

APPLICATION OF PUBLIC INTEREST LITIGATION (PIL) IN PUBLIC BUILDING FAILURE CASES

Zul Zakiyuddin Ahmad Rashid

Universiti Sains Malaysia

Abdul Aziz Hussin

Universiti Sains Malaysia

Arman Abdul Razak

Universiti Sains Malaysia

Abstract

There are various reports on mismanagement of public fund and negligent decision making made by Malaysian public office bearers. Reports on illogical spending by the government agencies or building failures as a result of procurement and construction anomalies keep on piling. While certain legal provisions are available to tackle the issue, the applications of such provisions are subjected to the discretion of Attorney General, as well as respective departments' disciplinary board. More than ever, the Attorney General and relevant authorities attitude toward such misdemeanour tend to be forgiving, leading to no action been taken. There are numerous cries from the public to see act been forgive and forget, which may lessen the public confidence in good governance of the authority. Public Interest Litigation has always been the tool utilised by many countries including India and South Africa in ensuring good governance. This paper will look at the Malaysian approach on Public Interest Litigation within similar scope and objective, particularly on its application with regards to public building failures.

Keywords: Public interest litigation, good governance, public building failures

Corresponding Author's Email Address: zulzaki@usm.my

INTRODUCTION

Public Interest Litigation (PIL) is defined by Salman (2010) as a branch of administrative law which involves judicial review of administrative actions, where it has a pivotal role to play in an administrative state particularly in the promotion of good governance. Initiated by citizens who may not be directly affected by the administrative acts, such public interest litigants are often frowned upon by the executive as meddling busybodies. In PIL, the courts allow volunteers like lawyers or citizen petitioners to bring a case on behalf of victimised groups without sufficient means or access to legal services.

Tan (2003) stated that PIL involves the institution of actions by private citizens in courts to seek redress against public wrongs committed by the government or public bodies. It is an adjudication of disputes between private individuals and the state initiated to promote public good in terms of serving a collective societal interest.

According to Salman (2010), the basic and crucial factor in PIL is the effect of the decision. That is, whether the action is instituted by an individual, organisation or a class action, and even if the remedy will benefit the applicant directly, the litigation will still benefit public interest and have impact on the wider public (Nijar, 2006).

PIL has, among others, the following values; it provides effective judicial protection of weaker sections of the community; ensures access to justice; protects and sustains democratic governance and the rule of law; and makes officialdom accountable (Mario, 1995; Salman, 2010).

Lim Beng Choon J in *George John v. Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319, 325, illustrated the origin of PIL and its concept as follows:

“The concept of ‘public interest litigation’ was said to have first been mooted by the Indian Supreme Court in Fertilizer Corporation Kamgar Union v. Union of India AIR 1981 SC 344. The judgment of Krishna Iyer J (ibid, p.350) had no doubt influenced greatly the Indian judicial thinking on the concept of public interest litigation. In justifying this concept, Krishna Iyer J said: “Law, as I conceive it, is social auditor and this audit function can be put into action when someone with real public interest ignites the jurisdiction” (ibid, p.354).

In the Australian case of *Oshlack v. Richmond River Council* (1997) 152 ALR 83, the court identifies PIL by the public character to which the litigation relates, as evidenced by: properly bringing proceedings to advance public interest; that the proceedings contribute to the proper understanding of the law in question; and that they involve no private gain.

As Lord Diplock said in the English House of Lords:

‘There would be a grave lacuna 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.’

The dictum by Lord Diplock in the above case was then adopted in the Malaysian case of *Mohamed bin Ismail v. Tan Sri Haji Othman Saat* [1982] 2 MLJ 133 at 136, where Wan Yahya J. said:

‘... if they (public authorities) transgress any law or constitutional directive, then any public- spirited citizen, even if 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.’

BENEFITS OF PUBLIC INTEREST LITIGATION

Samantaray and Sharma (2012) listed several benefits of PIL. According to them, PIL has a vital role in the civil justice system in that it could achieve those objectives which could hardly be achieved through conventional private litigation. PIL, for instance, offers a ladder to justice to disadvantaged sections of society, provides an avenue to enforce diffused or collective rights, and enables civil society to not only spread awareness about human rights but also allows them to participate in government decision making. PIL could also contribute to good governance by keeping the government accountable.

SUBJECTS OF PUBLIC INTEREST LITIGATION

PIL is useful with regards to the accountability of government agencies. Various subjects may be litigated under PIL. Few indications can be taken from the Indian jurisdiction where PIL has been duly practised within the judiciary system, and, where PIL can be filed before the Supreme Court under Article 32 of the Constitution or before the High Court of a State under Article 226 of the Constitution under their respective Writ Jurisdictions (Singh, 2008; Sripati, 1997). Accordingly, the following are the subjects which may be litigated under the head of PIL:

(I) Matters of public interest: Generally they include

- (i) Bonded labour matters;
- (ii) Matters of neglected children;
- (iii) Exploitation of casual labourers and nonpayment of wages to them (except in individual cases);
- (iv) Matters of harassment or torture of persons belonging to Scheduled Castes, Scheduled;
- (v) Tribes and Economically Backward Classes, either by co-villagers or by police;
- (vi) Matters relating to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forests and wild life;
- (vii) Petitions from riot victims;
- (viii) Other matters of public importance.

(II) Matters of private nature: They include

- (i) threat to or harassment of the petitioner by private persons;
- (ii) seeking enquiry by an agency other than local police;
- (iii) seeking police protection;
- (iv) landlord/tenant dispute;
- (v) service matters;
- (vi) admission to medical or engineering colleges;
- (vii) early hearing of matters pending in High Court and subordinate courts and are not considered matters of public interest.

(III) Letter Petitions:

Petitions received by post even though not in public interest can be treated as writ petitions if so directed by the Honourable Judge nominated for this purpose. Individual petitions complaining harassment or torture or death in jail or by police, complaints of atrocities on women such as harassment for dowry, bride burning, rape, murder and kidnapping, complaints relating to family pensions and complaints of refusal by police to register the case can be registered as writ petitions, if so approved by the concerned Honourable Judge.

Considering the above, PIL can provide an avenue for the public to make office bearers accountable with regards to mismanagement of public funds of negligence in the execution of public projects. This includes mismanagement and negligence in public building construction and maintenance, which has occurred quite substantively in Malaysia.

PUBLIC BUILDING FAILURES IN MALAYSIA

There are various instances where public buildings have been reported to fail in Malaysia. Hamzah et al. (2010) have listed a number of building defects suffered by public schools across Malaysia, including cracks and defects on roof structures.

Apart from schools, other buildings constructed using public funds have also suffered from a number of building defects. Among the incidents that made the headlines was the roof collapse of a newly built stadium in Terengganu, Malaysia. Serious engineering flaws, shoddy workmanship, inferior materials and lack of expertise in the key project management team were found to be the main contributing factors behind the roof collapse at Stadium Sultan Mizan Zainal Abidin in Gong Badak (The Star, 2010).

Another example of building defect which involved a public building occurred at a place of worship, where the ceiling was reported to have collapsed at a mosque in Kampung Tebau, Bukit Tunggal, Terengganu (The Star, 2013). The incident occurred only two years after the opening of the mosque. This is not the first time failures were reported at a place of worship. In October 2009, the entrance roof of a mosque at Kampung Batu Putih in Kertih, Kemaman, collapsed and injured three Indonesian workers (The Star, 2013).

Various causes of building failures were cited in the incidents. Whatever the reasons were, someone must and should be held responsible for these mistakes. In particular, when the failures involve public buildings, built using public funds, the person(s) in charge must be held responsible. The public has the right to have the matter brought to the attention of the courts. The issue is however, to what extent is Public Interest Litigation applicable in Malaysia?

APPLICATION OF PUBLIC INTEREST LITIGATION IN MALAYSIA

The application of PIL is inter-related with the issue of *locus standi* in initiating a proceeding (Jalil, 2004). Accordingly, in an application for judicial review, the court first determines whether the applicant has *locus*

standi to bring the case to the court. If the court finds that the applicant does not have *locus standi*, the court will dismiss the case as frivolous and vexatious. *Locus standi*, being a Latin phrase, is defined as "a place of standing". In legal terminology it means a right of appearance before any formal body, such as a court, in any given matter.

In administrative law, *locus standi* denotes a right to challenge an *ultra vires* or unlawful administrative action or decision in a court which affects the right or interest of a citizen. If a person intends to apply for judicial review of any decision made by any administrative officer, he must prove at the leave stage that he has *locus standi*, that is he must have sufficient interest in the subject matter of the case and he is adversely affected by the administrative decision. This is basically required to strike out frivolous and vexatious cases (Jalil, 2004).

In simpler words, before any action can commence, it is important for the applicant to have a *locus standi* in the matter (Salman, 2010). Accordingly, any public interest claim needs to be brought by the Attorney-General. That is, an individual can only bring action on behalf of others through the permission of the Attorney-General, under relator action. However, where such permission is declined or not given on time, such an individual cannot proceed with the action. This is a common law doctrine inherited by most commonwealth jurisdictions including Malaysia. Nevertheless, the Malaysian judiciary initially started on a good note by shelving the ideal of seeking permission of the Attorney-General before an individual can institute action on behalf of others.

In the case of *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177, the respondent and 183 other persons had applied for land in Mersing, Johore but with no response for some eight years. The respondent learnt that land in the area had been alienated to a number of people, including the appellant, who was at all material times the Menteri Besar of the State of Johore and other personages in the upper echelon of the administrative service. The respondent applied for declarations basically impugning 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 in addition to the appellant. The appellant applied to have the proceedings struck out primarily on a challenge to the respondent's standing to sue and also on certain procedural objections. The appellant's application was dismissed by the Federal Court on the issue of the respondent's *locus standi*. While giving its judgement, the court abandoned the necessity of obtaining the permission of Attorney-General and held that an individual has *locus standi* to institute action on behalf of others. The court further observed;

"It might not perhaps be inappropriate to make some observations on the *locus standi* rule in relation to injunctions and declarations. We refer to *Lim Chow Hock v. Government of the State of Perak & 2 Ors* [1980] 2 MLJ 148, 149- 151 and accept and approve the discussion in the judgment in that case (at pages 149-151) on the question of *locus standi* and endorse the concept of liberalizing the scope of individual standing. Even if the law's pace may be slower than society's march, what with increased and increasing civic consciousness and appreciation of rights and fundamental values in the citizenry, it must nonetheless strive to be relevant if it is to perform its function of peaceful ordering of the relations between and among persons in society, and between and among persons and government at various levels. It would not perhaps be inapt to aphorize that the idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom. In the United States of America, where standing rules are relatively lax, it has been found that although the gates have been open there has been no flood."

However, the court moved away from this noble wisdom and backtracked from the original idea in the subsequent cases involving individuals who have instituted action on behalf of others (Salman, 2010). This is evidenced from the court's decision and reasoning in the case of *Government of Malaysia v. Lim Kit Siang* (popularly referred to as the Lim Kit Siang case). In this case, the respondent who is a Member of Parliament and the Leader of the Opposition had applied for a declaration that the letter of intent issued by the government to United Engineers (M) Bhd. (UEM) in respect of the North and South Highway contract is invalid and also applied for a permanent injunction to restrain UEM from signing the contract with the government. The plaintiff filed his suit in the Penang High Court and on the same day applied by way of ex parte summons-in-chambers for an interim injunction against UEM to restrain it from signing the contract. The application was refused. On appeal to the Supreme Court, the court, in an oral judgment, ordered the interim injunction to be issued with liberty to apply and at the same time directed an early trial of the suits. UEM and the government applied to the

High Court to have the interim injunction set aside and the suits struck out on the grounds that they disclosed no reasonable cause of action and also for lack of *locus standi*, in addition to being frivolous, vexatious and an abuse of the court's process. The applications were heard by V. C. George J. who dismissed them.

Both UEM and the government appealed to the Supreme Court. The following questions, inter alia, arose on the appeal: (a) whether the respondent/plaintiff has a cause of action to maintain the suit against UEM; and (b) whether he has *locus standi*, i.e. title to bring and maintain the suit. The Supreme Court by majority held, amongst others, that (1) the respondent's statement of claim does not disclose any cause of action at all in order to enable him to maintain the suit against UEM, where he has no legal relationship with UEM, he is a complete stranger to the company and he is not a shareholder; and that (2) the respondent could not have *locus standi*, whether as a politician, a road and highway user or a taxpayer. This is because the rule as to *locus standi* applicable in Malaysia is that as accepted in England before the enactment of Order 53 of the English Rules of the Supreme Court. Since the Malaysian Judiciary has not accepted Order 53 and its statutory underpinning (i.e. section 31 of the Supreme Court Act) there is no justification to depart from the rule of *locus standi* accepted by the highest court in England prior to Order 53. The court observed;

"the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the private plaintiff relies on an interest in the enforcement of a public right and not a private right, standing will be denied unless the Attorney-General consents to a relator action or the plaintiff can demonstrate some special interest beyond that possessed by the public generally"

This decision and reasoning of the court have been re-affirmed in the case of *Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek & Ors* (commonly referred to as the Bakun Dam case). As such, the question that arises is then what will be the standard of measurement by the Attorney General in determining whether *locus standi* exists or otherwise. In relation to this, Order 53 of the Rules of High Court 1980 (Malaysia) is referred. Originally, Order 53 of the Rules of High Court 1980 (Malaysia) did not provide any provision for the *locus standi* rule. However, the Malaysian courts used "an aggrieved person" as the requirement for the *locus standi* rule before the amendment of Order 53 of the Rules of High Court in 2000. At that time, Malaysian courts only granted leave for an application of judicial review if the applicant could prove that he is "an aggrieved person". The meaning of "aggrieved person" was that the applicant's legal right has been affected by the decision of the administrative authority (Jalil, 2004).

Order 53 of the Rules of High Court (Malaysia) was later amended in 2000 and the new rule 2(4) was inserted in Order 53. Rule 2(4) of the new Order 53 provides the requirement of *locus standi*. This rule provides that if a person is "adversely affected" by the decision of an administrative authority, he is entitled to apply to the High Court for judicial review of the decision taken. The wording of the new rule 2(4) is as follows:

Any person who is adversely affected by the decision of any public authority shall be entitled to make the application (for judicial review).

With reference to post amendment decisions on *locus standi*, the decision of the High Court of Malaya, Kuala Lumpur in *YAM Tuanku Dato' Seri Nadzaruddin v. Datuk Bandar Kuala Lumpur and Anor* [2003] 1 CLJ 210 can shed some indication. In this case, the applicant applied for leave to apply for judicial review against the decision given by the first respondent. The first respondent approved the second respondent's plan to develop his land adjacent to the applicant's land. The development plan which was approved stated that the second respondent could build two blocks on the land with 107 units. The applicant opposed the approved development plan inter alia that the plan would raise the density from 30 persons to 285 persons per acre in the area which may cause many social and traffic problems.

In this case the issue of the *locus standi* rule was raised and the court referred to rule 2(4) of the new Order 53 of the Rules of High Court (Malaysia) (amended in 2000) and found that the applicant had *locus standi* as he was

adversely affected as the owner of the adjacent land of the respondent. It is to be noted that in this case the High Court stated that if the applicant did not have a legal or equitable right he must have at least "sufficient interest" in the subject matter. The High Court observed as follows:

"The court is in full agreement with Lim Beng Choon J. in George Johns case when he said: In order to have the locus standi to invoke the jurisdiction of judicial review, the applicant should claim, if not a legal or equitable right, at least a sufficient interest in respect of the matter to be litigated. The extent of sufficient interest depends on diverse variable factors such as the content and intent of the statute of which contravention is alleged, the nature of the breaches of statutory power the specific circumstances of the case, the nature and extent of the applicant's interest or grievance and the nature and extent of the prejudice or injury suffered by him."

It is interesting to note that the court stated that for *locus standi* to exist, at least "sufficient interest" in the subject matter must have existed, instead of the person being adversely affected. Therefore, it would be interesting to see whether this dictum of "sufficient interest" in the subject matter leads to a more liberalised approach within the Malaysian law perspective.

Accordingly, the practice currently observed by the Malaysian jurisdiction is that every application for PIL must be brought to the Attorney General in determining the *locus standi* issue. The Attorney General will then determine whether the application can stand or not, based on Rule 2(4) of the new Order 53 of the Rules of High Court. Referring to this, it is submitted that the Malaysian jurisdiction has to liberalise the rule on *locus standi* in order to advocate the practice of PIL (Jalil, 2004).

There is an apparent need to make the *locus standi* rule flexible so that a public spirited man or a representative body may apply for judicial review of wrongful administrative decisions. To challenge an administrative action, the applicant must have sufficient interest in the subject matter. An applicant for judicial review may have sufficient interest if his personal right or interest or legitimate expectation is affected. However, where public right or interest is affected, any public-spirited man or a representative body or a pressure group may have sufficient interest to challenge the administrative action, provided that, such public spirited man or representative body or the pressure group must act with *bona fide* interests and not with malicious or ulterior motives.

While the initial move of the Malaysian judiciary on shelving the ideal of seeking permission of the Attorney-General before an individual can institute action on behalf of others as decided in the case of *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* is applauded, subsequent decisions prove otherwise. This trend will hinder the development of PIL. Nevertheless, the liberalisation in defining *locus standi* as illustrated in *YAM Tuanku Dato' Seri Nadzaruddin v. Datuk Bandar Kuala Lumpur and Anor* [2003] 1 CLJ 210, though it has to be brought to the Attorney General, is cherished. It is then hoped that perhaps the Malaysian judiciary may take some note on the wordings of O' Regan J. in the case of *Ferreira v. Levin NO and Others* 1996 (1) SA 984 (CC):

"existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffused or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation."

It is high time for PIL to be given a new lease of life, in safeguarding the objective of accountability and transparency in the public sector, particularly in the eyes of the public. Malaysia must take the cue and raise the bar at par with other jurisdiction such as India, especially when it comes to transparency and accountability of the public sector.

CONCLUSION

The number of public building failures in Malaysia is alarming. Steps to curb this issue and to make accountable persons responsible for such failure is required to avoid further occurrences. Looking at the attitude of Malaysian courts in giving judgment against negligent developers shows that the act of negligence is taken seriously. In a recent case, a developer was ordered to pay half a million Malaysian Ringgit for a defective house (Bernama 2014). Having said this, the issue of *locus standi* has to be resolved before maximum advantage of public interest litigation can be fully utilised. Public Interest Litigation suits this intent and purpose well as it opens the opportunity for the public to initiate legal action against negligent officers entrusted with managing public funds. This will ensure that negligent parties, particularly within the public service, are made accountable, and it will also send a message that proper execution and good governance is always necessary and crucial in the execution of public works.

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