Vol. 4, Part 1 [1977] JMCL June 1977

JERNAL UNDANG-UNDANG
JOURNAL OF MALAYSIAN
and
COMPARATIVE LAW

THE MYSTERIOUS CASE OF THE DISAPPEARING BUSINESS: GOVERNMENT OF MALAYSIA & ANOR v. SELANGOR PILOT ASSOCIATION*

THE FACTS

On 12th September 1969 six licensed pilots entered into a partnership agreement to carry on the business of pilotage in Port Klang (then called Port Swettenham) under the name of "The Selangor Pilot Association (1946)." They agreed that the proceeds of all pilots' dues would be pooled together with all other receipts on account of the partnership. The income received by the Association consisted entirely of pilotage dues earned by the licensed pilots who were partners and by the licensed pilots who were employed by the Assocation.

In those days, licensed pilots were free to act on their own if they wished. None did so. From the formation of the Association until 1972, all licensed pilots offering services in Port Klang were either partners in the Association or employees of it. In other words, every vessel requiring a pilot in that port had to secure one through the Association.

On 13th April 1972 Port Klang was declared to be a pilotage district under the Port Authorities Act, 1963, section 29A(1), put into the Act by the Port Authorities (Amendment) Act 1972. On 1st May 1972 the Port Klang Authority began to operate the pilotage services in that port. If the Act of 1972 was valid, no one else could. That Act inserted into the Act of 1963 section 35A, providing:

"(1) Any person who, not being an authority pilot, engages in any pilotage act or attempts to obtain employment as a pilot of a vessel entering or within any pilotage district shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

"(2) Any master or owner of a ship entering or being within any pilotage district who knowingly employs as pilot any person who is not an

*[1977] 1 MLJ 133

authority pilot shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars."

The Selangor Pilot Association stopped business. They sold their launches and other equipment to the Port Klang Authority. All but two or three pilots who had worked in the Association's business accepted offers of employment as pilots by the Authority. If the Act of 1972 was valid, the Association had been deprived of their business. There is no restriction in the constitution of Malaysia on depriving a person of a business, except that deprivation of property must be in accordance with law. If the Act did not deprive the Association of property, it could not be impugned. If the Act did deprive the Association of property it could not be impugned if it was a law. The only pertinent ground on which it could be argued that the Act was not a law was infringement of article 13(2) of the constitution:

"No law shall provide for the compulsory acquisition or use of property without adequate compensation."

The value of a business as a going concern comprises many elements: premises (rented, in the case of the Association), plant, cash, debts, expectation of future profits and sometimes other things, depending on the character of the business. It appears that the Association was a well run and thriving business earning a reasonable profit and providing efficient and adequate pilotage services to all vessels using Port Klang. Accordingly, the business must have been worth more than the proceeds of sale of its physical assets, its cash in hand and book debts.

The Association brought an action against the Government of Malaysia and the Port Klang authority claiming: (a) compensation for the loss of goodwill of their business and for loss of future profits; and (b) a declaration that section 35A of the Act of 1963 was unconstitutional, and damages. There could be no doubt that the effect of the declaration of the pilotage area and the operation of section 35A was to deprive the Association of their business or that they had not been compensated by being paid the full value of the business. Whether the inadequacy of the compensation is best described by referring to the omission to compensate for goodwill or loss of future profits (which seem to be the same thing in this case) is open to question. It seems more apt to say that the value of the business was $X, that the Association received from the Authority only the proceeds of sale of their equipment, which were less than $X, and that therefore the Association had not received adequate compensation. The precise formulation of the claim, however, is immaterial, for the substance of the complaint was clearly before the court.

Granted that the Association had been deprived of their business, and granted that they had not received adequate compensation, the litigation raised the following issues:

(1) Was what the Association had been deprived of property?

(2) If so, did the Act provide for its compulsory acquisition or use?
(3) If so, had the Association a money claim and, if so, against whom?

A BUSINESS AS PROPERTY

In the end, the Act was held valid and the plaintiffs failed. Nine judges participated in the case, and five of them (of whom four constituted the majority in the Privy Council) were for the defendants.

At first instance ([1974] 2 M.L.J. 123), Abdul Hamid J. declined to decide whether "property" in article 13 includes goodwill because of his opinion that, in any event, the Act did not provide for the compulsory acquisition or use of it. He drew a distinction between a mere prohibition of the enjoyment of property and an actual taking of it "for government or semi-government purposes" and pointed out that the Act prohibited the Association only from carrying on their business in Port Klang, leaving them free to engage in the provision of pilotage services anywhere else. The learned judge said: "... I am of the opinion that the law in imposing a prohibition against any person engaging in a pilotage act not being an authority pilot within certain area in the port and the approaches to the port would at most interfere with the plaintiffs' enjoyment of certain property, e.g. goodwill, if there is any, but cannot in any way be said to constitute any actual taking-away of such property."

The words *if there is any* cast an unnecessary doubt. A monopoly can have goodwill. The Port Klang Authority may have none because their expectation of future custom for their pilotage services is based on the statutory prohibition of using anyone else's, and because, on account of their statutory constitution, the Authority cannot sell their business. The Association's monopoly was not based on regulation of competition by law. The fact that no one competed with them was due to their commercial success, and their expectation that all pilotage work in Port Klang would come their way was the most valuable goodwill a pilotage business in Port Klang could have. But for the Act, the Association could have exploited it by providing pilots and making profits or by selling it and acquiring its capital value in money or money's worth.

In article 13 of the constitution of Malaysia the words "property" is not used in a special sense. It means what people can own, buy and sell, give as security for debts, use, wear out, improve, give away, destroy, settle on trust, leave by will or succeed to on intestacy. Property includes a business as a going concern, whose value includes the expectation of future custom, whether described as goodwill, future profits or in any other way. A going concern is a different type of property from a business in liquidation. There is no basis for any doubt that if the owner of a going concern is prohibited by law from engaging any further in his business, he has been deprived of property and the value of the property is what he could have sold the business for immediately before there was wind of an

impending statutory prohibition.

When considering deprivation of property, the distinction between prohibiting use and taking away can be illuminating, but it can also be misleading if mistaken for a determining criterion. It is true that prohibiting someone from using property does not necessarily involve taking it away from him. It is equally true that prohibition of use may amount to deprivation. That is a question of degree; it is a question of the circumstances. The interpretation of constitutions is not a precise science. Nor is depriving people of property. The following examples all involve prohibitions, but some involve depriving people of property and some do not.

1. A, B and C own pilotage businesses, all operating only in ports X and Y. They operate a service available at all times. An Act of Parliament is passed prohibiting ships entering or leaving port X on Sundays.
2. A, B and C own pilotage businesses as in example 1. An Act of Parliament is passed prohibiting the continuation in port Y of any pilotage business in which non-union labour has been employed in the previous year. A has employed non-union labour during that period but B and C have not.
3. A, B and C own pilotage businesses as in example 1. An Act of Parliament is passed prohibiting anyone but D from operating a pilotage business in port Z.
4. A, B and C own pilotage businesses as in example 1. An Act of Parliament is passed prohibiting anyone but D from operating a pilotage business in ports X and Y.

Assuming that the Act of Parliament in each example actually comes into operation, there is clearly no deprivation of property of A, B or C in example 3; and there clearly is such a deprivation of the property of all of them in example 4. There is probably no deprivation of the property of any of them in example 1, especially if they have as much business in six days as they used to have in seven; but A has been deprived of property in example 2. In each case the property is a business, including goodwill or, in other words, the expectation of profits from future custom. There is no distinction between depriving someone of goodwill and rendering it useless in the hands of the owner. If it is useless, it stops bringing in custom, so there is no expectation of income, so there is no goodwill. Other types of property can be in a different case. Prohibiting pilots from using their pilot launches to take the public on pleasure cruises is not depriving them of their launches or of the goodwill of their pilotage business (though it may be deprivation of other property, if they have goodwill as operators of pleasure cruises). In the case of the Selangor Pilot Association, the fact that the Act of 1972 left them free to operate pilotage services anywhere except in Port Klang does not in the least detract from the deprivation of property. The Association's business was in Port Klang, and the business was destroyed.

The majority of the Privy Council agreed "that a person may be deprived of his property by a mere negative or restrictive provision. . ." They seem to have thought, nevertheless, though it was not necessary for their decision, that the Selangor Pilot Association had not been deprived of property. Lord Dilhorne, delivering the majority judgment, said: "The first question for consideration is whether this restriction on the exercise of a pilot's rights given by the grant of a licence amounted to a deprivation of property. An ordinary driving licence in the United Kingdom entitles its holder to drive many classes of vehicles, including heavy locomotives. If Parliament in its wisdom thought it advisable that in future drivers of heavy locomotives should have a special test and that unless the holders of driving licences had passed that test, they should not drive heavy locomotives, could it be said that all holders of driving licences were in consequence deprived of property? Does disqualification from holding a driving licence involve deprivation of property? In the opinion of their lordships, the answer to these questions is in the negative. In their view the restriction placed on the activities of individual licensed pilots did not deprive them of property and if this be the case, it is hard to see that it can be said to have deprived the licensed pilots who were partners in the Association of property. All they lost was the right to act as pilots unless employed by the Authority and the right to employ others on pilotage, neither right being property."

In that part of their judgement, the majority were asking themselves the wrong questions. A question they might profitably have asked themselves is: "What does one learn about pilotage in Port Klang from hypothetical special tests for drivers of heavy locomotives in the United Kingdom or disqualification from driving (presumably for failing the test) there?" The answer is: nothing. But if an analogy is sought, a relevant one can be invented. Assuming that there is some analogy between a licence to practise a vocation (e.g. a pilot's licence) and a licence which is a practical necessity to practise a vocation (e.g. a driving licence for a commercial traveller), the consideration should be of special employers, not special tests. Suppose an Act of the United Kingdom Parliament prohibiting holders of driving licences from driving heavy locomotives unless employed by the British Heavy Locomotives Authority. Have drivers employed by or in partnership as private operators of heavy locomotives been deprived of their licences? Of course not. Have the employers been deprived of property? Of course they have. Change the example and have the Act of Parliament instead provide that all persons except those employed by the British Heavy Locomotives Authority are disqualified from driving. Have private operators of heavy locomotives been deprived of property? Of course they have. The question is not whether the licences have gone, or whether they are property, but whas has happened to the business. Lord Salmon said in his dissenting judgment in the Privy Council:

> "I entirely agree with my noble and learned friends that a pilot had no right of property in his licence and that the respondents' right to employ pilots was not a right of property. To deprive a pilot of his right to a licence or anyone of his right to employ a pilot does not, looked at in isolation, amount to depriving either of them of property; still less does it amount to an acquisition of property by the Authority. In my view, however, this, for reasons which I shall explain, is entirely irrelevant to the question raised by this appeal."

The majority recognised that guardedly. Lord Dilhorne said: "It may be that the Association by its enjoyment over a considerable period of time of a monopoly in the provision of pilotage services had acquired a goodwill, the value of which would be reflected on a sale by it of its business and of which it was deprived by the amending Act. But if that were so, it does not follow that the goodwill was acquired by the Port Authority from the Association and in the opinion of the majority of their Lordships it was not."

That is the central question in the case: if the plaintiffs were deprived of property, were they so deprived by provision for the compulsory acquisition or use of it? A deprivation of property is unconstitutional only if not in accordance with law. The Act of 1972 was a law unless it provided for the compulsory acquisition or use of the property without adequate compensation.

COMPULSORY ACQUISITION OR USE OF PROPERTY

The Federal Court decided the case unanimously in favour of the plaintiffs ([1975] 2 M.L.J. 66). Suffian L.P. said, after examining the precedents from India and Northern Ireland: "With respect to the judges in those countries, I would agree that on the construction of our article 13, in Malaysia too a person may be deprived of his property or his property may be acquired by or on behalf of the state by a mere negative or restrictive provision interfering with his enjoyment of the property, even if there has been no transfer of the ownership or right to possession of that property to the state or to a corporation owned or controlled by the state."

Different meanings must perhaps be attached to "deprived" of property and "compulsory acquisition or use" of property because the words appear in adjacent clauses of one article of the constitution, so that it is not possible to assume that whenever a person has been deprived of property there has been a compulsory acquisition or use of it. But the constitution of Malaysia is not an Act of Parliament and it also cannot be assumed that the interpretation of the constitution is to be conducted in the same way as the interpretation of an Act of Parliament. It is possible to regard "compulsory acquisition" as applying only to the vesting of the former owner's title in a new owner. It can be said that the Selangor Pilot Association owned the goodwill of their business (because they owned the

business) and that the Act of 1972, because it did not vest the goodwill in the Port Klang Authority, did not provide for the compulsory acquisition of it. The Association expected future profits because they had goodwill, while the Authority now expect it because it is a criminal offence for anyone else to provide the service. Equally, it is possible to regard article 13 as being in the constitution of Malaysia for the purpose of preventing Parliament despoiling private property. It can be said that the Selangor Pilot Association had a business before the Act of 1972 becalmed them, and that after that the Port Klang Authority had an identical business. Therefore the Act provided for the compulsory acquisition by the Authority of the property of the Association. The learned Lord President held that opinion, saying: "The plaintiffs have been legislated out of business; while it is true that they were not deprived of the physical assets of their business, nevertheless they have suffered an abridgement of the incidents of its ownership, they have been deprived of the business of supplying pilotage service in Port Swettenham though only by a negative or restrictive provision interfering with the enjoyment of their property. As the impugned section 35A omits to provide for adequate compensation, it contravenes article 13 of our constitution. . ." Lee Hun Hoe C.J. (Borneo) agreed with the Lord President in a separate judgement, and Ali Hasan J. agreed with both his brethren.

Lord Salmon, dissenting in the Privy Council, took the same view as the Federal Court on this matter. He narrated exactly how he thought the Association's property was compulsorily acquired by the Authority: "Apparently 30th April 1972 was the last day upon which the respondents carried on their business. Their customers whose vessels entered the port on that day would have seen the respondents' business being carried on as usual. On the following day nothing would have appeared to have changed The same launches with the same pilots would have been carrying out the same services for the respondents' erstwhile customers as they had always done. It would in my view be wholly unrealistic to say that the Authority had not acquired the respondents' business; and acquired it as a result of the amending Act of 1972. If a customer had asked the respondents whether they had any news they could no doubt have truly replied: 'Yes, bad news. The Authority has today taken over our whole business. They are employing our pilots and using our launches. It is true that they are graciously going to pay us for the launches but they refuse to pay us any compensation for the loss of our goodwill and our prospect of making future profits which they have now acquired.' If they were then asked how did this acquisition come about, the respondents could reply, in my view, truly: 'Solely as the inevitable result of the recent legislation passed by the Government.' " The majority, on the other hand, held the opinion that, even if the Association were deprived of property in the form of the goodwill of their business, their property was not acquired by the

Authority. Lord Dilhorne's judgment does not expressly say why they arrived at the conclusion, but their comments on *Ulster Transport Authority* v. *James Brown & Sons Ltd.* [1953] N.I. 79 suggest that the interpretation of article 13(2) of the constitution of Malaysia that they were laying down is: (1) compulsory acquisition of property means statutory provision for the transfer of title from one owner to another; (2) statutory prohibition of an activity is not compulsory acquisition of property, even if the result is to deprive someone of property and to create rights or wealth in another person, provided; (a) there is no such transfer as is mentioned in (1); and (b) the negative legislation is not merely a colourable device to carry out the substance of a transfer of title without making one in form. They said: "In this case it was suggested in the lower courts that section 35A was a colourable device for acquiring the Association's property but no such suggestion was advanced on the hearing of this appeal."

Use of the expression "colourable device" suggests that something like fraud by Parliament is under consideration. Parliament knows that it has no power to achieve object A by method X, but it has power to achieve object B by method Y. It uses method Y which, in the particular instance, achieves object A as effectively as if method X had been employed, hoping no one will notice that it is not object B, or not only object B, which is the motive for the legislation. For example, Parliament has no power to vest other people's property in the Federation, without the other people being paid the value of the property taken from them, by a law providing for compulsory acquisition of property without adequate compensation. On the other hand, Parliament has power to diminish or prevent the incidence of anti-social acts by a law providing for the creation of a new criminal offence. If Parliament desires to assist the Government to build up a stock of dynamite the better to operate nationalised quarries, an Act vesting privately owned dynamite in the Federation must provide for adequate compensation in order to be constitutional, for it is a law providing for the compulsory acquisition of property. If, on the other hand, Parliament desires to combat the use of explosives in safe-cracking, an Act making it a criminal offence to be found in possession of dynamite without lawful excuse would be valid, without provision for compensation, even if it were to provide for the forfeiture of the dynamite on conviction. An Act of Parliament reciting that it was desired to combat the use of dynamite in safe-cracking and enacting that all privately owned dynamite was to vest in the Federation and be delivered to the Department of Quarries would be susceptible, if it did not provide for adequate compensation, to the charge that a colourable device had been employed to acquire property compulsorily. Lord Salmon said:

> "In my view, Parliament's motives for making such a law [i.e., a law enabling property to be taken without compensation] are irrelevant.

> If the effect of a law is to enable property to be acquired without compensation, whatever may be the court's view of Parliament's behaviour in passing it, it would be invalid . . . in Malaysia under article 13(2) of the constitution."

That does not mean that property cannot be regulated, for regulation does not necessarily amount to acquisition. Nor does it mean that every incidental expropriation without compensation is unconstitutional – for example that statute cannot provide for increased fines or taxes. It is, in the end, a question of the pith and substance of the statute – whether it is, for example, an Act for the acquisition of property or an Act for the suppression of crime. It may be that that is usually a question of the effect of the Act, or its main effect, but it may also be that Lord Salmon went too far in regarding the motive of Parliament as irrelevant. The motive for legislation can generally be assumed the furthering of the national well-being, and it can also generally be assumed that those who participate in its enactment intend to act constitutionally. There can, however, be specific motives, based on a particular conception of where the national well-being lies, coupled with attention to the letter of the constitution rather than its spirit. Just over a quarter of a century ago, the Parliament of South Africa tried to alter the suffrage of Cape coloured voters in the guise of altering the constitution of the Senate, and succeeded in doing so by the device of increasing the number of judges. It is not necessary, though, to envisage such extremes. Politicians are naturally enthusiastic about their policies, often impatient with what they regard as formal impediments to their getting on with the job, and sometimes conscious of how short a time may be available for them to influence the national destiny. If it seems that the direct route to a destination is barred by constitutional obstacles, there can be a tempatation to take another route that appears to be open but which, in the true spirit of the constitution, is a route to a different destination.

All five judges in the Privy Council thought that a person could be deprived of property within the meaning of article 13(1) without having his property compulsorily acquired or used within the meaning of article 13(2). They all preferred, in interpreting the constitution of Malaysia, the reasoning of Das J. in *State of West Bengal* v. *Bose*, 1954 S.C.R. 587, to that of the majority in that case, although the view of the majority in the *Bose* case became the settled view of the Supreme Court as to the correct interpretation of the constitution of India (*Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd.*, 1954 S.C.R. 674; *Saghir Ahmad* v. *State of U.P.*, 1955 S.C.R. 707). None of the judges in the Privy Council gave examples of deprivation of property which, in their view, would be constitutionally valid without compensation. For the majority, there was no deprivation in the *Selangor Pilot* case itself, though they did say that if the Association had been deprived of goodwill, it had not been acquired

by the Authority. That may serve as an example for them, but it will not serve for Lord Salmon, who held that the property of the Association (their business) had been acquired by the Authority. If all Lord Salmon had in mind was that there could be statutory regulation of property not amounting to its compulsory acquisition or use, it would generally be said that such regulation does not amount to deprivation. Deprivation under revenue laws or criminal law is obviously not a matter for compensation: to subject the taxing power or the power to legislate on criminal law to article 13(2) would be to use one part of the constitution to deny any effect to other parts.

The view of the majority of the Privy Council seems to have been affected by a confusion between a business and its constituent parts. A business is property, and in asking whether A's business has been acquired by B it does not help to ask whether each separate component of A's business has been transferred to B. The substance of the matter may be divorced from the form. Suppose A owns premises in the middle of Kuala Lumpur on which she runs a highly esteemed boutique for ladies with ample money to spend on clothes. (1) A enters into an agreement for B to take it over. The agreement is for the entire business of A (including name, goodwill and all other assets of the business) to be transferred to B. Has B acquired A's business? Would it be a fair bargain for B to pay A the full market value of A's business as a going concern? (2) A enters into an agreement with B to assign to B the premises of the business and its name, but not its stock or book debts. Nothing is said about goodwill, but A covenants not to conduct a retail business dealing in women's clothes in Kuala Lumpur, Selangor or Perak for five years. Has B acquired A's business? Would it be a fair bargain for B to pay A the full market value of A's business as a going concern? The answer in each case is that B has acquired A's business but has not acquired its full value as a going concern. In example (1), *all* the assets of A's business are assigned to B, but A may set up a rival business next door the next day and draw off much of B's custom. In example (2), B is secure from A's competition because of A's covenant,and therefore acquires a business probably of greater value than in example (1), although *fewer* assets are transferred by A to B than in example (1). If, instead of an agreement, there had been (1) a statute providing that A's entire business was to vest in B or (2) a statute vesting the premises and name in B and prohibiting A from setting up a rival business in Kuala Lumpur, Selangor or Perak for five years, it seems that the majority of the Privy Council would hold that the entire business had been compulsorily acquired in example (1) but that only the premises and name had been compulsorily acquired in example (2). That is, unless example (2) could be stigmatised as a "colourable device." It seems likely that the result of the *Selangor Pilot* case will be that article 13(2) will only be made to work on matters of substance by litigation based on allegations of "colourable device."

There are only two possible ways in which a person may be deprived of his property without it being acquired by anyone else. One is by its destruction; the other is by subjecting it to such a degree of regulation that it becomes useless. In the case of goodwill, those are the same thing, for useless goodwill does not exist, but with a physical asset the distinction has meaning. If the Privy Council have decided that there is only a compulsory acquisition when there is a transfer of title, or a colourable device to achieve the same object but not in so many words, it is difficult to forecast how article 13(2) will be considered to apply to the following cases.

(1) It is desired to build a new road along a route that will pass through what is now a privately owned hotel.

(a) Parliament passes an Act vesting the premises in the Federation.

Or,

(b) Parliament passes an Act enacting that the business of hotel-keeping shall henceforth not be conducted on any premises designated by the Minister as required in the future for road works; and later passes another Act vesting in the Federation all premises through which the new road will pass.

It looks as though only the second Act provides for compulsory acquisition in (1) (b). There is certainly no colourable device for acquiring hotels (though acquisition of hotels appears to be what the Act in (1)(a) provides for); there may be a colourable device to pay compensation at a lower level.

(2) Pawnbrokers may carry on business provided they hold an annually renewable licence issued by the Government. It is desired to provide poor people with easier finance than that provided by private pawnbrokers.

(a) Parliament passes an Act establishing the National Consumer Credit Bank and vesting all pawnbrokers' businesses in the Bank. Or,

(b) Parliament passes an Act establishing the National Consumer Credit Bank, vesting all pawnbroking premises in the Bank and prohibiting any person but the Bank from conducting the business of Pawnbroker. Or,

(c) Parliament passes an Act establishing the National Consumer Credit Bank and revoking all pawnbrokers' licences.

It looks as though only premises have been compulsorily acquired in (2)(b) and nothing in (2)(c), although in 2(b) and 2(c) the loss to pawnbrokers and the gain to the Bank are identical to those in (2)(a) (which tells of an act for the compulsory acquisition of pawnbrokers' businesses). Are (b) and (c) colourable devices?

(3) Anybody may carry on a road haulage business and anyone who

holds an ordinary driving licence may drive a road haulage vehicle. It is desired to improve the standard of lorry driving.

(a) Parliament passes an Act providing that no one may drive a lorry unless his driving licence is endorsed to the effect that he has passed a special government test for lorry drivers introduced by the Act. Or,

(b) Parliament passes an Act establishing the National Road Haulage Corporation with power to operate a road haulage business and as the only body administering a special government test for lorry drivers introduced by the Act. The Act also provides that no one may drive a lorry unless his driving licence is endorsed to the effect that he has passed the special test and that the Minister may make such regulations relating to testing as he thinks fit. The Minister makes a regulation providing that only persons employed by the National Road Haulage Corporation may take the special test.

There is no acquisition of property in (3)(a). It looks as though there is none in (3)(b) either, although the result is to vest a monopoly of road haulage business in the Corporation. The Act and regulation in (b) are difficult to prove to be a colourable device, for the sole object stated in Parliament and by the Minister is to improve the standard of lorry driving. (In the *Selangor Pilot* case, the Authority need not have bought the Association's launches and equipment and, if they had not, the Association might not have been able to realise their value.)

(4) It is desired to use premises, on which privately owned residences now stand, for the purpose of building a new Federal Court House.

(a) Parliament passes an Act vesting the premises in the Federation. Or,

(b) Parliament passes an Act prohibiting the use of the premises for any other purpose than that of a Federal Court House. Or,

(c) Parliament passes an Act requiring the owners of the premises to pull down any structures on them. Or,

(d) Parliament passes an Act requiring the owners of the premises to put them in suitable condition for use as a Federal Court House.

It looks as though there is compulsory acquisition of property only in (4)(a), but people have been deprived of property in (c) and possibly in (b) and (d) as well.

Whether there should be a provision, such as article 13(2) of the constitution of Malaysia, restricting the competence of Parliament to legislate on matters affecting property, is an important question for framers of constitutions. In Northern Ireland, the general provision was repealed in 1962; in India it has been watered down by strings of

amendments. In Australia there has never been a restraint (except in the sense that, the Commonwealth Parliament being authorised only to take property on just terms, it is the preserve of state Parliaments to take it without just terms). There is no relevant provision in the case of Canada; while the United Kingdom and New Zealand have constitutions which do not exist apart from ordinary laws and conventions. So far as the United Kingdom is concerned, it is generally considered bad form for Parliament to legislate people's property away without compensation, but Acts are occasionally passed affecting property in a fashion that would be unconstitutional in the United States of America, where there has been no constitutional amendment increasing the powers of Congress or of state legislatures in this respect. What a constitution ought to provide, however, is not relevant to the question of how its actual provisions ought to be interpreted. Article 13(2) goes to substance, not to form. Enough examples have probably been given to show that there are many legislative forms for securing the same substance. From the point of view of assessing the adequacy of compensation, there ought to be no distinction between an Act which purports to vest A's business in B and an Act which purports to prohibit anyone but B from carrying on a business of a type previously carried on by A. It could be said that there has been a compulsory acquisition where, without provision for a transfer of title, there is such a statutory provision as results in the impoverishment of A and the creation in B of the same sort of rights, of the same order of value, as those whose loss has impoverished A. Or it could be said that destruction is an act of ownership, and so implies acquisition. In fact, the loss of the members of the Selangor Pilot Association may have been of small value, since they sold their physical assets and were all offered employment as pilots by the Port Klang Authority. It is difficult to credit that the possible smallness influenced the interpretation of the constitution; but it is also difficult to credit that it is good law that an Act of Parliament revoking all licences to mine tin in Malaysia without compensation would be held to accord with article 13(2), once the evidence showed that persons not needing licences acquired consequential business.

It could be maintained that, while deprivation and compulsory acquisition or use are not synonymous, it is deprivation which is the narrower term; i.e., all deprivation is compulsory acquisition or use but not all compulsory acquisition or use involves deprivation. For example, if an Act provides that cars belonging to the Federation shall have the like rights to passing over a private road on A's land as those granted by A to B as an easement, provided that the exercise of those rights does not interfere with the exercise by B of his rights, the provision is for compulsory use of A's land, and possibly of B's easement, but neither A nor B has been deprived of property. If, on the other hand, an Act makes provision for the slaughter and burning of the carcasses of all buffaloes in

the state of Kedah, there has been compulsory acquisition as well as deprivation because the Act has assumed to exercise one of the major rights of ownership (destruction), and there is a purely verbal distinction between such provision and one for the vesting of the buffaloes in the Federation for the purpose of destruction. None of that detracts from the view of Lord Salmon, which accords with constitutional interpretation in India and Northern Ireland, that the Port Klang Authority did actually acquire property from the Selangor Pilot Association.

Lord Dilhorne's majority judgment contains this sentence: "As a matter of drafting, it would be wrong to use the word 'deprived' in article 13(1) if it meant and only meant acquisition or use when those words are used in article 13(2)." That would be a more telling point if one knew what the effect of article 13(1) was; or whether there is anything that is not wrong with its drafting. "No person should be deprived of property save in accordance with law" would be equally a legal prohibition if it were not in the constitution; and it does not constitute a restraint on the legislative power of Parliament. If, however, it is desired to declare a property owner's legal right to quiet enjoyment to be a constitutional right, it is natural draftsmanship to express it from his point of view, namely freedom from deprivation; while if it is desired to fetter the legislative power of Parliament by reference to a requirement of adequate compensation, it is natural draftsmanship to state what is to be compensated for, namely compulsory acquisition or use of property (i.e., whether or not amounting to deprivation).

The Claim for Compensation or Damages

If an Act of Parliament purports to provide for the compulsory acquisition or use of property without providing for adequate compensation in the same or some other Act, the normal consequence will be that the Act is void in so far as it provides for that compulsory acquisition or use. A property owner who would be affected if the Act were valid can ignore it and plead its invalidity in any proceedings brought against him or seek a declaration of the invalidity. The Selangor Pilot Association also sought a declaration that they were entitled to compensation for loss of their goodwill and damages for loss of profits. Towards the end of the majority judgment in the Privy Council, Lord Dilhorne said: "Having reached the conclusion that there was no failure to comply with article 13, it is not necessary to consider whether, if there had been, it would have been right to grant the declaration [of entitlement to compensation]. It is certainly open to doubt whether the Association would have any right of action against the Government of Malaysia for failure by the legislature to observe the provisions of the constitution. If section 35A was ultra vires and of no effect, as the Association contended, there was nothing to stop it carrying on its pilotage activities." The claim for damages for loss of

profits seems to be the same money claim as that for compensation for deprivation of goodwill, expressed in different words. The Federal Court had given the Association their order for compensation or damages, leaving the amount to be assessed by the trial court. Lord Salmon said in his dissenting opinion in the Privy Council: "I hardly think that it can seriously be meant that if section 35A was ultra vires, 'there was nothing to stop [the Association] carrying on their pilotage activities' and that the respondents would still not be able to obtain any damages or compensation although the Authority de facto acquired their business four years ago. Indeed, I understood counsel for the appellants very fairly to concede on behalf of his clients that they did not wish the order of the Federal Court to be disturbed if this Board came to the conclusion that the appellants had by virtue of the amending Act of 1972 been in breach of article 13(2) of the constitution." Four judges, therefore, three in the Federal Court and one in the Privy Council, thought that an order for money to be paid to the Association could be made.

In fact, the first principle of applying a constitution which is in the form of a fundamental law is that the court should give all such remedies as are necessary to ensure that the constitution is maintained in operation as the fundamental law. They may have to improvise. An award of money may be the best or only way of giving effect to article 13(2) in a variety of circumstances.

If an Act of Parliament is passed providing for the vesting of certain houses in the Federation (the object being to demolish them to make way for a new road) without compensation, and (a) the owner of such a house refuses to move: he can resist ejection on the ground of the invalidity of the Act; or (b) the owner of such a house returns home from work one day to find it demolished behind his back: he can recover compensation in the form of damages in tort (there being a trespass because the alleged authorising Act is invalid). That is one basis for a money claim: damages in tort. It is probably the same if he is ordered out, leaves, and suffers demolition of his house, for succumbing to the suasion of an Act of Parliament, albeit invalid, would not found a plea of volenti non fit injuria.

The second basis is express or implied contract. Suppose the same Act as in the last paragraph. Public servants call at such a house and ask the owner to leave so that it can be demolished. He demurs, and a high official of apparent authority tells him he will be paid (or the servants of the Federation behave in any way that would cause a reasonable person to expect payment) and he goes in reliance on that. He can sue for damages for breach of contract if he is not paid. (Such an express or implied contract may probably also be derived from legislation, such as ministerial regulations made under the Act.)

Thirdly, a claim to adequate compensation may be based on the expropriating statute, even if it does not provide for it. Suppose, for

example, that the Act under discussion in the last two paragraphs had contained a section stipulating: "And on a house being designated under this Act for vesting in the Federation the title of the owner thereto shall be converted into a right to be paid a sum of money by way of compensation, such compensation to be assessed by the Minister." If a house owner leaves his premises to comply with the Act, and they are demolished, and later the Minister assesses compensation below the market value the house had, the former owner can claim that the right to compensation vested in him by the Act is, by virtue of the constitution, a right to adequate compensation.

None of those three bases was present in the *Selangor Pilot Association* case. There are, however, two other bases, either or both of which were present. First, the defendents and the plaintiffs agree that, if the Act is found unconsitutional by the court, an order for money and not a declaration of the invalidity of the Act should be made. There is no conceivable reason for not making an order effectuating such an agreement. Secondly, the deprivation was over four years old when the case reached the Privy Council, and it was impossible to restore the property to the plaintiffs. There was no tort, but the property was destroyed, so the only way to give the plaintiffs the protection the constitution meant them to have was to order compensation to be paid. On that last footing, it would seem, the payment ought to be made by the person who acquired or used the property, the Port Klang Authority; the majority in the Privy Council must surely be right to doubt whether the enactment by Parliament of an unconstitutional statute gives a person aggrieved a cause of action against the Government of Malaysia. (It may give a cause of action against the Federation.)

CONCLUSION

The Privy Council has often had difficulty with constitutions, most of the members (all in the *Selangor Pilot Association* case) not being used to handling one in their own country. The courts of the Federation of Malaya (as it was when the constitution started to operate on Merdeka Day twenty years ago) had difficulty at first too, also, no doubt, through lack of familiarity. There is a quite understandable problem in adapting from interpreting the legislation of a body not subject to judicial review to applying a fundamental law. For many years now, not only the Federal Court of Malaysia but also a number of High Court judges have been making distinguished contributions to the development of Malaysian constitutional jurisprudence. It is to be hoped that the reversal of the wisdom of Suffian L.P. and his brethren by the majority of the Privy Council will not prove a lasting obstacle to the development of constitutional law. It is surprising that Lord Salmon's reasoning did not carry conviction to the other members of the Privy Council, but the very

existence of a dissenting opinion provides some support for argument in a future case.

Lord Salmon said: "In my opinion this appeal raises constitutional issues of vital importance. I fear that it [i.e., presumably, the advice of the majority to the Yang diPertuan Agong] will encourage and facilitate nationalisation without compensation throughout the Commonwealth." The appeal did, indeed, raise very important constitutional issues. However, the fear of Lord Salmon may well prove unfounded. There are no Commonwealth countries with fundamental liberties so extensively entrenched in their constitutions as are those of Malaysia. In many Commonwealth countries, of course, such as the United Kingdom, liberties are better preserved by common consent than they are in other countries with purported constitutional guarantees. In Malaysia, there is no sign of a governmental desire to deprive people of property, whether by nationalisation or otherwise, without adequate compensation. The Port Klang case may even have been an oversight. The Malaysian Government may wish for "adequate" to be not too high compensation, but they have disclosed no policy of expropriation without it. If they wanted to get rid of article 13(2) they could, for they command the machinery of constitutional amendment. It is not likely that the Privy Counsil will turn out to have granted a thieves' charter. It is more probable that they have made a blot on Commonwealth constitutional law that will take a little while to erase and which, in the meantime, will provide a little further discouragement to those who had hoped for the development of an orderly jurisprudence through the retention of a Commonwealth court of appeal.

Professor L.A. Sheridan

*Dean, Faculty of Law,
University College, Cardiff

CUSTODY OF MUSLIM INFANTS

Section 27 of the Civil Law Act, 1956 provides that in all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of the Act, regard being had to the religions and customs of the parties concerned, unless other provision is or shall be made by any written law.

Other provision has been made by the Guardianship of Infants Act, 1961. Section 1 (2) of that Act provides that nothing in the Act shall apply in any State to persons professing the Muslim religion until the Act has been adopted by a law made by the legislature of that State and any such law may provide that –

(a) nothing in the Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of eighteen years who professes the Muslim religion and whose father professes or professed at the date of his death that religion or in the case of an illegitimate child whose mother so professes or professed that religion;

(b) in the case of any other person, the provisions of this Act so far as they are contrary to the Muslim religion, shall cease to apply to such person upon his professing the Muslim religion, if at the date of such professing he has completed his age of eighteen years or if not having completed such age he professes the Muslim religion with the consent of the person who under the Act is the guardian of the person of the infant."

It might be noted that the Act has been adopted with modifications in Selangor(Enactment No. 6 of 1961). The Act was considered by Abdul Hamid J. in the case of *Myriam v. Mohamed Ariff*[1]. He said (at p. 268) –

> "In general in applying the provisions of the Guardianship of Infants Act, 1961, regard must be had to the religion and custom of the parties concerned. This does not however mean that any decision must be made in accordance with the rules of the religion and custom of the parties concerned except of course, when it relates to or concerns any person under the age of 18 and professing the Muslim religion in which case any provision which conflicts or is contrary to the Muslim religion or custom of the Malays will not apply.

[1] [1971] 1 M.L.J. 265.