

Is Public Interest Litigation Becoming More Prevalent in Malaysia?

Public interest is a branch of administrative law which involves judicial review of administrative actions plays a pivotal role in an administrative state such as Malaysia, particularly in the promotion of good governance. In fact, in an administrative state, one of the benefits of public interest litigation will be its contribution towards improving the quality of public administration as well as the system of accountability and transparency in government decision-making¹. Providing a stimulus to the growth of a good public administration should in turn benefit the citizens as a whole in their dealings with public authorities².

In this regard, public interest litigation can bring greater awareness of the benefits of good governance to the public. It does not matter if an activist or NGO fails in their attempts to do so³. As public interest litigation actions often generate wide publicity, the impact of it in the minds of the public is sufficient to promote the importance of good governance⁴. This will help complement the government's efforts in achieving a good public administration which provides the check and balance against executive actions in Malaysia. The traditional view of locus standi permits that only an aggrieved individual having personally suffered a legal injury by reason of a violation of his rights or legally protected interest can file a lawsuit for the redress of his grievances⁵. Although this standing rule assists the Court in filtering applications to prevent unnecessary litigation against the public bodies, but the Court's jurisdiction to supervise administrative authorities would be substantially weakened if the accessibility of judicial review is confined on the sole ground what could be properly viewed as a personal interest⁶. Hence, the involvement of public interest litigation in judicial review proceedings plays a substantial part in maintaining the rule of law.

Since its formation, Malaysia had no strong tradition of public interest litigation despite the existence of a written Constitution containing a bill of rights. This was partly due to the impediment in the case of Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang⁷ which marked the courts' fundamental shift from a liberal approach to a restrictive one in terms of the locus standi which required a public interest litigant to show that his private right had been infringed or he had suffered a special damage, before his action against the executive can be maintained. However, this has since changed in 2012, where the rule regarding locus standi was amended in Rules of Court 2012⁸ using the test of an adversely affected person but the scope was widened to include action or omission of public duty.

Even though this new rule did not relax much as the standard remains high in order for someone to commence legal action which made it difficult for any citizen to bring a suit against public authority if his right is not adversely affected, this development was still a much welcomed one as it shifted closer to the test used in English courts.

The landscape has further changed with the Federal Court's decision in the case of Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor⁹ ("MTUC case"). The Federal Court in its decision quoted the Supreme Court of India in *Malik Brothers v Narendra Dadhich*¹⁰, where the Supreme Court said that public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty and protecting social rights. The purpose of the Court in entertaining applications of judicial review is the vindication of the rule of law, effective access to justice to the economically weaker class and realisation of fundamental rights. The directions issued by the courts of law in public interest litigation are for the betterment of the society at large and not to benefit 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 otherwise the purpose of public interest litigation will be frustrated.

The Federal Court held that in order to pass the "adversely affected" test, an applicant has to at least show that he has a real and genuine interest in the subject matter¹¹. The Federal Court added that it is not necessary for the applicant to establish infringement of a private right or the suffering of special damage¹². The Federal Court found that Malaysian Trade Union Congress had a real and genuine interest to access the concessionaire agreement involving Syarikat Bekalan Air Selangor Sdn Bhd (Syabas) and an audit report, on the basis that the government is under a responsibility to provide safe and affordable treated water, and that water being an inalienable and basic right to human existence and living; there should not be unreasonable profiteering given that the supply and distribution of treated water had been privatised; and they have a legitimate expectation that the government shall at all times ensure that its people has affordable access to treated water¹³.

The Federal Court had also set aside the test of locus standi of the Supreme Court decision in the case of Lim Kit Siang. The decision in the MTUC case decision is significant as it liberalised the rules on locus standi, signalling 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 that laid down in Lim Kit Siang.

In conclusion, the lack of access to public interest litigation breeds complacency in the public administration if the administrative powers affecting a wide spectrum of society can only be challenged by affected citizens but not public-spirited citizens. It is therefore of pivotal importance that the executive should always view public interest litigation as a partner providing constructive criticism and not as an enemy in the administration of a good government. It is in this respect that the role played by public interest litigation in the promotion of good governance in public authorities can neither be ignored nor underestimated. Even though there has not been any particular breakthrough or major increase in public interest litigation cases in Malaysia in the recent years, the doors of the judiciary remain open as the judicial attitude towards it has been liberalised after the case of MTUC case.

¹ Tan Kor Mee, Roger "The Role of Public Interest Litigation in Promoting Good Governance in Malaysia and Singapore" *The Journal of the Malaysian Bar*, (2004) XXXIII No 1, pp. 94. <https://www.malaysianbar.org.my/cms/upload_files/document/58_176_roger_tan-1.pdf>

² *Ibid.*

³ Tan Kor Mee, Roger "The Role of Public Interest Litigation in Promoting Good Governance in Malaysia and Singapore" *The Journal of the Malaysian Bar*, (2004) XXXIII No 1, pp. 101. <https://www.malaysianbar.org.my/cms/upload_files/document/58_176_roger_tan-1.pdf>

⁴ *Ibid.*

⁵ Gan Chee Keong, Ahmad Azam Mohd Shariff, Ramalingam Rajamanickam, Nazura Abdul Manap "An Overview on the Public Interest Litigation in Malaysia: Development and Dilemma Under Provision of Remedies for Enforcement of Fundamental Rights" *Mediterranean Journal of Social Sciences*, MCSER Publishing, Rome-Italy, Vol 7 No 2 March 2016, pp. 115.

⁶ *Ibid.*

⁷ *Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12.

⁸ Order 53 Rule 2(4), Rules of Court 2012.

⁹ *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145.

¹⁰ *Malik Brothers v Narendra Dadhich* AIR [1999] SC 3211.

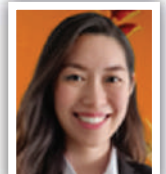
¹¹ *Malaysian Trade Union Congress (n 9)* [40].

¹² *Ibid* [58].

¹³ *Ibid.*



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