THE RIGHTS OF MANUFACTURERS IN MALAYSIA UNDER THE INDUSTRIAL CO-ORDINATION ACT 1975

PART I

INTRODUCTION

The passing of the Industrial Co-Ordination Act 1975 [1] as amended by the Industrial Co-Ordination (Amendment) Act 1977 [2] hails a new era in the control of industrial development in Malaysia. This legislation for the first time seeks to cover all manufacturing activities in the country. Up to this point administrative devices, investment incentives and the enforcement of a variety of statutes, *e.g.* the Exchange Control Act, the Central Bank Act, the Banking Act, the Borrowing Companies Act, the Immigration Act, and the Investment Incentives Act were relied upon in policing manufacturing enterprises and ensuring that they complied with national policy. In spite of this array of devices, it was still possible for a manufacturing venture to be set up or be carried on without being subjected to governmental control. In reality, this could only be done when the enterprise in question was small, its raw materials and markets local, its sources of finance private and its know-how locally available. Although the ICA purports to apply to all manufacturing activities, nevertheless the exemptions ordered by the Minister under the ICA[3] leaves the sort of venture described above unscathed.

The business community in Malaysia has strenuously objected to the ICA and there is little doubt that the legislation has adversely affected the investment climate of the country. An investor, be he local or foreign, will need to be assured of the security of his investment in a manufacturing enterprise on at least two levels: (1) If he decides to make the investment in the first place, what legal safeguards are provided to ensure that it will not be expropriated in the future. (ii) Having made the investment, whether he can run it as he pleases within the limitations imposed at the time the project was established. This would include future expansion plans, diversification of products, and, if it is a foreign investor, the continuing ability to remit profits abroad.

The ICA is viewed as being an encroachment into both these areas. It is possible for the provisions of the ICA to be enforced

1 Act 156. Henceforth referred to as the ICA.

2 Act A401. Unless otherwise stated all references to the ICA shall be to the ICA as amended.

3 S. 11. Two exemptions have been made: (i) manufacturing concerns with less than $250,000, shareholders' funds or employing less than 25 workers; (ii) the second exemption is for milling oil palm or processing fresh palm fruit into crude oil and producing and processing raw natural rubber, *e.g.*, latex sheets. See PUA 136 of 1976.

in such a way as to render worthless the investment made or it could be used to frustrate future plans. It is in the light of these considerations that the provisions of the ICA are examined. This article will first discuss the scope and meaning of the various sections of the ICA and then go on to consider limitations that could arise when action is taken under the statute. These limitations arise under the Federal Constitution and under principles of administrative law. Finally, this article considers whether there is any real need for the ICA.

THE STATUTE

Justification for the Statute

There have been numerous pronouncements by Government Ministers and officials explaining the need for the legislation and seeking to reassure and placate manufacturers. The Government view of the legislation may be summarised as follows:

(1) The legislation seeks to formalize a pre-existing policy that was already being implemented. Since 1969 companies seeking to establish new projects or expand existing ones have been required to apply to the Ministry of Trade and Industry for approval. Projects with a capital investment of less than M$500,000 have been exempted from the Government's policy on *Bumiputra* participation under the ICA.

(2) The Government should be aware of any new industrial projects as unco-ordinated development can work to the detriment of existing industries and the country. There is a need at this stage of development to maximise the utilisation of investment capital, land and trained labour.

(3) Excessive and unhealthy competition within established industries must be avoided. A new entrant to a given industry may not be aware that several other projects in that field have already been approved. The new entrant may cause one or more of the other manufacturers to collapse or himself fail.

(4) Manufacturers, especially those manufacturing for the domestic market, will be assured that no new projects for similar products will be established without Government approval. In evaluating an application the Government will have regard to the domestic market.

(5) The Act will enable Government to facilitate the collection of comprehensive data and information to enable it to plan industrial development and formulate policies in order to provide investors with maximum assistance.[4]

The justification advanced by Government for the ICA is persuasive. In a developing country with limited skilled manpower and capital and where one of the principal attractions which the country has to offer is a high minimum rate of return on capital there must

[4] These points emerge from the Chairman's Column, *Malaysian Industrial Digest,* Vol. 8, No. 2, FIDA 1975.

be sophisticated machinery for industrial planning. Such industrial planning requires the co-ordination of various Government departments and agencies. The concentration of information in one body which can freely disseminate it is most valuable. The business community does not object to the intent and spirit of the legislation. But what it does object to is "the lack of proper and institutionalised channels in the legislation for consultation and redress."[5] Implicit in the discomfort felt by the business community is the fear of expropriation of the investment through indirect means.

Coverage

Section 3(1) of the ICA provides:

> No person shall engage in any manufacturing activity unless he is issued a licence in respect of such manufacturing activity.

It is quite clear that the provision is all embracing. The use of the word "person" indicates that it applies to individuals, incorporated and unincorporated bodies of persons, and natural and artificial legal entities. In the light of the wide definition of "manufacturing activity" in section 2[6] the ICA will cover diverse activities including those which do not bring into existence an article which is distinct from the parts that go to make it. Merely the rendering of a service which adds to the value or appeal or completeness of the article will constitute the service of a manufacturing activity. For example, a person restoring antique furniture, or re-upholstering furniture, or polishing brass will be regarded as carrying on a "manufacturing activity".

Section 3(1) requires a licence to be issued in respect of "such" manufacturing activity. This implies that a separate licence must be obtained for each type of manufacturing activity carried on by one manufacturer. In line with the definition of "manufacturing activity" the producing of a completed article may result in one manufacturer carrying on several different types of manufacturing activities. Such an interpretation would create an administrative nightmare. Therefore the logical approach would be to regard a manufacturer as carrying on only one activity where various processes are carried out in producing a given completed article. This would require the one manufacturer to carry out all the necessary processes in completing the article from start to finish. Thus if a furniture-maker sends metal parts for chroming to an outsider that outsider will be regarded as carrying on a separate manufacturing activity.

[5] P.Y. Chin, *Take-Off Via Industrialization,* Malaysian Business, June 1977, p. 7.

[6] S. 2 "manufacturing activity" with its grammatical variations and cognate expressions means the making, altering, blending, ornamenting, finishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal and includes the assembly of parts and ship repairing but shall not include any activity normally associated with retail or wholesale trade." This definition of "manufacturing activity" is much wider than the common usage connotation of the word "manufacture". One of the principal elements of manufacture in its everyday sense is the intention to produce something commercially distinct from its constituent parts. (See *F.C.T.* v. *Rochester* (1934) 50 C.L.R. 225.) "The essence of making or of manufacturing is that what is made shall be a different thing from out of which it is made." *Per* Darling J. in *McNicol* v. *Pinch* [1906] K.B. 352 at p. 361.

It would seem that the crux of the matter is not so much the diversity of manufacturing activities that one manufacturer may embark upon in producing one or more products but the place where the activity is carried on. Section 4(2) provides that whereas only one application need be made for one or more products[7] manufactured in one or more places of manufacturing activity, a separate licence shall be issued for each place of manufacturing activity. The effect of section 4(2) is that full information is obtained about the range of products manufactured by one manufacturer and the different places where he carries on his activities. At the same time it streamlines the administrative burden in requiring one licence to be issued for each place of manufacture. Different conditions may prevail in different places and accordingly it may be appropriate to issue licences on different terms for different locations. The conditions imposed in the licence could also be used to obtain a more desirable dispersal of industry in the country as a whole.

The final matter to be noted in section 3(1) is that no person may engage in manufacturing activity without a licence. No distinction is made between manufacturers existing at the time of the commencement of the statute and new manufacturers. The retrospective nature of the legislation is supported by section 5 of the ICA. Section 5 requires every person already engaged in a manufacturing activity at the date of commencement of the statute to apply for a licence in the prescribed form within a year from the date of commencement of the Act.

This retroactive nature of the legislation has drawn considerable adverse comment. It imposes a considerable administrative burden on the licensing authority although this problem has been overcome to some degree through the general exemptions ordered by the Minister.[8] However the more substantive objections still remain. An existing manufacturer must apply for a licence within one year of the commencement of the ICA and no provision is made for the extension of this period. If a person continues manufacturing operations beyond the permitted period without a licence he becomes guilty of an offence under section 3(2). The commission of the offence under section 3(2) could result in the manufacturer's plant, machinery, manufactured goods and raw materials being seized.[9]

The retroactive nature of the legislation creates uncertainty. The licensing authority is empowered to impose conditions when granting a licence.[10] The manufacturer may not be prepared for such conditions and compliance with these conditions may adversely affect his rate of return on the investment. There are also provisions for varying conditions already imposed.[11] This would make definite plan-

7 "Product" is defined in s. 2 as meaning "any article, thing, substance or service produced as a result of any manufacturing activity, and includes a range of products". This definition is in keeping with the wide definition of "manufacturing activity". Note the inclusion of a "service" in the definition.

8 See *op. cit.* n. 3.

9 See s. 9 of the ICA.

10 ICA s.4(3).

11 *Ibid.* s.4(4).

ning for the future more difficult. Instead of promoting orderly industrial development the provision could have the effect of keeping out sound and stable long-term investors and attracting fly-by-night operators.

A new manufacturer has no right to obtain a licence. The grant of a licence depends entirely on the discretion of the licensing officer.[12] The only guidelines laid down in accordance with which the licensing officer must act are that he must "consider whether the issue of a licence is consistent with national economic and social objectives and would promote the orderly development of manufacturing activities in Malaysia."[13] This is not so much a guideline as a declaration of policy. It is quite apparent that any new manufacturer in order to evoke a favourable response in negotiations with Government officials must tailor his project to comply with the New Economic Policy as enunciated in the Second Malaysia Plan.[14] What is needed in the ICA is a clear indication of the precise matters that the licensing officer will consider. This could save a prospective investor considerable time and expense. Further it would provide a prospective investor who has been refused a licence definite grounds on which he could appeal.[15]

Conditions

The provision dealing with the imposition of conditions in a licence is section 4(4) of the ICA:

> The licensing officer in issuing a licence, may, in furtherance of the aforesaid objectives[16] impose such conditions as he may think fit and such conditions may be varied on the application of the manufacturer or on the licensing officer's own motion after consultation with the manufacturer in respect of whom the conditions are to be varied.

It has been declared that the conditions that will be imposed under the ICA will be the same as those already being imposed by the Ministry of Trade and Industry prior to the introduction of the ICA. These conditions relate to local, equity structure, board of directors, employment structure, distribution pattern, usage of local professional services, construction dates, quality standards, pricing, anti-pollution measures, usage of local raw materials, technical agreements and marketing arrangements.[17] Reassurances have come from the Government that existing manufacturers will be granted licences

12 The term "licensing officer" is defined in s. 2 as meaning "any public officer appointed by the Prime Minister". The licensing authority was switched from the Minister responsible for industrial development to a licensing officer by the amendments made to the principal Act in 1977 in response to criticisms expressed by the business community. It was felt that the Minister for Trade and Industry wielded too much power under the principal Act. This way the Prime Minister has ultimate control over the workings of the Act. This is one of the cosmetic changes made by the amending Act.

13 The ICA s.4(3).

14 See Part II (to be continued in the Dec. issue).

15 See ICA s. 13, discussed *infra* pp. 204-205.

16 *I.e.* national economic and social objectives and the promotion of orderly industrial development.

17 The Chairman's Column, *Malaysia Industrial Digest,* Vol. 8, No. 2, p. 10.

subject to the same conditions that had already been agreed upon previously.[18]

Whilst that may be the intention and indeed the practice of Government the scope of the provision is not so restricted and could be used in the future to impose different terms. An absolute discretion is conferred on the licensing officer to impose such conditions as he may think fit. There is nothing in the ICA enumerating matters in relation to which conditions may be imposed. The objectives of the ICA which the conditions should further are so wide and vague that virtually any condition would fall within them.

Even though a licence may be granted subject to perfectly reasonable and expected conditions, section 4(4) empowers the licensing officer to vary these conditions in the future on his own motion. Although he is required to consult with the manufacturer there is no requirement that the new conditions must be agreed to by the manufacturer. Such a power has the effect of undermining the confidence of manufacturers. It could deter new manufacturers from setting up a project and deter existing manufacturers from expanding. It makes future planning and projections hazardous.

It is also possible that the conditions imposed on the licence are so onerous that the manufacturer is forced to close down or to transfer the venture to persons who can obtain more favourable conditions from the licensing officer. If this situation does eventuate the question arises whether the conduct of the licensing authority is unconstitutional.

Section 7A makes a further incursion into the freedom of a manufacturer in running his business. Sub-section (1) of the provision prohibits a manufacturer from manufacturing any product not specified in the licence without the approval of the licensing officer. Under sub-section (2) however, a manufacturer is free to discontinue or suspend the manufacture of any product and need only notify the licensing officer of his intention. The apparent justification for this is that in the case of the former situation other manufacturers may already be making similar products and the local market may not be able to absorb a further output of that product. From the manufacturer's standpoint, however, an expansion into the proposed area may be the most efficient way of carrying on the business and indeed the new product may be largely a by-product of his principal manufacturing activity. If he can market his product more cheaply than other manufacturers then the refusal of the licensing officer to allow him to manufacture it will ultimately affect the consumer. In the case of the latter situation notification of discontinuance will enable the licensing officer to allow other manufacturers to enter the field.

Rationalisation of manufacturing activity through the natural forces of free competition is also made more difficult by the ICA. Section 7(1) provides that a licence may only be transferred from one manufacturer to another with the approval of the licensing officer. The licensing officer has a complete discretion in whether or not to grant

[18] Minister for Trade and Industry, Datuk Hamzah, on Television Malaysia, April 1975.

approval. Some of the circumstances in which an approval will normally be granted are specified in section 7(2). But all of these deal with situations where a different person will carry on the same business by virtue of the death, incapacity or bankruptcy of the original grantee, or liquidation of a company or appointment of a receiver and manager to the company that was originally granted the licence. No reference is made to amalgamations, take-overs and mergers.[18a] Such events in a particular industry may well bring about economies of scale which would be beneficial to the country as a whole. Although in practice the licensing officer will allow a transfer of the licence yet under the ICA his discretion is so wide that it creates uncertainty which could well interfere with rational decision-making. This element of uncertainty is further aggravated by the fact that in allowing the transfer the licensing officer may impose further conditions in the licence.

Collection of Information

One of the principal reasons advanced by the Government for enacting the ICA is to enable it to collect information relating to manufacturing activities. However, it would seem that the Government has conferred upon the licensing officer far wider powers than are needed for this purpose. Section 10 of the ICA requires every manufacturer to supply such returns or other information pertaining to his manufacturing activity for which the licence is issued as is requested by the licensing officer. However, information relating to secret manufacturing processes is excluded from the scope of the section.

The fear of manufacturers is that detailed dossiers will be compiled on their mode of operations. Secret processes are only one matter manufacturers are loath to disclose. Their cost and pricing structures and profit margins are equally important. The fear of manufacturers is that information provided to the licensing officer will find its way to competitors. This may cost them dearly in maintaining their competitive position.

There is nothing in the ICA which makes the information collected by the licensing officer confidential. There is a need for a provision in the ICA which makes information supplied to the licensing officer classified information. Provisions similar to those in the income tax legislation[20] should be inserted making it an offence for any officer of the licensing authority to release or use information obtained from manufacturers for any purpose other than those specified in the Act itself. Such legitimate uses ought to be restricted to contesting legal actions brought by the manufacturer challenging the refusal of the licensing officer to grant a licence or challenging the validity of conditions imposed therein.

19 [Ed.: Perhaps this is because the Guidelines for the Regulation of Acquisition of Assets, Mergers and Takeovers, already covers this field].
20 Income Tax Act, 1967 (Revised 1971) (Act 53), ss. 117 and 138.

Revocation of Licence and Enforcement

The grounds and procedures for revocation are laid down in section 6 of the ICA:

> 6(1) The licensing officer may in his discretion revoke a licence if the manufacturer to whom a licence is issued:—
>
> (a) has not complied with any condition imposed in the licence;
>
> (b) is no longer engaged in the manufacturing activity in respect of which the licence is issued; or
>
> (c) has made a false statement in his application for the licence.

Sub-section (2) allows the licensing officer to call on the manufacturer to show cause why his licence should not be revoked. It is to be noted that there is no obligation on the licensing officer to so call upon the manufacturer.[21] Sub-section (3) gives the licensing officer a discretion to withhold or suspend a revocation of licence if he is satisfied that a breach of sub-section (1) by the manufacturer occurred because of circumstances outside his control and that the breach can be remedied within such period as the licensing officer may direct. A manufacturer whose licence has been revoked may appeal to the Minister.[22]

Once a licence is revoked the manufacturer must cease his activity. Failure to do so will result in the commission of an offence under section 3(2) and could result in the seizure of the manufacturing equipment or any other thing in the factory.[23]

Section 6(1) has raised a considerable degree of disquiet especially amongst the local manufacturers. The three grounds on which a revocation may be issued are in themselves reasonable. However, section 6(l)(a) could have far-reaching implications. The conditions imposed may be so onerous that they are commercially impossible to comply with. Failure to comply could then result in revocation. Again the question arises whether a revocation of a licence in circumstances suggested above could be challenged as being un-constitutional.[24]

As part of the scheme of enforcement very wide powers of search and seizure are conferred by the ICA.[25] These may be invoked only where an offence against the Act is committed. An offence against the Act is committed when a manufacturer carries on manufacturing without a licence[26] which in turn may arise because he has not applied for a licence, or has applied and not been granted one, or where his licence has been revoked. However, the powers of search and seizure are not confined to situations where the manufacturer is unlicensed. They can also be invoked when an offence against any rule made under the ICA has been committed.[27] In this respect the search and

21 See Part II (to be continued in the Dec. issue).
22 ICA s. 13. See further *infra.*
23 See ICA s.9(3) & (4).
24 See *infra* p.
25 *Op.cit.* n. 23.
26 ICA s. 3(2).
27 S. 12 of the ICA confers powers on the Minister to "make rules generally for the better carrying into effect of the provisions of this Act...".

seizure power certainly goes too far. The fear of manufacturers is that their confidential documents will be seized rather than their manufacturing equipment.

The use of such wide powers must be confined only to the most blatant breaches of the Act. It must not lend itself to be used for trivial breaches so as to undermine the confidence of manufacturers.

Appeals

The right of appeal was introduced into the ICA by the amending legislation. Section 13 provides:—

> 13(1) Any manufacturer who is aggrieved by:—
>
> (a) a refusal to grant a licence;
>
> (b) the revocation of a licence;
>
> (c) the refusal to approve the transfer of a licence may within thirty days and in such manner as may be prescribed, appeal to the Minister.
>
> (2) The Minister may after hearing the appeal, make such order as it deems fit in respect of the matters enumerated in paragraphs (a), (b) and (c) of the preceding subsection and such order shall be final and shall not be questioned in any court.

If the appeal is against revocation of the licence then the licence shall continue in force until the appeal has been dealt with.[28]

The right of appeal was introduced into the ICA in response to the criticism of businessmen that no safeguards against the actions of the licensing authority were built into the legislation. The expectation of the Government is that the licensing authority will now be more cautious in considering an application for a licence. It is open to question whether the provision will in fact succeed in that objective. It is to be noticed, first, that the grounds on which an aggrieved manufacturer may appeal are limited. The provision is more significant for the grounds of appeal it omits than for the grounds it includes. The most important ground omitted is with regard to the conditions imposed in a licence which is granted. Perhaps it was felt by Government that the inclusion of this as a ground of appeal would be redundant as the conditions imposed would in any event be those which Government, as a matter of policy, would require the licensing authority to impose in any event. Nevertheless, an aggrieved manufacturer may be able to seek an appropriate remedy in the courts when unreasonable conditions are imposed.[29] The second matter to be noted is that the minister's order "shall be final and shall not be questioned in any court". The legislation therefore seeks to constitute the executive limb of the state as the final arbiter in a dispute which is in fact between a private person and the executive. It is open to doubt whether the provision will be effective in excluding the jurisdiction of the courts in this manner.[30]

28 ICA S. 14.
29 See Part II (to be continued in the Dec. issue).
30 See Part II (to be continued in the Dec. issue).

Shortcomings of the Legislation

From the foregoing it is clear that the ICA raises many doubts as to its exact scope and the manner in which it can be used. It is therefore not surprising to find the statute acting as a disincentive to potential investors and creating uncertainty amongst existing businessmen. Dr. Stephen Goh suggests four reasons for the unease created in the business community by the legislation.[31]

> First, the legislation is all embracing. It applies to all manufacturing activities without distinction whatsoever. It attempts to cover too much with vague phraseology. And on its practical application, the administrative authority may have been allotted a task more than it could handle.
>
> Second, the legislation has retrospective application by requiring existing manufacturing activities to apply for a licence within a grace period of one year which is not extended. And the conferring authority, namely, the licensing officer, has the prerogative to require them to cease operating by the non-issuance or revocation of such a licence.
>
> Third, wide powers are given to the Minister and licensing authority. He and minor officials can play God in a sense.
>
> And fourth, there are no built-in safeguards in the legislation for a body such as Parliament or an industry committee to review the rules that the Minister makes. Consequently, in the granting of all these powers to make rules, the Minister and the licensing authority are denied the collective wisdom of Parliament and the private sector.

Not only has the legislation created disquiet amongst manufacturers it has also affected business confidence in other areas as well. The question that gives rise to these doubts is whether this legislation augurs in other legislation which will impose severe controls on all business activity and could be used to expropriate businesses.

CONSTITUTIONAL CHALLENGES TO THE ICA

Legal challenges to the ICA may be mounted on three fronts: (a) that the statute is invalid as being unconstitutional; (b) that action taken under the legislation contravenes the Federal Constitution; and (c) although the conduct of the licensing officer and Minister may not contravene the Federal Constitution yet there has been a wrongful exercise of powers or discretions which may be remedied by the courts.

Constitutional Validity of Statute

Article 4(1) of the Federal Constitution declares:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day[32] which is inconsistent with this Constitution shall, to the extent of the inconsistency be void.

Procedural restrictions regarding how, when and where the validity of a law as being inconsistent with the Constitution may be challenged are contained in Article 4(3) and (4). In essence, in so far as is relevant for present purposes, these provisions provide that where the validity of a law passed by a State Legislature or Federal Parliament is being questioned on the basis that the legislative body in question

[31] Malaysian Business June 1977, p. 10.
[32] *I.e.* Independence Day, namely 31st August 1957.

did not have the power to pass the law then the law may be challenged only in proceedings seeking a declaration that the law is invalid on that ground.[33] Such proceedings may only be commenced with the leave of a judge of the Federal Court and the Federation has a right to be a party to those proceedings.

There is no doubt that the ICA cannot be challenged on the ground that Federal Parliament did not have power to enact such a law. Article 74 empowers Federal Parliament to make laws with respect to any of the matters enumerated in, *inter alia* the Federal List in the 9th Schedule of the Constitution. Item 8(i) of the Federal List in the 9th Schedule provides that Federal Parliament may make laws with respect to "Trade, commerce and industry, including.. .(i) Industries; regulation of industrial undertakings."[34]

The next ground on which the validity of the legislation may be challenged arises because of its retroactive nature. It requires not only new manufacturing enterprises to obtain a licence but also established ones. A limited period of time (one year) is allowed for existing manufacturers to apply for a licence. Pending decision on the application presumably the manufacturer will be permitted to continue bis manufacturing activity.[35] But if he is refused a licence the continuation of the manufacturing activity will result in the commission of an offence against the ICA.[36]

Article 7(1) of the Federal Constitution provides:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made....

This provision is intended primarily to preclude the passing of criminal laws having retrospective effects. The ICA section 3(2) makes provision for punishment by requiring the imposition of a fine or imprisonment or both where a person is convicted of carrying on a manufacturing activity without a licence. However, the punishment is only imposed in respect of failure to obtain a licence after the Act

[33] In *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli* [1967] 1 M.L.J. 46, Pike C.J. (Borneo) said, at p. 49, that "an Act of Parliament shall only be challengeable on the ground that it makes provision in respect of a matter in respect of which Parliament has no power to make a law.. .(and) the only method by which it is permissible to question it is by an action for a declaration that the law is invalid on the ground above stated". The effect of this pronouncement is that the validity of an Act of Parliament cannot be questioned on any ground other than the ground that Parliament did not have power to enact it and that the validity of a law cannot be questioned in any proceedings except proceedings for a declaration. This is an extremely narrow view of Art. 4. A party should be free to question the validity of any law in any proceedings where the grounds are other than the competency of the legislature e.g. infringement of a fundamental liberty or failure to follow proper procedures. See further Loke Kit Choy, (1969) 11 Mal. L.R. 260 at p. 266.

[34] The Federal Court in *Selangor Pilot Association (1946)* v. *Government of Malaysia & Anor.* [1975] 2 M.L.J. 66, summarily dismissed a similar argument which challenged the competence of Parliament to make certain amendments to the Port Authorities Act, 1963. It is implicit from the manner in which the Federal Court dealt with the argument that it did not ascribe to the narrow construction of Art. 4 put forward by Pike C.J. (Borneo) in the *Stephen Kalong Ningkan Case, ibid.*

[35] There is nothing in the ICA which deals with this problem.

[36] ICA s. 3(2).

was passed and hence there is no element of retrospectivity in the imposition of the punishment which can be challenged under Article 7(1) of the Constitution.

Furthermore, it would be difficult to make out a case showing that the obligation on manufacturers already carrying out their activities on the date on which the ICA came into effect is retrospective in nature. The licence does not regulate matters already done. It is retroactive only in the sense that it imposes a control in future when there was none before. Although in practical terms this undermines business confidence and certainty, in law the statute cannot be impugned on this ground. In any event Article 66(6) of the Federal Constitution expressly provides that Parliament has power "to make laws with retrospective effect."

CONSTITUTIONAL VALIDITY OF CONDUCT UNDER THE STATUTE

The constitutional validity of the conduct of the licensing officer and the Minister taken in pursuance of powers conferred under the ICA may be challenged as being in contravention of Article 13 and Article 153 of the Federal Constitution. The success of such a challenge may have the effect of rendering not only the conduct invalid but also the statute. However the basis of such a challenge depends on the course of conduct of the licensing officer and the Minister and the effect that such conduct has on a given manufacturer. Different considerations arise where the conduct of the licensing authority is directed against manufacturers already in business on the date of the promulgation of the ICA and new manufacturers.

Existing Manufacturers

To summarise the position of manufacturers already in business at the time the ICA came into effect: (a) they are required to apply for a licence within a year; (b) the licensing officer may impose such conditions as he sees fit in the light of national economic and social objectives in the licence; (c) should the manufacturer breach the conditions imposed in the licence he may find his licence revoked; (d) if a licence is refused or if he continues in business after it is revoked he will have committed an offence against the ICA; (e) as a consequence of breaching the ICA the manufacturer may find his plant and machinery seized should he continue in production without a licence. The net result of all this is that if a manufacturer desires to remain in business after the date the ICA came into effect he must abide by conditions and restrictions from which he was previously free. Failure to abide by these restrictions will result, in the very least, in the termination of his business. When an existing manufacturer is refused a licence altogether he could launch a constitutional challenge against the licensing authority and the legislation. If a licence is granted subject to onerous conditions then the manufacturer may in addition be able to challenge these conditions on grounds under administrative law.

(a) *Refusal to Grant Licence*

The refusal to grant a licence ultimately has the effect of putting the manufacturer concerned out of business. The question that arises therefore is whether there has been an unconstitutional deprivation of property. Article 13 of the Federal Constitution provides:

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

In the context of the present situation the principal matters arising from Article 13 which require special consideration are (1) the meaning of the word "property" and (2) the co-relation between clauses (1) and (2) of Article 13, particularly with regards to the words "deprived" and "compulsory acquisition or use". The two matters in fact overlap as the second matter is often relevant in "delimiting the concept of property".[37] In the present context the concept of property and the question of deprivation are in fact closely linked. For Article 13 to apply that which a manufacturer is "deprived" of as a consequence of refusal of a licence must be "property".

(1) *Property*

The word "property" where used in a constitution as part of a scheme of protection of fundamental liberties[38] has been given a very wide interpretation by the courts. However the various definitions of "property" by the courts are often linked with the question of deprivation or acquisition of property. In *Minister of State for The Army v. Dalziel*[39] Stark C.J. in the High Court of Australia said:[40]

> Property, it has been said, is *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action. And to acquire any such right is rightly described as an 'acquisition of property'.

In India, where the relevant provision of the Constitution is similar to the Malaysian provision and indeed the Malaysian provision is said to be based on the Indian provision,[41] the wide interpretation of the word "property" in *Minister of State for the Army* v. *Dalziel*

37 Howard, *Australian Federal Constitutional Law* (Law Book Co., Sydney, 2nd edn. 1972), at p. 394.

38 Art. 13 of the Federal Constitution appears in Part II under the heading "Fundamental Liberties".

39 (1944) 68 C.L.R. 261.

40 *Ibid,* at p. 290. Rich and McTiernan JJ. adopted equally wide formulations of the meaning of property. See *ibid,* at pp. 285 and 295 respectively. The constitutional provision under consideration in the case was Art. 51 Item 31 of the Constitution of the Commonwealth of Australia which confers power on the Commonwealth to make laws with respect to the "acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

41 See Suffian L.P. in *Selangor Pilot Association* v. *Government of Malaysia* [1975] 2 M.L.J. 66 at p. 68.

has been approved by the Indian Supreme Court.[42] In *State of West Bengal* v. *Subodh Gopal Bose*[43] Sastri C.J., in defining "property", said:[44]

> Now, the word 'property' in the context of Art. 31 which is designed to protect private property in all its forms, must be understood both in a corporeal sense as having reference to all those specific things that are susceptible of private appropriation and enjoyment as well as in its juridical or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the exclusion of all others.

Equally wide views of the word were adopted by the judges in *Dwarkadas Shrinivas* v. *Sholapur Spinning & Weaving Co. Ltd.*[45] For example Ghulam Hasan J. said,[46]

> Having regard to the setting in which Article 31 is placed, the word 'property' used in the Article must be construed in the widest sense as connoting a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights. The word 'property' is not defined in the Constitution and there is no good reason to restrict its meaning.

This definition of "property" was cited with approval by Suffian L.P. in *Selangor Pilot Association (1946)* v. *Government of Malaysia.*[47]

In view of these wide pronouncements of the meaning of property the question in the context of the ICA is what property is a manufacturer already in business deprived of if he is refused a licence? The refusal of the licence does not take away from him the tangible and intangible assets used in running the business. All that has happened is that he can no longer lawfully carry on his business. In *Ulster Transport Authority* v. *Brown & Sons Ltd.*[48] Curran J. in the Queen's Bench Divisional Court expressed the view that the right to exercise any lawful trade is in the nature of property. His Lordship, however, drew a distinction between the setting up of a new trade and the carrying on of an established one, the nature of property being ascribed only to the latter.

If Curran J.'s view is correct then the refusal of a licence to a manufacturer already in business at the time the ICA came into force

[42] See Mahajan J. in *Dwarkadas Shrinivas* v. *Sholapur Spinning & Weaving Co. Ltd.* AIR 1954 S.C. 119 at p. 129. The relevant provision of the Indian Constitution, Art. 31 before April 27, 1955, read:

> "31. (1) No person shall be deprived of his property save by authority of law.
>
> (2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

[43] A.I.R. 1954 S.C. 92.

[44] *Ibid,* at p. 101.

[45] A.I.R. 1954 S.C. 119.

[46] *Ibid.* at p. 139.

[47] [1975] 2 M.L.J. *66* at p. 67. [Ed.: Overruled by the Privy Council on Appeal [1977] 1 M.L.J. 133.]

[48] [1953] N.I. 79 at p. 99.

would amount to a deprivation of property under Article 13 of the Federal Constitution. Support for this view is to be found in the decision of the Supreme Court of India in *Saghir Ahmad* v. *State of U.P.*[49] In that case the appellants ran a bus service on certain routes. The running of bus services was regulated by a system of licences and permits under certain legislation. The respondent State conceived the idea of setting up its own bus service, at first in competition with private operators, but subsequently decided to establish a monopoly and exclude all private operators such as the appellants. In pursuance to this policy the licensing and regulatory authority cancelled permits already issued to private operators and refused to issue permits to applicants who would have otherwise been entitled to such permits. A challenge to this course of conduct was upheld by the High Court following which the State passed new legislation under which the State Government was authorised to declare that bus services on any given route were to be run exclusively by the State Government. Acting under this legislation the State Government took over the routes operated by the appellants. None of the tangible assets of the appellants were taken over. The appellants challenged the constitutionality of this second statute. The Supreme Court held that the legislation in question was in contravention of the Indian Constitution and therefore void. The attitude of the Supreme Court towards the impugned legislation is reflected by Mukherjea J., who delivered the judgment of the Court, when he said:[50]

> One thing, however, in our opinion, has a decided bearing on the question of reasonableness and that is the immediate effect which the legislation is likely to produce. Hundreds of citizens are earning their livelihood by carrying on this business on various routes within the State of Uttar Pradesh. Although they carry on the business only with the aid of permits, which are granted to them by the authorities under the Motor Vehicles Act, no compensation has been allowed to them under the statute. It goes without saying that as a result of the Act they will all be deprived of the means of supporting themselves and their families and they will be left with their buses which will be of no further use to them and which they may not be able to dispose of easily or at a reasonable price.

Although this statement was made in the context of Article 19(1) of the Indian Constitution, which provided that any restriction imposed on a fundamental right must be reasonable, before the provision was amended, nevertheless the statement does raise the question of deprivation of property and payment of compensation thereof. In the context of dealing with Article 31 of the Indian Constitution (Article 13 of the Malaysian Constitution), Mukherjea J. said:[51]

> The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive the appellants of their buses or any other tangible property but *they are depriving them of the business of running buses on hire on public roads.* We think therefore that in these circumstances the legislation does conflict with the provisions of Article 31(2) of the Constitution and as the requirements of that clause have not been complied with, it should be held to be invalid on that ground.

[49] A.I.R. 1954 S.C. 728.
[50] *Ibid,* at p. 739.
[51] *Ibid,* at p. 740. Emphasis added.

That statement clearly implies that the right to carry on a business is a right in the nature of property which falls within the term "property" when used in the Constitution in the context of protecting a fundamental right.

In *Ulster Transport Authority* v. *James Brown & Sons Ltd.*[52] on appeal to the Court of Appeal Lord MacDermott L.C.J. expressed reservations about Curran J.'s view in the Queen's Bench Divisional Court that the carrying on of a lawful trade constituted a right in the nature of property. His Lordship said:[53]

> As I read his judgment his view was that the property lost was not so much goodwill as the right to exercise a lawful trade which, on the strength of certain United States authorities, he considered to be in the nature of property. No doubt, most kinds of property may, in the final analysis, be said to consist of a bundle of rights, but the term is not necessarily synonymous with a right no matter how fundamental and valuable that right may be, and I do not wish to be taken at acquiescing in the view that the right to exercise a lawful trade comes within the common meaning of property... I express no concluded opinion on the matter one way or the other.

Although his Lordship expresses reservation about the matter he expressly refrains from stating a concluded opinion on the matter. Furthermore, his Lordship does not give any reasons why such a right ought not to be classified as a right in the nature of property at least for the purposes of protection of fundamental rights and liberties under a constitution.

Some support for the proposition that the lawful carrying on of a business comprises a right in the nature of property is to be found in *Selangor Pilot Association (1946)* v. *Government of Malaysia.*[54] The appellants had a monopoly for the supply of pilotage services in the Port Swettenham harbour for many years. The partners of the firm and other pilots employed by the firm were licensed as pilots under the Merchant Shipping Ordinance. In 1972 the Port Authorities Act, 1963, was amended by the Port Authorities (Amendment) Act, 1972 (Act A99). The effect of these amendments was that the Port Klang Authority was given power to declare any area in a port as a pilotage district. Once such a declaration was made only pilots engaged by the Authority could render pilotage services in that district. Subsequent to the passing of these amendments the Authority declared the whole of the Port Swettenham harbour area a pilotage district. The result of this was that the appellants could no longer lawfully carry on their business. All their tangible assets were acquired by the Authority but no separate consideration was agreed to or paid for the loss of goodwill of the appellants. The appellants argued that Act A99 was unconstitutional in that they had been completely restrained from carrying on their business the result of which was that their property had been acquired without payment of compensation. Therefore Act A99 was in breach of Article 13 of the Federal Constitution. The Federal Court unanimously held that the appellants had lost their goodwill for which no compensation had been paid in

52 [1953] N.I. 79.
53 *Ibid.* at p. 110-111.
54 [1975] 2 M.L.J. 66.

accordance with Article 13. A declaration was made that the respondents pay compensation for the goodwill. The Privy Council[55] by a majority of 4 to 1 reversed the decision of the Federal Court. The main thrust of the judgments of the two courts will be discussed subsequently.[56] With regard to whether the carrying on of a business can constitute a right in the nature of property Suffian L.P. in the Federal Court said:[57]

> 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, though it is within Parliament's competence to enact that law.

It is important to note that in all the cases where the carrying on of a business has been recognised as a right in the nature of property the business in question was already in existence. Any doubts as to the right to continue to carry on a pre-existing business being a property right are dispelled when it is borne in mind that an on-going business possesses goodwill. Goodwill has always been recognised as property. Thus in *Ulster Transport Authority* v. *James Brown & Sons Ltd.*[58] the Court of Appeal affirmed the decision of the Queen's Bench Division on the basis that the respondents had been deprived of property in the form of goodwill without compensation in contravention of section 5(1) of the Government of Ireland Act 1920 which, in effect, prohibits the Northern Ireland Parliament from making a law "so as either directly or indirectly to... take any property without compensation." In that case the respondents had for many years carried on *inter alia* a business as furniture removers. In 1948 the Northern Ireland Parliament passed legislation under which only the appellants were permitted to carry furniture owned by other persons for reward on public roads. In the course of his judgment Lord MacDermott L.C.J. said:[59]

> But does that loss constitute or include a loss of 'property'? In considering that question I do not think any significant distinction is to be drawn between the two elements I have enumerated. 'Goodwill' is a word sometimes used to indicate a ready formed connection of customers whose custom is of value because it is likely to continue. But in its commercial sense the word may connote much more than this. It is, as Lord Macnaghten observed in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine Ltd.*[60] 'the attractive force which brings in custom', and it may reside, not only in trade connections, but in many other quarters, such as particular premises, long experience in some specialised sphere, or the good repute associated with a name or mark. It is something generated by effort that adds to the value of the business. When the make-up of a well-established, profitable enterprise providing a special service (such as the respondents' furniture removing service) is examined I think it well-nigh impossible to disentangle the business

55 [1977] 1 M.L.J. 133. For a further discussion of this case see L.A. Sheridan, [1977] J.M.C.L. 1.
56 See *infra* p. 216.
57 *Op. cit.* n. 54 at p. 69. Emphasis added.
58 [1953] N.I. 79.
59 *ibid,* at pp. 109-110.
60 [1901] A.C. 217.

> that has been built up from its goodwill or to give the latter a single or precise meaning. I therefore approach the question under consideration on the basis that here the relevant loss is really a loss of goodwill in the commercial sense and as described by Lord Macnaghten in *Muller & Co.'s* case.

In *Selangor Pilot Association (1946)* v. *Government of Malaysia*[61] in both the Federal Court and the Privy Council it was found that goodwill constituted property for the purposes of Article 13 of the Federal Constitution.

It is clear that where goodwill is coupled with the carrying on of a business which existed before the impugned legislation is introduced there is a loss of property. An on-going business is alienable, it has a market value, and when coupled with goodwill it can be protected by the courts, *e.g.* in an action for passing off. A person selling a business as a going concern may enter into a restrictive covenant not to compete. Such a restrictive covenant is designed to protect the goodwill of the business sold in the hands of the buyer and any consideration paid in respect of that covenant will reflect the value of the goodwill. It is submitted that it is indeed proper to restrict the recognition of the rights discussed above as being property under Article 13 only where there is already a pre-existing business. If there was no such restriction the prohibited business could be set up after the prohibition came into effect simply to obtain compensation.[62]

It is urged that the courts adopt a bold and flexible approach in interpreting the word "property" in Article 13 of the Federal Constitution even to the extent of recognising a pre-existing right to carry on a lawful business as a right in the nature of property independent of goodwill. The underlying policy ought to be that echoed by Dixon J. in *Bank of New South Wales* v. *Commonwealth:*[63]

> *I* take *Minister of State for the Army* v. *Dalziel* to mean that s.51(xxxi) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. Section 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of a power it provides the individual or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraphs should be given as full and flexible an operation as will cover the objects it was designed to effect.

Before considering whether the refusal to grant a licence to a pre-existing manufacturer falls within Article 13(2) so that compensation will have to be paid to the manufacturer, one other provision of the Federal Constitution must be considered.

61 [1975] M.L.J. 66 (F.C.); [1977] 1 M.L.J. 133 (P.C.).
62 *Cf. Louis K. Liggett Co.* v. *Baldridge* (1928) 73 L. Ed. 204. See further, Sheridan, *Constitutional Protection, Expropriation and Restrictions on Property Rights,* Malayan Law Journal Ltd., Singapore 1963, Chap. 8.
63 (1948) 76 C.L.R. 1 at p. 349.

Article 153 of the Federal Constitution makes provision for the conferring of special privileges on Malays through reservation of quotas in the issue of permits or licences and reservation of places in the public service for Malays. Various safeguards are built into the provision. Article 153 (8) (c) provides that even if a reservation is made by federal law in the issue of permits or licences for Malays, "no such law shall for the purpose of ensuring such a reservation —

> (c) where no permit or licence was previously required for the operation of the trade of business, authorise a refusal to grant a permit or licence to any person for the operation of any trade or business which immediately before the coming into force of the law he had been bona fide carrying on, or authorise a refusal subsequently to renew to any such person any permit or license, or a refusal to grant to the heirs, successors or assigns of any such person any such permit or licence when the renewal or grant might in accordance with the other provisions of that law reasonably be expected in the ordinary course of events.

The ICA in fact does not make any express reservations for Malays even though section 4(2) requires the licensing officer to have regard to the national economic and social objectives when considering the issue of a grant of a licence. Hence even though under the present economic and social objectives 30% of all economic activity is intended to be transferred to the Malays by 1990[64] in the furtherance of this objective a manufacturer already in business at the time the ICA came into operation cannot be refused a licence. However, the protection afforded by Article 153(8)(c) is rather limited. It only applies when the federal law in question makes a reservation for Malays. Unless it can be shown that an established manufacturer was granted a licence in pursuance to a policy of advancement of the Malays under quotas reserved for them Article I53(8)(c) will have no application.[65]

(2) *The Co-Relationship between Article 13(1) & (2)*

Under Article 13(1) a person can only be deprived of property in accordance with law. It may well be that in refusing to grant a licence to an existing manufacturer the licensing officer is acting in accordance with the law. Without more, therefore, there would be no breach of the constitution. The question that must then be confronted is whether a deprivation in such circumstances entitles the manufacturer to compensation under Article 13(2). The words which qualify the right to compensation in Article 13(2) are "the compulsory acquisition or use of property". Therefore does a deprivation under Article 13(1) *ipso facto* entitle the manufacturer to compensation? The question arises because it is possible for a person to be "deprived" of property without any parallel acquisition or use of that property by another.

In India there are two conflicting views on the co-relationship between sub-clauses (1) and (2) of Article 31. The wider view is that if property is taken away from a person or is rendered useless

64 See Part II (to be continued in the Dec. issue).

65 In order to re-assure non-Malay manufacturers after the passing of the ICA the Minister for Trade and Industry declared "it is definitely not the intention of Government to deprive *non-Bumiputras* of their existing investments and opportunities in the manufacturing sector", on Television Malaysia, April 1975.

in his hands that amounts to an acquisition whether or not that property then vests in some other person. This wide view can be seen in the judgment of Mahajan J. in *Dwarkadas Shrinivas* v. *Sholapur Spinning & Weaving Co. Ltd.*[66]

> The next contention of the learned counsel that the word 'acquisition' in Art. 31(2) means the acquisition of title by the State and that unless the State becomes vested with the property there can be no acquisition within the meaning of the clause and that the expression 'taking possession' connoted the idea of requisition cannot be sustained and does not, to my mind, affect the decision of the case. As above pointed, both these expressions used in Clause (2) convey the same meaning that is conveyed in Clause (1) by the expression 'deprivation'. As I read Art. 31 it gives complete protection to private property as against executive action, no matter by what process a person is deprived of possession of it. In other words, the Constitution declares that no person shall be deprived of possession of private property without payment of compensation and that too under the authority of law, provided there was a public purpose behind that law.
>
> 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 is against loss of property to the owner and there is no protection give to the State by the Article. It has no fundamental right as against the individual citizen. Article 31 states the limitations on the power of the State in the field of taking property and those limitations are in the interests of the person sought to be deprived of his property. The question whether acquisition has a larger concept than is conveyed by the expression 'taking possession' is really of academic interest in view of the comprehensive phraseology employed by Clause (2) of Art. 31.

The narrower issue is that each of the sub-clauses of Article 31 cover different grounds. Therefore under sub-clause (1) a person may only be deprived of property if a law authorises such deprivation, but compensation is only payable in the circumstances stated in sub-clause (2), *i.e.* if the property is in fact acquired or taken possession of by the state. The narrower view is reflected in the judgment of Das J. in *Chiranjit Lal's* case:[67]

> Article 31(1) formulates the fundamental right in a negative form prohibiting the deprivation of property except by authority of law. It implies that a person may be deprived of his property by authority of law. Article 31(2) prohibits the acquisition or taking possession of property for a public purpose under any law, unless such law provides for payment of compensation. It is suggested that clauses (1) and (2) of Article 31 deal with the same topic, namely, compulsory acquisition or taking possession of property, clause (2) being only an elaboration of clause (1). There appear to me to be two objections to this suggestion. If that were the correct view, then clause (1) must be held to be wholly redundant and clause (2), by itself, would have been sufficient. In the next place, such a view would exclude deprivation of property otherwise than by acquisition or taking of possession.

The majority of the judges in the Indian Supreme Court have adopted the wider view.[68] This dichotomy of views was the crux of the issue in *Selangor Pilot Association (1946)* v. *Government of Malaysia.*[69] The Federal Court unanimously adopted the wider view.

66 A.I.R. 1954 S.C. 119 at p. 128.

67 [1950] S.C.R. 869 at p. 924. This view was reiterated by Das J. in *State of West Bengal* v. *Subodh Gopal Base* A.I.R. 1954 S.C. 92 and the *Dwarkadas* case, *ibid.*

68 See cases cited in n. 67 *ibid.*

69 [1975] 2 M.L.J. 66 (F.C.); [1977] 1 M.L.J. 133 (P.C.). For facts see *supra* p. 212.

The Privy Council, however, reversed the decision of the Federal Court and unanimously rejected the wider view and adopted the narrower approach, including Lord Salmon who dissented on the actual decision. Viscount Dilhorne, delivering the majority judgment said:[70]

> Their Lordships have carefully considered the views expressed in these Indian cases to which reference has been made and the judgments of the Federal Court in this case and have come to the conclusion that Article 13 of the Constitution of Malaysia cannot properly be construed in the way in which Article 31 of the Constitution of India has been construed. Deprivation may take many forms. A person may be deprived of his property by another acquiring it or using it but those are not the only ways by which he can be deprived. 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). Great care is usually taken in the drafting of Constitutions.
>
> As in the present case the Association was in consequence of the amending Act deprived of property, there was no breach of Article 13(1) for that deprivation was in accordance with a law which it was within the competence of the Legislature to pass.
>
> In relation to Article 13(2) the question to be answered is: Was any property of the Association compulsorily acquired or used by the Port Authority? Only if there was, could there have been a failure to comply with Article 13(2). The only property, launches, etc., acquired by the Port Authority from the Association was acquired by voluntary agreement. Even if the right of the Association to employ licensed pilots which was destroyed by the amending Act can be regarded as a right of property, in the view of the majority of their Lordships the Association's right to employ pilots was not acquired or used by the Port Authority. Its right to employ them was given to it and acquired by it from the Legislature.
>
> 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.

Lord Salmon, dissenting, found that in fact the goodwill had been compulsorily acquired by the Government.

> In the present case it is impossible to see where the respondents' business could have gone other than to the Port Authority and, although just as in the Northern Ireland case,[71] nothing was spelt out in the relevant Act about the acquisition of the respondents' business, it is quite obvious that the appellants intended that that is where that businesses should go as a result of the amending Act of 1972 — and that is where it went.
>
> The Act of 1972 deprived the respondents of the right and the chance of selling their business because its inevitable effect was to cause the Authority to take over the business. Since... it is impossible to disentangle a business such as the respondents' from its goodwill, when the Authority acquired the business, they acquired its goodwill with it. The fact that by reason of the provisions of the Act, the Authority could not sell the goodwill is beside the point. They had deprived the respondents of the right of selling a valuable asset, namely the goodwill, by acquiring their business and goodwill, and therefore they were liable to compensate the respondents for the loss of a right which was of value to the respondents notwithstanding that it may not have been a right which was of any value to the Authority. Compulsorily to acquire an

70 *ibid.* pp. 135-136.

71 *I.e. Ulster Transport Authority* v. *James Brown & Sons Ltd.* [1953] N.I. 79.

> asset from a person to whom it was of value does not excuse the acquirer from compensating that person for the loss of that asset even if it is of no value to the acquirer.[72]

The view of the majority in the Privy Council could engender great hardship. A person whose property has been taken away is not concerned whether or not it has vested in somebody else. His primary concern is to obtain compensation for that which he has lost whether or not somebody else benefits from his loss. Equally, Lord Salmon's view, although it would have entitled the Association in that case to compensation, is also too narrow. It can only be applied when an on-going business of that type is vested into a state monopoly. It is only in that situation that a clearly identifiable acquirer of the goodwill can be pin-pointed. It cannot apply where a manufacturer is put out of business because of refusal to grant a licence under the ICA. No person can be identified as having acquired the goodwill lost except perhaps in situations where there is only one other manufacturer of that product. Even then a court would be much constrained in arriving at that conclusion because it is not possible to clearly identify in the ICA an intention of the legislature that the business of one manufacturer is to be acquired by another through the device of refusal to grant a licence.

It is respectfully submitted that the approach of the Privy Council in the interpretation of Article 13 is too literal. Their Lordships' total rejection of the approach of the majority of the Supreme Court of India on Article 31 of the Indian Constitution as having no place in the interpretation of the Malaysian Constitution ignores the realities that underlay the drafting of the Malaysian Constitution. "Great care" was indeed taken in drafting the Malaysian Constitution. The Constitutional Commission which drafted the Constitution of the Federation of Malaya included in its ranks representatives of the highest standing from India and Pakistan.[73] The Supreme Court of India had already delivered its judgments in the various cases in which its views on Article 31 were expounded before the convening of the Constitutional Commission. Therefore in drafting Article 13 the Commission cannot be regarded as being unaware of what the words of that provision meant in the light of the decisions of the Indian Supreme Court.

It is submitted that as a matter of policy the Courts ought to adopt the wider interpretation of Article 13 of the Federal Constitution. The policy basis is aptly enunciated by Sastri C.J. in *State of West Bengal* v. *Subodh Gopal Bose.*[74]

> The correct approach, in my opinion, to the interpretation of Art. 31 is to bear in mind the context and setting in which it has been placed. As already stated, Part III (Part II of the Malaysian Constitution) of the Constitution is designed to afford protection to the freedoms and rights mentioned therein against inroads by the State which includes the legislatures as well as the executive governments in the country. Though,

[72] *Op. cit.* n. 69 at p. 140.
[73] Report of the Federation of Malaya Constitutional Commission, 1957, London, HMSO, Colonial No. 330. The Indian member was Mr. B. Malik and the Pakistani member was Justice Abdul Hamid.
[74] A.I.R. S.C. 1954 92 at p. 98.

protection against executive action is not really needed under systems of government based on British jurisprudence according to which no member of the executive can interfere with the liberty or property of a subject except in pursuance of powers given by law, our Constitution-makers, who were framing a written Constitution, conferred such protection explicitly by including the executive governments of the Union and the State in the definition of "the State" in Art. 12.[74a]

A fundamental right is thus sought to be protected not only against the legislative organ of the State but also against its executive organ. The purpose of Art. 31, it is hardly necessary to emphasise, is not to declare the right of the State to deprive a person of his property but, as the heading of the article shows, to protect the "right to property" of every person. But how does the article protect the right to property? It protects it by defining the limitations of the power of the State to take away private property without the consent of the owner. It is an important limitation on that power that legislative action is a pre-requisite for its exercise.

In England the struggle between prerogative and Parliament having ended in favour of the latter the prerogative right of taking private property became merged in the absolutism of Parliament, and the right to compensation as a fundamental right of the subject does not exist independently of Parliamentary enactment. The result is that Parliament alone could authorise interference with the enjoyment of private property. Blackstone also says that it is the legislature alone that can interpose and compel the individual to part with his property: Commentaries, Vol. I, p. 110.

It is this limitation which the framers of our Constitution have embodied in cl. (1) of Art. 31 which is thus designed to protect the rights to property against deprivation by the State acting through its executive organ, the Government. Clause (2) imposes two further limitations on the Legislature itself. It is prohibited from making a law authorising expropriation except for public purposes and on payment of compensation for the injury sustained by the owner. These important limitations on the power of the State, acting through the executive and legislative organs, to take away private property are designed to protect the owner against arbitrary deprivation of his property.

Clauses (1) and (2) of Art. 31 are thus not mutually exclusive in scope and content, but should, in my view, be read together and understood as dealing with the same subject, namely, the prosecution of the right to property by means of the limitations on the State power referred to above, the deprivation contemplated in cl. (1) being no other than the acquisition or taking possession of property referred to in cl. (2).

Sastri C.J. had this to say about the narrower view as expounded by Das J.[75]

He (Das J.) reads clauses (1) and (2) as mutually exclusive in scope and content, — cl. (2) imposing limitations only on two particular kinds of deprivation of private property, namely, those brought about by acquisition or taking possession thereof, and cl. (1) authorising all other kinds of deprivation with no limitation except that they should be authorised by law. There are several objections to the acceptance of this view. But the most serious of them all is that it largely nullifies the protection afforded by the Constitution to rights of private property and, indeed, stultifies the very conception of the 'right to property' as a fundamental right.

For, on this view, the State, acting through its legislative organ, could, for instance, arbitrarily prohibit a person from using his property, or

[74a] The definition of "state" in Art. 160 of the Malaysian Constitution does not include the executive.

[75] *Ibid,* at p. 97. See *supra* p. 216 for Das J.'s view.

> authorise its destruction, or render it useless for him, without any compensation and without a public purpose to be served thereby, as these two conditions are stipulated only for acquisition and taking possession under cl. (2). Now, the whole object of Part III of the Constitution (Part II of the Malaysian Constitution) is to provide protection for the freedoms and rights mentioned therein against arbitrary invasion by the State, which, as defined by Art. 12 includes the Legislatures of the country. It would be a startling irony if the fundamental rights of property were, in effect, to be turned by construction into an arbitrary power of the State to deprive a person of his property without compensation in all ways other than acquisition or taking possession of such property.

No doubt there are differences between Article 31 of the Indian Constitution and Article 13 of the Malaysian Constitution. The principal difference is that clause (2) of Article 13 of the Malaysian Constitution does not require the property to be acquired for public purposes. It is enough if there is a compulsory acquisition or use of property owned by a person. Hence on that score the executive is conferred wider powers in Malaysia than in India. But that difference does not undermine the underlying policy of the provisions contained in Part II of the Constitution and neither does it dilute the policy that ought to be adopted in interpreting those provisions.

Whilst it is true that the wider interpretation does disregard the fact that different words are used in Article 13(2) from Article 13(1) nevertheless it is submitted that the wider interpretation allows the courts greater flexibility in deciding whether or not action taken by the Government under a given statute does fall within Article 13. Thus if legislation provides for the confiscation of counterfeit currency or pornographic books and magazines then it is quite clear that the legislation is aimed at curbing a particular activity which is detrimental to the country. On the other hand the legislation in question in the *Selangor Pilot Association* case was quite clearly directed at expropriating private property. Even if such a deprivation is in the public interest nevertheless compensation ought to be paid.[76] A similar sentiment is expressed by Lord Salmon in the *Selangor Pilot Association* case.[77]

> In my opinion, this appeal raises constitutional issues of vital importance. I fear that it will encourage and facilitate nationalisation without compensation throughout the Commonwealth. Suppose a part of the Commonwealth with a Constitution containing a clause in substance the same as Article 13(2), and a nationally owned airline competing perhaps not too successfully with a privately owned airline. A law is passed making it a criminal offence for a licensed pilot to accept employment as a pilot with any airline other than the nationally owned one. This would have the effect of putting the privately owned airline out of business and of automatically transferring the bulk of its customers to the national airline. I consider that the law I have postulated would be void under the Constitution unless it provided for the private airline to be compensated for that part of its business which the national airline acquired.... There are many who believe passionately, and perhaps rightly, that nationalisation is necessarily in the public interest and leads to greater

[76] Sheridan in *Constitutional Protection, Expropriation and Restrictions on Property Rights,* M.L.J., Singapore 1963 suggests that the "pith and substance" of the legislation in question ought to be established and Art. 13(2) be applied only where the pith and substance of the legislation is the public acquisition of private property. (See p. 128).

[77] [1977] 1 M.L.J. 133 at p. 139.

> efficiency. That was the reason that was given in the present case for nationalising the respondents' business and would no doubt be given in cases of the kind I have mentioned. Even if this view is correct, I do not understand how it surmounts Article 13(2) of the Constitution.

What then is the ICA aimed at? The preamble to the statute reads, "An Act to provide for the co-ordination and orderly development of manufacturing activities in Malaysia". The various Government statements seeking to justify the legislation say the same thing. It is clear that the system of licensing manufacturing activities introduced by the ICA enables Government to keep very close tabs on all manufacturing activity. However, the powers conferred to Government under the ICA are extremely wide, and, it is submitted, wider than they need be simply to fulfil the aims expressed by Government. It is submitted that the essence and aims behind the conduct of the Government each time action is taken under the ICA in relation to each manufacturer constitutes the true intention or "pith and substance" of the legislation as applied to that manufacturer. If it can be shown, for example, that an existing manufacturer was refused a licence so that another manufacturer who is politically more acceptable can operate more successfully then clearly the intention of the Government is to expropriate the existing manufacturer and Article 13(2) ought to apply. It is further submitted that an intention of deprivation of property be imputed on the Government every time an existing manufacturer is refused a licence and that the burden of proof be on the Government to show that a licence was refused in a given situation in pursuance to a *bona fide* desire to promote the orderly development of industry in the country.

(b) *Expropriation Via Onerous Conditions*

A manufacturer already carrying on his business at the time the ICA came into effect may have his business expropriated not only through the refusal to grant a licence by the licensing authority but also indirectly through the imposition of burdensome conditions. It has already been shown that the licensing officer may impose any conditions he sees fit that are in keeping with the national social and economic objectives.[78] Government spokesmen have indicated that the conditions that will be imposed are no different from those that are already imposed. Where a project was already set up prior to the commencement of the ICA with the approval of Government which contained certain conditions then there is no particular hardship if those conditions are also embodied in the licence issued after the ICA came into effect. The one significant difference is that by virtue of the conditions being included in the licence the Government is then able to use its powers under the ICA to ensure that they are complied with on pain of revocation of licence. On the other hand a breach of the conditions contained in the letter of approval does not give rise to any direct threat to the carrying on of the venture. The Government could not take any direct measures to force the closure of the business. It could exert pressure through withdrawal of tax incentives and through other indirect means. These devices are often enough to exact compliance.

[78] ICA s.4(3) & (4). See *supra* p. 201.

However, it must be borne in mind that the ICA applies not only to those ventures which had obtained Government approval at some earlier time but also those family enterprises which have been set up without any Government incentives or approvals many years ago and have been built up into large concerns over several generations. Any conditions imposed in licences granted to such concerns will constitute an interference to which that enterprise was not subject to before. It takes away from the manufacturer the complete freedom he previously had in carrying on his business. Indeed any such interference may result in the closure of the business. Similar considerations arise where additional conditions are imposed in a licence granted to a manufacturer who is already subject to certain conditions contained in the letter of approval.

In these situations the question arises whether the imposition of the conditions itself, apart from the question of revocation of licence for breach of those conditions, could constitute an expropriation of property under Article 13. To answer this question it is necessary to consider once again the meaning of the word "property". In *Guru Datta Sharma* v. *State of Bihar*[79] Ayyangar J. in the Supreme Court of India said:[80]

> Property, as a legal concept, is the sum of a bundle of rights and in the case of tangible property would include the right of possession, the right to enjoy, the right to destroy, the right to retain, the right to alienate and so on. All these, of course, would be subject to the relevant law — procedural or substantive — bearing upon each of these incidents, but the strands that make up the total are not individually to be identified as those constituting 'property'.

In relation to the imposition of conditions under the ICA the effect of the above *dictum* is that if these conditions merely curb the complete freedom originally enjoyed by the manufacturer but the manufacturer still remains vested with the property which is the subject of those controls then there is no expropriation of property. The conditions imposed affect only some of the strands in the bundle of rights.

On the other hand it is clear that if the strand in the bundle of rights that is abrogated underlies the enjoyment of the rights in the bundle then such a seizure will be a deprivation of property.[81] Thus if the conditions imposed in a licence issued under the ICA are such that they divest the manufacturer from the ultimate management and control of the business and seriously interfere with his right to deal with profits of the business as he chooses then it is arguable that there has been an expropriation of that strand in the bundle of rights in the property that underlies the enjoyment of the property.

Such an effect may be achieved not only through taking away certain rights through the conditions imposed on the licence but also through negative prohibitions imposed on the licence. In *Belfast Corporation* v. *O.D. Cars Ltd.*[82] Viscount Simonds quoted, with

[79] A.I.R. 1961 S.C. 1684.
[80] *ibid,* at p. 1697.
[81] See *Minister of State for the Army* v. *Dalziel* (1944) 68 C.L.R. 261 at pp. 285-286.
[82] [I960] A.C. 490 at p. 519.

approval, a passage from the judgment of Brandeis J. in *Pennsylvania Coal Co.* v. *Mahon.*[83]

> Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use.

His Lordship then went on to cite Holmes J. in the same case.[84]

> The general rule at least is, that, while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking.

Lord Salmon in the Privy Council in the *Selangor Pilot Association* case[85] also cited the above passage with approval. Viscount Dilhorne, delivering the judgement of the majority in that case agreed with Suffian L.P. in the Federal Court "that a person may be deprived of his property by a mere negative or restrictive provision.. ."[86]

Whilst the courts are in agreement that a negative restriction or prohibition can have the effect of depriving a person of his property the controversy remains as to whether in these circumstances the aggrieved person is entitled to compensation under Article 13(2) of the Federal Constitution. Where conditions which have such an effect are imposed in a licence issued under the ICA and the imposition of such conditions cannot be shown to have been in breach of the ICA itself then there is no breach of Article 13(1) because, even though property may have been deprived, it has been deprived in accordance with the law. But if such a deprivation can be fitted within Article 13(2) the manufacturer will nevertheless be entitled to compensation. The different views on this matter have already been discussed.[87] If the courts accept the view preferred by the writer, then, a manufacturer who previously was not subject to any control losses effective control over his business by virtue of the conditions imposed in the licence, will be entitled to obtain compensation under Article 13(2) of the Federal Constitution.

Where onerous conditions are imposed upon the grant of a licence for a manufacturer already in business at the time the ICA came into effect and who was previously not subject to any control, then, even though the conditions may be such as to amount to an expropriation as discussed above, he may nevertheless have difficulty in establishing exactly what it is that has been expropriated. Even if it is possible to pinpoint the nature of the property expropriated it may be difficult to make a proper valuation on the basis of which compensation may

83 (1922) 260 U.S. 393 at p. 417.
84 *Ibid,* at p. 415.
85 [1977] 1 M.L.J. 133 at p. 141.
86 *ibid,* at p. 135.
87 See *supra.*

be awarded under Article 13(2) of the Federal Constitution.[88] In such circumstances it may be best for the manufacturer to await the revocation of his licence. The consequences that follow from the revocation, *i.e.* the loss of the right to carry on the business and loss of goodwill will certainly fall within the category of loss of property. However the failure to comply with the conditions must be because the conditions are in that category of regulations that take property away from the owner.

It is also arguable that a revocation of the licence itself is a deprivation of property. The generally held view is that a licence is not in the nature of property but merely a privilege or permit to do something. However, it has also been held that a licence itself could constitute property.[89]

New Manufacturers

It is unlikely that a person who was not already carrying on a manufacturing activity on the date the ICA came into effect could mount a challenge on constitutional grounds against action taken by the licensing authority against him under the legislation. A refusal to grant a licence would not result in the loss of a business or goodwill attached to that business which could be characterised as property in respect of which compensation must be paid. No doubt money spent on preliminary surveys or feasibility studies would have been wasted but the findings of such studies may well have proved to be negative in any event.

It is also difficult to see how the imposition of onerous conditions in a licence granted to a person who has not yet established his manufacturing activity can be challenged on the basis of expropriating his property without compensation. Again, until such time as the business is actually set up, there is no property which can be expropriated.

However, the refusal to grant a licence or the imposition of onerous conditions in a licence granted may nevertheless be challenged in the courts on grounds under administrative law.

[To be continued.]

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88 In the *Dwarkadas* case A.I.R. 1954 S.C. 119 it was held that even though the shares of the shareholders were not taken over there was nevertheless a deprivation of property because the statute in question removed the rights and privileges of holding a share from the shareholder e.g. the right to appoint and dismiss directors, the right to wind up the company and the right to run the business.

89 In *Station Hotels Bhd.* v. *Malayan Railway Administration* [1977] 1 M.L.J. 112 at p. 155 the court adopted the orthodox view. But in *Banks* v. *Transport Regulation Board* (1968) 119 C.L.R. 222, Barwick C.J. in the High Court of Australia distinguished the orthodox view and concluded that a licence could be a right in the nature of property. See further *infra* pp. 92-93.

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