

RIGHTS TO PROPERTY UNDER SIEGE?

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CLIENT ALERT: RIGHTS TO PROPERTY UNDER SIEGE?



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1. Introduction

Rights to property is guaranteed under Article 13(1) of the Federal Constitution (“FC”). This includes (but is not limited to) the right to acquire, hold and enjoy property. However, this constitutional right is qualified, subject to the Executive’s right to acquire land for adequate compensation under Article 13(2).

Rights to property

- Article 13(1) FC – No person shall be deprived of property save in accordance with the law.
- Article 13 (2) FC – No law shall provide for the compulsory acquisition or use of property without adequate compensation.

2. Land Acquisition Act (“LAA”) 1960 Provisions

The Executive’s right to compulsory acquisition of private land are set out in the provisions of the LAA. in which the purpose of land acquisition must be within the categories laid down in Section 3(1) which states that:

The State Authority may acquire any land which is needed :-

- for any public purpose;
- which is beneficial to the economic development of Malaysia; or
- for purpose of mining, residential, agricultural, commercial, industrial or recreational purposes.

Brief procedures under the LAA 1960:

a) Administrative stage (Acquisition)

i. Preliminary notice

s.4 LAA 1960 provides that the State Authority shall notify the public of the land acquisition by publishing it in the Gazette.

ii. Entry and survey of the Subject Land

s.5 LAA 1960 provides that the State Director may authorize any person to enter upon any land specified in a notification published under s.4.

iii. Marking of the Subject Land and notation of the acquisition on the Land Register

s.9 LAA 1960 provides that the Land Administrator shall mark out the Subject Land and make a note of intended acquisition on the Land Register.



iv. An enquiry conducted by the Land Administrator
s. 12 LAA 1960 provides that the Land Administrator shall make full enquiry into the value of the land and assess the amount of compensation.

v. An award by the Land Administrator
s. 14 LAA 1960 provides that upon the conclusion of the enquiry under s.12, the Land Administrator shall prepare a written award.

b) Judicial Stage – Contesting an Award of Compensation (Post-Acquisition)

i. Application to Court by persons interested (defined in s.2 as every person claiming an interest in compensation to be made on account of the acquisition of land)

s.37(1) LAA 1960 – Any person interested who are unsatisfied with the award by the Land Administrator may make objection to the:

- (a) measurement of land;
- (b) amount of compensation;
- (c) persons to whom it is payable;
- (d) apportionment of the compensation.

ii. The reference proceeding is heard by one High court judge sitting with two assessors.

The First Schedule of the Land Acquisition Act 1960 lists the principles for determining the amount of compensation to be awarded:

- Market value of the land
- Betterment
- Severance
- Injurious Affection
- Incidental expenses incurred as a result of change of residence or place of business
- Accommodation Works

3. Emergency (Essential Powers) Ordinance (“EO”) 2021

The Emergency (Essential Powers) Ordinance (“EO”) 2021 has come into effect on 11 January 2021 which supersedes any conflict or inconsistency between the EO 2021 and any other written law.

- s. 3 of the EO 2021 allows the Executive to take temporary possession of land, building and movable property.
- s. 4 of the EO 2021 provides that any resources may utilised for any purpose the Executive deems necessary.
- s. 5(1) of the EO 2021 provides that compensation in respect of the possession or utilisation under s. 3 and s. 4, respectively shall be assessed by a person authorised by the Executive.
- s. 5(2) of the EO 2021 provides that the assessment of compensation under subsection (1) shall be final and conclusive and shall not be challenged in any court on any ground.





RIGHTS TO PROPERTY UNDER SIEGE?

At face value, implementation under these three sections of the EO 2021 will effectively negate the protection afforded under Article 13 of the Federal Constitution which safeguards the land owner's rights to property and his right to receive adequate compensation as a result of the land being acquired. All provisions under the LAA 1960 will not be in play, which includes the due procedures and requirements under the administrative and judicial stages as discussed above.

The Executive has the power to take temporary possession of land, building or movable property without the need to give preliminary notice before entry. Theoretically, this may be an exercise accompanied by the sound of trumpets or a silent stealing away after the folding of tents. Although the imagery of armed forces and police officers raiding "kampung" on horseback and seizing land by force might seem daunting, the prospect is rather far-fetched and not the actuality in practice.

The EO 2021 must not be read in isolation but in accordance to the purpose it seeks to achieve. The EO 2021 was introduced by reason of a grave emergency threatening the security, economic life and public order in the country from the Covid-19 pandemic in which an immediate action was required to resolve this. Sections 3 - 5 of the EO must only be invoked where immediate action is required to safeguard public livelihood. Therefore, powers under EO 2021 are not to be used arbitrarily.

EO 2021 equips the Executive with various apparatus to manoeuvre through tight spots when deemed necessary. S. 3 of the Act provides them with an expeditious avenue to take temporary possession of land, building or movable property. For instance, if a piece of land or building has been earmarked as a makeshift quarantine centre for a nearby Covid-19 cluster, it would not be practical for the Executive to go through lengthy procedures under the LAA 1960 before being able to take possession for quarantine purposes since the gravity of the situation necessitates immediate action. It should also be noted that unlike compulsory acquisition under the LAA 1960, possession is only temporary under the EO 2021, where landowner will reclaim possession on top of being compensated.

IS THE EO 2021 NECESSARY?

In the current climate where public healthcare facilities are being stretched due to the growing intake of Covid-19 positive patients, senior members of the Executive alluded to the possibility of directing private hospitals to take in Covid-19 patients and their labs be used for testing under s. 3 and s. 4 of the EO 2021. Failure to comply would result in a fine not exceeding RM 5 million or imprisonment not exceeding 10 years or both as set out in s. 9 of the EO 2021.



This was evident in the recent Perlindungan Ekonomi & Rakyat Malaysia (“**PERMAI**”) assistance package that was announced on 18 January 2021 where an allocation of RM 100 million was set aside to initiate a collaboration between the public and private healthcare systems. Private hospitals have indicated their willingness to go “all in” on this hybrid arrangement where the number of healthcare facilities will be increased with the sharing of resources.

Prior to the implementation of EO 2021, the Executive managed to procure the engagement of privately owned hotels to be converted into quarantine stations for travellers to undergo their mandatory quarantine upon arrival in the country.

This was done by virtue of the Minister declaring the list of quarantine stations in the Gazette with the power conferred to him in s. 2 of the Prevention and Control of Infectious Diseases Act (“**PCIDA**”) 1988.

Now, this begs the question of whether the Executive can achieve the very same purpose that the EO 2021 was implemented for without relying on its provisions. Would the Executive be able to declare private hospitals as quarantine stations in the Gazette under s. 2 of the PCIDA instead?

FORM OF REDRESS

S. 5(2) of the EO states that all assessment of compensation under S. 5(1) is conclusive and shall not be challenged in any court on any ground. This goes against the landmark Federal Court decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat [2017] 3 MLJ 561* where it was held that the judicial scrutiny is of paramount importance to assess the amount of adequate compensation to be awarded on the premise of principle of equivalence. However, aggrieved parties may still seek judicial redress from courts that retain powers to hear matters. It will be interesting to see how the Judiciary addresses the constitutionality issue of provisions in the EO 2021 with a barrage of actions lining up at their door.

4. Conclusion

It can be concluded that the Executive stayed very much within the boundaries of proportionality, favouring discourse over force from the early inception of the EO 2021 by resorting to keep their “ace”, being the provisions under the EO 2021 and potentially only bringing it into play as a contingency.

Rights to property have remained unscathed for the most part. Land owners and interest holders alike need not fear the sword of Damocles hanging precariously over their heads, for now as the implications of the EO 2021 affecting the rights to property are to be fully weighed in due time.



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