PRIVATIVE CLAUSES: POST-*FIRE BRICKS* DEVELOPMENT AND TREND

This article will attempt to highlight the recent development in case law relating to privative clauses in this country and the legislative trend relating thereto. It will be beyond the scope of this article to analyse the judicial interpretation of such clauses before the landmark case of *South East Asia Fire Bricks Sdn. Bhd.* v *Non-Metallic Mineral Products Manufacturers Employees Union*[1] (hereinafter referred to as "the *Fire Bricks* case"). Only a brief reference will be made thereto.[2] Before proceeding any further, it must first be observed that privative clauses are commonly and widely used in Malaysian legislation. The discussion proper will begin with the decision of the Privy Council in the *Fire Bricks* case. The application of the *Fire Bricks'* ruling in subsequent cases by the Malaysian courts will follow suit. Next, the legislative trend in the use of privative clauses in statutes in recent years will be surveyed and analysed. As there is a scarcity of reported cases on the judicial interpretation of the recently enacted ouster provisions, a look at the possible judicial responses thereto will be irresistible. For the purpose of comparison, a brief reference will be made to the position in other common law jurisdictions regarding the legislative measures undertaken to safeguard judicial review. And finally, as the future judicial responses to the recently enacted clauses will be hard to predict and also basing on the assumption that the current legislative trend in the use of such clauses may continue for some time in the future, a few suggestions for thought will be proposed so that the rule of law will be maintained and preserved in our system.

I. The Position Before the *Fire Bricks* Case

Until the Fire Bricks case, judicial interpretation of privative clauses did not show a uniform and consistent approach. On

[1][1980] 2 MLJ 165.

[2]For the position before the *Fire Bricks* case, see MP Jain, *Administrative Law of Malaysia and Singapore* (2nd. ed.), 540-545.

the one hand, some judges interpreted such clauses restrictively[3] in line with the traditional approach as adopted in cases such as *Re Gilmore*[4], and *Anisminic Ltd.* v *Foreign Compensation Commission.*[5] On the other hand, some judges construed such clauses somewhat liberally[6] and in so doing displayed a judicial self-restraint in interfering with the decisions of tribunals and administrative authorities. In no case was a privative clause construed as wide enough to oust judicial review in toto.

In this relation, a special note must be taken of the interpretation of the now repealed section 29(3)(a) of the Industrial Relations Act 1967. The said section provided that-

> An award of the Industrial Court shall be final and conclusive, and that no award shall be challenged, appealed against, reviewed, quashed or called in question in any court of law.

Before the *Fire Bricks* case, the High Court had construed the aforesaid ouster provision narrowly.[7] It could not preclude judicial review whether on the ground of error of law on the face of the record or excess of or lack of jurisdiction.

II. The *Fire Bricks* Case

This case revolved around the interpretation of the former section 29(3)(a) of the Industrial Relations Act 1967 just adverted to in the foregoing. In this case the High Court quashed the decision of the Industrial Court on the ground that there was an error of law on the face of the record.

[3]See cases like *Mohamed* v *Commissioner of Lands* [1968] 1 MLJ 227; *Kannan & Anor* v *Menteri Buruh dan Tenaga Rakyat* [1974] 1 MLJ 90; *Selangor Omnibus Co. Ltd.* v *Transport Workers' Union, Malaysia* [1967] 1 MLJ 280; *Lian Yit Engineering Works Sdn. Bhd.* v *Loh Ah Fon* [1974] 2 MLJ 41; *Sungai Wangi Estate* v *UNI* [1975] 1 MLJ 136; *Soon Kok Leong* v *Minister of the Interior, Malaysia* [1968] 2 MLJ 88; *Re Soon Hiang* [1969] 1 MLJ 218, and *Kuluwante* v *Government of Malaysia* [1978] 1 MLJ 92.

[4][1957] 1 All E.R. 796.

[5][1969] 2 AC 147.

[6]See *Liew Shin Lai* v *Minister of Home Affairs* [1970] 2 MLJ 7; *Mak Sik Kwong (I)* [1975] 2 MLJ 168, and *Mak Sik Kwong (II)* [1975] 2 MLJ 175.

[7]See *Selangor Omnibus* [1967] 1 MLJ 280; *Lian Yit Engineering* [1974] 2 MLJ 41, and *Sungai Wangi Estate* v *UNI* [1975] 1 MLJ 136.

Upon appeal, the Federal Court reversed the decision of the High Court and held that there had been no error of law. On further appeal, the Privy Council pointed out that in considering the effect of section 29(3)(a) two separate questions arose for consideration. The first question was whether the section had any application to certiorari, so as to oust it, or whether it merely prohibited appeals. And if it did apply to certiorari, the second question was whether, notwithstanding the ouster, certiorari was still available to correct an error of law on the face of the record.

In respect of the first question, the Privy Council ruled that section 29(3)(a) did oust certiorari at least to some extent because of the wording of the said section. The word "quashed" is ordinarily used to describe the result of an order of certiorari, and the expression "called in question in any court of law" is wide enough to include certiorari procedure.

On the second question, the Privy Council-

i. quoted with approval the advice of the House of Lords in *Anisminic* that when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by certiorari, they must be construed strictly, and that they would not have the effect of ousting that power if the inferior tribunal had acted without jurisdiction or if it had done or failed to do something in the course of the inquiry which was of such a nature that its decision was a nullity. However, if the inferior tribunal had merely made an error of law which did not affect its jurisdiction, and if its decision was not a nullity for some reason such as breach of the rules of natural justice, then the ouster would be effective;
ii. did not accept the suggestion that the distinction between an error of law which affected jurisdiction and one which did not should be discarded; and
iii. ruled that an error or errors of law on the face of the record did not affect the jurisdiction of the Industrial Court and therefore section 29(3)(a) effectively ousted the jurisdiction of the High Court to quash the decision by certiorari proceedings.

It must be noted that the Privy Council decision is significant in several aspects.

Firstly, the Privy Council gave a somewhat liberal interpretation to section 29(3)(a) in contrast with the earlier strict interpretation[8] given by the local courts. Prior to this case, the local courts had unequivocally and consistently held that in respect of an error of law on the face of the record the privative clause in question was not wide enough to protect such an error, whereas the Privy Council took the opposite view because it ruled that such an error did not affect the jurisdiction of the Industrial Court and therefore certiorari was effectively excluded. This ruling by the Privy Council has a negative effect on judicial review in this country in that it necessarily whittles down the scope of judicial review.

Secondly, the refusal of the Privy Council to discard the distinction between error of law and error of jurisdiction, too, has a two-fold effect on judicial review in this country. In the first place, that ruling is not in line with the move made to abolish the dichotomy between error of law and error of jurisdiction which abolition will result in enlarging the scope of judicial review. In the second place, the ruling has resulted in making a tribunal of limited jurisdiction being the final arbiter on questions of law without having to worry about judicial interference so long as it does not commit an error of jurisdiction or if its decision is not a nullity.

III. The Application of the *Fire Bricks* Case

It is proposed to examine the application of the *Fire Bricks* case to section 33B(1) of the Industrial Relations Act 1967, to simpler ouster clauses, and to ouster provisions which are wider than section 29(3)(a) of the Industrial Relations Act 1967.

[8] *Ibid.*

1. *Section 33B(1), Industrial Relations Act 1967*

Section 29(3)(a) is the forerunner of the present section 33B(1) of the Industrial Relations Act 1967. It was re-numbered as section 32(3)(a) when the Industrial Relations Act 1967 was revised in 1976 by Act 177. Later, section 32(3)(a) was deleted and replaced by section 33B(1) by Act A484 in 1980. The two sections are almost identical in terms of phraseology. The current section 33B(1) runs as follows-

> Subject to this Act ... an award, decision or order of the [Industrial] Court under this Act ... shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

Since 1981, the *Fire Bricks'* ruling has been consistently applied and accepted in this country by a line of authority ranging from *Assunta Hospital* v *Dr. A. Duti*[9] to the most recent case of *Harper Trading (M) Sdn. Bhd.* v *National Union of Commercial Workers*.[10] Most of the cases concerned the effect of section 33B(1) on judicial review. A few cases would suffice to substantiate this observation. In *V. Subramaniam* v *Craigielea Estate*,[11] the Federal Court while commenting on section 29(3)(a) observed that "*South East Asia Fire Bricks* has put to rest completely the idea that mere error of law on the face of the record entitles the High Court to quash the award of the Industrial Court provided that it had jurisdiction and did not exceed it when making its award". In *Harpers Trading*[12], the Supreme Court held that errors of law within jurisdiction committed while the Industrial Court was making an award did not render the award a nullity and certiorari could not go to quash the award. The *Fire Bricks* case was one of the authorities cited for the said ruling. Similarly, in *Enesty* v *Transport Workers Union & Anor*,[13] the Supreme Court quoted in extenso and verbatim the dicta of Lord Fraser of Tullybelton in the *Fire*

[9] [1981] 1 MLJ 115.
[10] [1991] 1 MLJ 417.
[11] [1982] 1 MLJ 317.
[12] [1991] 1 MLJ 417.
[13] [1986] 1 MLJ 18.

Bricks case in order to drive home the point that the High Court could intervene with the award of the Industrial Court only if the tribunal had committed an error of jurisdiction as distinct from a mere error of law.[14]

A survey of Malaysian cases after the *Fire Bricks* case reveals that the courts have applied the ruling of the Privy Council faithfully and rigidly. The courts were not enthusiastic in reviewing the awards, decisions or orders of the Industrial Court. The reasons given for non-interference were either because the errors of law complained of were errors made within jurisdiction[15] or errors of law on the face of the record.[16] Only in a few cases were the courts willing to issue certiorari on the ground of errors of jurisdiction or defects of jurisdiction.[17] The Fire Bricks case has cast a prolonged and restrictive impact on judicial review in this country.

The Supreme Court in *Enesty* v. *Transport Workers Union & Anor*[18] had the opportunity to explore the possibility of abolishing the distinction between an error of law and an error of jurisdiction but it had failed to avail itself of the opportunity. It expressed the possibility that - "[p]erhaps the time will come for this Court to consider the view expressed by Lord Diplock in the House of Lords in *Re Racal Communications Ltd.*[19] and thereby open the way for the acceptance of Lord Denning's suggestion in *Pearlman* v *Harrow School*[20] in discarding the distinction between an error of law which affected jurisdiction and one which did not". In this context, it can be observed that our Supreme Court is still reluctant to take the initiative to do away with the dichotomy between

[14] See also *Sabah Banking Employees' Union* [1989] 2 MLJ 284; *Malayan Banking Bhd.* [1988] 3 MLJ 204.

[15] *Malayan Commercial Banks Association* [1981] 2 MLJ 183; *Harper Trading (M) Sdn. Bhd.* [1991] 1 MLJ 417; *Sarawak Commercial Banks Association* [1990] 2 MLJ. 315.

[16] *Re Dunlop Estate* [1981] 1 MLJ 249; *National Union of Hotel, Bar and Restaurant Workers* [1981] 1 MLJ 256 ; *National Union of Commercial Workers* [1981] 1 MLJ 242.

[17] *Lee Wah Bank Ltd.* [1981] 1 MLJ 169; *Inchape Malaysia Holdings* [1985] 2 MLJ 297; *Malayan Banking Bhd.* [1988] 3 MLJ 204; *OCBC* [1986] 1 MLJ 338.

[18] [1986] 1 MLJ 18.

[19] [1980] 3 WLR 181.

[20] [1979] 1 QB 56.

error of law and error of jurisdiction whereas some of the Law Lords who presided over the *Fire Bricks* case had already done so quite some time ago. Out of the four assenting Law Lords, at least two had subsequently changed their stance when they presided in the House of Lords. Lord Keith did so in *Re Racal Communications,* and Lord Fraser in *O'Reilly* v *Mackman.*[21] By adopting the *Fire Bricks* case as "the prevailing norm" in this country, the policy of the Supreme Court does not accord with the current judicial thinking in the common law jurisdictions. The move now is towards enlarging the scope of judicial review rather than restricting it.

2. *Simpler privative clauses*

It will be recalled that the *Fire Bricks* case dealt with an ouster provision which was wide and elaborate and the Privy Council duly acknowledged this feature when it rejected *Re Gilmore* (which dealt with a simple finality clause) as a norm to construe a wider provision in the form of section 29(3)(a) of the Industrial Relations Act 1967. This distinctive feature of section 29(3)(a) or section 33B(1) of the Industrial Relations Act 1967 must be kept in the forefront of the judges' minds when they are using the *Fire Bricks* case as a precedent in subsequent cases. However, in later cases, the courts applied the *Fire Bricks* case indiscreetly to simpler ouster provisions totally ignoring the advice of the Privy Council. A few cases will suffice to illustrate the point. *Wong Yet Eng* v *Chin Cheng Foo*[22] dealt with section 15 of the Control of Rent Act 1966 which postulates that "... any decision made by the Appeal Board shall be final and shall not be questioned in any court". In spite of the fact that the ouster provision is narrower or simpler than section 29(3)(a) of the Industrial Relations Act, the Federal Court ruled that on the authority of *Fire Bricks,* "certiorari will lie if the error goes to jurisdiction or if the Appeal Board had done or failed to do something

[21][1983] 2 AC 237.
[22][1985] 1 MLJ 36.

in the course of the enquiry as to render its decision a nullity". Likewise, in *Tanjung Jaga* v *Minister of Labour and Manpower & Anor*[23] the ouster provision involved is section 9(6) of the Industrial Relations Act which states that "[a] decision of the Minister under subsection (5) shall be final and shall not be questioned in any court". Again the Supreme Court pointed out that "[t]his clause is of course ineffective as regards jurisdictional review ...". This time, the Court relied on *Pahang South Union Omnibus* v *Minister of Labour and Manpower & Anor*[24] which also dealt with the same ouster clause in question. In *Pahang South Union Omnibus*, the Federal Court expressed the view that "[t]he Privy Council reiterated in *South East Asia Fire Bricks* ... that such a clause would not preclude the jurisdiction of the High Court to review a decision by certiorari if it is vitiated by jurisdictional error or is a nullity".

The move to equate an elaborate privative clause with a narrower one should be avoided because it has resulted in whittling down the scope of judicial review. This move is out of line with the pre-*Fire Bricks* authorities which had interpreted the simpler ouster provisions restrictively. For example, the court ruled that section 16A(5) of the Industrial Relations Act 1967 (a clause rather similar to section 9(6) of the same Act) was unable to preclude certiorari in the event of an error of law on the face of the record or on the ground of excess of jurisdiction in *Kannan and Anor* v *Menteri Buruh dan Tenaga Rakyat*.[25]

3. *Wider ouster provisions*

Another pertinent question to ponder over is whether the *Fire Bricks'* ruling can be used as a precedent to construe ouster provisions which are wider in scope than section 29(3)(a) or section 33B(1) of the Industrial Relations Act.

[23][1987] 1 MLJ 124.
[24][1981] 2 MLJ 199. See also *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam* [1990] 3 MLJ 231.
[25][1974] 1 MLJ 90. See also *Mohammed* v *Commissioner of Lands* [1968] 1 MLJ 227.

Section 18C of the Societies Act 1966 will now be examined as it is an example par excellence of such a clause. It is a very wide and elaborate privative clause, far wider than either section 29(3)(a) or section 33B(1) of the Industrial Relations Act 1967. It runs as follows:

> The decision of a political party or any person authorised by it or by its constitution or rules or regulations made thereunder on the interpretation of its constitution, rules or on any matter relating to the affairs of the party shall be final and conclusive and such decision shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any ground, and no court shall have jurisdiction to entertain or determine any suit, application, question or proceeding on any ground regarding the validity of such decision.

The effect of the aforesaid provision was considered recently by the High Court in *Senator Lau Keng Siong & Anor* v *Ng Cheng Kiat.*[26] The Court referred to *Fire Bricks, Anisminic* and *Re Racal Communication,* but from the various parts of the judgment of the Court it is quite clear that the Court favoured the *Fire Bricks'* ruling as the authority to interpret the said provision. In other words, the clause in question will not have the effect of ousting judicial review if the inferior tribunal has acted without jurisdiction or if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. The decision of the High Court shows that in spite of the width and elaborateness of the clause in question and also the fact that the case in question dealt with the decisions of a political party, the Court was still not willing to relinquish its supervisory jurisdiction in toto. This decision is in accord with the long-standing judicial policy of not relinquishing judicial review in toto even in the face of a very wide and elaborate ouster provision in order to preserve some form of jurisdictional review or the rule of law.

[26][1990] 3 MLJ 417.

IV. Possibility of a Complete Ouster

Local judicial precedent thus far shows that no legislative formulae devised by parliamentary draftsmen have succeeded in shutting out judicial review in totality. But it must be admitted that it is possible in theory and in practice to devise a judge-proof ouster provision. The traditional judicial policy of preventing the acquisition and exercise of absolute power by the executive or an inferior tribunal must necessarily give way to clear and unequivocal statutory language to the contrary, or to use the words of Denning L.J (as he then was) in *Re Gilmore*, "the most clear and explicit words". In our system, the rule of law demands that not only the administrators should faithfully abide by legal rules but also the courts. This principle of judicial deference may require that the courts apply a red-light theorist's approach in the face of a clear parliamentary instruction and intention to the contrary.[27] In this relation, reference must be made to the ouster provisions of two English statutes, namely, section 7(8) of the Interception of Communications Act 1985, and section 5(4) of the Security Service Act 1989. In order to illustrate the point, only the Interception of Communications Act 1985 will be examined here. In brief summary, several provisions of the 1985 Act will be looked at. The criteria governing the issue of a warrant to intercept postal or telephonic communications are laid down in section 2. Section 8 creates the office of a commissioner (a person who holds or has held a high judicial office). The Commissioner is appointed by the Prime Minister to replace, in effect, the office of judicial monitor, to review the carrying out of the provisions of the Act, to give to the tribunal[28] all such assistance as the tribunal may require for the purpose of enabling them to carry out their functions under the Act, and to report to the Prime Minister annually. Section 7 provides for a tribunal to consider complaints about interceptions. The tribunal is composed of five members each of whom shall be a barrister,

[27]For details of this doctrine, see for example, Allars, *Introduction to Australian Administrative Law* (1990), 234-235.
[28]Set up under section 7.

advocate or solicitor of not less than ten years' standing (para 1(1), Schedule 1). This tribunal has power, inter alia, to quash a warrant if a contravention of section 2 is established and to award compensation. Section 7(8) expresses in no uncertain terms that the decisions of the tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court. By section 9, no evidence may be adduced and no cross-examination may be directed to suggest in any court or tribunal proceedings (other than proceedings of the section 7 tribunal) that a warrant has been issued. The Divisional Court in *R. v Secretary of State for the Home Department (ex parte Ruddock)*[29] held that the courts under the 1985 Act cease to exercise supervisory or investigative functions in the field of interceptions of communications. Thus by a properly worded clause, in particular by the use of the word 'jurisdiction', coupled with the provision of an adequate machinery to redress grievances arising under the 1985 Act, judicial review is effectively and totally ousted. The tribunal established under the Act is regarded as competent to decide whatever questions of law and fact entrusted to it and its decisions, notwithstanding they are wrong or a complete nullity, are not only unappealable but also immune from judicial review.[30]

A note of caution must be given here. The traditional strict construction policy must not be simply abandoned in favour of the principle of judicial deference save when conditions warranting its application are fulfilled.[31] The former is to be regarded as the rule and the latter an exception.

A pertinent question arises in this context is whether the principle of judicial deference is applicable to the Land Acquisition Act 1960 particularly in the face of section 68A which states that where any land has been acquired under the Act no subsequent disposal or use of, or dealing with, the land, whether by the State Authority or by the Government, person or corporation on whose behalf the land was acquired, shall invalidate the acquisition of the land. It is submitted that

[29][1987] 2 All ER 518.
[30]Section 5(4) of the Security Service Act 1989 has an identical ouster provision and therefore should be similarly construed.
[31]See Allars, *op. cit.*, n.27.

the said principle has no application to section 68A because other than the wording of the said section, there is also an absence of an adequate and competent machinery[32] to redress grievances arising under the Act following the acquisition of the land.

V. Recent Legislative Trend and Possible Responses Thereto

A trend easily discernible in recent years in the use of privative clauses in statutes in this country is the resort by Parliament to very wide and elaborate ouster clauses or clauses which are purported to have very drastic effect on judicial review. Article 150(8) of the Federal Constitution, section 8B(1) of the Internal Security Act 1960, section 18C of the Societies Act 1966, and section 68A of the Land Acquisition Act 1960, are examples par excellence of the types of ouster provisions referred to. Section 18C of the Societies Act 1966 has already been examined in the context of the application of the *Fire Bricks'* ruling. It need not be repeated here. The phraseology of the aforesaid ouster provisions is significant as it differs from the usual ouster clauses. In order to examine their effect on judicial review, reference to their actual provisions is necessary and they will be considered separately below.

1. *Article 150(8), Federal Constitution*

Clause (8) of Article 150 provides that notwithstanding anything in this Constitution-

a. the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1)[33] ... shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and
b. no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of-

[32]Especially a tribunal.
[33]Article 150(1) gives the power to the Yang di-Pertuan Agong to issue a Proclamation of Emergency on any of the grounds enumerated therein.

i. a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1)
ii. ...
iii. ...
iv. ...[34]

Article 150(8) was introduced only in 1981 by Act A514.[35] Clause(8)(a) decisively reaffirms the principle that the subjective satisfaction of the Yang di-Pertuan Agong to issue a Proclamation of Emergency is non-justiciable as established in local case law before 1981. But an important question that arises is whether the validity of a Proclamation can still be challenged on the ground of *mala fides* as an implied restriction on the power so conferred. Pike C.J. in *Stephen Kalong Ningkan* v *Tun Abang Haji Openg & Tawi Sli* (No. 2)[36] opined that there could be no judicial review "provided [the Proclamation] was made *bona fide*". This view is also supported by Indian case law.[37] But it must be stated that this view was expressed before the 1981 amendment to Article 150 particularly clause (8)(b) which specifically forbids the court to entertain or determine any question regarding the validity of such a Proclamation. Should the ouster clause incorporated in Article 150(8) be interpreted literally or should the implied restriction of *mala fides* be continued to be imposed are very difficult questions confronting constitutional and administrative lawyers. It is respectfully submitted that the exception of *mala fides* is based on sound constitutional policy of protecting and preserving the rule of law in our system. *Mala fides* constitutes an abuse of power and should not be condoned even in the case of emergency powers, extremely wide though they are. Some support for this view may be founded on the Indian case of *Rajastan* v *India*[38] where nearly all the Judges

[34]Chiefly for the sake of simplicity, only the power of Proclamation of Emergency will be covered in the illustration.
[35]The Constitution (Amendment) Act 1981.
[36][1967] 1 MLJ 46.
[37]*Infra*, n. 38.
[38]A.I.R. 1977 SC 1361.

of the Indian Supreme Court asserted that despite the broad ambit of the power under Article 356[39] "a presidential proclamation could be challenged if the power was exercised *mala fide* or on constitutionally or legally prohibited grounds or for extraneous or collateral purposes". And further, the presence of an ouster clause in Article 356(5) (which provided that the satisfaction of the President "shall be final and conclusive and shall not be questioned in any court on any ground") did not prevent the Court from imposing an implied restriction on the said power. It can thus be plausibly argued that in spite of the truly broad ambit of the ouster provisions in Article 150(8)(a) and (b), the High Court still enjoys some residuary supervisory jurisdiction to intervene on the ground of *mala fides* if a strict construction approach is adopted.

2. *Section 8B(1), Internal Security Act 1960*

This section says that-

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.[40]

This section came into effect on 25th August 1989 via Act A739.[41] The Explanatory Statement to the Amendment Bill stated that "[t]he intention of this new section is to decisively reaffirm the principle that the subjective test applies in determining the proper exercise of the discretionary power by the Minister as laid down in the case of *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 ...".

[39]This article empowers the President to take over the administration of a State on account of the failure of constitutional machinery therein.

[40]See also, section 11C(1), Dangerous Drugs (Special Preventive Measures) Act 1985, and section 7C(1), Emergency (Public Order and Prevention of Crime) Ordinance 1969. As these three ouster provisions are in pari materia, they are to be similarly construed.

[41]Internal Security (Amendment) Act 1989.

In *Karam Singh,* the Federal Court laid down an important rule that the subjective satisfaction of the Minister to detain a person is not open to judicial review. This principle has been reaffirmed and reiterated in a number of cases[42] subsequently. This rule, too, is subject to an important qualification or implied restriction that it is open to the detainee to prove that the power has been exercised *mala fide* or improperly once the detaining authority has established the legality of the detention. This qualification is also established in *Karam Singh* itself. Therefore, it is submitted that, with the coming into effect of section 8B(1), the scope of judicial review in cases of preventive detention is as follows-

i. The subjective satisfaction of the Minsiter to detain a person is not subject to judicial review save on the ground of *mala fides*.

ii. Any procedural impropriety is reviewable. In *Puvaneswaran* v *Menteri Hal Ehwal Dalam Negeri, Malaysia and Anor,*[43] a case of preventive detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969, the High Court applied the traditional mandatory-directory dichotomy. Accordingly, if the procedural requirements are vital and go to the root of the matter, they would be mandatory and a breach thereof cannot be condoned. However, if the requirements are not mandatory, they would be directory only and a breach thereof could be condoned provided there is substantial compliance with the requirements read as a whole and provided no prejudice ensues.

iii. The doctrine of express substantive ultra vires applies and judicial review is available if the grounds of detention are alleged to be not within the scope of the enabling statute. *Re Tan Sri Raja Khalid*[44] established this point. The law should be the same either before or after 25th August 1989.

[42]For example, *Theresa Lim Chin Chin* v *IGP* [1988] 1 MLJ 293; *Re Tan Sri Raja Khalid* [1988] 1 MLJ 184; *Karpal Singh* [1988] 3 MLJ 29.
[43][1991] 3 MLJ 28.
[44][1988] 1 MLJ 184.

In the light of the foregoing analysis, it may be deduced that the effect of section 8B(1) on judicial review is not that drastic after all.

3. *Section 68A, Land Acquisition Act 1960*

This section was introduced by the Land Acquisition (Amendment) Act 1991.[45] It came into effect on 13th September 1991. It incorporated an ouster provision which is purported to have a very drastic effect on judicial review of land acquisition cases under the Land Acquisition Act 1960. It states as follows-

> Where any land has been acquired under this Act, whether before or after the commencement of this section, no subsequent disposal or use of, or dealing with, the land, whether by the State Authority or by the Government, person or corporation on whose behalf the land was acquired, shall invalidate the acquisition of the land.

The Explanatory Statement to the Amendment Bill which introduced section 68A said that this new section "purports to save an acquisition of land from being rendered invalid by reason of any subsequent disposal or use of, or dealing with, the land". So the section only "purports to save an acquisition". Whether it will succeed to do so is a matter of judicial interpretation. Adopting the traditional approach which advocates that when words in a statute purport to oust judicial review of the decisions of a public authority they must be construed strictly, a few comments may be made pertaining to the application of section 68A. They are -

i. First, the purpose or purposes of acquisition must come within the scope of section 3 which enumerates the purposes for which the acquisition is needed. The acquisition must not contravene section 3 and section 68A cannot override the doctrine of express substantive *ultra vires*.

[45]Act A804.

ii. Secondly, the affected landowner or landowners must be adequately compensated for the loss of the land in accordance with Article 13(2) of the Federal Constitution. It is submitted that if the compensation is grossly inadequate, the action of the State Authority may amount to "unreasonableness" or "unfairness" and when this happens judicial review may still be available even in the face of section 68A, and in spite of the fact that the Act in question does provide a machinery for resolving the problem of inadequate compensation.[46]

iii. Thirdly, if the procedures of acquisition are not complied with by the State Authority, the acquisition can still be questioned or reviewed on the ground of procedural impropriety. Section 68A will not and cannot oust the doctrine of express procedural *ultra vires*.

iv. Fourthly, if through the subsequent disposal or use of, or dealing with, the land it can be shown, for example, that the action of the State Authority is actuated by *mala fides* or improper purpose, the question then arises is whether the affected party or parties can invoke the aid of the *Anisminic* doctrine to nullify the prior acquisition. Is section 68A effective enough to preclude the application of the *Anisminic* principle? Before dealing with these questions, it must first be stated that the action of acquisition and the subsequent action of disposal, etc., of the land should be regarded as one single transaction, or the prior and the subsequent actions must be regarded as so closely inter-linked that they cannot be severed from each other and therefore each action cannot be viewed at separately. Many a times, the real purpose or motive of the acquisition can only be deduced from the subsequent disposal or use of, or dealing with, the land. Next, reverting to the questions postulated earlier, *mala fides* or improper purpose are classified as "jurisdictional errors" under the *Anisminic* formulation or in other words they are instances of "abuse of power". They render an administrative decision or action void. Therefore, it is submitted that it

[46]See *Lai Cheng Cheong* [1983] 2 MLJ 113, and *Dollah Salleh* [1989] 3 MLJ 484, on the effect of alternative remedy.

would be against the doctrine of rule of law to argue that section 68A can condone jurisdictional errors or abuse of power.

Thus by resorting to the strict construction approach, judicial review is still very much preserved even in the face of section 68A.

VI. The Position in Other Common Law Jurisdictions

For purposes of comparison and perhaps as suggestions for statutory reform, reference to the position in other common law jurisdictions is unavoidable. In England and Australia, legislative attempts have been made to nullify the effect of privative clauses in statutes. In England section 11(1) of the Tribunals and Inquiries Act 1957 rendered all pre-1958 privative clauses ineffective to oust judicial review. The 1957 Act is now replaced by the Tribunals and Enquiries Act 1971, section 14 of which performs a similar function like section 11(1) of its predecessor. "It seems also that a post-1958 clause which substantially re-enacts a pre-1958 clause will be treated as pre-1958 for this purpose."[47] Australia has introduced statutory reform to the same effect.[48] More interestingly, in Australia a privative clause cannot affect the original jurisdiction of the High Court under section 75(v) of the Commonwealth Constitution to grant prohibition or mandamus against an officer of the Commonwealth. In India, Article 226 of the Constitution incorporates a provision which entrenches the writ system and so a statutory provision purporting to oust the High Court's jurisdiction to issue a writ cannot be effective in the face of Article 226. No legislative attempt has been made, or is contemplated in Malaysia along the lines indicated in the foregoing.

VII. Conclusion

The *Fire Bricks'* ruling alone is restrictive of judicial review comparing with the position before 1980. The indiscreet and

[47]Wade, *Administrative Law* (6th. ed.), 730.

[48]Section 4, Administrative Decisions (Judicial Review) Act 1977, and section 12, Administrative Law Act 1978 (Vic.) See Allars, *op. cit.*, n.27, p.133.

indiscriminate application of the *Fire Bricks'* ruling to any form of ouster provisions is bound to cause further problems on judicial review of the decisions of inferior tribunals and other bodies. The current legislative trend of enacting ouster provisions which are very wide and elaborate or clauses which are purported to have very drastic effect on judicial review adds further dimensions and complexity to the already confused situation. With a view to remedying the defects currently existing in our system, legislative measures aiming either at nullifying the ouster provisions currently in operation or at entrenching the writ system are most desirable in the long run. But judging by current legislative trend in the use of privative clauses and the 1988 amendment[49] to Article 121 of the Federal Constitution, the likelihood of such legislative measures being undertaken in the near future will be rather remote. However, there is an urgent need to restrict the application of the *Fire Bricks'* ruling by the courts. The *Fire Bricks'* ruling should be restricted to clauses which are as wide and elaborate as section 33B(1) of the Industrial Relations Act 1967. And in order to avoid the problems posed by the error of law-error of jurisdiction dichotomy, the courts may resort to the *Anisminic* doctrine by giving a broad ambit to the expression "jurisdictional error" so that an error of law can be converted into a jurisdictional error. As a compromise to legislative reform, there is much truth and wisdom in the proposal that a full acceptance of the *Anisminic* doctrine, qualified by a principle of judicial deference, would be desirable in providing a uniform rationale for reviewing the decisions of both tribunals and inferior courts and administrators generally.[50] And in the same context, an indiscreet and extensive use of ouster provisions must be avoided and resisted by the legislators because such a measure is bound to lead to abuse.

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[49]Constitution (Amendment) Act 1988, Act A704.
[50]Allars, *op.cit.*, n.27, pp. 234-235.