MANAGING DISCREPANCIES AND PUBLIC MISCONDUCTS

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Abstract

Public interest litigation which were initiated by citizens is considered as one of the ways of the public challenging the 'misconduct' of the government. Public interest litigation is deemed as a check and balance against administrative actions. Therefore, it is safe to say that public interest litigation has a significant role in ensuring the good governance of a state or country. The effectiveness of the public challenging government's conduct lies largely on the decisions established in the court cases. Nevertheless, there are cases reported against the executives that were ineffective due to the restrictive approach to locus standi. In 1988, there were cases that marked the courts fundamental shift from a liberal to restrictive approach in terms of the rules of standing which a public interest litigant was required to meet before his action against the executive can be maintained. This paper attempted to discuss the court's approach in manifesting public interest litigation. The sort of pattern shown to curb public misconducts. All this contribute to the growth of civil society, weak nor strong.

Keywords: *public interest litigation, misconducts, good governance*

Introduction

Public interest litigation initiated by citizens is considered as one of the ways of the public challenging the 'misconduct' of the government. Public interest litigation is deemed as a check and balance against administrative actions.(The Malaysian Bar, 2003). The effectiveness of the public challenging government's conduct lies on the decisions established in the court cases. Judicial review is the most commonly sought remedy against administrative malpractices or unjust decisions in Malaysia. Nevertheless, many cases reported against the executives were all unsuccessful due to the restrictive approach to locus standi. In 1988, "the case marked the courts' fundamental shift from a liberal to restrictive approach in terms of the rules of standing which a public interest litigant is required to meet before his action against the executive can be maintained." (Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12).

Originally, many commonwealth countries have adopted the Swedish institution of Ombudsman as an independent and impartial arbiter between the government and the individuals to check the abuse and mal-administration in the public sector, the government in Malaysia has, on the other hand, set up what is known as the Public Complaints Bureau (PCB). The bureau is responsible to receive and investigate complaints arising from public dissatisfaction toward any action they consider as unjust, not in accordance with existing laws, abuse of power, misconduct, inefficiency and delay in service provision. The PCB is required to report the outcome of its investigation with recommendations to a Permanent Committee on Public Complaints (PCPC) 5 and other relevant authorities. It is also to forward the decisions of the PCPC to ministries, federal and state departments, statutory boards, local authorities and agencies concerned for the purpose of corrective actions and monitoring those actions.

However, the PCB as an adjunct of the PM's office falls short of Ombudsman; it also suffers from insufficient authority to take actions against errant officials. The PCB can only investigate and forward its report to PCPC for further deliberations and decisions on recovery actions. Thus PCB is said to provide a passive check on administration. Public interest litigation is most commonly used to challenge the decisions of public authorities by judicial review. Judicial review is a form of court proceeding in which a judge reviews the lawfulness of a decision or action, or a failure to act, by a public body.

How effective the public in challenging the government's 'misconduct 'will be deliberated in the cases below. To see the pattern, the discussion on public interest litigation will focus on few episodes before

the 1988 era and also post 1988 era particularly in Malaysia. This will disclose the operative role of judicial review in managing discrepancies and public misconducts.

Judicial Review Pre-1988 Era

Public interest litigation plays a prominent role in maintaining the rule of law and enhances access to justice for disadvantages groups under public law. As a result, the Court should be more lenient in terms of rules of standing in public law to allow any public acting in good faith. If public interest litigation is prevented by traditional rules of locus standi, then it is considered a grave voids in the public law system." (Chee Keong, Gan & Mohd Shariff, 2016). In the spectrum of public law, locus standi signifies a right to challenge any unlawful decision or action made by any administrative authorities. A person must prove at that he has locus standi or standing, in which he must have sufficient interest in the subject matter of the case and is adversely affected by the mentioned administrative action, if he intends to apply for judicial review of the decision made by the officer (Zul Zakiyudin & Abdul Aziz & Arman Abdul Razak, 2015).

Prior to 1988, the practice of Malaysia courts is giving a liberal approach to the issue of locus standi in Malaysia. At that time, locus standi is a rule of practice and procedure which usually were laid down by the judges and it was not defined by any statutory Enactment. In order to suit the changing times, it was altered by the judges like all rules of practice. There are several cases which reflects how the Malaysian courts was using liberal approach in terms of the rules of standing which a public interest litigant is required to meet before his action against the executive can be taken. Such liberal approach can be evidenced in the cases of *Lim Cho Hock v Government of the Sate of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* and *Tan Sri Haji Othman Saat v. Mohamed bin Ismail*.

Surviving standing

Lim Cho Hock's case is the first reported high-water mark case liberalizing standing. The characteristics of public interest litigation are best reflected in this case. In this case, a Member of Parliament and State Assemblyman sought declarations that the Chief Minister could not hold the office of the President of the Ipoh Municipal Council at the time being the Chief Minister and that his appointment as President of the Municipal Council was inoperative and null and void. Even though he was unsuccessful in obtaining the declarations, this public interest litigant was apparently instituted on behalf of the community in that area *(Lim Cho Hock v Government of the Sate if Perak, Menteri Besar, State of Perak and President, Municiality of Ipoh [1980] 2 MLJ 148).*

In Malaysia, Section 41 of Specific Relief Act (Act 137) stipulates that a declaration can be sought as to the plaintiff's entitlement to a legal character, or status or right to property. Whilst Order 15 rule 16 Rule of High Court 1980 provides that the plaintiff needs to establish only that his or her legal interests are peculiarly affected. Thereby, in the Lim Cho Hock's case, it was held that the plaintiff (Lim) in seeking for a declaratory judgement had to show that his legal interests were peculiarly affected (that the defendant's action would cause him to suffer special damage). He needed to show that he had a genuine interest in having his legal position declared. Here, the applicant, who was an Ipoh parliamentarian challenged as invalid the appointment of the same man to the offices of Menteri Besar and President of the Ipoh Municipal Council.

Even though the applicant was unsuccessful in obtaining the declaration, Abdoolcader J as he then was, found that the applicant as ratepayer had locus standi to institute proceedings as he reviewed extensively numerous authorities on the issue of locus standi in the Commonwealth and concluded that;

> *"In the light of the authorities I have discussed, I can see no reason to deny standing to the plaintiff as a ratepayer to institute and seek the relief he does in these proceedings".* (*Lim Cho Hock v Government of the Sate if Perak, Menteri Besar, State of Perak and President, Municiality of Ipoh [1980] 2 MLJ 149-151).*

Abdoolcader J further approved Lim Cho Hock's case and adopted the liberalizing approach relating to individual standing and gave a long list of reasons why the threshold of locus standi must be lowered nowadays. He stated that;

> *"In the matter if locus standi in declarations, the sensible approach would be that as a matter of jurisdiction, that should suffice; an assertion of an infringement of a contractual or a propriety right, the commission of a tort, or the breach of statutory right which affects the plaintiffs interests or where the plaintiff has some genuine interest in his legal position."(Lim Cho Hock v Government of the Sate if Perak, Menteri Besar, State of Perak and President, Municiality of Ipoh [1980] 2 MLJ 149).*

This articulated standpoint of the judiciary remains in the case *Tan Sri Haji Othman Saat* the illustration of which can be found below.

Assessing act of standing.

Here in Tan Sri Haji Othman Saat's Case the court highlighted the power of standing. In this case, "the respondent and 183 other persons had applied for land in Mersing, Johore but receive no response for some eight years *(Tan Sri Haji Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177)*. The respondent learnt that land in the area had been alienated to the appellant (together with other 7 people) who was the Menteri Besar of the Johore State and other person who serves is the upper rank in administrative service. The respondent then applied for declarations basically for challenging the validity of the alienation of the land and named as respondents thereto the State Director of Lands and Mines and the Government of the State of Johore. The appellant then applied to strike out the proceedings claiming that the respondent has no locus standi and also other procedural objections. Nevertheless, the Federal Court dismissed the appellant's application. The court held that a person has locus standi to institute action on behalf of others." *(Tan Sri Haji Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177).*

The court reasoned that any citizen could challenge an unlawful government act or act against public miscounduct; locus standi was grounded not only in having sufficient interest in the subject matter of the dispute but also the right of a citizen to challenge acts of maladministration. The Judge of the case; Wan Yahya J adopted the dictum by Lord Diplock in an English case that;

> *"There would be a grave lacunae in our system of public law if a pressure group, like the Federation, of even a single public spirited tax-payer, were prevented by out-dated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped"(Oshlack v. Richmond River Council (1997) 152 ALR 83).*

Wan Yahya J further stated;

> *"... if they (public authorities) transgress any law or constitutional directive, then any public-spirited citizen, even he has no greater interest than a person having regard for the due observation of the law, may move the courts and the courts may grant him the appropriate legal remedy in its discretion" (Zul Zakiyudin & Abdul Aziz & Arman Abdul Razak. (2015).*

From the mentioned cases above, it is clear that the courts were forthrightly liberal in the rule on standing (specifically in public interest litigation). Both Lim Cho Hock and Othman Saat's case made a notable remark in which the courts recognized the applicants for going against the malpractices or abuse of power by the administrative authorities. In this respect, such recognition certainly contributed to the effectiveness of the public challenging government's misconduct.

Despite the liberal approach in matters of individual standing, the concerned parties failed to obtain declarations from the courts. The reason being the law requires the applicant to hold a genuine interest in having their legal position declared, failing which the remedy would not be granted.

The facts remain still, failure to obtain the relief from the court would deprived the aggrieved of their legal rights. Therefore, the issue of the effectiveness of the public challenging the administration abuse

or corruption in the pre-1988 era remain debatable as due rights were not wholly granted to the concerned parties. The following discussion will show the application of public interest litigation post era 1988 to gauge the struggle the courts encounter on standing.

Judicial Review Post-1988 Era

As illustrated above the phenomena involving standing are promising but the court somehow departed from the liberal to restrictive approach. This event among others took place as a result of the criminal case in *PP v Dato Yap Peng (1987) 2 MLJ 311*. Due to the courts forceful ruling in this case, the constitution was critically amended.

The aftermaths of the case was due to the radical Supreme Court decision. The Supreme Court here came to the decision that section 418A was unconstitutional on the ground that it violated Article 121(1) of the Constitution. Article 121(1) of the Constitution provided that the judicial power of the Federation shall be vested in the two High Courts and such inferior courts as might be provided by federal law. The Supreme Court in that case had this to say that judicial power to transfer cases from a subordinate court of competent jurisdiction as presently provided by s. 418A of the Penal Code cannot be conferred on any organ of government other than the judiciary. Judicial power broadly defined refer to the power of every sovereign authority to decide controversies between the subjects, between itself and its subjects whether the right relates to life, liberty or property, and this power rightly should and must be vested in the third arm of the government, the judiciary.

The amendment to art 121(1) has the effect of allowing Parliament to enact legislation regulating judicial review. Since 1988 then, the Supreme Court has taken a rigid and narrow approach on the issue of standing, hence affecting the growth of public interest litigation. Despite the bleak growth, the year 2000 and beyond, exhibited some divergence of judicial attitudes on the public interest litigation in hearing the application for reliefs. The irregular attitude of the court on the issue of standing must not hamper the growth of public interest litigation. The current Malaysian framework strive to resolve the problems. Apparently the realization emerged in the following case where the court exhibited an improved analysis of public interest litigation to counter maladministration and the like.

Potential effect of Public Interest Litigation: (MTUC) CASE

Malaysian Trade Union Congress *(MTUC case*) laudable in that it depicted the courts shift towards realism. In the Federal Court case of *Malaysian Trade Union Congress & 13 Ors v Menteri Tenaga, Air dan Komunikasi & Anor(MTUC case)(2014) 3 MLJ 145,* was a major groundbreaking case in Malaysia needs to be looked at. The case was brought by the Malaysian Trade Union Congress (“MTUC”) after their request for SYABAS’ documents concerning the increase in water tariffs was rejected by the Minister in charge. The services of the Selangor Water Supply Department had been privatised with effect from 15 March 2002. As a result, water distribution was taken over by Perbadanan Urus Air Selangor Bhd, which was subsequently taken over by Syarikat Bekalan Air Selangor Sdn Bhd ("SYABAS").

About two years later, SYABAS was granted a 30-year concession to supply treated water to the State of Selangor and the Federal Territory under a Concession Agreement which, inter alia, provided that SYABAS was entitled to increase the water tariffs if it achieved a 5% reduction in what was known as non-revenue water. SYABAS subsequently applied to increase the water tariffs by 15% based on an audit report which purportedly confirmed that SYABAS had achieved a 5% reduction in non-revenue water. Thereafter the Minister announced that SYABAS had met the performance target and was eligible to increase water tariffs by 15% as from 1 November 2006.

The Malaysian Trade Union Congress ("MTUC") applied to the Minister for a copy of the Concession Agreement and the Audit Report justifying the 15% increase. The Minister refused to furnish the documents as he considered them to be classified. On 15 January 2007, MTUC and 13 others filed an application for judicial review asking for, amongst others, a declaration that the general public and

MTUC had a right to view the two documents and an order directing the Minister to disclose the contents of the same.

In the High Court, Hadhariah Syed Ismail JC (as her Ladyship then was) allowed the judicial review application. The Government's appeal against the High Court's decision was allowed by the Court of Appeal.

MTUC and the other Applicants appeal to the Federal Court. Order 53 of the Rules of High Court 1980 ("RHC") prescribes the mode and procedure by which an application for judicial review is to be made. It was only inserted into the RHC to allows any person who was "adversely affected by the decision of any public authority" to apply for judicial review. The Court adopted the principles laid down in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532, 541-542* where the Court of Appeal held as follows:

> *"It is to rid this dichotomous approach which often produced injustice that O.53 in its present form was introduced. There is a single test of threshold locus standi for all the remedies that are available under the order. It is that the applicant should be "adversely affected". The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words "adversely affected". At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned".*

At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as too trivial or minor to merit consideration. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v Narendra Dadhich AIR (1999) SC 3211*, where, when granting relief, it was said:

> *"Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated."*

On the basis of the foregoing, the Federal Court held that the "adversely affected" test was the single test for all the remedies provided for under Order 53 of the RHC. The Court added that it is not necessary for the applicant to establish infringement of a private right or the suffering of special damage. The Federal Court found that MTUC possessed the necessary locus standi to bring the action.

The pronouncement by the Federal Court on locus standi in this case is significant as it seems to signal a wider access to the courts for the purpose of having decisions, actions and omissions of public authorities reviewed by the judiciary as the test laid down in the MTUC Case appears to be less stringent than the earlier cases above.

Conclusion

Generally, Malaysian public are dissuaded to take the government and public bodies to courts. Nevertheless, the cases discussed above marked the courts' fundamental shift from a liberal to a restrictive approach and back to liberal stand again, in terms of the rules of standing which a public interest litigant is required to meet before the action against the executive can be maintained. For public interest litigation to thrive, the public must have the insight to bring complaints to the courts. What can be concluded from the above discussion is that public interest litigation plays a significant role in

pushing good governance forward. The cases in *Lim Cho Hock* and the cases post era 1988 have shown the courts' matured attitude in revamping bad administration. These liberal shift of the courts on the Rules of standing in fact helps to generate the culture of good administration. The test adopted on who should be entitled for redress is the overriding test that can be used in stimulating civil society. Managing discrepancies and misconducts through this manner would likely endure time and pressure as the impact it brings to integrity is undoubtedly far-fetched.

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