sup>59</sup> According to Buang, the Land Acquisition Act 1960 has two goals,

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<sup>54</sup> Rau, KV Padmanabha, *Land Acquisition in Malaysia: Cases and Commentaries* (International Law Book Services, 1999), 1.

<sup>55</sup> Veraya, Manokaran. "Compulsory Land Acquisition in West Malaysia: With Special Reference to Kedah" (PhD diss., Faculty of Law, Universiti Malaya, 1976), 1-2.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> House of Representatives, *Parliamentary Debates*, Vol. II, No. 22, (12 September 1960).

<sup>59</sup> MP Jain and Grace Xavier, "Compulsory acquisition of land in Malaysia (Pt I)," *The Malaysian Law Journal* 2, no. 141-180 (31 May 1996): xxxii.

first, to offer a uniform approach that applies to all states in Peninsular Malaysia, and second, to act as a quick mechanism for compulsorily acquiring land in areas where land is desperately needed for development.<sup>60</sup> The Act, if effectively administered, should be able to strike a balance between serving the state's demands while also providing justice to dispossessed landowners.

The impact of the balancing clauses is largely determined by the definition and scope of 'in accordance with law', 'public purpose' and 'adequate compensation'. Thus, the purpose of the following discussion is to determine how Article 13 of the Federal Constitution and the provisions of the Land Acquisition Act 1960, with the help of government branches, seek to strike a balance between public and private interests.

### **The Phrase "In accordance with law"**

Article 13(1) requires that 'no one shall be deprived of property save in accordance with the law'. It would appear that Article 13(1) was intended to protect property rights against executive arbitrariness. In *Lai Tai v The Collector*,<sup>61</sup> the occupant was not provided with the requisite notice of intention to acquire, and as a result, he did not appear at the award hearing. The occupant was also not served with the award's statutory notice. For the reasons stated above, the court exercised its legal discretion in allowing the aggrieved applicant to bring his otherwise time-barred suit for determination by the court. In *Philip Hoalim v State Commissioner, Penang*,<sup>62</sup> it was highlighted that the executive acts resulting in property deprivation may be challenged because they are not 'in compliance with the law.' Thus, the term 'law' seemingly does not appear to be confined only to statutory law. It could also include the *audi alteram partem* principle of natural justice.

It should be noted, however, that Article 13(1) only protects against the executive branch, not the legislative. It is *lex* (enacted law) and not *jus* (justice) that is referred to as 'law' (right). The phrase 'in

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<sup>60</sup> Buang, Salleh, *Compulsory Land Acquisition* (Central Law Book, 1993), 1-2.

<sup>61</sup> [1960] 1 LNS 49.

<sup>62</sup> [1974] 2 MLJ 100.

accordance with the law' does not include the concept of due process as it is understood in the United States. Thus, in Malaysia, a law is valid even if it is unreasonable or unjust. In *Comptroller-General of Inland Revenue v NP*,<sup>63</sup> and *Arumugam Pillai v Government*,<sup>64</sup> it was held that the words 'in accordance with law' carry no element of natural justice or the American concept of due process. As a result, a citizen whose property is deprived by legislation enacted by a competent legislature cannot challenge the reasonableness of the law by citing Article 13(1), no matter how arbitrary the law might be.

In *S. Kulasingam v Commissioner of Lands, Federal Territory & Ors*,<sup>65</sup> it was argued that the requirement of Article 13(1) imports the rules of natural justice because the word 'law' encompasses common law which also includes natural justice. Despite the demands of the rules of natural justice, the court construed the word 'law' to mean only enacted law and natural justice is not part of Article 13(1).<sup>66</sup> As a result, the Federal Court held that there is no right to a pre-acquisition hearing under the Land Acquisition Act 1960. Article 13(1) does not render any law unconstitutional even if it allows for the appropriation of property without a hearing. The Court further held that such law cannot be challenged because it provides for a procedure for an inquiry and a hearing on the amount of compensation, but no hearing on the decision to acquire the land itself.

The court found its reasoning by stating that the Land Acquisition Act 1960 consolidates previous land acquisition enactments based on the Indian Lands Act 1894. The Indian Act did not include any provision for a pre-acquisition hearing until 1923, when it was amended to incorporate the new section 5A. Before 1923's revision to the Indian Act, the wishes of the landowners were completely irrelevant because the Act did not provide any provision for the landowners to raise objection to the acquisition itself. As a result, the court held that this similarly applies to the Land Acquisition Act 1960.

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<sup>63</sup> [1973] 1 MLJ 165.

<sup>64</sup> [1975] 2 MLJ 29.

<sup>65</sup> [1982] 1 MLJ 204.

<sup>66</sup> See also *Pemungut Hasil Tanah v Ong Gaik Kee* [1983] 2 MLJ 35; *Superintendent of Land v Lim Teck Hoo* [1980] 1 MLJ 58.

Although the Land Acquisition Act 1960 mandates a post-acquisition hearing on the amount of compensation, it is silent as to whether or not a hearing should be held before the decision to acquire the property. This is indeed a glaring omission in the law. Furthermore, the court's interpretation of the law is flawed as it fails to take into account the definitional provision in Article 160(2) which defines the term 'law' to include common law. Since common law is the source of natural justice, it should be an integral part of the Malaysian legal system and hence should be allowed to fill in the gaps left by the legislators.

Despite the Court's finding that Article 13(1) provides landowners with procedural safeguards in the sense that any deprivation must be in accordance with enacted law, this protection is not as strong as it appears. Naturally, a person who wishes to challenge the acquisition of his property, in principle, has the right to demand that each provision of the Land Acquisition Act 1960 relied on by the acquiring body for compulsory acquisition to be strictly followed, failure of which, the safeguards provided for in Article 13(1) are breached.<sup>67</sup> Unfortunately, this is not exactly the situation. The following case exemplifies this situation.

The Court of Appeal had unanimously held in *Ee Chong Pang & Ors v The Land Administrator of the District of Alor Gajah & Anor*<sup>68</sup> that the issuance of Form A under section 4(1) of the Land Acquisition Act 1960 is mandatory and that the State Authority's failure to comply with this mandatory provision could only mean that the land acquisition was not in accordance with the law. However, leave to appeal to the Federal Court was granted on the question of whether the State Authority must first issue a notice in Form A (preliminary notification of land likely to be acquired) under section 4(1) of the Land Acquisition Act 1960 before issuing the notice of acquisition (Form D) under section 8(1) of the Land Acquisition Act 1960. The Federal Court unanimously held that the answer to this question is in the negative and that the State Authority can issue the notice in Form D under section 8(1) without first issuing the notice in Form A under section 4(1) of the Land Acquisition Act 1960. Thus,

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<sup>67</sup> *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526, FC.

<sup>68</sup> [2013] 3 CLJ 649, CA.

reversing the Court of Appeal's decision and demonstrating that procedural failure on the part of the State Authority is not a sufficient ground to challenge the acquisition.

### Public Purpose

As discussed earlier, the concept of 'eminent domain' is used in many countries' constitutions to guarantee that private property will not be acquired unless it is for a public purpose. Although this notion is not explicitly stated in Article 13, its objective can be deduced from the Land Acquisition Act 1960. Section 3 of the Act specifies various purposes for which land acquisition can be exercised. The statutory purposes in section 3(1) are broadly defined as (a) any public purpose, (b) any purpose that the State Authority believes is beneficial to Malaysia's economic development, and (c) any specific purpose such as mining, residential, agricultural, commercial, industrial, recreational or any combination of these purposes.

Be that as it may, the Land Acquisition Act 1960 does not specifically define the term 'public purpose'. The Federal Court in *S. Kulasingam v Commissioner of Lands, Federal Territory & Ors*<sup>69</sup> indicated that the term 'public purpose' is difficult to be defined. Thus, a simple, common-sense test of 'public purpose' should be applied to see whether it serves the general public interest. In many subsequent cases,<sup>70</sup> the courts followed the decision in *S. Kulasingam v Commissioner of Lands, Federal Territory & Ors*,<sup>71</sup> which construed an open and imprecise definition of 'public purpose'.

To make matters worse, the courts ruled that statutory purposes stated in section 3(1) may be invoked individually or in combination with other purposes.<sup>72</sup> It is also sufficient to generally state the

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<sup>69</sup> [1982] 1 MLJ 204.

<sup>70</sup> *Wang Su Sing v Hj Zamari Hj Mohd Ramli & Ors* [2014] 2 CLJ 257; *Kuala Lumpur Kepong Bhd v Pentadbir Tanah Jajahan Tanah Merah & Anor* [2015] 6 CLJ 1.

<sup>71</sup> [1982] 1 MLJ 204.

<sup>72</sup> See *Tan Yen Foon v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur* [2008] 7 CLJ 267; *Tan Boon Bak & Sons Ltd v Government of the State of Perak & Anor* [1982] CLJ 499; *Yew Lean Finance Development (M) Sdn Bhd v Director of Lands & Mines Penang* [1976] 1 LNS 173.

acquisition's broad purpose as residential, industrial or public without specifying the exact purpose.<sup>73</sup> The courts further held that it is not required to specifically state that a project is beneficial to the country's economic development.<sup>74</sup> Following this, the acquisition of land for a development project that would create jobs and promote tourism industry is considered as beneficial to the country's economic development<sup>75</sup> regardless of whether the immediate beneficiary is a private enterprise.

Unlike India, Malaysia allows land acquisition by a company under section 3(1)(b) of the Land Acquisition Act 1960. Section 3(1)(b) states that the State Authority may acquire any land that any person or corporation needs. This is the outcome of the amendment to section 3(1)(b) in 1991, which aimed at broadening the acquisition powers.<sup>76</sup> Thus, the present position is that a third-party acquisition under section 3(1)(b) is permissible. Due to this, the state government can form joint ventures with private developers to acquire land and meet corporate interests.<sup>77</sup> It is submitted that the wording of section 3(1)(b) and the approach taken by the courts empowers the State

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<sup>73</sup> *Yew Lean Finance Development (M) Sdn Bhd v Director of Lands & Mines Penang* [1976] 1 LNS 173.

<sup>74</sup> See *Lim Goo Kia v Pentadbir Tanah Daerah Kota Tinggi & Ors & Another Case* [2014] 1 LNS 1006; *United Malacca Rubber Estates Bhd v Pentadbir Tanah Daerah Johor Bahru & Anor* [1996] 1 LNS 108.

<sup>75</sup> See *Hj Zakaria Hj Ahmad v Kerajaan Negeri Kedah* [1997] 1 LNS 311; *Ahmad Saman v Kerajaan Negeri Kedah* [2004] 1 CLJ 211.

<sup>76</sup> Chuan, Gan Ching, "Section 68A, Land Acquisition Act, 1960: A Stumbling Block to Judicial Review?" *JMCL* 20 (1993): 203. See also, Buang, no 61, 70. Some opinions expressed concerns during the Parliamentary debates when the amendment to section 3(1)(b) was still in the Bill stage that the new amendment would allow the government to take alienated land from one individual and give it to another person or firm to develop. It was also claimed that, in addition to creating hardship to the deprived landowner, such administrative measures would provide unfair benefits and profit to the lucky privatized firm. In a nutshell, it was claimed that the amendment would lead to presidential power abuse.

<sup>77</sup> Amnesty International, "The Forest is Our Heartbeat: The Struggle to Defend Indigenous Land in Malaysia," *Amnesty International London*, 2018, 20. See also Stephanie Lee, "Shafie: Communal Land Titles to be Scrapped," *Malaysia Star*, August 8, 2018, <https://www.thestar.com.my/news/nation/2018/08/08/shafie-communal-land-titles-to-be-scrapped/>.

Authority to wield broad powers, including the ability to label any purpose as public, which is contentious in and of itself.

Even so, not all powers are concentrated in the hands of the State Authority. Section 8(3) of the Land Acquisition Act 1960 provides the statutory presumption that any land acquisition purpose specified in Form D is conclusive proof of that purpose. However, it has been held in several cases that the courts are not prevented from examining whether the acquiring authority has misconstrued its statutory powers or whether the purpose stated in the statutory declaration falls within section 3(1) or whether bad faith has been established.<sup>78</sup> Therefore, despite the conclusive presumption in section 8(3), the court still empowers itself to examine the purpose and determine if it is as stated. However, only a handful of cases against the State Authority have been successful.<sup>79</sup> This is partly due to the fact that proving bad faith is difficult. For example, establishing that there are other properties available when the State Authority acquires the land is insufficient to prove *mala fide*.<sup>80</sup>

Furthermore, there is an inconsistency in judicial decisions. While the court in *S. Kulasingam v Commissioner*<sup>81</sup> had held that the purpose of acquisition can be questioned, in *Yew Lean Finance v Director of Land & Mines*,<sup>82</sup> the court was of the view that what is or is not a 'public purpose' for land acquisition cannot be challenged in a court of law. Thus, in most cases, the court would be reluctant to invalidate an acquisition merely on the ground that it is not for 'public purpose'. The court would unlikely overturn the decision of the State Authority as it will place the court in an awkward position of having to strike down a state's decision. This appears to be a dereliction of

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<sup>78</sup> *Syed Omar Abdul Rahman Taha Alsagoff v Government of Johor* [1979] 1 MLJ 49; *S. Kulasingam v Commissioner* [1982] 1 MLJ 204.

<sup>79</sup> For example, acquisition for the purpose of relocating retired estate workers from a private estate is also not for public purpose (see *Kuala Lumpur Kepong Bhd v Pentadbir Tanah Jajahan Tanah Merah & Anor* [2015] 6 CLJ 1, CA).

<sup>80</sup> *Yap Seok Pen v Government of Kelantan* [1982] 2 MLJ 202; [1986] 1 MLJ 449.

<sup>81</sup> [1982] 1 MLJ 204.

<sup>82</sup> [1977] 2 MLJ 45.

the judicial responsibility of ensuring that powers are exercised within legal bounds and in good faith for purposes permitted.<sup>83</sup>

### **Adequate compensation**

In addition to the balancing safeguards provided by Article 13(1) of the Malaysian Constitution against government interference in private property, Article 13(2) requires that 'no law shall provide for the compulsory acquisition or use of property without adequate compensation.' However, Article 13(2) is silent on the principles to be considered in determining compensation. Thus, reference has to be made to the First Schedule of the Land Acquisition Act 1960 as well as those cases that have been decided by the courts. The issue in determining the adequacy of compensation had been discussed by the courts in a number of cases. Most courts have adopted the 'fair market value' test which refers to the price that an owner would be willing to sell but not obligated to do so in which he could reasonably expect to get from a willing purchaser with whom he was bargaining for the sale and purchase of the land.<sup>84</sup>

Despite this, the 'fair market value' test has been criticised as an ineffective means of assessing the property's value.<sup>85</sup> This was because, in most land acquisition cases, the states merely provide monetary compensation even though section 15 of the Land Acquisition Act 1960 empowers the states to determine whether compensation should be provided in monetary form or the form of an equitable arrangement with the affected parties. This is because the

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<sup>83</sup> Faruqi, Shad Saleem, *Document of destiny* (Selangor: Star Publications (M) Berhad, 2008), 377.

<sup>84</sup> *Nanyang Manufacturing v The Collector* [1954] MLJ 69. See also *Ng Tiou Hong v Collector* [1984] 2 MLJ 35; *Draman bin Kasim v Lادن Administrator* [1990] 3 MLJ 465; *Bukit Rajah Rubber Co v The Collector* [1968] 1 MLJ 176; *Khoo Peng Leong v Supt. Of Lands* [1966] 2 MLJ 156.

<sup>85</sup> Tagliarino, Nicholas K, "The status of national legal frameworks for valuing compensation for expropriated land: An analysis of whether national laws in 50 countries/regions across Asia, Africa, and Latin America comply with international standards on compensation valuation," *Land* 6, no. 2, 37 (2017): 8, <https://doi:10.3390/land6020037>.



Land Acquisition Act 1960 does not define how an equitable arrangement should be created. In fact, up to this date, no local case law can be found that shows how the courts have interpreted such an arrangement. The First Schedule to the Land Acquisition Act 1960, on the other hand, merely sets forth the principles to be considered in determining the fair market value of compensation as well as those that have been decided by the courts from time to time. These, among other things, include professional experts' opinions, potentialities of the land acquired, its location, accessibility, and evidence of the pricing of similar properties sold in the neighbourhood.<sup>86</sup>

In determining compensation, however, an increase in the value of the acquired land due to the intended use for which it would be put in the post-acquisition period cannot be taken into consideration. For example, if the increase in value of the acquired land is solely attributable to the government's development plans, the government is not required to pay for it. This viewpoint may appear reasonable to many. However, it sanctions irreparable harm to the individual whose property is taken. If he wishes to move on with his life, he will be unable to afford a similar piece of property in the same neighbourhood due to the property's value appreciation in the post-acquisition period.<sup>87</sup> Thus, a dispossessed owner is unlikely to be able to purchase a similar piece of land in the same area with the 'adequate compensation' he receives.<sup>88</sup> This implies that the adequacy of the Land Acquisition Act 1960's monetary compensation programme is dubious. Evidence of cases that were brought to the court also showed that the highest number of cases were objections against the amount of compensation awarded (as can be seen in Table 1 below). However, most courts have not even considered the question of whether an adequate balance has been struck.

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<sup>86</sup> See generally Teo, Keang Sood, and Lake Tee Khaw, *Land law in Malaysia: cases and commentary* (Butterworths, 1995), 801-817.

<sup>87</sup> Faruqi, Shad Saleem, *supra* note 80, 376.

<sup>88</sup> *Ibid.*

Table 1: Number of cases from 2015 until February 2020 (High Court) according to types of cases in Kuala Lumpur and Selangor

Number of cases according to types of cases in Kuala Lumpur and Selangor			
Year	Non-compliance of procedure for land acquisition	Objection against the amount of compensation awarded	Total
2015	0	123	<b>123</b>
2016	20	282	<b>302</b>
2017	1	302	<b>303</b>
2018	0	430	<b>430</b>
2019	0	277	<b>277</b>
Feb 2020	2	7	<b>9</b>
<b>TOTAL</b>	<b>23</b>	<b>1,421</b>	<b>1,444</b>

(Source: Office of the Registrar, Federal Court of Malaysia)

Although Article 13(2) limits the legislature's power, some cases have further decided that the legislature can deprive private property even without providing adequate compensation. This position is contrary to Australia. Although the Australian Constitution only requires 'just terms,' the dicta suggests that the courts will not allow the property to be taken for less than its market value.<sup>89</sup> This is not always the case in Malaysia. In *Government of Malaysia v Selangor Pilot Association*<sup>90</sup> the pilotage industry maintained by the respondent was legislated out of existence through nationalisation and handed over to a state corporation. The state corporation took over the physical assets of the respondents, hired most of its former workers and served its former clients. However, the state corporation refused to pay for the

<sup>89</sup> In *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, the High Court stated that 'just terms' should not be equated with full compensation but rather with a lower criterion of fairness that considers the community's interests.

<sup>90</sup> [1977] 1 MLJ 133.

respondents' goodwill. The respondents' claimed for compensation for the loss of their business goodwill. The Federal Court followed the Indian Supreme Court's interpretation of the previous Article 31<sup>91</sup> and held in favour of the respondents. However, the Privy Council dismissed it on the questionable ground that no property had been acquired within the meaning of Article 13. The Privy Council stated that no goodwill was acquired because it was derived from the employment of certain pilots and the state corporation did not acquire the right to employ the pilots from the respondents. The Privy Council further held that while the legislation may have taken away the respondent's goodwill, it did not transfer the goodwill to the state corporation. However, consolation can be taken from the dissenting opinion of Lord Salmon who argued that although nationalisation is necessarily in the public interest, it should not be allowed to override Article 13(2). If the court allows it, it will empower the states to evade the Constitution by enacting legislation that reduced the value of the property before acquiring it, which in the instant case was the respondents' business. Lord Salmon concluded that the legislative measures passed in 1972 had the inevitable effect of the authority acquiring the respondents' property without compensation, thereby violating Article 13(2).

## CONCLUSION

As previously discussed in all three jurisdictions, each country's constitutional compulsory acquisition provision is susceptible to judicial and legislative interpretation and application of that provision. Furthermore, it was found that the appellate courts have played a crucial role in balancing the public's interests with the

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<sup>91</sup> In *Dwarkanadas Shrinivas v Sholapur Spinning and Weaving Co Ltd* AIR (1954) SC 119, the court held that an acquisition of property includes the 'procuring of property' without acquiring legal title. The court stated that 'it is immaterial to the person who is deprived of property as to what use the State makes of his property or what title it acquires in it. The protection covers the owner's loss of property'. The court further stated that the duty to compensate could only be restricted to acquisitions if the court applied a 'close and literal reading' of Article 31(2) which it did not. As the result, the court conflated Articles 31(1) and (2) and held that the legislature could not deprive an individual of property without compensation.

individual's right to private property. While Malaysian and Australian courts appear to favour the state's interests above those of individuals, the United States Supreme Court, for various reasons, tends to prefer private property owners. The individual right appears to take precedent in American law, but Malaysia and Australia do not.

The United States is primarily concerned with limiting acquisition power and establishing a greater scope of private property protection. Despite the United States' Constitution balancing clauses, judicial interpretation has pushed for the protection of private property even further. Therefore, property may only be taken for public use if just compensation is provided. Even though the public use criterion was loosened with the aim of enabling public infrastructure, the courts have remained watchful in upholding the just compensation requirement. In order to prevent unjustified government takings, the courts recognised inverse condemnation suits, whereas to prevent the unjustified deprivation of property rights by excessive government regulations, the courts recognised regulatory takings and scrutinised the fairness of specific requirements.

On the other hand, Australia appears to provide substantial federal government control, emphasising the power to acquire the property rather than the limitation on the power, without much consideration for it being an individual right. While Section 51(xxxi) provides the balancing requirement in Australia's land acquisition, the High Court had consistently interpreted it as a strong grant of power to the government rather than treating it as a limitation to restrain legislative activity.

That being said, however, the Australian approach is relevant in providing a fair balance between the state's power to acquire property compulsorily to accomplish social justice goals and the protection of private property rights. The High Court achieves this through the combination of a broad definition of property with a close textual reading of Section 51(xxxi) 'just terms' and 'purpose in respect of which,' resulting in many acquisitions that would be considered a taking in the United States being considered acceptable adjustments of private property rights in Australia.

On the one hand, Malaysia demonstrates a posture that prioritises public interests through the joint action of the executive,

judicial and legislative branches. Despite land acquisition laws being historically intended to address communist insurgency, Malaysian courts appear to favour the state's interests over the interests of individuals. In many cases, land acquisitions are ostensibly for public purposes but are actually for the benefit of third-party economic interests. On top of that, the public purpose requirements have been amended to give a broad acquisition power to the state. The courts have also failed to remain vigilant in upholding the adequate compensation requirement whereby compensation is only with regards to the tangible aspects of the land without any consideration of its intangible value or any consideration of any equitable principles. While the Malaysian Constitution purportedly mandates balance, it is clear that both the court and the legislature have the power to modify the Malaysian position in balancing the various property rights in land acquisition. In conclusion, from analysing the law on public purpose and adequate compensation, public interests appear to take precedence in the Malaysian land acquisition law.