THE ROLE OF PUBLIC INTEREST LITIGATION IN PROMOTING GOOD GOVERNANCE IN MALAYSIA AND SINGAPORE*

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SUMMARY: In this paper, a two-case study is undertaken on public interest litigation in the promotion of good governance in Malaysia and Singapore. As public interest litigation is a branch of administrative law which involves judicial review of administrative actions, 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 meddlesome busybodies. This makes them a thorn in the executive's side, and various obstacles were placed in the way by the executive to stymie the growth of public interest litigation. However, it was judicial self-restraint that brought the growth of public interest litigation in Malaysia to a grinding halt. In *Government of Malaysia v Lim Kit Siang,* the Malaysian Supreme Court took a restrictive approach to the rules of standing. But that does not mean that public-spirited individuals and non-governmental organisations should lose heart. On the contrary, they should persevere and continue to resort to public interest litigation so that it affords an opportunity for the courts to liberalise the current restrictive standing criteria. On the other hand, the absence of public interest litigation in Singapore presupposes that Singapore has a good public administration. Public interest litigation therefore promotes good governance in public administration. It does not hinder. It can be a panacea for administrative ills in public administration, a role which can no longer be underestimated or overlooked by the executive in this age and time.

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I. Introdution

The invocation of public interest litigation as a check against executive actions in Malaysia was severely clogged after 1988 by the case of *Government of Malaysia v Lim Kit Siang*.[1] This case marked the courts' fundamental shift from a liberal to a 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. In Singapore, it can be safely said that there is no public interest litigation at all, though there have been some leading cases[2] on judicial review brought by citizens adversely affected by administrative decisions. Most of all, I was perplexed by the number of public interest litigation actions[3] filed in Malaysia while at the same time, there are no public interest litigation actions brought in Singapore which is regarded as having a good public administration.[4] It is therefore apposite to examine this phenomenon and to evaluate the role of public interest litigation in the promotion of good governance in Malaysia and Singapore.

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[1] [1988] 2 MLJ 12.

[2] See, for example, *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts* [1996] 1 SLR 609; *Chng Suan Tze v Minister of Home Affairs*[1989] 1 MLJ 69.

[3] From the examination of the law reports available to me, there are 13 reported actions (inclusive of *Lim Kit Siang*) strictly in the nature of a public interest litigation filed in Malaysia – 4 before *Lim Kit Siang*: *Lim Cho Hock v Government of the Sate if Perak, Menteri Besar, State of Perak and President, Municiality of Ipoh* [1980] 2 MLJ 148; *Tan Sri Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177; *George John v Goh Eng Wah Bros Filem Sdn Bhd* [1988] 1 MLJ 319; *Petroliam Nasional Berhad (Petronas) & Anor v Cheah Kam Chew* [1987] 1 MLJ 25 and thereafter 9 cases: *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64; *Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 MLJ 281*; Tengku Jaffar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156; *Tun Datuk Haji Mustapha bin Datuk Harun v State Legislative Assembly of Sabah & Anor* [1993] 1 MLJ 26; *Razak Ahmad v Ketua Pengarah, Kementerian Sains, Teknologi & Alam Sekitar* [1994] 2 CLJ 363, [1994] MLJU 234; *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor* [1994] 2 MLJ 297; *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287; *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors* [1997] 3 MLJ 23; *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & 5 Ors* [2003] 3 AMR 213 which were all unsuccessful due to the restrictive approach to locus standi taken in *Lim Kit Siang*.

[4] See *Taiwan official all praise for Singapore's civil service*, The Straits Times (Singapore), 12 September 1996 Section: East Asia; 15. Also, according to Transparency International (TI)'s 2002 Corruption Perceptions Index (CPI) released on 28 August 2002, Singapore was ranked 5th least corrupt in the world, after Finland, Denmark, New Zealand and Iceland. This also makes it the least corrupt country in Asia. Malaysia, on the other hand, was ranked at 33rd: *Economic Watch: S'pore keeps clean image*, The Edge Singapore, 2 September 2002.

It is against this background that this paper is intended to serve the following purposes:

- first, to examine underlying values of public interest litigation and the definitive role of public interest litigation in an administrative state, primarily in the promotion of good public administration.
- second, as public interest litigation is essentially a judicial review of executive actions, to examine the executive's attitudes towards judicial review and considers the legal and non-legal impediments to judicial review which in turn constitute obstacles to public interest litigation.
- third, to examine the scope of public interest litigation, the courts' approach towards locus standi in public interest litigation, the impact of *Lim Kit Siang* on public interest litigation in Malaysia and the absence of any public interest litigation in Singapore.
- the last part of this paper is to evaluate the extent to which public interest litigation has promoted good governance and administration in Malaysia and Singapore and to conclude that the role of public interest litigation in the promotion of good governance in Malaysia and Singapore is one of pivotal importance.

A. *What is public interest litigation?*

Firstly, let us examine the concept of public interest litigation. Public interest litigation involves the institution of actions by private citizens in courts to seek redress against public wrongs committed by government or public bodies.[5] It is an adjudication of disputes between private individuals and the state initiated to promote the public good in terms of serving a collective societal interest.[6]

In *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors*,[7] Lim Beng Choon J traced the origin of public interest litigation and its justification as follows:

[5] But note that not all public bodies or authorities are amenable to judicial review. See *Infra*, Part II (C): *Public Law-Private Law Divide: Is it necessary?*
[6] See M.P. Jain, *Public Interest Litigation* [1984] MLJ cvi.
[7] [1988] 1 MLJ 319, 325.

> 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* at 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 at p 354: '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.'

Therefore, the rights which an individual seeks to assert do not flow from his capacity as an individual with aggrieved interests but are public rights, with the individual seeking to vindicate the public interest. His motivation stems not from personal interest,[8] as in the case of enforcing private rights such as enforcing a breach of contract or vindicating a tortious breach of duty causing personal loss or property damage, but from a sense of public-spiritedness and ontological inclinations.[9] The view of the public interest litigant is that there are rights or collective interests which must be safeguarded to avoid government lawlessness which harms the social interest. These public rights are in nature diffuse, societal and fragmented.[10] The rights to clean air, water and environment, for example, are not just matters of individual concern but affect broad sectors of the larger community.

Public interest litigation is thus distinguishable from applications for the

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[8] Nevertheless, in the process of successfully maintaining his public interest litigation action, his own private interests may be looked at as a matter of public importance. See *Benazir Bhutto v Federation of Pakistan*, PLD [1988] SC 416.

[9] See generally Roger Tan Kor Mee, *Natural Law v Legal Positivism* [1990] 1 CLJ v, in which it is argued that the validity of the state and its law depends on their observance of natural law ideals - ideals which impose higher obligations on positive law.

[10] Indian jurists like Justice Bhagwati have called such rights as 'meta-rights' which are 'the collective social rights and duties of groups, classes, and communities.' (See *S P Gupta v Union of India*, A.I.R. 1982 S.C. 149, 192) To them, meta-rights were necessary because the litigants comprised individuals drawn from the lowest rung of society: slum dwellers, torture victims, prisoners, migrant labourers, and women and children from destitute homes. See also Mauro Cappelletti, *Vindicating the Public Interest through the Courts: A Comparativist's Contribution, in Access to Justice: Emerging Issues and Perspectives* 513 (M Cappalletti & B Garth eds., 1979).

judicial review of administrative action. The latter directly affects the individual, for example, his dismissal and subsequent non-observance of the rules of natural justice by an employment tribunal. It is also not public law litigation which is essentially constitutional law litigation[11] involving, *inter alia*, referring questions on the effect of any provision of the Constitution to the court for determination.[12] This should not also be confused with actions filed as a result of infringement of constitutional rights by the executive.[13]

The characteristics of public interest litigation are best reflected in the first reported public interest litigation case in Malaysia of *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh*.[14] 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 same time and that the appointment of the Chief Minister 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 instituting this action on behalf of the community in that area.

B. *A Misnomer?*

The term 'public interest litigation' has been described in some jurisdictions to be a misnomer. Baxi[15] argued that from the Indian perspective, the term 'social action litigation' would be more appropriate as public interest litigation in India is more focused on state repression or government lawlessness rather than on public participation in governmental decision making.

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[11] For example, see *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLJ 355; *Lim Cho Hock v Speaker, Perak State Legislative Assembly* [1979] 2 MLJ 85; *Tun Datuk Haji Mohamed Adnan Robert v Tun Datuk Haji Mustapha bin Datuk Harun* and *Datuk Joseph Pairin Kitigan v Tun Datuk Haji Mustapha bin Datuk Harun* [1987] 1 MLJ 471.

[12] For example, pursuant to art 128 of the Malaysian Constitution.

[13] *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts, supra*, n 2.

[14] *Supra*, n 3.

[15] Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, in JUDGES AND THE JUDICIAL POWER* at 294 (Rajeev Dhavan, et al. eds. 1985).

Sathe[16] also argued that 'public interest litigation' is a misnomer because all public law litigation is inspired by public interest. According to him, even private adjudication serves the public interest because this is served where contracts are honoured; liability for civil wrongs is imposed and property or status rights respected. In his view, public interest is served indirectly by private litigation because the main focus is on the private interest of the litigants. Public interest is also served more directly by public law adjudication because the focus is on the unconstitutionality arising from either lack of power or inconsistency with a constitutionally guaranteed right. To him, public interest litigation is a narrower form of public law litigation.

However, for the purposes of this paper, I shall use the term 'public interest litigation' as such term has been used and accepted here in judicial decisions.[17]

C. *What is Good Governance?*

Secondly, let us examine the concept of good governance as it constitutes the thrust of this paper that public interest litigation promotes good governance. What then is good governance? It is submitted that good governance is synonymous with good public administration.

The mission statement of the Singapore Attorney General's Chambers is: 'To enhance the rule of law and constitutional government in Singapore by providing sound legal advice and assistance in developing a fair and responsive legal system, furthering *good public administration* and protecting the interests of the state and of the people.' [Emphasis added.] This is prominently displayed on its website. So do other governmental departments both in Singapore and Malaysia, and some prefer to call it grandiloquently as a 'Client's Charter'. Other examples include the Malaysian police's motto of 'Mesra, Cepat dan

[16] S.P. Sathe, *Judicial Activism: The Indian Experience* [2001] 6 Wash. U. J.L. & Pol'y 29.
[17] *Utusan Melayu (Malaysia) Berhad & Anor v Chan Tse Yuen* [1989] 1 MLJ 185 and *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors, supra,* n 7. The term 'public interest litigation' is also relevant when it comes to costs where it is often submitted that such applicants should not be required to pay costs under certain circumstances.

Betul' (Courteous, Swift and Accurate) and Dr Mahatir Mohamad's slogan of a 'Clean, Efficient and Trustworthy Government' when he first took office.

Whether such governmental department or leaders are treating these mission statements or slogans as their lodestars or merely paying lip service remains to be seen. But this is an encouraging trend as it is prompted by a desire to observe good governance in public administration. It is also an act which in itself is consonant with good public administration. The public can use this as a barometer to gauge whether the performance of that governmental department has lived up to its self-proclaimed standards. If the public should walk away thinking that what is contained in the mission statement is a standing joke or a shibboleth, then that department has obviously performed miserably. Conversely, if the citizens are satisfied with the service provided by that department, then this is a good sign that that department is operating efficiently. But good public administration is not just about having mission statements or slogans. In *R v Monopolies and Mergers Commission and another, ex parte Argyll Group plc*,[18] Sir John Donaldson catalogued five requirements of a good public administration as follows:

- it is concerned with substance rather than form.
- it is concerned with the speed of decision.
- it requires a proper consideration of the public interest.
- it requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be and whether they are natural or juridical persons. But in judging the relevance of an interest, however legitimate, regard has to be had to the purpose of the administrative process concerned.
- it requires decisiveness and finality, unless there are compelling reasons to the contrary.

I should also add the following to the list:

- it requires a proper consideration of the legitimate interests of individual citizens irrespective of race, religion, creed and colour.
- non-discriminatory application in public administration of the

[18] [1986] 2 All ER 257, 263.

procedural norms established by past practice or published guidelines.[19]

- all persons who are in a similar position should be treated similarly.[20]
- good administration requires complaints to be investigated.[21]
- transparency and accountability in decision-making process.
- public authorities should behave in a consistent manner; act diligently particularly in response to queries from the public; and if possible state the reasons for their decisions so that it gives those affected something to challenge, if they are minded, and gives the courts something concrete to review.[22]
- good public administration requires an independent judiciary and civil service.

The above list is not exhaustive. If these principles are observed by administrative bodies in their decision-making process, a lot of time can be saved including judicial time in trying to remedy bad decisions.

In addition, each of the three organs of government, namely legislature, executive and judiciary plays an important part in promoting good governance. Good governance is not exactly a new phenomenon in the administration of government. For centuries, governments have fallen due to poor governance and corrupted public administration. Correspondingly, a government that pushes

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[19] See the Canadian case of *Fraser H. Edison v The Queen and Dollard Investments Limited v Minister of National Revenue* [2001] FCT 734. See also the *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 where Lord Fraser of Tullybelton said: 'The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.' This dictum was followed locally in *Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya* [1995] 3 MLJ 665 and *Re Siah Mooi Guat* [1988] 3 MLJ 448.

[20] Per Sir John Donaldson MR in *R v Hertfordshire CC Ex p Cheung*, The Times, April 4, 1986.

[21] As Lord Denning observed *in Padfield and Others v Minister of Agriculture, Fisheries and Food and Others* [1968] AC 997, 1006: 'Good administration requires that complaints should be investigated and that grievances should be remedied. When Parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side. He should not refuse to have a complaint investigated without good reason.' See also *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996]1 MLJ 481.

[22] John A Usher, *Principles of Good Administration* in *General Principles of EC Law* (Longman, 1988), 100-121.

for good governance will have the support of the people.

Undoubtedly, this concept requires decision-makers to strike a balance between the conflicting private and public interests, *albeit* the process may be a difficult one especially when the need for fairness usually has to make way for efficiency. Good governance will therefore ensure good decision-making procedures which should in turn contribute to good substantive decisions.[23]

D. *Public interest litigation in the promotion of Good Governance*

This concept of good governance can be promoted through actions taken by public interest litigants in the courts to right any administrative wrongdoing. In this age when government departments and public authorities possess great powers and influence over the affairs and rights of the community, public interest litigation as a socially-motivated check on administrative excesses can no longer be ignored, especially when public criticism tends to fall on deaf ears.

Public interest litigation has been proven to have promoted good governance in public administration. For example, the earlier practice of appointing the Chief Minister of a State also as a President of a Municipal Council has now ceased after the case of *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh*,[24] even though the public interest litigant in that case failed to obtain the declarations sought. In one case,[25] the government had to pass an amending act with retrospective effect in order to avert a suit brought by a public interest litigant. In *The Discipline of Law*,[26] Lord Denning narrated how several senior police officers were prosecuted for corruption after a taxpayer and his wife took the Metropolitan Police Commissioner to court[27]

[23] See Thio Li-ann, *Law and the Administrative State: The Singapore legal system*, edited by Kevin Y L Tan, Second Edition, Singapore University Press, 1999, 162.
[24] *Supra*, n 3.
[25] *Petroliam Nasional Berhad (Petronas) & Anor v Cheah Kam Chew, supra*, n 3.
[26] Lord Denning, *The Discipline of Law* (Butterworths, 1979), 122.
[27] *R v Police Commissioners, ex parte Blackburn (No 3)* [1973] 2 QB 241.

when he discovered that the laws against pornography were not enforced.

The concept of public interest litigation therefore affords socially concerned citizens an avenue to be involved in the promotion of good governance in public administration. By this way, administrative bodies will be mindful of making good decisions if they know that what they decide may be subject to challenge by the citizens, particularly by those citizens who have the means and intellect to subject such decisions to microscopic examination.

It is submitted that it is a citizen's right to a good public administration. If not a legal right, a citizen certainly has a moral right to it.[28] As taxpayers, such right extends to having a government which not only practises good governance, but is seen to be doing so.

While it cannot be denied that judicial review of administrative acts has always been a remedy for aggrieved citizens via the O 53[29] procedure, however not all citizens have the means or fortitude or are civic-minded enough to take on the executive if administrative decisions affect a larger number of the community. It is for this reason that socially concerned individuals and bodies such as non-governmental orgainsations ('NGOs') have a role to play. It will be demonstrated later that such public participation will be viewed with suspicion by the government, used for decades to the belief that executive government is empowered, pursuant to the doctrine of separation of powers, to govern with the least interference from the other branches of government.

However, effectiveness of public interest litigation depends on whether the government will heed every judicial pronouncement to practise good governance. But judicial control of the executive is the *sine qua non* to having

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[28] Though there is no specific statute in Malaysia and Singapore that confers such right on a citizen, the right to a good public administration can be inferred from statutes which incorporated good governance principles. See *infra*, Part III(F): *PIL and Good Governance Based Legislations*. In Europe, it has been argued that though there is no decision explicitly based on a general right to good administration, litigants there have repeatedly invoked this concept. See Lord Millet, *The Right to Good Administration in European Law* [2002] Public Law 309, 312.

[29] This refers to the procedural rules for application for judicial review under Order 53 of the respective rules of court in Malaysia, Singapore and England.

a good public administration. And public interest litigation is the raison d'être for ensuring there is one.

II. PUBLIC LAW -PRIVATE LAW DIVIDE

A. *Are we bound by the shackles of O'Reilly v Mackman?*

Public interest litigation is ignited by public interest. As public interest litigation is essentially a form of judicial review of administrative actions of public authorities undertaken by public-spirited citizens, the oft-repeated debate of public law-private law divide will invariably influence the courts in deciding whether such socially-motivated judicial review is permissible in situations where:

(1) the rights sought to be protected or vindicated are in fact a combination of public rights and private rights or solely an accumulation of private rights which turn such rights into public rights; and

(2) whether the bodies which are being challenged were performing public functions or merely private functions when making the decisions.

This involves the issue of amenability of public authorities to judicial review since judicial review is a 'public law' remedy.[30] It is, therefore, apposite to first examine some English authorities on the issue of public-private law divide as it has been acknowledged that Malaysian courts have, in the development of administrative law, been considerably influenced by the English courts.[31]

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[30] Judicial review is the name given to those applications to the High Court for public law remedies of prerogative writs. The rules governing applications for judicial review are contained in O 53 Rules of High Court of Malaysia and O 53 Rules of Supreme Court of Singapore.

[31] Per Gopal Sri Ram JCA in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*, *supra*, n 21, 514. Generally, Malaysian courts are permitted under s 3 of the Civil Law Act 1956 to apply the English common law in West Malaysia as administered in England on 7 April 1956 subject to local circumstances. However, despite s 3 of the 1956 Act, there are cases which held that the developments of common law after 1956 may well be applicable in Malaysia. See *Commonwealth of Australia v Midford (M) Sdn Bhd* [1990] 1 MLJ 475.

The application of the English common law in Singapore is governed by s 3 of the Application of English Law Act (Cap. 7A) which provides that the English common law so far as it was part of the law of Singapore immediately before 12 November 1993 shall continue to be part of the law of Singapore subject to local circumstances. In an interesting though unofficial poll undertaken by a writer, it was concluded that of the 527 decisions of the High Court of Singapore reported

The need to divorce public law and private law became an obligation when the House of Lords in *O'Reilly v Mackman*[32] held that it is an abuse of process of the court for a person seeking to challenge the decision of a public authority to proceed by way of an ordinary action and not by way of judicial review proceedings.[33] In that case, four appellants who were prisoners serving long jail sentences commenced separate actions, three by writ and one by originating summons, for a declaration without resort to the new O 53. This was done with the hope that ordinary actions for declaration would entitle them the right to call oral evidence and cross-examine witnesses. Lord Diplock held that public interest in good administration requires public authorities to be protected in that the new O 53 requiring leave and filing application for judicial review within a stipulated time should be observed. In following Goulding J in *Heywood v Hull Prison Board of Visitors*,[34] Lord Diplock disapproved of the idea that O 15 r 16 governing declaratory relief should be of unlimited application in cases of public law.

This approach ran contrary to the views expressed by Lord Wilberforce two years earlier in *Davy v Spelthorne BC*[35] that English law fastens not on the separate systems of public law and private law but upon remedies. In fact, prior to the new O 53 introduced in 1977, a plaintiff could choose whether to apply for a prerogative order or to sue for a declaration. In *Pyx Granite Co Ltd v Ministry of Housing and Local Government*[36] Lord Goddard said (quoting from the report of *Heywood v Board of Visitors of Hull Prison*[37]):

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in the Malayan Law Journal between 1965 to 1985, English authorities formed 66.7 % of all the 1,383 case authorities cited by the High Court. At the Court of Appeal, English authorities comprised 70.8% or 427 of all the 638 legal authorities cited by the Court of Appeal during the same period. [See Walter Woon, *The Applicability of English Law in Singapore The Singapore legal system*, edited by Kevin Y L Tan, Second Edition, Singapore University Press, 1999, 230 which also discussed the reasons why the overwhelming majority of precedents cited in court were English authorities. His views will also apply to Malaysia. This explains why English precedents are treated with high persuasive authority in Singapore and Malaysia.]

[32] [1983] 2 AC 237.

[33] For a good analysis of the possible exceptions to this general rule, see the illuminating article of Michael Beloff entitled *The Boundaries of Judicial Review* in *New Directions in Judicial Review* edited by JL Jowell and Dawn Oliver (Stevens & Sons, 1988), 5.

[34] [1980] 3 All ER 594.

[35] [1984] AC 262, 278.

[36] [1960] AC 260, 290.

[37] 1980] 1 WLR 1386, 1393.

> It was also argued that if there was a remedy obtainable in the High Court it must be by way of certiorari. I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.

In this respect, Wade[38] argued that for several decades before 1977 the courts were actively encouraging ordinary actions for declarations in order to evade the handicaps of certiorari, yet it did not appear that public authorities were lacking any protection. Indeed, any baseless actions could always be struck out under O 18 r 19 and this was often done by the public authorities. According to Wade, points of law could be tried as preliminary issues and this often saved trial of facts and, therefore, the House of Lords had obviously overstressed such procedural privileges when the public authorities themselves did not appear to feel the need for this protection. For example, the repeal of the Public Authorities Protection Act 1893 in 1954 was met with general approval. In his view, 'despite some incongruities, public and private law worked harmoniously together without any need for exclusive forms of action, and the system of remedies efficiently supported the great expansion of administrative law during those years.'[39]

In Malaysia, it has been held that restriction expounded by Lord Diplock in *O'Reilly v Mackman* does not apply as the decision was based on the new English O 53 which has not been accepted here. In other words, the court's discretion to make declaratory judgments under O 15 r 16 Rules of High Court[40] is unlimited and cannot be fettered simply by the fact that in a particular case certiorari is also an available remedy but not applied for by an applicant. It follows that even if certiorari is available to the applicant, this does not debar

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[38] *Administrative Law* (6th Ed., 1988), 680.
[39] *Ibid.*
[40] O 15 r 16 reads: 'No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.'

him from seeking declaration instead as declaration and certiorari are concurrent remedies and not mutually exclusive.[41]

Singapore courts took almost a similar approach[42] by adopting the old English O 53 procedure of not granting declaratory reliefs on an application for judicial review because declaration was not a prerogative order. O 53 Rules of Singapore Supreme Court was based on the old English O 53 which did not confer any express power on the courts to grant a declaration notwithstanding that the High Court had the power to grant a declaration by virtue of s 18(2) and the First Schedule of the Supreme Court of Judicature Act (Cap 322). It can be gleaned from these authorities[43] that *O'Reilly v Mackman* has no application in Singapore as declaratory reliefs can be obtained not under O 53 but by ordinary action, either begun by writ or originating summons, against a public authority.[44]

B. *New Malaysian O 53 RHC versus O'Reilly v Mackman*

The current Malaysian position of not confining actions against public authorities to judicial review proceedings propounded by Lord Diplock in *O'Reilly v Mackman* remains notwithstanding the coming into force of the new O 53 RHC of Malaysia.[45] Under the new O 53 which is now entitled 'Application

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[41] See *Sugumar Balakrishnan v Chief Minister of State of Sabah & Anor* [1989] 1 MLJ 233*; Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101; *Government of Malaysia v Lim Kit Siang, supra,* n 1.

[42] *Re Application by Dow Jones (Asia) Inc* [1988] 1 MLJ 222, followed by *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts* [1996] 1 SLR 609. The courts in Brunei also would not strike out a claim just because it may have offended what Lord Diplock said in *O'Reilly v Mackman* except in a clear case: *Zainuddin Dato Seri Paduka Haji Marsal v Pengiran Putera Negara Pengiran Haji Umar & Anor* [1997] 4 MLJ 135.

[43] *Ibid.*

[44] Similarly, *O'Reilly v Mackman* should now be read subject to the new application procedure for judicial review in the United Kingdom where only one procedure is adopted for all remedies. See the Civil Procedure Rules 1998.

[45] O 53 was amended pursuant to Rules of the High Court (Amendment) 2000 and came into effect on 21 September 2000.

for Judicial Review', public law remedies of prerogative orders[46] and private law remedies of declaration, injunction and damages are both available in judicial review proceedings. Declaration can now be claimed either jointly or in the alternative to the prerogative orders.[47] In the first reported case under the new O 53, *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*,[48] the Court of Appeal ruled that it was not required that application for declaratory reliefs under O 53 should be made jointly with other reliefs. In this case, the appellant had asked for leave to apply for judicial review by seeking only declaratory reliefs.

In fact, public law practitioners should now adopt the suggestion by Lord Woolf MR in *Trustees of the Dennis Rye Pension Fund & Anor v Sheffield City Council*[49] if one is not sure whether judicial review or an ordinary action is the correct procedure. In this case, Lord Woolf suggested[50] that it will be safer to make an application for judicial review than commence an ordinary action so that the question of the procedure adopted being treated as an abuse

[46] These are the prerogative writs of habeas corpus, mandamus, prohibition, *quo warranto* and certiorari inherited from the British courts which are now statutorily recognised in Paragraph I of the First Schedule to the Courts of Judicature Act, 1964 for the 'enforcement of the rights conferred by Part II of the Constitution, or any of them or for any purpose.' (Part II deals with the Fundamental Liberties.) However, the Singapore provision reads 'for the enforcement of any of the rights conferred by any written law or for any purpose.') This provision has been given a wide interpretation in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan, supra,* n 21, (544-545) that courts should now resort to this paragraph to 'found jurisdiction to grant relief not expressly prohibited by written law.' In the words of Gopal Sri Ram JCA: 'They (the courts) are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice.' His lordship was also of the view that because of the close resemblance in the language with article 226 of the Indian Constitution, greater weight should be accorded to the decisions of the Indian courts than the decisions of courts in those jurisdictions devoid of the equivalent provision, including England, Australia, New Zealand and Canada. See also *Abdul Ghani Haroon v Ketua Polis Negara* ([2001] 6 MLJ 198) where the High Court of Shah Alam relied on wide wording of Paragraph 1 to grant an order restraining the police from re-arresting the applicants within the next 24 hours.

[47] R 2(2) O 53 RHC. This is only subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950, particularly s 41 which states that no declaration shall be made if the applicant being able to seek further relief than a mere declaration or title, omits to do so.

[48] [2002] 2 MLJ 413.

[49] [1997] 4 All ER 747, 755.

[50] The suggestion met with the unanimous approval of the House of Lords in *Steed v Secretary of State for the Home Department* [2000] 3 All ER 226. The approach was also adopted by the Malaysian Court of Appeal in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor, supra,* n 48.

of the process of the court by avoiding the protection provided by judicial review will not arise.

> In the words of Lord Woolf MR:
> In the majority of cases it should not be necessary for *purely procedural reasons* to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave.

It follows that the restrictive approach of *O'Reilly v Mackman* should now be condemned to oblivion; otherwise only lawyers and not litigants will rejoice in this state of affairs which creates procedure disputes. As Michael Beloff put it, 'procedural law should be the servant, not the master, of substantive law.'[51] Likewise, Gopal Sri Ram JCA observed in *Sivarasa Rasiah* that a rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice. His lordship expressed disappointment that in this day and age, applications and suits were disposed of on purely technical and procedural grounds without even slightest attempt to ensure that justice according to the merits of a particular case was done. In this respect, the court should not forget its duty to do justice according to law and the substantial merits of each case.[52]

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[51] *Supra*, n 33, 17.

[52] *Supra*, n 48, 422. But formalism is an inheritance of the common law's adherence to procedural rules reinforced by the fact that it is a penchant of vigilant advocates in an adversarial system of justice to get actions dismissed on procedural grounds. In Malaysia, this practice is now subject to the new Order 2 Rule 3 which states that 'a court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a *substantial miscarriage of justice*.' [Emphasis added]. See *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & 5*

In the circumstances, as far as a public interest litigant is concerned, if the only remedy sought is declaration, he can now proceed under O 53 or by an ordinary action.[53] On the other hand, if the remedies sought are only prerogative orders or jointly with declaratory reliefs, then O 53 must be resorted to but it will be demonstrated later that this will not be a wise move as the new O 53 imposes a more restrictive standing criterion.

C. *Public law-Private law Divide – Is it necessary?*

Michael Beloff argued that the dichotomy of procedures actually provides the citizens with a trap and not a target.[54] In Malaysia, it can be safely concluded that such dichotomy is no longer applicable with the new O 53 in operation. Under the new O 53, apart from being able to obtain the traditional private remedies, a litigant proceeding under O 53 can now also seek discovery and inspection of documents; administer interrogatories or cross-examine deponents of any affidavit[55] which are procedures traditionally associated with an ordinary action. This begs the next question whether a dichotomy of public law and private law is necessary after all.

In this regard, Dawn Oliver[56] argued that there is in fact no such divide and that any distinctions between the two are purely artificial. Oliver is of the view that there exist common underlying values which indicate that common law is capable of developing supervisory jurisdiction akin to that of judicial

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Ors, *supra*, n 3. See also Lord Diplock, *Judicial Control of Government* [1979] MLJ cxl as to what extent the common law or common law judges have applied substantive principles inherent in the common law.

[53] If the litigant has suffered any special damage or is directly affected by the administrative decision, then he must proceed under O 53. See *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & 5 Ors*, *supra*, n 3.

[54] *Supra*, n 33, 17 referring to Sir Patrick Neill Q C, *Administrative Law Ladders and Snakes*, Child Co Lecture 1985, 28-32.

[55] See O 53 r 6 RHC which provides that: 'Within 14 days after leave has been granted, any party to an application for judicial review may apply to the Judge for discovery and inspection of documents pursuant to Order 24, to administer interrogatories pursuant to Order 26, or to cross-examine the deponent of any affidavit filed in support of or in opposition to the application pursuant to Order 38.'

[56] *Common Values and the Public-Private Divide* (Butterworths, 1999).

review over private bodies by imposing public law principles such as fairness and rationality in private law on those exercising private functions. In other words, public law and private law have similar objectives, namely to protect the interests of individuals in their autonomy, dignity, respect, status and security; to control exercises of power and to promote democracy and citizenship both in the public and in the private sphere. In her view, an integrated approach to substance, remedies and procedures should be taken in place of the public-private divide so as to enable the development of common law and equity in promoting the protection of individuals and public interests against abuses of all kinds of power.

G Samuel,[57] on the other hand, argued that not dividing public law and private law would equate the state with a private person entitled to the same rights of privacy, reputation, property and the like which is not healthy in protecting civil liberties. Woolf LJ writing extra-judicially[58] in 1984 also expressed the view that this dichotomy needs to exist not only because public law requires the court to perform a different role from that which it has traditionally adopted in private law disputes, but the interest of the public in the outcome of litigation over public duties requires procedural safeguards which are not necessary in disputes over private rights. His lordship also said that while the difference between the two systems must exist and their parameters recognised, this does not mean that the systems do not need to coalesce because if public law has been able to develop by adopting private law principles and remedies, private law can also emulate the supervisory role which so far has been the hallmark of the courts' public law role.

Having said that, any divorce between public law and private law, if it is necessary, is only relevant as far as public interest litigation as a form of judicial review is concerned. The reason is that such a distinction enables the court to decide which particular public body or authority is amenable to judicial review. Indeed it is difficult to draw a definite line between the two especially in this age when private bodies such as privatised entities also exercise public

[57] *Public and private law: A private lawyer's response,* 46 MLR (1983) 558.
[58] *Public Law-Private Law: Why the Divide? A Personal View* [1986] Public Law 220, 237-238.

functions.[59] It is submitted that public interest litigation is generally confined to actions against infringement of public law rights whether committed by public or private bodies. Matters which have been characterised as 'private' claims would be inappropriate for public interest litigation as a public interest litigant will not be able to establish a privity of contract or that a duty of care is owed to him or to the larger community. Hence public interest litigation will not be permitted if the nature of the claim is seen as 'private'. But this is not easy to distinguish: even the British House of Lords had difficulty deciding which side of the public-private divide a claim falls.[60] However, the functions and powers of the decision-making body, whether private or body, should involve a sufficient public element which will determine whether a decision is susceptible to challenge by way of public interest litigation.[61]

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[59] For example, Tenaga Nasional Berhad, Indah Water Sdn Bhd and SAJ Holdings Sdn Bhd. See *Tekali Prospecting Sdn Bhd v Tenaga Nasional Bhd & Anor*[2002] 1 MLJ 113.

[60] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

[61] See *R v Panel on Takeovers and Mergers, ex p Datafin* [1987] 1 QB 815 where it was observed by Lloyd LJ that it is not the source of power, but the nature of power which is the determinative factor whether a body is amenable to judicial review. In *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909, Sir Thomas Bingham MR said that before a body would be considered to be exercising public functions, those functions must be 'woven into a system of governmental control'. *Datafin* was followed by the Malaysian case of *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657. But see *Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor* [1988] 1 MLJ 174, where the Supreme Court held that the act of the Kuala Lumpur Commodity Exchange is not subject to supervisory control of the court as the relationship between the members of the Exchange is only contractual and the exercise of the power of the KLCE in this case under reg 11 of the General Regulations is also an exercise of a power derived under the contract.

Equally, the Singapore Court of Appeal allowed the appeal of the PSC in *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR 644 from the decision of the High Court which granted the respondent leave under O 53 r 1 RSC to apply for an order of certiorari to quash the decision of the Commissioner for Lands, Permanent Secretary (Law) in extending her probationary period for one year retrospectively and the decision of the PSC refusing her appeal against the retrospective extension of the probationary period and the termination of her appointment. After distinguishing the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] ICR 14, the Court of Appeal ruled that as the decision was not one of general application affecting employees of a public body but related solely to the respondent, such decision is not susceptible to judicial review.

III. THE ROLE OF PUBLIC INTEREST LITIGATION IN AN ADMINISTRATIVE STATE

A. *Public interest litigation an important part of administrative law*

We all live in an administrative state which continues to be shaped by government policies implemented by a large number of administrative bodies. Policy formation has replaced the operation of common law as the primary means of social regulation and agencies have displaced the courts as the primary means by which that regulation is effectuated.[62] But all these are sanctioned by the legislature which enacts policies that are an embodiment of the administrative state. In some instances, government policies are treated as if they have the force of law because of the legal and administrative consequences if they are not followed.[63] In this sense, the formulation of policies is often influenced by the political regime which is in power.[64]

The courts also have a major influence on the nature and shape of the administrative state in the sense that they will decide what particular constraints to impose on administrative action, and more generally on the overall purpose of judicial review. As was argued by Professor Paul Craig, 'administrative law, when viewed in this way, is always a combination of what is going on in the political world, combined with the reactions of the judiciary.'[65] In fact, the judiciary is a political institution. It is political simply because they are appointed by politicians who are obviously aware of the political views and inclinations of

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[62] See Edward L Rubin, *Law and Legislation in the Administrative State*, 89 Colum L Rev 369.
[63] For example, a contract can be invalidated if it is opposed to public policy. See also s 24(e) of the Malaysian Contracts Act 1950; Roger Tan Kor Mee, *The FIC Guidelines – To comply or not to comply - that is the question* [2000] 2 MLJ cxlv, referred to in *Irene Man Yee Ching v Standard Chartered Bank & Anor* [2000] 649 MLJU 1.
[64] It has been argued that in recent years, public choice analysis has suggested that legislators are more interested in re-election than improving their effectiveness in achieving public purposes. See Edward L Rubin, *Law and Legislation in the Administrative State*, *supra*, n 62.
[65] PP Craig, *Administrative Law*, (Sweet & Maxwell, 4th Edition, 1999), 3-4.

a particular judge before appointing such judges. A judge's political view and outlook will, therefore, influence his judgments.[66]

As policies and politics are interwoven in the administration of a state, such government policies will affect the community as a whole. Public interest litigation which involves judicial review of these policies is an important aspect of administrative law. It seeks to uphold the fundamental principle of rule of law. Regrettably, public interest litigation is a subject largely ignored by local writers of administrative law.

B. *Role of individuals in developing public interest litigation in an administrative state*

Generally, the Malaysian and Singaporean public are reluctant to take the government and public bodies to courts. There is always this perennial fear that the government department will 'punish' them by administrative means such as making his life difficult in future dealings with that government

[66] See Professor JA Griffiths, *The Politics of Judiciary* (Fontana Books 1981) who has argued that English judges are not entirely objective nor neutral in their decisions but rather their decisions reflect the judges' own political outlook and attitude. Likewise, his religious, racial and cultural backgrounds constitute factors that will influence his otherwise independent and judicious minds. This is unhelpful especially when our society is one which is multi-religious, multi-cultural, multi-lingual and multi-racial. While the current majority of Malaysian judges were mostly trained and educated in England and grew up in English medium schools, the present and future generation of judges in Malaysia will be a different breed altogether. The problem is compounded as the composition of the judiciary is not reflective of the racial composition of the country. Further, as majority of present law graduates come from local universities where studies on fundamental liberties are under emphasised as opposed to national interest and security, it is feared that this new breed of judges in the next twenty years who will be more reluctant than the present generation to review administrative action. I may be wrong with the prognosis, but such possibility cannot be ruled out.

While it is wrong for the executive to fail to give important consideration to a matter which it ought to have given or it gives an irrelevant consideration to a matter which he ought not to have given, judges themselves are sometimes guilty of the same when arriving at their decisions. This is only human as they are tempted to decide on a particular case according to their social, economic and political inclinations, *albeit* by ensuring that such a tendency is not in any wise hinted in his judgement. It is therefore easier to say that a judge should rise above politics, and it is quite another thing if one is the occupant of that seat himself, dispensing justice in the face of a strong and powerful executive.

department. But such timorous public reaction is perhaps understandable given that the Chinese and Malay culture was rooted in a time when emperors or the raja-raja would have someone beheaded for having the temerity to question or criticise their actions. These communities are also less anti-establishment, and more inclined to kow-tow to the establishment, preferring to shy away from a challenge if dissatisfied with a government decision unless provoked by suffering grave personal injustice. To them, acceptable inconvenience is preferable to avoid the greater trouble if the government is taken to courts.

With such a high price awaiting an unsuccessful public interest litigant, that litigant will find it more expedient to obtain political justice by resorting to seeking help at service stations run by the political parties, especially the ruling party. A man in the street will also find an immediate affinity for pro-government personalities such as 'Michael Chong' compared with names like 'Karpal Singh' who are more associated with the anti-establishment movement which the government will be less likely to listen to. To them also, having the rice bowl intact is more important than standing up for their rights or having an assertive judiciary to confront the executive let alone trying to promote good governance in government administration![67] In other words, only a well-fed man will have nothing better to do than offending the establishment or in the Chinese Hokkien dialect, '*chup ba bo dai chi zo*'[68] since public interest litigation involves upholding and preserving diffuse rights which sometimes do not really concern a particular individual. In other words, unless one's personal interest is harmed, whatever sense of citizenship or collective interest beyond self will make no sense to such individual.

This apathetic '*chup ba bo dai chi zo*' attitude is a worrying trend to public interest and human rights group. But to the executive, neither is there a need to create public awareness of the benefits of public interest litigation when it can become a curse to the administration and a bane to politicians.

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[67] For example, despite the huge controversy that surrounded the dismissal of Tun Salleh Abas, the former Malaysian Lord President still lost in his bid for a parliamentary seat in the subsequent General Elections. This is a classic case exemplified by the words of Arthur M Schlesinger, Jr: 'Issues that once galvanised the electorate fade into irrelevance.'

[68] This in the vernacular expression means one getting into unnecessary trouble for getting involved in others' affairs when he has too much time on his hands.

Therefore, for public interest litigation to thrive, the public must have the gumption to bring complaints to the courts. Axiomatically, unless the complaint of administrative abuse is brought to the courts, the courts have no opportunity to adjudicate on it. This in turn impedes the development of public interest litigation related jurisprudence.

C. *Diceyan concept of rule of law the bête noire of an administrative state?*

Judicial control of the executive is crucial irrespective of which constitutional system we are in – whether in a system which subscribes to the supremacy of the legislature or the paramountcy of a written constitution.

Public interest litigation which seeks to judicially control the executive in an administrative state will be heretical to the gospel of rule of law preached by Dicey.[69] From a Diceyan perspective which framed the early development of English administrative law, 'administrative law' was alien to the common law jurisdiction and non-existent within. British common law. Any existence of such a notion of law is due to misapplication of the French system of '*droit administratif*' which is a separate body of rules for administrative authorities applied by special administrative courts. In other words, any separate judicial system of adjudicating disputes between private citizens and executive authorities would be incompatible with the constitutional principle of separation of powers and the rule of law as there should be equal subjection of all classes to the ordinary law administered by ordinary law courts.[70] The UK Courts were therefore not positioned to review legislative acts where parliamentary supremacy was the primary legal-political principle of constitutional government.[71]

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[69] A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., 1915, repr. 1982).
[70] Lord Diplock, *Judicial Control of Government, supra,* n 52.
[71] The principle of parliamentary sovereignty is still being held dearly by Englishmen. They believe that despite their entry into the European Economic Community and the ratification of the European Convention of Human Rights, the supreme British Parliament can still decide tomorrow to opt out of these affiliations and promulgate that neither the European Community law nor the decision of the European Court of Human Rights shall override any domestic act of

It follows that the Diceyan concept of rule of law has become otiose. It is no longer compatible with today's administrative state particularly with the development of the tribunal system in the UK which is in fact a de facto separate regime. Neither is today's role of UK courts in reviewing legislative acts inconsequential in the system of parliamentary supremacy particularly with the continued expansion of judicial review and the courts' powers under the Human Rights Act 1998 to invalidate any subordinate legislation which is incompatible with the European Convention of Human Rights.

D. *Powerful executive reigns in unwritten and written constitutions*

Indeed in the absence of a written constitution, the British Parliament reigns supreme as far as its legislative powers are concerned.[72] This is fundamentally majoritarian[73] in that Parliament can make, unmake and amend any law it likes, however substantively illiberal or undemocratic in nature, with the only check being the political one of the ballot box.

With a strong government based on the Westminster system of parliamentary democracy operating within the context of what has been termed

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the British Parliament. As rhetorically put by Professor Paul Craig in *Administrative Law* (*supra*, n 65, 4), Parliament is omnicompetent and it can, in theory, ban smoking in Paris or repeal the grant of independence to former colonies! For a good revisit of Dicey, see Bingham, *Dicey Revisited* [2002] Public Law 39. 2001 See also BM Selway, *The Constitution of the UK: a Long Distance Perspective* [2001] CLWR 30(3).

[72] This means that Parliament's supremacy is a continuing supremacy as one Parliament cannot limit the powers of a future Parliament. Each Parliament is supreme. It can repeal any laws enacted by the previous Parliament even if that previous Parliament had tried to entrench the provisions against subsequent repeal. Repeal of previous laws can be done by way of an express repeal or an implied repeal. The former is self-explanatory but the latter means that when the new Parliament passes a new Act, any previous inconsistent law will be repealed by implication. There is no necessity to state expressly in the new Act that the earlier laws are repealed as the courts will imply this in the event of a conflict between two laws. See *Ellen Street Estates Ltd v Minister of Health* [1934] 1 K B 590. However, this must now be read subject to the European Communities Act 1972 as regards a conflict between domestic law and community law.

[73] See Dawn Oliver, *Common Values and the Public-Private Divide*, *supra*, n 56, 4.

an elective dictatorship,[74] Parliament is in fact answerable to Downing Street. With political patronage and controls, and by employing all sorts of inducements and arm-twisting, a powerful party whip can quite easily keep the legislators in check. This left the control over executive excesses to the judiciary, regarded for centuries as the bulwark of Englishmen's freedoms and liberties. The advent of a welfare state framed around a substantially increased number of legislative regulations which affected an Englishman's rights from his cradle to his grave made the need for some form of judicial check more pressing.[75]

In the case of Malaysia and Singapore, both countries imported the unwritten British common law and its parliamentary institutions, but framed government through adopting a written constitution, declared as the supreme law of the land.[76]

However, the Constitution can still be easily amended by the powerful executive which controls the Parliament. The Malaysian Government has always maintained two-thirds majority in Parliament successively for many decades.[77] Singapore has always been governed by one political party since Independence,

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[74] A doctrine which is enunciated by Lord Hailsham in *The Dilemma Of Democracy* (Collins 1978) where he wanted more effective curbs on the highly centralised power of Britain's 'elective dictatorship'. He said, *inter alia*, at 125 that 'since the sixteenth century and except in time of war, never has a government possessed more power than it has today. Never has it spent more money, employed a greater army of people, imposed so many regulations, passed so many laws, raised so much in taxation, operated in so many spheres or exercised a wider patronage.'

[75] This is particularly so where there is infringement of human rights. The Human Rights Act 1998 now provides, notwithstanding the doctrine of parliamentary supremacy, that a UK court may invalidate any subordinate legislation which is judged incompatible with the European Convention of Human Rights. However, the courts are not empowered to strike down any primary legislation, but they can issue certificates of incompatibility and such a declaration effectively places the issue before a Minister who can take remedial action of making such amendments to the legislation as he considers necessary to remove the incompatibility.

[76] Art 4 of the Malaysian Constitution declares that the Malaysian Constitution is the supreme law of the Federation and any law passed after Independence Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. Likewise, art 4 of the Singapore Constitution declares that the Constitution is the supreme law of Singapore and any law enacted by the legislature after the commencement of the Constitution which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

[77] Currently of the 193 parliamentary seats, the ruling party has 150 seats and the remaining 43 seats are held by the Opposition. The only time the ruling party lost its two thirds majority in Parliament was in the 1969 parliamentary elections.

and almost her entire unicameral Parliament is in the hands of that party.[78] Therefore, any dissenting voice and disobedience to the party will be dealt with severely.[79] The notion that ministers are both individually and collectively responsible to Parliament is but also an illusion[80] because of the overwhelming majority which the government enjoys in the legislature. What happens is that our ministers spend more time pleasing the Prime Minister than pleasing Parliament! Consequently, the supremacy of the constitution is perhaps only a myth if the sacrosanct law of the land is subservient to the powerful executive which controls the legislative powers.

Since both the Malaysian and Singapore Constitutions are the supreme law of the land in that any legislative acts inconsistent with the Constitution would be invalidated,[81] *fortiori*, the judicial branch should play a more active role in order to uphold and give effect to the written constitution.[82] As my

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[78] In the first Parliament (8.12.65-7.2.68), the ruling party People's Action Party ('PAP') controlled 55 out of 64 parliamentary seats; 63 out of 64 seats in the second Parliament (6.5.68-15.8.72); all the 54 seats in the third Parliament (12.10.72-5.12.76); all the 78 seats in the fourth Parliament (7.2.77-4.12.80); 75 of the 76 seats in the fifth Parliament (3.2.81-3.12.84); 77 of the 79 seats in the sixth Parliament (25.2.85-16.8.88); 80 of the 82 seats in the seventh Parliament (9.1.89-13.8.91) excluding 2 nominated MPs; 78 of the 82 seats in the eighth Parliament (6.1.92-15.12.96) excluding 10 nominated MPs; 82 of the 85 seats (26.5.97-17.01.01) excluding 14 nominated MPs; all seats as well as all group representation constituencies except for the Potong Pasir constituency in the current Parliament.

[79] See the case of the two State Assemblymen, Lim Boo Chang (Datuk Keramat) and Tan Cheng Liang (Jawi), who were suspended from their party in December 2002 for abstaining from voting against an Opposition motion in the Penang State Assembly to defer the construction of the RM1.2 billion Penang Outer Ring Road Project despite being told by the Government Whip to vote against it.

[80] Even though the Constitution recognises collective ministerial responsibility, it is however silent on individual ministerial responsibility – see art 43(3) and art 24(2) of the Malaysian and Singapore Constitutions respectively. In Malaysia, the practice of appointing senators as ministers also further erodes the principle of ministerial responsibility as these ministers are not subject to question time in the House of Representatives.

[81] See *supra*, n 76.

[82] Even though the Malaysian and Singapore constitutions do not contain express provisions for the courts to decide on the constitutionality of a statute, it is said that such authority is found in the inherent powers of court. It is commonly asserted by the courts in a jurisdiction which has framed the constitution as the fundamental and paramount law of the nation. See the decision of the USA Supreme Court in *Marbury v Madison* (1803) 5 US (1 Cranch) 137. Examples of local courts applying this principle include cases such as *Haw Tua Tau v Public Prosecutor* [1980] 1 MLJ 2; *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410. Further, while we do not have a special constitutional court such as the German Constitution Court dealing exclusively with

British professor of public law, Professor Graham Zellick[83] would tell me during my student days, the reason why Britain had prepared written constitutions for all her former colonies despite not having one herself stemmed from the belief that the legislative arm in these former colonies could not later be trusted to act responsibly and fairly.

However, a Malaysian judge was of the view that that explains why the English common law 'has to grope about in the dark and unlit passages of constitutional and administrative law, and undergo a rather slow and gradual development'[84] as it lacks the distinct advantage of a written constitution. Gopal Sri Ram JCA said, 'it is wholly unnecessary for our courts to look to the courts of England for any inspiration for the development of our jurisprudence on the subject under consideration. That is not to say that we may not derive useful assistance from their decisions. But we have a dynamic written constitution, and our primary duty is to resolve issues of public law by having resort to its provisions.'[85]

E. *The role of the constitutional court in an administrative state*

(i) *Judicial Intervention*

The extent of public interest litigation, therefore, depends on the limits of judicial enforcement of executive actions. It can exercise either judicial activism or restraint in this regard, but an overzealous judiciary will certainly put the executive and the judiciary on a collision course.[86] But this in no way means

constitutional questions, art 128 of the Malaysian Constitution and art 100 of the Singapore Constitution do respectively empower the Federal Court of Malaysia and a tribunal of 3 Supreme Court judges of Singapore to determine questions on the effect of any constitutional provision.

[83] Professor Zellick was then the Dean of the Faculty of Laws, Queen Mary College, University of London and who is now the Vice-Chancellor of the University.

[84] Per Gopal Sri Ram JCA in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, 281.

[85] *Ibid*, 281.

[86] One example is the dismissal of the Malaysian head of judiciary in 1988 which was prompted by the judiciary's allegation that 'the Prime Minister evidently refuses to accept the principle

that the courts have no role to play in checking administrative action. Lord Diplock in 1979 noted:

> … judicial modesty must go hand in hand with judicial courage. If the Federal or a State legislature attempts to legislate in breach of the Constitution which is the supreme law of Malaysia, if any executive or administrative authority, however exalted or however lowly, has so acted that it has failed to observe or to apply the law, it is the responsibility of the Judiciary of Malaysia, so to declare and to refuse to give legal effect to such *ultra vires* legislative or administrative act: for this is the only way in which the rule of law will continue to be preserved.[87]

As Professor Wade also said in his Appendix to Dicey's *Law of the Constitution*: 'The last word on the question of legality rests with the courts and not with the administration.'[88]

In Malaysia, the position is best summed up in the words of HRH Raja Azlan Shah, acting CJ (Malaya) (as he then was), in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*.[89] His Royal Highness said trenchantly:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. *The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important*

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that the duty and the function of the court is to question and correct the acts and the conduct of the Executive when it ventures outside the bounds of law...' Tun Salleh Abas with K Das, *May Day for Justice* (Magnus Books), 68.

[87] Lord Diplock, *Judicial Control of Government, supra*, n 52, cxlvii.

[88] (9th ed., 1952) 487. Quoted with approval by the Malaysian Federal Court in *YB Menteri Sumber Manusia v Assoc of Bank Officers, Pen M'sia* [1999] 252 MLJ 1, 30-31.

[89] [1979] 1 MLJ 135.

> *safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.* I would once again emphasize what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place', (per Danckwerts LJ in *Bradbury v London Borough of Enfield* (1967) 3 All ER 434 at p 442).' [90]

These views were echoed by the Singapore Court of Appeal in *Chng Suan Tze v Minister of Home Affairs, Singapore & Ors.*[91] The position of Singapore courts is reinforced by art 93 of the Constitution which provides that the judicial power is vested exclusively in the Supreme Court and the Subordinate Courts in that the courts are empowered to review of the exercise of arbitrary powers of the executive.[92]

However, there is the other concern advocating judicial restraint in reviewing administrative decisions in that if the courts were allowed to venture into every area of decision-making of administrative bodies, how then would the autonomy of decision-makers be preserved? Should the courts adopt an expansive view of judicial review? It heightens the danger of courts transgressing the orthodox conceptual limits of review: that what is being supervised is not the decision itself but the decision-making process.[93] This concern is often made with the rejoinder that judicial control is necessary because the courts are the guardian and protector of liberties and freedoms. But is that ideal practically realisable, given that Singapore and Malaysia have only recently adopted such principles, without the institution of the judiciary

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[90] *Ibid*, 148, (emphasis added).
[91] [1989] 1 MLJ 69.
[92] But see art 149(3) of the Singapore Constitution which was added after the decision of *Chng Suan Tze v Minister of Home Affairs, Singapore & Ors, supra* n 2.
[93] See decision of the House of Lords in *Council of Civil Service Union v Minister of Civil Service* [1985] AC 374 (or *'GCHQ case')* that judicial review was not concerned with the decision but with the decision making process. See also *J P Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, 154-155; *Hotel Equitorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1984] 1 MLJ 363; *Re Application by Dow Jones (Asia) Inc* [1987] SLR 505.

sufficiently maturing to be mature, strong and fearless so as to be an effective check?[94]

Inspired by the free-for-all public interest or social action litigation and a highly active judiciary in India, Malaysia's conservative judiciary has been urged to be more judicially active in promoting social justice in a speedier fashion.[95] While this approach has obvious benefits, the danger is that excessive judicial zeal which has unelected judges venturing into the domain of the elected government can bring the government of the day to a standstill. Who then can ensure that judges[96] do not transgress their constitutional role and duty by engaging in politicised judgments?[97]

But India is not a good example to follow as far as the expanded growth of judicial review is concerned. Its judicial activism has now become judicial 'populism' or judicial 'excessivism'.[98] The Indian courts now appear to be acting as a government by judiciary. For example, the courts there have gone to the extent of giving judicial directions on the number of new cars that could be registered each month in New Delhi.[99] Other examples include the courts ordering 100 buses to be converted from using diesel to clean compressed natural gas;[100] giving directions as to the width of a road;[101] setting guidelines

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[94] Particularly when the judiciary has been viewed from the Western standards as one that is compliant to the executive. See Tun Salleh Abas with K Das, *May Day for Justice, supra*, n 86; *Lee Kuan Yew v Vinocur & Ors* [1996] 2 SLR 542.

[95] MP Jain, *Administrative Law of Malaysia and Singapore* (Third Ed. Malayan Law Journal).

[96] Justice Alex Chernov, *Who Judges the Judges?* in *Current Judicial Trends and the Rule of Justice*, Colloquium Issue, INSAF, The Journal of the Malaysia Bar, December 2002, 2.

[97] The executive's lamentation is best borne out in these words of Dr Mahatir Mohamad: 'Judicial review empowers the interpreters of the law with unlimited scope such that they can deny the effectiveness or smooth enforcement of whatever law. No one can predict the result of a review of a judge because the end result depends on maintenance of this relationship is that the judiciary will decline to his discretion. Having arrived at the decision that anyone can bring the Government to court, the Government can no longer decide anything with exactitude. Each decision can be challenged and perhaps be rejected. So the Government is no longer the executive power. Other parties have taken over the task.' [Quoted in Tun Salleh Abas with K Das, *May Day for Justice, supra*, n 86, 38-39.]

[98] SP Sathe, *Judicial Activism: The Indian Experience , supra*, n 16.

[99] *The Straits Times (Singapore),* 22 May 1999, 47.

[100] *The Straits Times (Singapore),* 16 April 2002.

[101] *Upendra Baxi v State of Uttar Pradesh* [1986] 4 SCC 106.

for inter-country adoption of children;[102] prescribing qualifications for bus drivers of educational institutions;[103] asking a State to enact laws to proscribe ragging of college students[104] and issuing directions to the Municipal Council to construct public latrines, drains, etc.[105]

In any event, judicial intervention is a necessity in an administrative state these days when administrative bodies are adopting the practice of anything is permissible unless and until it is stopped by the courts. It is no longer the case that if the legality of a course of action was in doubt, it would not be adopted.[106] The involvement of the courts and judges in public interest litigation has also become inevitable if justice is to be done in an increasingly regulated society.[107] It is within this context that the judicial arm in the separation of powers is best positioned to curb administrative abuses and excesses or to use the words of HRH Sutan Azlan Shah, 'departmental aggression'.[108]

(ii) *The role of courts in promoting Good Governance*

The judiciary should help enforce the concept of good governance in public administration. It is a principle that is based on equity and fairness. Corrupt and intolerant regimes will find good governance as a threat to their surviving in power.

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[102] *Laxmi Kant Panday v Union of India* AIR [1987] SC 232.
[103] *M C Mehta v Union of India* [1988] IX AD (SC) 37.
[104] *State of Himachal Pradesh v A Parent of a Student of Medical College* [1985] 3 SCC 169, but the judgement was reversed upon appeal to the Supreme Court.
[105] *Municipal Council, Ratlam v Vardichand* [1980] 4 SCC 162: AIR 1980 SC 1622. In a way, judicial activism in India is perhaps a constitutional necessity as India does not have the strong provincial governments that operate in Canada, the separation of powers that functions in the United States nor the referenda employed in Australia. Consequently, the Indian judiciary has become a first and a last resort. See Carl Barr, *Social Action Litigation in India: The operation and limits of the world's most active judiciary* in *Comparative Judicial Review and Public Policy*, edited by Donald W Jackson and C Neal Tate (Greenwood Press, 1992), 85.
[106] LJ Woolf, *Public Law-Private Law: Why the Divide? A Personal View, supra*, n 58, 221-222.
[107] Abram Chayes, *The Role of the Judge in Public Law Litigation* 89 Harv L R 1281.
[108] In the case of Malaysia and Singapore, there is no other choice as there is no other body exercising extra-judicial control over the government such as the system of parliamentary ombudsman in England.

Many a time, the citizens' right to freedom of speech is curtailed so that any administrative skeletons can be concealed at the expense of an ignorant and misinformed public. A judiciary operating in such an environment is beholden to set the rules of good governance for the general good of the citizenry when the legislature controlled by a corrupt and intolerant regime fails in its constitutional duty. Under these circumstances, judicial creativity and activism are necessary to shield the rights of the citizens from encroachment. It is submitted that it is also justifiable under these circumstances for judges to 'make' laws while interpreting them! Of course, if the judicial arm of the government is equally corrupt, then it spells disaster for the country for the wealth of the country will be plundered and the citizens' rights trodden with impunity.

The judiciary should therefore lend a hand to public interest litigants who have taken upon themselves to ensure that administrative agencies do not act beyond their powers. In this sense, the judiciary too has to observe principles of good governance in dispensing justice. When the other arms of the government may be a let-down to the people, the judiciary must rise to the occasion to act against any transgressions of the nation's laws. It is fundamentally necessary that judges must not only remain independent but be seen to be independent. Judges must also act impartially without fear or favour. A good judge must not betray the oath of this high judicial office which has been bestowed upon him. He must also be passionately committed to defending the fundamental principle of rule of law and the Constitution. Most of all, he must dispense justice even though heavens fall – *fiat justitia ruat coelum*!

In this sense, the role of courts in an administrative state is to help create a good public administration. The role of the courts is not just about complaint or grievance handling, but rather complaint avoidance.[109] It is through the pronouncements of the courts that governmental departments are mindful of the limits and excesses of their administrative powers. Such pronouncements will later represent the dos and don'ts in public administration and mistakes previously made will not be repeated. Therefore, administrative procedures

[109] Peter Cane, *An Introduction to Administrative Law* [Calrendon Law Series, Third Edition 1996, 378.]

can always be improved from time to time with reference to such judicial pronouncements.

F. *Comparative Review of Public Interest Litigation*

Unlike Malaysia and Singapore, there has been a spate of public interest litigation cases in the Commonwealth[110] in recent years, *albeit* it has not taken on the radical nature of the Indian experience.

These cases could not have had been instituted without public spirited citizens and bodies such as Raymond Blackburn of England and Greenpeace. They obviously fervently believed that a citizen action or the general approach of *actio popularis*[111] is necessary to keep public authorities within their powers in order to uphold the rule of law and achieve social justice for communal good. The state should not, therefore, transgress the rights of the citizens which belong to the community. After all, the source of all law-making power is the people.[112]

(i) *UK Experience*

The first of the string of what is now commonly known as the *Blackburn cases*[113] was *R v Commissioner of Police of Metropolis, ex parte*

[110] The concept of public interest litigation is still at its infancy as far as Pakistan is concerned with the first evidence of Pakistani public interest litigation reported in 1988. See Werner Menski, Ahmad Rafay Alam, Mehreen Kasuri Raza, *Public Interest Litigation in Pakistan* (Pakistan Law House, Platinum Publishing Ltd, 2000).

[111] This is otherwise known as a citizen action which is a right resident in any member of a community to take legal action in vindication of a public interest. As Professor Paul Craig put it, 'A citizen action or *action popularis* is based on the premise that the main aim of public law is to keep public bodies within their powers, and the presumption is that citizens generally should be enabled to vindicate the public interest without showing individual harm over and above the general community.' [PP Craig, *Administrative Law*, *supra*, n 65, 710.]

[112] Lord Diplock, *Judicial Control of Government*, *supra*, n 52, cxliv.

[113] Mr Blackburn had been very successful in his citizen actions against public authorities in his capacity as a taxpayer mainly due to Lord Denning's approach to locus standi whereby his lordship felt that courts should hear anyone who had a genuine grievance. In dealing with

Blackburn[114] where Mr Blackburn, a one time Member of Parliament, successfully applied for mandamus to compel the Commissioner of Police to act against the gaming clubs in London which were openly breaking the law. In *Blackburn v Attorney General*,[115] he sought a declaration against the government when the government decided to join the Common Market arguing that by signing the Treaty of Rome, the government would be surrendering the sovereignty of the Crown in Parliament.

He took the Police Commissioner to court again in *R v Police Commissioners, ex parte Blackburn (No 3)*.[116] This time with his wife to require the police to enforce the laws against pornography. When the Greater London Council did nothing to stop the exhibition of pornographic films, he also applied for a writ of prohibition and succeeded.[117]

NGOs also resorted to public interest litigation on various issues. For example, complaining about the Independent Broadcasting Authority for its plan to broadcast a television film described as 'a shocker, the worst ever';[118] payment of a large sum of money by the government to the European community;[119] the government ratifying the Treaty of Rome;[120] social security claims;[121] writing off taxes for the previous two years[122] and environmental issues.[123]

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meddlesome busybodies, he had this to say: 'Have they a genuine grievance? Are they genuinely concerned? Or are they mere busybodies? This matter is to be decided objectively. A 'busybody' is one who meddles officiously in other people's affairs. He convinces himself - subjectively - that there is cause for grievance when there is none. He should be refused. But a man who is genuinely concerned can point - objectively - to something that has gone wrong and should be put right. He should be heard.' (*R v Inland Revenue Commissioners, exp National Federation of Self-Employed and Small Business Ltd* [1980] QB 407].

[114] [1968] 2 QB 118.

[115] [1971] 1 WLR 1037.

[116] *Supra*, n 27.

[117] *R v GLC, ex parte Blackburn* [1976] 1 WLR 550.

[118] *Attorney General v Independent Broadcasting Authority* [1973] QB 629.

[119] *R v HM Treasury, ex p Smedley* [1985] 1 All ER 589.

[120] *R v Foreign Secretary; ex p Rees Mogs* [1994] QB 552.

[121] *R v Secretary of State for Social Services and another, ex parte Child Poverty Action Group* [1990] 2 QB 540.

[122] *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93.

[123] *R v Inspectorate of Pollution & Anor; ex p Greenpeace Ltd* (No 2) (1994) 4 All ER 329.

(ii) *Australian Experience*

In Australia, public interest litigation has increased in the last seventeen years while reform has been proposed to ameliorate the restrictive rules of standing.[124] Public interest litigation has been invoked[125] by three priests against the decision of the Censorship Board to allow the importation of an allegedly blasphemous film;[126] an environmental group attempting to stop a proposed building development with regard to the validity of purported compliance with certain environmental laws;[127] members of an aboriginal community to prevent allegedly criminal interference with tribal relics protected by a statutory penal provision;[128] the Right to Life Association against the decision of the Secretary of the Department of Health and Human Services not to stop three clinical trials of a 'morning after' abortion drug;[129] a passive smoker against tobacco advertising for a sporting event;[130] a parent challenging religious activities at a government school;[131] an applicant challenging the Minister's decision to have outdated military weaponry melted down for scrap;[132] a citizen attempting to stop the presentation of a Mental Health Bill for the Governor's assent;[133] largest environmental organisation in Tasmania challenging the decision of the Minister for Resources to grant a licence to a company to export 200,000 tonnes of woodchips.[134]

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[124] See Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies* (Report No 78 of 1996); Australian Law Reform Constitution, *Standing in Public Interest Litigation* (Report No 27 of 1985).

[125] Even though the procedure is by way of judicial review pursuant to the Administrative Decisions (Judicial Review) Act 1977, the nature of these actions is in the form of public interest litigation instituted by private persons and bodies who may not have been directly affected by the decisions of public authorities.

[126] *Ogle v Strickland* [1987] 71 ALR 41.

[127] *Australian Conservation Foundation Inc v Commonwealth* [1980] 146 CLR 493.

[128] *Onus v Alcoa of Australia Ltd* [1981] 36 A.L.R. 425.

[129] *Right to Life Association (NSW) Inc v Secretary, Commonwealth Department of Human Services and Health* [1995] 128 ALR 238.

[130] *Ragg v Nationalwide News Pty Ltd* [Unreported, NSW Sup Ct, Young J, May 1991].

[131] *Benjamin v Downs* [1976] 2 NSWLR 199.

[132] *Standbridge v Minister of Defence* [Unreported, Fed Ct, Drummond J, May 1995].

[133] *Eastgate v Rozzoli* [1990] 20 NSWLR 188.

[134] *Tasmanian Conservation Trust Inc v Minister for Resources* [1997] 127 ALR 580.

(iii) *Canadian Experience*

With regard to the Canadian experience, it has been noted that the following quartet of standing cases has provided a new opportunity for public interest litigation in Canada when much of Canadian law had previously been immune from legal challenge because of stringent standing rules or other barriers to access.[135]

In *Thorson v Canada (AG)* (No 2),[136] a federal taxpayer challenged the constitutionality of federal legislation. In *MacNeil v Nova Scotia (Board of Censors)*[137] the plaintiff challenged the constitutionality of the legislation which was precipitated by the Amusements Regulation Board's ban on the film 'Last Tango in Paris' from public viewing in theatres or other places in the Province. The plaintiff in *Canada (AG) v Borowski*[138] attacked the validity of the criminal code provision relating to abortion on the ground that they contravened the life and security and the equality rights of the foetus as a person protected under the Canadian Charter of Rights and Freedoms. A Manitoba resident challenged the making of payments to Manitoba purportedly under the Canadian Assistance Plan and the validity of an agreement between Canada and Manitoba in the case of *Finlay v Canada (Minister of Finance)*.[139]

(iv) *Benefits of public interest litigation*

Undoubtedly, the underlying objective of these public interest litigation cases in the three jurisdictions is to ensure that public authorities act within their lawful powers. It is also very much related to the manner in which the decision-making process of public authorities is undertaken which bears out the lack of good governance in public administration.

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[135] See L Friedlander, *Costs and the Public Interest Litigant* [1995] 40 McGill L J 55 at 55.
[136] [1975] 1 S.C.R. 138.
[137] [1976] 2 S.C.R. 265.
[138] [1981] 2 S.C.R. 575.
[139] [1986] 2 S.C.R. 607

In fact, in an administrative state, one of the benefits of the 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-making.[140] By 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 authorities.

G. *Public interest litigation and Good Governance Based Legislations*

In Malaysia, checks and balances have been installed in statutes relating to the citizens' use of their properties, access to natural resources, environmental protection and the provision of services by government. All these are intended to ensure good governance and procedural propriety in the decision-making process by public authorities.

The following statutes have precipitated public interest litigation in Malaysia. Firstly, the precepts of good governance are even evident in State Constitutions. One standard provision is that the State Secretary, State Financial Officer and the State Legal adviser representing the civil service and the Federal Government are also ex-officio members of the State Executive Council. This is to promote accountability and transparency in the administration of the State by politicians.

Similarly, the Incorporation (State Legislatures Competency) Act 1962, a Federal law, sets out the power of the State Legislatures to make laws with

[140] See the Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies* (Report No 78 of 1996), 22-23 which states that the benefits that can derive from public interest litigation include: '(1) the development of the law leading to greater certainty, greater equity, and access to the legal system and increased public confidence in the administration of the law (which in turn should lead to less disputes and less expenditure on litigation); (2) economies of scale; (3) impetus for reform and structural change to reduce potential disputes (for example, a test case can encourage the development of rules and procedures designed to ensure greater compliance with a particular law); (4) contribution to market regulation and public sector accountability by allowing greater scope for private enforcement; (5) reduction of other social costs by stopping or preventing costly market or government failures.'

respect to the incorporation of certain persons and bodies relating to ordinary day-to-day matters affecting the citizens.[141] The 1962 Act provides that in respect of the incorporation of any person or body for the purpose of agricultural development or housing development or development of urban or rural areas, special provisions in the Second Schedule to the 1962 Act will have to be inserted into the State Enactment. Among the checks and balances required to be inserted are those relating to conflict of interest and the requirement of appointing three representatives from the Federal Government as members of the corporation. This is intended to deter any administrative abuse of power and corruption by statutory bodies.

The other piece of Federal legislation which promotes public accountability is the Delegation of Powers Act 1956. This Act sets out the manner in which statutory powers and duties and the signing of certain documents are delegated. This is to ensure that any executive acts executed by any officer without being first delegated with proper powers in accordance with this Act shall be null and void.

The Town and Country Planning Act 1976 can be described as the statute best founded on principles of good governance. S 21(6) of the 1976 Act imposes a duty on a planning authority to notify adjoining landowners of applications for planning permission. This gives adjoining property owners a say over the development that is taking place next to their properties – an element of public participation not dissimilar with the underlying value of public interest litigation.

Equally, s 13 of the same Act imposes a duty on the local planning authority to first make copies of the draft local plan available for inspection by the public before adopting it. This affords the public an opportunity to make any objections to or representations in respect of the draft local plan. It further provides that the local planning authority shall first publish, in three issues of at least two

[141] These are state scholarships, state educational endowments; charities and charitable institutions; incorporation of the State Secretary; incorporation of the Mentri Besar or Chief Minister; the development of urban and rural areas; assistance to padi planters; state parks, museums and public libraries; sultanate lands; propagation of the teachings of Islam; economic and social development of the Islamic community; agricultural development; housing development; water supply; customary lands and water resources management.

local newspapers, one of which being in the national language, a notice setting out the details where and when copies of the draft local plan begin to be available for inspection.

Transparency is the other hallmark of good governance. The legislature has rightly introduced this principle at the lowest tier of the government. By s 23 of the Local Government Act 1976, all meetings of a local authority shall be open to the public and the press unless the local authority by resolution at the meeting otherwise decides. Any Committee of a local authority can also open its meetings to the public and the press if it so decides by resolution.

The above statutory provisions proved that the concept of good governance is not new in Malaysia. It has permeated the local statute books. These statutory provisions have indirectly conferred on a citizen a general right to a good public administration. If it is a general right, it follows that public interest litigation being a citizen action has a role to play in ensuring that these laws are complied with by public authorities.

H. *Public interest litigation a check against breach of Good Governance by the Executive*

As accountability and transparency are cardinal principles of good governance, accepting responsibility and the concept of open government are important in a parliamentary democracy. The government is expected to act responsibly and in a transparent manner or be held accountable at parliamentary elections. Alas it is often said that we can have the best laws, but if the executive does not observe it or lacks the will to enforce it, it comes to nothing. Public interest litigation is often invoked when the executive either fails to observe or enforce the laws.

One example of lack of transparency in decision-making is the contravention of s 21(6) of the Town and Country Planning 1976 Act which is commonplace,[142] particularly when the adjoining landowners are rich and

[142] See *Lee Freddie & Ors v Majlis Perbandaran Petaling Jaya & Anor,* [1994] 3 MLJ 640; *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru, supra,* n 3*; YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur* [2003] 5 MLJ 128.

powerful. Even if notification is made and objections are received, little weight is given to such objections. There is a tendency by some authorities to bulldoze through the decision-making process and grant approval to the proposed development without proper regard to the objections raised by the affected landowners. To them, it is sufficient so long as the procedural requirements have been followed. The outcome of the decision is immaterial. Such apathy is the antithesis of good governance as it reduces affected landowners to accepting this practice as a part of life in a society where power is vested in the wealthy. On the other hand, some affected landowners are more fortunate especially if they have equally strong connections with those in high places who will help put a stop to this unhealthy practice. This non-legal route is obviously not based on the principle of rule of law but rule the law when the law is ruled by the wealthy and the powerful.

It will cause disillusionment among members of the public if law is not the solution to their problems, but rather it depends on who you know that matters. Consequently, a culture of patronage is perpetuated when good governance is relegated to a low position. Unless the disillusioned individuals take this matter to court, the public authorities will continue this course of action. This is where the call of duty falls on public-spirited citizens and NGOs to use public interest litigation as the vehicle to promote good governance by subjecting the actions of the public authorities to curial scrutiny.

In other cases, approval for development is given subject to unreasonable conditions imposed by local authorities which sometimes act so unreasonably that they offend the principle of 'Wednesbury Reasonableness'.[143] One common complaint is the imposition of conditions attached to the issuance of certificate of fitness for occupation ('CFO') which is important to a landowner as a completed building cannot be occupied without it.

A case in point is *Tropiland Sdn Bhd v Majlis Perbandaran Seberang Perai*,[144] where the plaintiffs' application for CFO for their completed five-

[143] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 685.
[144] [1996] 4 MLJ 16.

storey building was rejected by the defendants on the grounds that the plaintiffs had failed to comply with certain conditions, namely, (a) the completion of the remaining 20% of reconstruction and upgrading of the monsoon drain on state land notwithstanding the presence of squatters; and (b) the construction of a concrete perimeter drain along the eastern and southern boundary of the land under development, which did not appear in the amended layout plan. The plaintiffs contended that there was no justification for the defendants to impose such conditions and sought (i) a declaration that the defendants were not justified in the exercise of discretion to require the plaintiffs to construct the perimeter drain along the boundary of the land before the issuance of the CFO; (ii) a declaration that the defendants were not justified in the exercise of discretion to require the plaintiffs to complete the construction of the monsoon drain notwithstanding the presence of the squatters; and (iii) damages in respect of the loss and damages suffered due to the refusal to issue the CFO.

In granting an order in terms of the plaintiffs' application, Vincent Ng J said:

> This court cannot condone such conduct. Unwarranted use of the administrative fiat is no substitute for *principles of good governance* which enjoins all authorities including local authorities to implement laws, by-laws, rules and policies guided exclusively by equitable and fair principles, at all times. Surely, in a vibrant and progressive state such as Penang …. a developer is entitled to expect its local authority to exercise greater care and indeed appreciation of the contents of the plans that they approve.[145]

As regards s 21(6) of the 1976 Act which imposes a duty on the local planning authority to advertise the draft local plan so that the public have an opportunity to inspect it and make any objections or representations to it, a common complaint is that often only a small advertisement space is taken up in the newspapers for this purpose. More often than not, it is so inconspicuous that even the vigilant ones are caught unaware. Local authorities should shed this attitude that having the public involved in the determination of the local plan will inconvenience or stifle their plans, however meritorious, for the area.

[145] *Ibid*, 36, (emphasis added).

In fact, public participation in the deliberation of local government matters is vital if democracy is to flourish at local government level.

As respects opening *all* the meetings of local authority to the public and the press pursuant to s 23 of the Local Government Act 1976, it appears to me that no local authority has ever opened *all* its meetings to the public and the press. It is observed that if any resolution is taken, it is a one-off thing at the beginning of the year which resolves that all meetings during the year would be in closed doors. Sometimes, no resolution is even taken to this effect when the law in fact requires a resolution to be taken in *every* meeting if the public and the press are to be denied access to the meetings.

Regrettably, closing the doors to the public and the press during meetings of the local authorities defeats the primary intention of the legislature in promoting transparency in the decision-making process at the local government level. S 23 of the Act has been framed in the positive sense, that is, *all* the meetings *shall* be open to the public and the press. To deny access to *all* meetings is not in consonance with good public administration. Barring access to a specified meeting is probably understandable especially when it involves deliberation on matters of security or sensitive religious or racial issues. Hence barring access to *all* meetings can be a matter susceptible to challenge as being an unreasonable exercise of discretion on the part of the opaque local authority. Transparency and accountability go hand in hand, and the local authorities should have nothing to fear. After all, truth fears no trial.

All in all, if public interest litigants have the support of the judiciary in ensuring public authorities administer their affairs in accordance with principles of good public administration, I am confident that it will come a day when such a concept will transmogrify into a way of life when non-adherence to it will be met with public abhorrence.

(I) *Problems faced in the promotion of Good Governance*

While the policy decision-makers are mostly correct in their approach towards good governance, this is not so when it reaches those on the ground who are

responsible for implementing it. Public complaints are usually directed at those who are entrusted with the duty to implement or enforce the laws or policies. The problem is compounded if the civil service is mono-ethnic and is not representative of the various races of that country. As a result, this will give rise to accusation that the mono-ethnic civil service will tend to safeguard the interest of their own race.

Take for example, junior officers find themselves in a dilemma when faced with an application by religious groups to build places of worship. The situation is worsened by the fact that as the civil service is mono-ethnic, it is also mono-religious and therefore junior officers will have no choice but to reject the application as they would not want to be irreverent to their own faith by helping in the propagation of other religions. Without appreciating the importance of respecting the constitutional right[146] to freedom of worship of other races and which it is a duty of an independent civil service to do so, delayed tactics are sometimes used to defer these applications. Often the problem is only rectified after appeals are made to their superiors, and the appeal process often takes the affected persons through a long and winding path. If this goes on, instead of making the citizenry happy, it creates resentment and this is not conducive to national unity.

The executive must therefore take steps to correct this unhealthy practice.[147] The other problem is when the civil service is not independent, particularly when civil servants at the lower level of administration hold different political views and are not mindful of the principle that civil service is independent of the executive. This principle is vital as governments come and go, but civil servants remain. The problem is, of course, here our governments come and go, but it is always the same people or the same political party which comes back. Nevertheless there can be no doubt that an independent civil service which is competent and incorrupt is an essential constitutional bulwark as well as a practical necessity.[148]

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[146] Art 11 and art 15 of the Malaysian and Singapore constitutions respectively.
[147] One way of doing it is to introduce good governance as a subject in our schools so that this healthy culture can be nurtured from young.
[148] Andrew Harding, *Law, Government and the Constitution in Malaysia* [Malayan Law Journal, 1996], 122.

For these reasons, leaders of the executive branch must lead the way in advocating good governance in public administration. They must not be chary of introducing good governance to every level of governmental administration because if it is able to permeate the entire public administration, the problems associated with administrative corruption and abuse will slowly fade away by themselves and die a natural death. The executive too must not be intolerant of dissent including any complaint against maladministration.

In this regard, public interest litigation can bring greater awareness of the benefits of good governance to the public. It does not matter if a public spirited citizen or NGO fails in their attempts to do so. 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 governance. This will help complement the government's efforts in achieving a good public administration which the executive should view it positively and take it in stride.

IV. IMPEDIMENTS TO JUDICIAL REVIEW AND OBSTACLES TO PUBLIC INTEREST LITIGATION

A. *Judicial activism or judicial self-restraint?*

Judicial activism has been defined as judicial policymaking tantamount to 'making laws' when its decisions tend to have a prospective rather than a retrospective effect.[149] Judges who engage in judicial activism will often be described as courageous and fearless, *albeit* those who over-indulge in it will be considered as an aberration. Judicial self-restraint, on the other hand, equates with judicial self-discipline in upholding the doctrine of separation of powers in a parliamentary democracy. Judicial self-restraint is often vindicated on the basis that the judges' role in judicial review is different from that in an appellate process. The former does not entitle the judge to review the merits of the administrative decisions. Judges who exercise judicial self-restraint will generally be commended by the executive and those who engage in judicial activism will be rebuked.[150]

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[149] See Charles J Ogletree Jr, *The Bicentennial Celebration of the Courts in the District of Columbia Circuit: Judicial Activism or Judicial Necessity: The DC District Court's Criminal Justice Legacy* [2002] 90 Geo L J 685.

[150] *Ibid.*

However, the degree of the role played by public interest litigation, being relatively a new concept of judicial review in Malaysia and Singapore, is very much dependent on whether the judiciary is activist or conservative.

As far as the development of law in Malaysia is concerned, it has been said that neither is judicial activism[151] nor judicial creativity[152] dead in Malaysia. In fact, the common law is no stranger to judicial activism.[153] Singapore is also not devoid of judicial activism as exemplified by the two landmark decisions in public law delivered by the Singapore Court of Appeal in *Chng Suan Tze v Minister of Home Affairs*[154] and *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts*.[155]

It is, therefore, not a question of whether our courts should cross the Rubicon into judicial activism, but rather the extent of judicial activism being practised in these two jurisdictions.

Judges who get carried away and overreach themselves not knowing the limits and boundaries of judicial review will undoubtedly be accused of usurping

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[151] Per Muhammad Kamil J in *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor* [1998] 2 MLJ 53, 62.

[152] In *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1, 72, Mohamed Dzaiddin FCJ said: 'It must also be remembered that it is not uncommon for judges, for good or better reasons, to change their minds or views on certain legal issues. To me, I call this judicial creativity, a function which we, the judges, perform in the development of the law. The law must not be seen to be static.'

[153] Per Yong Pung How CJ in *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1, 10

[154] *Supra*, n 2.

[155] *Supra*, n 2.

[156] Even HRH Raja Azlan Shah qualified his judgement in the *Sri Lempah Enterprise* case by saying: '... it is not the province of the Courts to review the decisions of government departments merely on their merits. Government by judges would be regarded as a usurpation.' [s*upra*, n 89 at 149]. Lord Greene MR also said in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 685, 686 (approved by the House of Lords in *Smith v East Elloe Rural District Council* [1956] AC 736, 763, and in *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503): 'The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.'

the legislative role.[156] Within the Malaysian and Singapore context, it is submitted that judicial activism is not measured by the number of judicial decisions being made against the executive. Instead it is the level of judicial alacrity and intrepidity in meeting executive abuses in the face of infringement of the rule of law and fundamental liberties of the citizenry. In this respect, we have seen the seeds of judicial activism fructify in Malaysia and Singapore before.[157] A docile judiciary, on the other hand, is one which retreats into its traditional judicial role as literal interpreters of the law, standing idle in the face of blatant abuses of executive power.

This view was echoed extra-judicially by Britain's Lord Chancellor, Lord Mackay who took the unprecedented step of reminding British judges that it was their duty to apply the law as Parliament had enacted it and the ultimate authority over the judiciary and the executive was Parliament. He warned judges not to overstep their powers by using judicial review to challenge ministerial decisions and that so long as ministers had fulfilled their legal obligations, 'the decisions of Parliament in the form of legislation duly passed must prevail'. See *British judiciary chief to judges: Courts not above Parliament*, The Straits Times (Singapore) on 8 December 1995. The remark was apparently made in response to a complaint from Sir Ivan Lawrence, a leading Tory MP, in Parliament that life was becoming impossible for ministers whose every administrative decision was challenged in the courts. But see *Don't blame the judges: Anthony Lester QC argues that it is the executive - and not the judiciary - which threatens the primacy of parliament*, The Guardian on 24 February 2003. Indeed, being a member of the Government, Lord Mackay is speaking from the position of the executive.

[157] More recently, the Malaysian Federal Court in a surprising landmark decision of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other* [2002] 4 MLJ 449 broke new ground in the area of law relating to preventive detention. It finally shed its long established stand of non-intervention in security matters by ruling that the court could now inquire into the basis for the detaining authority's reasons for detaining persons under the Internal Security Act. The court adopted an 'objective test' of judicial review of such detentions and would rule such detentions unlawful if there existed *mala fide* on the part of the detaining authority. In other words, if no adequate evidence of national security is given, the decision making process would be unfair as the court will not accept on a mere *ipse dixit* of the government the oft-cited defence of the government that 'when the state itself is endangered, our cherished freedoms may have to take second place.' (Per Lord Denning in *R v Secretary of State for the Home Department, ex parte Hosenball* [1977] 3 All ER 452.)

Likewise, the Singapore Court of Appeal rose to the occasion in *Chng Suan Tze v Minister of Home Affairs* [1989] 1 MLJ 69 when it overruled the earlier High Court decision of *Lee Mau Seng v Minister of Home Affairs* [1971] 2 MLJ 137 by holding that *mala fide* could be a justiciable matter in the context of Internal Security Act (Cap. 143); a decision only to be quickly overridden by the government by way of amendments to the said Act which resurrected the 'subjective test' applied in the *Lee Mau Seng* case. For a commentary respecting the effect of the amendments to the Internal Security Act had on *Chng Suan Tze v Minister of Home Affairs*, see Sin Boon Ann, *Judges and Administrative Discretion – A Look at Chng Suan Tze v Minister of Home Affairs & Ors*, [1989] 2 MLJ ci.

In fact, the radical changes in the scope of judicial review described as an upsurge in judicial activism[158] in Britain after the landmark case of *Wednesbury* in 1948 have been followed by the courts in Malaysia and Singapore for the purpose of controlling what would otherwise be unfettered executive action. In a way, this branch of public or administrative law has evolved on a case by case basis and the process appears to be continuing even though it tends to proceed on procedural grounds.

Malaysian courts have also adopted robust approaches towards controlling administrative discretion. An example is the *Sri Lempah Enterprise* case[159] where the Malaysian Federal Court followed *Pyx Granite Co Ltd v Ministry of Housing and Local Government*[160] in holding that planning authorities given very wide powers to impose 'such conditions as they think fit' must still act fairly and reasonably. Similarly, the Malaysian courts had also attempted to stretch Lord Diplock's concept of irrationality[161] to include substantive unfairness, permitting the courts to scrutinise or look at the merits of administrative decisions.[162]

In a landmark, *albeit* majority decision of the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor,*[163] Edgar Joseph Jr FCJ interpreted Lord Diplock's notion of irrationality to permit the courts to scrutinise administrative decisions 'not only for *process*, but also for

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[158] Per Lord Roskill in *GCHQ case*, *supra*, n 93, 414.
[159] *Supra*, n 89. See also the Federal Court decision in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1.
[160] *Supra*, n 36.
[161] In the *GCHQ case*, *supra*, n 93, Lord Diplock categorised the grounds of judicial review under three heads - (1) illegality, where the decision-making authority has been guilty of an error of law such as by purporting to exercise a power it does not have (2) irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision – the 'Wednesbury unreasonableness' (3) procedural impropriety, where the decision-making authority has failed in its duty to act fairly. His lordship also stressed that further development on a case to case basis might in the course of time add further grounds, and one possible adoption in the future would be the principle of 'proportionality' which has already been recognised in several members of the European Economic Community.
[162] In the words of Gopal Sri Ram JCA in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996]1 MLJ 481, the courts are entitled to undertake a 'critical scrutiny of the factual matrix' of administrative decisions to determine whether such decisions are reasonable.
[163] [1997] 1 MLJ 145.

substance'.[164] In other words, judicial review is no longer concerned with the decision making process but the decision itself! His lordship said:

> Lord Diplock's second ground for challenge, namely, 'irrationality' recognises a different route whereby the *substance* of a decision may be reviewed by the courts. By this means, Lord Diplock made it clear that despite being legal, that is to say within the powers conferred, a decision may nevertheless, be struck down, for being contrary to *substantive principles*.[165]

This dictum was quickly followed by the Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor*[166] where Gopal Sri Ram JCA in delivering the judgement of the court held that the result of *Rama Chandran*[167] is that even though the decision may be fair procedurally, it can still be struck down for being unreasonable and the punishment meted out is not disproportionate to the wrongdoing complained of.[168]

But judicial activists' euphoria over *Rama Chandran* was short-lived as the umbilical cord that enables this process of metamorphosis into a new head of judicial review was quickly severed by the Federal Court when overruling the Court of Appeal decision in *Sugumar Balakrishnan.*[169] The Federal Court ruled[170] that the doctrine of substantive fairness could not be invoked as a separate or additional ground of judicial review of an administrative decision and held that Edgar Joseph Jr FCJ was certainly not putting forward a new head for judicial review in *Rama Chandran* when his lordship observed that courts could scrutinise decisions not only for process, but also for substance. The Federal Court warned that it was not permissible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of

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[164] *Ibid*, 186.
[165] *Ibid*, 188.
[166] [1998] 3 MLJ 289.
[167] *Supra*, n 163.
[168] In his judgement *supra*, n 166, 323, Gopal Sri Ram JCA also chastised the judge below for failing to 'sufficiently appreciate the wealth of public law jurisprudence flowing from the majority judgments in that case.'
[169] *Supra*, n 166.

judicial review which even the English courts in common law have not recognised. It will appear that this decision which is that of the entire court will prevail over the majority decision of the Federal Court in *Rama Chandran.*

Judicial self-restraint has also extended to the infant doctrine of proportionality[171] when the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara*[172] decided, *albeit* obliquely, not to adopt this doctrine which was applied earlier by the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*[173] without even referring to its earlier decision in *Rama Chandran* where Edgar Joseph Jr FCJ attempted to plant the seeds of the principle of proportionality. The Court of Appeal then tried to revive this principle in *Sugumar Balakrishnan*[174] without also adverting to *Ng Hock Cheng*. Upon appeal, the Federal Court did not touch on the issue of proportionality as applied by the Court of Appeal and elucidated in *Rama Chandran*, even though the Federal Court neither approved of *Tan Tek Seng* nor followed *Rama Chandran* in its judgement on the application of substantive justice in Malaysia. This left the question whether the doctrine of proportionality is still alive in Malaysia, or it has died of infanticide.[175] Neither has this principle of proportionality been adopted by the Singapore courts which preferred to treat it as a principle within

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[170] *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72.

[171] Generally, this principle requires the public authority to mete out punishment commensurate with the wrongdoing complained of. Thus the administrative action can be quashed if it is disproportionate to the mischief at which it is aimed or burdens imposed by the exercise of the power are disproportionate to the object to be achieved. See MP Jain, *Administrative Law of Malaysia and Singapore* (Third Ed. Malayan Law Journal), *supra*, n 95, 482-486. For a good elucidation on the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, *Beyond the Rule of Law: Towards Constitutional Judicial Review* [2000] PL 671; Craig, Administrative Law, *supra*, n 65, 561-563; Professor David Feldman, *Proportionality and the Human Rights Act 1998*, essay in *The Principle of Proportionality in the Laws of Europe* edited by Evelyn Ellis (1999), pp 117, 127. See also C *R Smith Glaziers (Dunfermline) Limited v Customs and Excise Commissioners (Scotland)* [2003] UKHL 7.

[172] [1988] 1 MLJ 153.

[173] *Supra*, n 84.

[174] *Supra*, n 166.

[175] The views expressed in *Rama Chandran* on proportionality were applied by the High Court in *Ekambaran a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors* [1997] 2 MLJ 454. See also the two conflicting views, Sudha CKG Pillay, *The Changing Faces of Administrative Law in Malaysia* [1999] 1 MLJ cxl; Choo Chin Thye, *The Role of Article 8 of the Federal Constitution in the Judicial Review of Public Law in Malaysia* [2002] 3 MLJ civ.

the ground of 'irrationality'.[176]

While these cases have shown the existence of judicial activism in Malaysia in recent years, this is only true at the Court of Appeal level.[177] It is submitted that with the current composition of conservative judges at the apex court, it is unlikely that the doctrine of proportionality will be conclusively endorsed as a separate head of judicial review in Malaysia.[178] Similarly, if judicial self-restraint continues to be perpetuated at the apex level of the Malaysian judiciary, this will impede the growth of public interest litigation as it will be demonstrated later that unless judicial activism is exercised to deal with the current antiquated rules of standing applicable to public interest litigation, the role of public interest litigation in promoting good governance is minimal.

This brings about the next question, that is, if judicial activism is still very much alive in Malaysia, why is Malaysia lacking behind other Commonwealth countries in the development of public interest litigation as a branch of administrative law? It is submitted that the cause of it is the existence of various impediments both legal and non-legal erected by the executive to stymie the growth of public interest litigation.[179] Nevertheless it is submitted that an activist judiciary should be able to come to grips with these impediments. The only fear is that some of these impediments are judicially induced, for example, the doctrine of judicial self-restraint.

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[176] See *Chng Suan Tze v Minister of Home Affairs, supra*, n 2 and *Chan Hiang Leng Colin & Ors v Public Prosecutor, supra*, n 2. However, this principle which originated from the European jurisprudence has been actively applied in India (*Ranjit Thakur v Union of India* [1987] AIR SC 2386) and now accepted as part of English administrative law (R *(Alconbury) Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, para 51) despite the courts' earlier ambivalent attitudes in divorcing this principle as a separate head of judicial review from *Wednesbury* as exemplified in Lord Lowry's judgement in *Brind and others v Secretary of State for the Home Department* [1991] 1 AC 696.

[177] As exemplified in cases such as *Tan Tek Seng* and *Sugumar Balakrishnan*. See also the decision of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 as regards ouster clauses.

[178] At best, it may just be treated as an integral part of the *Wednesbury* principle and not as some who have gone as far as to suggest that this spells the funeral of *Wednesbury*. (See Michael J Beloff, *Judicial Review – Is It Going Too Far?*, Journal of the Commonwealth Lawyers' Association August 2002 Vol 11, No 2., 16. See also Lord Cooke's dictum in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 549.)

[179] The unique position of Singapore of having no public interest litigation will be examined later.

B. *Justiciability*

One form of judicial self-restraint is the concept of 'justiciability' which refers to real and substantial controversy that is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character.[180] A matter is justiciable if it is within the jurisdiction or function of a court of law to make a decision upon the matter properly before it.[181] It is equivalent to the concept of reviewability of administrative decisions by a court of law. In a way, a docile judiciary could use this concept to refrain from reviewing executive decisions and thereby exercising judicial self-restraint over the matter.

With the decision of the House of Lords in the *GCHQ case*, prerogative or non-statutory powers are now amenable to judicial review. The only qualifications are, *inter alia*, those matters relating to the making of treaties, the defence of the realm, the prerogative of mercy,[182] the grant of honours, the proroguing and dissolution of Parliament, conduct of international relations and the appointment of ministers. In most cases, matters relating to national security are not justiciable.[183]

As stated earlier, the concept of non-justiciability causes the courts to desist from reviewing administrative decisions on the grounds of merits. In other words, the courts cannot replace an administrative decision. The decision can only be quashed, stopped, nullified or remitted. This judicial self-restraint is commonly seen in cases involving political implications whereby justiciability is invoked with the excuse that such cases can be handled more expediently by political institutions.

But that is what public interest litigation is generally about, dealing with

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[180] *Black's Law Dictionary* (5th Ed, 1983), 1004 quoted by Edgar Joseph Jr SCJ in *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657, 672.
[181] Per Lai Kew Chai in *Teo Soh Lung v Minister of Home Affairs* [1988] 3 MLJ 241, 244.
[182] *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529.
[183] *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts, supra,* n 2. But see the change in Malaysian judicial attitudes towards the defence of national security in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other, supra,* n 157.

bad administrative decisions which often involved political connotations. Also, the gravamen of a complaint is always not so much with the procedural aspect of the decision, but its propriety. This hands-off approach therefore poses an obstacle to public interest litigation as only those judicially categorised cases are subject to challenge by a public interest litigant. This is a threat to the rule of law if reviewability of a matter is based on judicial instinct and not on principle.[184] If not exercised sparingly, this doctrine of justiciability will lead to judicial abdication as the scope of matters which can be impugned through public interest litigation will be reduced substantially.

C. *Ouster Clauses*

The other obstacle to public interest litigation is the imposition of statutory ouster clauses to limit or preclude judicial review on matters which the executive feels that it is best suited to adjudicate upon. This is incompatible with the rule of law, and as Thio Li-ann also argued, it is in fact an expression of distrust in judicial restraint.[185]

Ouster clauses which are intended to oust the supervisory jurisdiction of the courts over administrative decisions are unconscionable laws. They remove the rampart against abuse and injustices by a monolithic government or organisation. For example, the minister's power to issue restraining order against officials or members of religious bodies under the Singapore Maintenance of Religious Harmony Act (Cap 167A) is non-reviewable.[186] If this is one way of enforcing judicial self-restraint, then what is there to guard against ministerial activism and enforce ministerial self-restraint?

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[184] Thio Li-ann, *Law and the Administrative State: The Singapore legal system*, edited by Kevin Y L Tan, *supra*, n 23, 197.

[185] *Ibid*, 95.

[186] S 18 of the Maintenance of Religious Harmony Act (Cap 167A) of Singapore provides: 'All orders and decisions of the President and the Minister and recommendations of the Council made under this Act *shall be final and shall not be called in question in any court.*' See also s 8B(2) of the Internal Security Act (Cap 143) of Singapore which states that: '*There shall be no judicial review in any court* of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision.' [Emphases added]

The executive which comprises politicians is also not fit to preach good governance if political parties themselves are not keen to practise it. By s 18C of the Malaysian Societies Act 1966, the courts are prohibited from adjudicating upon disputes involving a political party.[187] This begets bad governance especially among leaders of the ruling party whose positions are always a subject of a tussle as holding of such offices means opening the doors to the corridors of power and wealth. These provisions naturally favour the incumbents, and do not constitute good governance in an organisation which forms the executive branch of government. It also lends little credence to the government's drive of instilling good governance in public administration. It will make every government's call to practise good governance sound as the pot calling the kettle black!

This impedes the growth of public interest litigation in checking executive mischief which is often initiated by civic-minded persons. Further, ousting judicial scrutiny over executive action is arguably against natural law in which a person has a right to receive natural justice from the legal court.[188] The executive ought to be held accountable for its actions. The basis for it is simple. As Parliament only scrutinises the policies of the government and their expediency, the question of its legality and validity ought to be left to the courts especially in our system of government which recognises the supremacy of the constitution.[189] It is commonplace for the legislature to insert ouster clauses in the statutes in order to thwart any judicial attempts to review executive or administrative decisions. For example, s 33B of the Industrial Relations Act, 1967 of Malaysia provides as follows:

> Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under

[187] It provides: '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 regulations 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.' See *Dato' Joseph Chong Chek Ah v Tan Sri Dato' Chan Choong Tak* [1997] 5 CLJ 125, [1996] 12 MLJU 1.

[188] Roger Tan Kor Mee, *Natural Law v Legal Positivism, supra,* n 9.

section 33A (1)) *shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.* [Emphasis added.]

In Singapore, the Constitution and the Internal Security Act (Cap 143) were also amended to limit judicial review of executive detention orders after the Court of Appeal's decision in *Chng Suan Tze v Minister of Home Affiars, Singapore & Ors*.[190] These amendments were later adopted by Malaysia for their Internal Security Act 1960.[191]

It has also become a habit for the executive to stipulate statutory provisions such as that an administrative body is entitled to decide or exercise its discretion as 'it thinks fit' or 'in its opinion'. This may end up as a *carte blanche* for the public authorities to make administrative decisions since most flawed decisions are not challenged in court. In fact, the question of whether an administrative body is satisfied before making an administrative decision is not dependent on the subjective satisfaction of the decision-maker. The test to be applied is an

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[189] In *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*, *supra*, n 122, 107, Lord Diplock had this to say: 'It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.' Likewise, it was observed by the Singapore Court of Appeal in *Chng Suan Tze v Public Prosecutor* [1989] 1 MLJ 69, 82 as follows: 'All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary powers.'

[190] *Supra*, n 2. See art 149(3) of the Singapore Constitution which reads: 'If, in respect of any proceedings whether instituted before or after 27th January 1989, any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any law referred to in this Article, *such question shall be determined in accordance with the provisions of any law as may be enacted by Parliament for this purpose; and nothing in Article 93 (Judicial Power of Singapore) shall invalidate any law enacted pursuant to this clause.*' At the same time, a new s 8B was inserted to the Internal Security Act (Cap 143) and sub-section (1) states: 'Subject to the provisions of subsection (2), the law governing the judicial review of any decision made or act done in pursuance of any power conferred upon the President or the Minister by the provisions of this Act shall be the same as was applicable and declared in Singapore on the 13th day of July 1971; *and no part of the law before, on or after that date of any other country in the Commonwealth relating to judicial review shall apply.*' [Emphasis added]

[191] See s 8B of the Act.

objective one. [192]

Ouster clauses are, therefore, designed to deter public-spirited citizens who are often viewed by the executive as meddlesome busybodies out to create trouble for the executive.[193] In any event, our courts have fared well hitherto in lifting this layer of law which insulates the executive from curial supervision.

Generally, the English decision of *Anisminic Ltd v Foreign Compensation Commission*[194] as respects reviewing ouster clauses if there is an error of law has been accepted in Malaysia and Singapore.[195] But in a famous case of *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors*[196] brought from Malaysia, the Privy Council gave an expansive interpretation to ouster clauses even though there was already suggestion then to discard the distinction between error of law affecting jurisdiction and one which does not.[197] But for almost two decades, Malaysian[198] courts applied the *Fire Bricks* ruling which essentially created a dichotomy between 'error of law' within jurisdiction and 'error of jurisdiction'; requiring the courts to ascertain whether an error of law goes to jurisdiction or not even though in practice error of law is often mixed up with jurisdictional error. This virtually immunised a tribunal from judicial review as it became the final judge of law and not the courts. Finally, in 1995, the Malaysian Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union*[199] took an unprecedented stand to obliterate this disticntion by not

[192] See *Tan Gek Neo Jessie v Minister of Finance & Anor* [1991] 1 SLR 325 and *Chng Suan Tze v Minister of Home Affairs, Singapore & Ors, supra*, n 2.
[193] In *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru, supra*, n 3, the applicant was described as a troublemaker.
[194] [1969] 1 All ER 208.
[195] *Leong Kum Fatt v Attorney General* [1986] 1 MLJ 7.
[196] [1980] 2 MLJ 165.
[197] See *Pearlman v Harrow School* [1972] 1 QB 56.
[198] The Fire Bricks decision has also by and large been accepted by the Singapore courts. See *Mohan Singh v Attorney General* [1987] 2 MLJ 595; *Stansfield Business International Pte Ltd v Minister for Manpower* [1999] 3 SLR 742.
[199] [1995] 2 MLJ 317.

following *Fire Bricks* in defiance of the doctrine of judicial precedent.[200]

However, the Federal Court reverted to taking a restrictive approach towards ouster clauses recently when it held in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*[201] that the ouster clause in s 59A of the Immigration Act 1959[202] is exclusionary in its scope and the administrative decision complained of is immunised from judicial review even if it has been infected with an error of law. The Malaysian apex court took the view that Parliament by deliberately spelling out that there shall be no judicial review by the court of any act or decision of the minister or the decision maker except for non-compliance of any procedural requirement must have intended that the section is conclusive on the exclusion of judicial review under the Act.[203] As *Anisminic* and *Hoh Kiang Ngan*[204] were not even referred to in the decisions of the judges, this case represents a step backwards in the development of administrative law in Malaysia.

Why the Federal Court judicial defeatism or passivism at a time when enforcing standards of good administration is so vitally important to guard against

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[200] The *Syarikat Kenderaan Melayu* decision was later approved by the Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369. See also the decisions of Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1; *National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja* [2000] 3 MLJ 689.

[201] [2002] 3 MLJ 72.

[202] It reads: '(1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.

(2) In this section, 'judicial review' includes proceedings instituted by way of-

(a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
(b) an application for a declaration or an injunction;
(c) any writ of habeas corpus; or
(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.'

[203] Interestingly, while Mr Sugumar failed to obtain real justice from the courts, he finally received political justice when he was given a re-entry permit by the new head of the Sabah Government who took over the administration.

[204] *Supra*, n 200.

administrative abuses mind-boggling. It is indeed a worrying trend.[205] The judiciary only has itself to blame if its supervisory powers are later further curtailed by the executive when the judges themselves indulge in self-curtailment of their own powers. But if the executive has intended to impede the growth of public interest litigation by way of legislating ouster clauses, then this recent decision of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* is indeed godsend.[206]

D. *Relator Action*[207]

There is another excuse for judicial self-restraint. The argument is simple, that is, if the rights asserted by the private individuals are public rights, it is the job of Attorney General who is the guardian and protector of public rights to represent public interest. The Attorney General may initiate actions either at his own volition or at the instance of a member of public by way of a relator action. It follows that if public interest litigation actions can only be initiated with the prior consent of the Attorney General, it is unlikely that consent will ever be given in politically sensitive cases.

Salleh Abas LP said in *Lim Kit Siang* that 'our system requires the public to trust the impartiality and fair-mindedness of the Attorney General. If he fails in his duty to exhibit this sense of fairness and to protect public interest of which he is the guardian, the matter can be raised in Parliament or elsewhere.'[208]

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[205] See Abdul Aziz Bari, Reginald Hugh Hickling, *The Doctrine of Separation of Powers and the Ghost of Karam Singh* [2001] 1 MLJ xxi.

[206] On the other hand, Singapore courts are more inclined to judicially review administrative decisions in spite of any statutory provisions ousting the jurisdiction of the court. A case in point is *Stansfield Business International Pte Ltd v Minister for Manpower, supra*, n 198.

[207] This is best explained by Salleh Abas LP in *Government of Malaysia v Lim Kit Siang*, *supra*, n 1, 20: 'In a public law litigation, the rule is that the Attorney General is the guardian of public interest. It is he who will enforce the performance of public duty and the compliance of public law. Thus when he sues, he is not required to show locus standi . . . On the other hand, any other person, however public spirited he may be, will not be able to commence such litigation, unless he has a locus standi, or in the absence of it, he has obtained the aid or consent of the Attorney General. If such consent is obtained, the suit is called a relator action in which the Attorney General becomes the plaintiff while the private citizen his relator.'

[208] *Supra*, n 1, 26.

It is ironic that such statement was made in the presence of the Attorney General who was at that time and still is the chief legal adviser to the Government because it is the duty of the Attorney General to defend the Government at all costs. Not being a member of the Parliament, he is not accountable to Parliament at all. As put incisively by the dissenting judge Seah SCJ in the same case, 'I would consider it as a dereliction of his constitutional duty if the learned Attorney General does not defend the suit vigorously.'[209] It is therefore unlikely for the Attorney General to lend his name to assail the validity of any laws prepared by his chambers and passed by his master, the Government. I hasten to add that if he ever gives his consent to the initiation of politically embarrassing actions against the Government, his own position would also be in peril.

Hence it is not surprising to hear a judge describe the relator action as 'archaic and impracticable, a historical vestige of interest perhaps to students of legal history'![210] Aboolcader SCJ also had this to say:

> For the Attorney-General to have to proceed himself or by relation in such a case would only be a deplorable and intolerable reflection as in the normal course of events such a situation would and should never be allowed to arise, and so the question of a relator action must necessarily remain attractive as a theoretical possibility with no conceivable hope generally for practical purposes of advancing to concrete action beyond that ... I am not therefore impressed that the road to relief in regard to public law issues can be travelled only with the permission of the Attorney-General.[211]

It follows that the inefficacy of relator action as a remedy in administrative law has rendered this mode of redress obsolete within the Malaysian and Singaporean context. In any event, if a public interest litigant can meet the rules of legal standing laid down by the courts, then the consent of the Attorney General is immaterial for him to found and maintain a public interest litigation action.[212] This should not obstruct the initiation of public interest litigation by public-spirited citizens.

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[209] *Supra*, n 1, 35-36.
[210] Per VC George J in *Lim Kit Siang v United Engineers (M) Bhd & 3 Ors* [1988] 1 MLJ 50, 59.
[211] *Government of Malaysia v Lim Kit Siang*, *supra*, n 1, 49.
[212] See *Murray Hiebert v Chandra Sri Ram* [1994] 4 MLJ 321.

E. *Unavailability of Judicial Remedies and Procedural Obstacles*

The other obstacles which a public interest litigant faces are his inability to obtain certain judicial remedies, and procedural barriers erected by the executive to prevent any action being taken against public authorities.

While prerogative orders[213] are available to a public interest litigant via an O 53 application for judicial review, a public interest litigant who institutes an action against the government and its departments may not obtain an injunction or specific performance against an officer of the government, and neither can he obtain an order intended to interfere with the public duties of any department of any government in any civil proceedings.[214] S 29(1)(a) of the Government Proceedings Act 1957 provides that in no proceeding against the government may the court grant an injunction or make an order for specific performance against the government, but may in lieu thereof grant declaratory reliefs of the rights of the parties.[215] S 29(2) of the said Act further provides that if the grant of an order would be to give any relief against the government where it would not have been obtained against the government, the grant of an injunction is also prohibited.[216]

In fact, if a public interest litigant should seek any of the prerogative orders under O 53, he still has to seek the leave of the court. Next, he will have

[213] See n 46, *supra* for the explanatory note on prerogative orders.
[214] S 29 Government Proceedings Act 1957 and Ss 51 and 54 Specific Relief Act 1950 of Malaysia; s 27 Government Proceedings Act Cap. 121 of Singapore. Neither does the court have the inherent jurisdiction to order an interim injunction against the government: *Government of Malaysia v Lim Kit Siang, supra*, n 1; *Law Kiat Long v Pardon Board Johore* [1968] 2 MLJ 249. See also *Ramamoorthy v Menteri Besar of Selangor* [1971] 1 MLJ 187 where the court held that no specific performance could be ordered against the government pursuant to s 29(1) of the Government Proceedings Act 1957. See also *Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors* [2002] 5 MLJ 720; *Bocotra Construction Pte Ltd & Ors v Attorney General* [1995] 2 SLR 523; *Zamrud Properties Sdn Bhd v Pang Mooi Gaid* [1999] 5 MLJ 180; *Tenaga Ehsan Sdn Bhd dan satu lagi lwn MTD Construction Sdn Bhd* [1996] 408 MLJU 1; *Saonab bte Bedul v Pentadbir Tanah dan Daerah Melaka Tengah* [1994] 3 MLJ 758; *Ho Kok Thin v The Sheriff/Registrar of the High Court of Borneo* [1989] 3 MLJ 181.
[215] See *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan* [1991] 3 MLJ 174; *Koh Ah Kow v Public Prosecutor* [1995] 2 SLR 342.
[216] *Tun Dato Haji Mustapha bin Dato Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang DiPertua Negeri Sabah and Datuk Joseph Pairin Kitigan* [1986] 2 MLJ 391.

to show that he has been 'adversely affected by the decision' of the public authority.[217] If he succeeds in meeting these criteria, the award of such remedies is still at the discretion of the court. As regards injunctive relief and specific performance, there is a statutory bar against such remedies being made against the government.[218]

As a result, declaratory relief appears to be the most popular remedy for a public interest litigant. Indeed, in some instances, a declaratory order operates as an injunction against the government as a government founded on rule of law cannot be seen to be acting against a decision of the court, *albeit* disrespecting the declaratory judgement may not be a contempt of court.[219] Thus, the government had to rush to the Court of Appeal to apply for an unusual order of staying the declaratory judgement granted earlier by the High Court against the government in the *Bakun case*.[220] Declaratory remedy is also more appropriate in some cases than the prerogative remedies as seen in *Dewan Undangan Negeri Kelantan v Nordin bin Salleh*[221] where the respondents were declared to be entitled to reinstatement as members of the Kelantan State Legislative Assembly.

Hence the effectiveness of public interest litigation depends very much on the effectiveness and availability of judicial remedies available to a public interest litigant in an action against public authorities.

Next, a public interest litigant also faces a number of procedural barriers when instituting an action against public authorities. Most Malaysian statutes[222] regulating public authorities also stipulate that the provisions of the Public Authorities Protection Act 1948 shall apply, that is to say, the limitation period

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[217] The rules on standing under Order 53 are now clearly spelt out in rule 2(4) of Order 53.

[218] Injunctive relief particularly one which is provisional in nature is no doubt a lethal weapon against maladministration as it maintains the status quo of the matter pending its disposal by the courts. On the other hand, prerogative writs such as certiorari and mandamus are sought only after the administrative acts complained of have been committed.

[219] *Webster v Southwark London Borough Council* [1983] QB 698.

[220] *Kajing Tubek & Ors v Ekran Bhd & Ors, supra,* n 3.

[221] [1992] 1 MLJ 697.

[222] For example, the Companies Commission of Malaysia Act 2001, Employees' Social Security Act 1969, Housing Development (Control and Licensing) Act 1966, Local Government Act 1976, Town and Country Planning Act 1976 and Universities and University Colleges Act 1971.

for instituting any suit, action, prosecution or other proceeding against any person for any act done in pursuance of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority is 36 months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof. Thus, some litigants had been caught unaware.[223] Further, it is also common to clothe the government and civil servants with statutory immunity from any personal action.[224] Without any deterrent safeguard against any administrative decision, a public interest litigant will often end up being unable to seek any redress due to this statutory protection which encourages complacency and hinders the inculcation of accountability in public administration. These obstacles put in place by the executive have also effectively insulated executive actions from curial supervision.

F. *Executive Control of the Judiciary?*

The political control over the judiciary by the executive also constitutes a serious non-legal impediment to public interest litigation. It is subtle, and lethal. A judge who owes allegiance not to the constitution but to his political master can quite easily shut the doors of the courts to public interest litigants on various grounds, particularly on the issue of legal standing.

This control is exercised in matters relating to the appointment, promotion and removal of judges. In this respect, the executive represented by the Prime Minister has the say in the appointment, promotion and removal of judges.[225] As the removal of judges is a cumbersome process[226] in both jurisdictions, the executive would naturally ensure at the appointment stage only pro-government

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[223] See *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427; *Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621.

[224] See, for example, s 95 of the Street, Drainage Building Act 1974 and *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200.

[225] See Part IX of the Malaysian Federal Constitution and Part VIII of the Singapore Constitution. As a whole, there is not much distinction between the provisions of the Malaysian and Singapore Constitution respecting the appointment and removal of judges. In Malaysia, the Yang di-Pertuan Agong has to act on the advice of the Prime Minister with respect to appointment of judges. As regards judges other than the Chief Justice, the Prime Minister also has to 'consult'

judges would be elevated to the bench or promoted to higher judicial office.[227] It has been oft-argued that a more transparent and impartial process should be adopted for the appointment of judges[228] as such a process of executive appointment would leave the system open to charges of political patronage or bias.

Further, apart from having virtually the entire control over the appointment of judges, the executive is also in the position to decide on the remuneration of judges as well as the annual budget for the administration of justice. In addition to that, State governments in Malaysia are also in the position to grant various

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the Chief Justice, President of Court of Appeal, the Chief Judge of the respective High Courts and the Chief Minister of Sabah or Sarawak, as the case may be. In other words, the Malaysian Prime Minister has a great say in the selection and appointment of judges, and the words 'consulting' and 'consult' cannot mean that the Prime Minister is legally required, *albeit* morally obliged perhaps, to accept the views of those he has consulted. (See generally *Fletcher and Others v Minister of Town and Country Planning* [1947] 2 All ER 496; *Re Union of the Beneficiaries of Whippingham and East Cowes, Dreham and Anor v Church Commissioners of England* [1954] AC 245; *Rollo and Anor v Minister of Town and Country Planning* [1948] 1 All ER 13; *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280; *R v Secretary of State for Social Services Ex p Association of Metropolitan Authorities* [1986] 1 All ER 164; *Haji Ariffin v Government of Pahang* [1969] 1 MLJ 6.)

The provision of Singapore Constitution is entirely similar save that it is expressly emphasised that if the President appoints any judge at his discretion, he has to concur with the advice of the Prime Minister.

[226] Compare it with s 95 of Scotland Act 1998 which provides that a judge of the Court of Session and the Chairman of the Scottish Land Court may be removed from office only by Her Majesty; and any recommendation to Her Majesty for such removal shall be made by the First Minister and the First Minister shall make such a recommendation *if (and only if) the Parliament, on a motion made by the First Minister, resolves that such a recommendation should be made.*

[227] Richard Devlin, A. Wayne MacKay and Natasha Kim, *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary*, 38 Alberta L Rev 734. Similarly, 'the ability to recognise one's prejudices or idiosyncrasies and to deliver impartial justice in the interests of the community at large inevitably demands that judicial officers are appointed from the ranks of those whose qualifications are of the highest order. Without the respect of the community, judicial independence will not survive. Incompetent, corrupt, dilatory or even rude judges will seldom now be tolerated. Inevitably there will be pressure from the community or from other branches of government for their control or removal.' (Justice Dame Silvia Cartwright, *The Judiciary: Qualifications Training and Gender Balance: Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach*, Cavendish Publishing Limited, 40.)

[228] See Raja Aziz Addruse, *Judicial Appointments: Who Should Have The Say?* in *Current Judicial Trends and the Rule of Justice*, Colloquium Issue, INSAF, The Journal of the Malaysia Bar, December 2002, 43.

perks to judicial officers such as lands and ceremonial titles.

Without an independent body to select and promote judges, it is only natural for a judge, being human and therefore fallible, to be deferential to the executive when its head has a say in his promotional aspects. It is also natural that among the brethren in the judiciary, rivalry exists, and being complaisant to the government is an advantage. Furthermore, if a judge who has served in every State in Malaysia were to apply and obtain a piece of land during his time of service there, he would indeed retire as a very wealthy pensioner.

It follows that any temptation and predilection for obtaining perks and gifts will ultimately jeopardise the independence and impartiality of judiciary. A judge who has associated too closely with the head of a government or who has received such gifts, though perfectly lawful, will place himself in a difficult position when presiding over a matter before him. He will certainly be in a serious predicament when hearing a case which the government cannot afford to lose because of the political ramifications that will follow or the embarrassment that will cause to a powerful politician. He has therefore unwittingly placed himself in a compromising position with the executive, and may now find himself obliged to be 'facilitative', adding fuel to accusations from the government critics that there now exists a compliant judiciary which is really the result of the judges' own-doing.

Such political control over the judiciary, it is submitted, has become a greater threat and impediment to the judiciary exercising control over the government of which a judge has now to be friendly and beholden to lest the wrath of the executive is incurred. The judge's dilemma is akin to a picture of a beautiful swan swimming gracefully in the lake, but its feet are in fact struggling underneath because the undercurrents are strong! This situation is compounded by the lack of transparency in the existing system of appointment and promotion of judges which may[229] only lead to negative speculations that are detrimental to the credibility and independence of judicial control over the executive.

[229] *Ibid*. See also n 66.

G. *Frustration of Judgements and Legal Actions*

Any successful curial intervention against any administrative wrongdoing will be rendered meaningless if the executive could use extra-judicial means to frustrate the decision of the courts or any applications filed before the courts.

A case in point is *Petroliam Nasional Berhad (Petronas) & Anor v Cheah Kam Chew*.[230] Here, the Malaysian government was faced with an application by an opposition politician who was also an account holder of Bank Bumiputra Malaysia Berhad to declare that the acquisition of shares in the bank by the Malaysian oil company, Petronas *ultra vires* the Petroleum Development Act, 1978. The executive immediately went ahead to use its overwhelming majority in the legislative body to pass an amending act, the Petroleum Development (Amendment) Act, 1985 with retrospective effect giving the necessary powers for Petronas to make the acquisition so that when the striking-out applications of the government and Petronas came to be heard, the issue became an academic one and the politician's action had to be struck out as it no longer disclosed any reasonable cause of action, even though the court awarded costs to the plaintiff politician and the award was upheld upon appeal. Though such a legislative act may be morally wrong, Parliament is not prohibited from passing any retrospective laws which are not criminal laws.[231] But it is certainly not an example of good governance if the executive could use this means to protect itself against any unfavourable judicial pronouncements.

Equally, the practice of the police in re-arresting detainees such as those detained under the Internal Security Act 1960 after their successful applications for a writ of *habeas corpus*[232] or public authorities rendering the facts of a case an academic issue[233] by the time it came up for hearing go to show that the executive is intolerant of the judicial branch reviewing its acts and

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[230] *Supra*, n 3.
[231] Art 7 of the Malaysian Constitution and art 11 of the Singapore Constitution.
[232] For example, see *Karpal Singh s/o Ram Singh v Menteri Hal-Ehwal Dalam Negeri & Anor* [1988] 1 MLJ 468; *Karpal Singh v Inspector General of Police & Anor* [1989] 1 MLJ 184.
[233] For example, see *Hj Awang Tengah Hj Awang Amin v Sabah Public Service Commission*

omissions.[234]

Ironically, such acts also depict a fearful executive when being hauled up to the courts to explain its administrative decisions.[235] In *Loh Kooi Choon v Government of Malaysia*,[236] the Malaysian government even amended the fundamental liberties provisions in art 5(4) of the Constitution before the appeal

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Government of the State of Sabah [1998] 10 MLU 1. In this case, the plaintiff, a member of the Sabah Public Service holding the post of Acting Director of the Sabah State Forestry Department was transferred on secondment to Sabah Foundation as its Deputy Director II pursuant to a letter dated 20 March 1997 and signed by the State Secretary ('the SS Order'). The plaintiff alleged that he was given a non-existent and charitable post and therefore refused to comply with the SS Order. The State Secretary, in consequence, referred the matter to the State Government of Sabah, the 1st defendants, who, having deliberated on the issue, nonetheless issued an Order of transfer on secondment to the plaintiff on 11 August 1997 ('the PSC Order') to the same position in Sabah Foundation. The plaintiff sought for a declaration that the SS Order and the PSC Order were unlawful, null and void and of no effect. The court held that the SS Order was ultra vires and unconstitutional as the power to transfer the plaintiff lies with the 1st defendants under art 37(1) of the State Constitution as there was no evidence to show that the 1st defendants have delegated such functions to the State Secretary. However, the court went on to rule that in view of the fact that the SS Order had been superseded by the PSC Order, the above finding had no practical consequences and the court would not grant a declaration to that effect as to do so would be an exercise in futility. See also *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru*, *supra*, n 3.

[234] But see *Abdul Ghani Haroon v Ketua Polis Negara and another application*, *supra*, n 46 where the court, apart from formally ordering their release, also made a further order restraining the police from re-arresting the applicants within the next 24 hours. Justice Mohd Hishamudin said: 'In view of the absence of the assurance (that there would not be any immediate rearrest) by the senior federal counsel, the court did not rule out the possibility of immediate rearrest in view of the heavy presence of police personnel. Should rearrest immediately occur, that would have been a grave injustice, for such an action on the part of the police would make a mockery not only of the judgment of the court, which was delivered in the morning but also of the whole habeas corpus proceeding and of the constitutional guarantees under art 5 of the Constitution. The court thus has the power to make the order asked for, particularly in view of the words 'or any others, for the enforcement of the rights conferred by Part II of the Constitution ...' and that it would have failed in its duty to uphold the law and the Constitution if it were to decline to grant the order asked for .... Perhaps I should add that it is also my view that even if I were not to grant the order asked for that afternoon, it would, nevertheless, *be a contempt of court on the part of the police to rearrest the applicants* based on the reasons for the original arrest, which arrest and detention the court earlier in the morning had ruled unlawful and mala fide.' [Emphasis added.]

[235] For example, see *Menteri Hal-Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147; *Lee Hock Mee v Pengarah Jabatan Pengangkutan Jalan Negeri Perak & Ors* [2000] 1 MLJ 723.

[236] [1977] 2 MLJ 187.

was heard by the Federal Court and the Singapore government amended art 149 of the Constitution to state that any legislation against subversion is valid notwithstanding that it is inconsistent with art 9 of the Constitution after re-arresting the applicant and before the matter came to court in *Teo Soh Lung v Minister for Home Affairs & Ors*.[237]

But all these acts of trying to circumvent the supervisory jurisdiction of the courts leave little room for the development of public interest litigation if judicial decisions and intervention can still be extra-judicially frustrated.[238]

H. Costs

Most of all, an unsuccessful public interest litigant would be pauperised by costs, a significant strain on financial resources and a deterrence towards undertaking future public interest litigation cases. Further, an unsuccessful public interest litigant who took on public authorities who are protected by the Public Authorities Protection Act 1948 will be required to pay costs taxed on a solicitor-client basis, a serious impediment indeed to any aspiring public interest litigants.

Therefore, it will appear that only the foolhardy will venture to take on the executive on matters which do not directly affect them. No matter how strongly one feels about a certain public issue, it is said that ideals do not pay unless one has the financial means and the extraordinary conviction to litigate the matter.

In some cases, deliberately withholding recovery actions for costs against unsuccessful public interest litigants would also work as a Sword of Damocles

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[237] [1989] SLR 499.

[238] In an amendment to art 121 of the Malaysian Constitution vide Constitution (Amendment) Act 1988 [Act A704], the jurisdiction and powers of the High Courts and inferior courts are now as contained in a federal law compared to the pre-amendment provision which stated that the 'judicial power of the Federation shall be vested in the High Courts'. With this amendment, the courts would now be subservient to the executive as their supervisory jurisdiction can be controlled by the executive through the legislature. See also art 93 of the Singapore Constitution which is still the same with the pre-amended art 121 of the Malaysian Constitution, but has also been excluded in so far as preventive laws are concerned as so provided in art 149(3).

to deter such litigants from instituting new public interest litigation actions against the same authorities or appealing against the earlier unfavourable decisions. In other cases, the authorities' magnanimity in not pursuing recovery of costs from the public interest litigants may lead the litigants into believing erroneously that the authorities have repented and any new public interest litigation action may prove harmful to this new state of affairs. Hence there will either be a reluctance to make further sacrifices or a defeated resignation that the all-powerful executive is best left untouched.

V. PUBLIC INTEREST LITIGATION IN PRACTICE

A. *A means to achieving social justice*

Despite the various impediments to the invocation of public interest litigation, this form of public-spirited action remains a popular means for the downtrodden to seek social justice. Often, administrative decisions and government policies affect a large spectrum of society. Those who suffer are usually the poor, illiterate, the disadvantaged and minorities who lack the clout to speak up. These unfortunate ones have no choice but to submit to the might of the all-powerful executive while their rights are disregarded with impunity. Their grievances often go unnoticed while the government, not being made aware of their plight either deliberately or otherwise, continues with its policies at their expense.

Of course, the Malaysian government has provided some avenues for such disadvantaged individuals to seek redress such as the establishment of the Human Rights Commission. But it is hardly an effective tool against executive oppression or infringement of human rights if its power is only to recommend to the government and such other authorities appropriate measures to be taken if an inquiry discloses a human rights infringement.[239] There are also statutory avenues such as the appeal procedure in the Town and Country Planning Act

[239] See ss 4(2)(b) and 13(2) of the Human Rights Commission of Malaysia Act 1999. The Commission is also a public authority, and any action to judicially review its decision must still overcome the locus standi hurdle erected by *Government of Malaysia v Lim Kit Siang, supra,* n 1. See *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & 5 Ors, supra,* n 3.

1976 for hearing objections and representations to revised draft local plans, but how many common people are aware of this right? More often than not, by the time they realise their rights, they will not be able to object due to the effluxion of time.

Moreover, those public spirited citizens who take up the causes of these affected citizens are often deterred by the strict rules of standing.

B. *The Role of Opposition in public interest litigation*

Consequently, it has to be left to the political opposition to challenge the executive action. Very rarely will there be a public spirited person having the intrepidity to fight for the community cause without being labeled as one in the opposition camp or a busybody who has set out to create trouble for the executive. *A fortiori*, with the amendment to O 53, he cannot even meet the rules of standing as someone 'adversely affected' by the administrative action to found and maintain the action in court. In other words, it is not enough to prove that he has been affected by the administrative action, he has to show that he has been 'adversely' affected by such decision.

Having said that, public interest litigation can be misused by the Opposition who view this as an effective tool to embarrass the government and obtain cheap publicity. This only furthers their cause and does not serve the public interest. It follows that if the decision is against the government, the executive will feel that the judiciary has become more pro-Opposition. This is because public interest litigation can be an effective means of delaying if not actually destroying controversial administrative decisions.[240] This will naturally cause the government to erect more roadblocks to stymie the growth of public interest litigation. Moreover, Malaysians have often been reminded that had the Opposition been successful in the case of *Government of Malaysia v Lim Kit Siang*,[241] there would not have been the North-South Highway in Malaysia. Malaysian law reports are also replete with public interest litigation cases being

[240] See Michael J Beloff, *Judicial Review – Is It Going Too Far?*, *supra*, n 178.
[241] *Supra*, n 1.

brought by prominent Opposition leaders such as Lim Kit Siang, Karpal Singh and Abdul Razak Ahmad.

A case in point is *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru*.[242] In this case, a Johor politician and lawyer who applied for a declaration that the planning permission granted to a company by the Johor Bahru City Council to develop a floating city was null and void because it was contrary to building laws, and that he was entitled to a reply to his letter to the defendant which enquired whether the defendant had given notice to the owners of lands adjoining the proposed floating city under s 21(6) of the Town and Country Planning Act 1976, was described by the judge as more 'concerned about the publicity that went along with this case'. The judge said, 'as a lawyer, that kind of publicity must have been good to him.'[243] Thus, when the Opposition lacks the number to check government excesses, this route is one effective way to expose administrative mischief. Thus some say that the acronym 'PIL' actually stands for 'publicity interested litigation' or 'political interested/inspired/inclined litigation'.[244]

If the government views this sort of litigation as more of a political stunt out to embarrass the administration, it will naturally be on a defensive trying to vindicate its actions or omissions instead of attempting to improve administrative governance and accountability.

C. *Scope of public interest litigation*

Generally, the range of matters that have attracted public interest litigation in Malaysia are neither as numerous nor as diverse as in India. Similarly, neither can the Singapore experience match the Malaysian experience as public interest

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[242] *Supra*, n 3.

[243] *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru, supra*, n 3, 298. But see MP Jain, *Administrative Law of Malaysia and Singapore, supra*, n 95, 765-766; Abdul Razak Ahmad, *Locus Standi and Judicial Review* (INFO Johore Bar No. 3/97 Sep. 97) 6.

[244] See also Sumit Mitra & Sayantan Chakravarty, *Locking Horns: Judiciary vs. Executive*, India Today, July 28, 1997, at 22-27, 26; Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 Am U Int'l L Rev 413, 484.

litigation appears to be almost non-existent in Singapore in terms of case law.[245] However, the topical concerns of Malaysians can be categorised under environmental protection; abuse of power and administrative corruption; breach of fundamental liberties and effects of the boom years where public interest litigation has been instituted or where such matters constitute good grounds for invoking public interest litigation.

(i) *Environmental Protection*

The most notable case filed in Malaysia as respects environmental preservation is *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors.*[246] The respondents' complaint related to the construction of Bakun Hydroelectric Project near Belaga in the Kapit Division of the State of Sarawak. When completed, it would be the largest dam in South East Asia, inundating an area equivalent to the size of Singapore. Three of the 10,000 natives affected by this project applied for declarations that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 ('Amendment Order'), a delegated legislation made under the Federal law, that is, Environmental Quality Act 1974 ('EQA') which sought to exclude dams from this federal law was invalid as it was done retrospectively. They argued that they were entitled to a copy of the environment impact assessment ('EIA') report on the project and for this reason they had been deprived of an opportunity to make representations in respect of the impact which the project would have upon the environment, before the decision to implement the project was made. The High Court granted the declarations,[247] but on appeal the Court of Appeal overturned the decision on the grounds that respondents had no locus standi to move the court for the declaratory reliefs. The Court of Appeal also held that constitutionally, as the development involved land and river within the state of Sarawak, the expression 'environment' by reason of item 2(a) of List II and item 13 of List IIIA of Sch 9 to the Federal Constitution, would lay wholly within the legislative and constitutional province of the State of Sarawak.

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[245] *Infra*, Part V (I): *Why is there no public interest litigation in Singapore?*
[246] *Supra*, n 3.
[247] [1996] 2 MLJ 388.

Therefore, the state of Sarawak possessed exclusive jurisdiction to exclude the operation of the federal law, that is, the Amendment Order. The court also ruled that even though the complaints advanced by the respondents amounted to deprivation of their lives under art 5(1) of the Federal Constitution, such deprivation was in accordance with the law, that is, the Land Code (Sarawak Cap 81) and therefore they had suffered no injury and there was thus no necessity for a remedy.

However, the observation made by the court that 'when our courts come to decide whether to grant standing to apply for a declaration in public law in a particular case, they must be extremely cautious in applying decisions of courts of other countries because the reasons for granting or refusing standing in those other jurisdictions may depend upon the economic, political and cultural needs and background of individual societies within which the particular court functions',[248] seems to me to be the main reason for overruling the High Court decision. In other words, economic and political needs have outweighed the needs for the protection and preservation of environment.

With respect, to hold that Federal law has no application over an environmental project which is situated in a state will have serious ramifications on the interpretation of the Federal Constitution as regards Federal laws such as the EQA which is an Act 'relating to the prevention, abatement, control of pollution and enhancement of the environment and for the purposes connected therewith'.[249] Item 2(a) of List II is not peculiar to Sabah and Sarawak and neither is item 13 of List IIIA of Sch 9 to the Federal Constitution. As item 2(a) applies in this case, it will make no difference if the *Bakun* project had been constructed in a state in West Malaysia in which case based on this decision, the EQA would also not apply to that state in the event of conflict with a state law.[250] Is construction of a dam within the meaning of 'land improvement' in item 2(a) of List II? While the 'English language is not an instrument of

[248] Per Gopal Sri Ram JCA, *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors*, *supra*, n 3, 40.
[249] Long Title and Preamble to the EQA.
[250] In particular where art 75 of the Federal Constitution provides that where there is a conflict between a federal law and a state law, the former shall prevail.

mathematical precision,'[251] it is submitted that it is a bit far-fetched to equate the inundation of land for the purpose of constructing a dam to that of 'land improvement'. Environmental effects transcend all boundaries and the ecological damage caused by this project is not just a loss to Sarawak but also to the entire country.[252] Therefore, art 75 of the Federal Constitution which provides that Federal law shall prevail over State law in the event of conflict should have been given its true meaning, particularly in matters affecting a federation consisting of so many states with diverse interests.

Similarly, is the application of item 13 in List IIIA wholly within the legislative and constitutional domain of the state of Sarawak? With respect, List IIIA is part of the Concurrent List, and it follows that a federal law can be made pursuant to item 13 in List IIIA as so authorised under art 74(1) of the Federal Constitution. If so made by the Federal Parliament, then pursuant to art 75, EQA being the federal law will prevail. While at the time of drafting the Constitution half a century ago, the Reid Commission obviously did not think that environment was then an important item to be enumerated in the 9 Sch to the Constitution, but the *Bakun* project still can fall within item 11(c) of the Federal List being 'electricity... and other works for the production and distribution of power and energy.' This ought to be the case because the project is granted and financed by the Federal Government and it is therefore 'Federal works and power' within the meaning of item 11(c) List I.

In fact, the crux of the matter is not about dam construction or supply and distribution of power and energy. It is about the environment and EQA is a Federal law relating to environment which the Federal Government is permitted to legislate under item 7 of the Concurrent List, namely 'public health'. Once legislated, the primacy of the Federal Law under art 75 should be recognised by the courts. In this case, the High Court judge was correct to hold that the Amendment Order was *ultra vires* the parent EQA and also s 20 of the Interpretation Acts 1948 and 1967 as it had sought to have retrospective effect.

However, the speed in which an extraordinary stay order is granted against

[251] Per Denning LJ in *Seaford Court Estates Ltd v Asher* [1945] 2 KB 461 at p 498.
[252] See also GS Nijar, *The Bakun Dam Case: A Crtitique* [1997] 3 MLJ ccxix.

the High Court order and the quick disposal of the appeal only go to show that environmental protection has no place when national interest is at stake. Nevertheless, it should be conceded that had it not for public interest litigation, such issues of public importance could not have been ventilated with such force in public. In a way, public interest litigation has brought a greater awareness among the Malaysian public of these vital issues affecting the environment, and it also helps build an informed society which is essential in a democratic society.

In India, public interest litigation has been extensively used to serve the cause of environmental protection, thanks to a public-spirited advocate, MC Metha who almost single-handedly filed most of the public interest litigation cases concerning environmental protection.[253] Judicial attitude there is inclined towards protecting the environment which is in the public interest to do so as expressed in these words:

> Where, on account of human agencies, the quality of air and the quality of environment are threatened or affected, the court would not hesitate to use its innovative power within its epistolary jurisdiction to enforce and safeguard the right to life to promote public interest.[254]

In fact, Gopal Sri Ram JCA himself ruled in *Tan Tek Seng* that the expression 'life' in art 5(1) of the Constitution[255] is to be given a broad and liberal meaning in order to implement the true intention of the framers of the Federal Constitution. In his lordship's words:

> Adopting the approach that commends itself to me, I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. *It includes the right to live*

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[253] See *MC Metha v Union of India* [1987] 4 SCC 463; *MC Mehta v Union of India* [1987] 1 SCC 395; *MC Metha v Union of India & Ors* [1996] 4 SCC 351.
[254] *V Lahshmipathy v State of Karnataka* AIR 1922 Knt 57.
[255] The equipollent provision in the Singapore Constitution is art 9.

in a reasonably healthy and pollution free environment.[256]

In a later case,[257] Gopal Sri Ram JCA also stated that 'it is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds.'

If so, the three respondents could not have been denied the legal standing to sue if their fundamental rights under art 5(1) have been infringed! It was held that the main reason for denying the respondents locus standi in *Kajing Tubek* was because a substantial number of persons whose rights were also affected by the *Bakun* project were not before the court to which the learned counsel in that case retorted extra-judicially: 'This in effect means that the many can, either willfully or through apathy, stultify the action taken by the more vigilant or alert members of the community.'[258]

In *Kajing Tubek*, the three respondents were affected by the *Bakun* project notwithstanding the findings of the Court of Appeal. It is therefore interesting to see how the court will next approach public interest litigation suits relating to environmental protection on the basis that the applicant is entitled to a healthful environment pursuant to art 5 of the Federal Constitution.

All in all, good administration requires public participation in environmental impact assessment. This important role of the public is recognised in 'A Handbook of Environmental Impact Assessment Guidelines' issued by the Director General of Environment:

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[256] *Supra*, n 84, 288 (emphasis added). See also Dr Abdul Haseeb Ansari, *Right to a healthful environment as a means to ensure environmental justice: An overview with special reference to India, Philippines and Malaysia* [1998] 4 MLJ xxv and Dr Abdul Aziz Bari, *Right to life under the Federal Constitution and Environmental Issues* [1999] 1 MLJ lx where the learned writers are of the view that art 5 implicitly recognises the right to a healthful environment.

[257] *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158, 164.

[258] GS Nijar, *The Bakun Dam Case: A Critique, supra*, n 252, ccxlix. See also *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors, supra*, n 223 where it was held that three members of the Kayang community were entitled to initiate a representative action despite half of the Kayan community disagreeing with the filing of the suit. However, the Court of Appeal said *Kajing Tubek* was not a representative action.

> The interaction between people and their environment is fundamental to the concept of impact. Some form of public participation in environmental impact assessment is the most reliable way of predicting the impact of a project on people. A responsible, interested and participating public is important in environmental management.[259]

In *Razak Ahmad v Ketua Pengarah, Kementerian Sains, Teknologi & Alam Sekitar*,[260] the High Court of Johor Bahru ruled that as a citizen of Malaysia and a resident of Johor Bahru, the applicant was entitled to a copy of the EIA as respects the development of the proposed 'floating city'in Johor Bahru.

Among the much publicised environmental projects currently are incineration plants and sanitary landfills which will not be a welcome sight to residents living near to these plants. Likewise, problems associated with pollution of air and water, toxic waste disposal, open burning and displacement of aboriginal peoples' rights[261] and ways of life over land affected by development projects will affect the community at large and unless resolved, these are seeds for the growth of public interest litigation cases in Malaysia.

(ii) *Abuse of Power and Administrative Corruption*

In Malaysia, there is a surfeit of actions filed in courts against administrative abuse or where the decision reached is unreasonable or capricious. But the litigants in most of these cases were directly affected by the administrative mischief complained of.

A case in point is *Tan Sri Haji Othman Saat v Mohamed bin Ismail*.[262]

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[259] Section 1.6.1, 11. See also Rajeswari Kanniah, *Public Participation in the Environmental Impact Assessment Process in Malaysia* [2000] 3 MLJ cxxxiv.

[260] *Supra*, n 3. However, the applicant had succeeded in this case mainly because the Federal Counsel representing the Director General of Environment did not object that the EIA was a public document.

[261] *See Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors*, *supra*, n 257.

[262] *Supra*, n 3.

In this case, the respondent together with 183 other persons had applied for land in Mersing, Johore but with no response for some eight years only to find out later to his horror that the land he applied for had been subsequently alienated to the Chief Minister of the State of Johor and other personages in the upper echelon of the administrative service. The respondent then alleged abuse of power and sought declarations to impugn the validity of the alienation and which he was successful when the Federal Court upheld the High Court's decision in granting him standing to invalidate the alienation of the land in question.

However, public interest litigation cases on administrative abuse or corruption are in a small number, and even then these socially-motivated individuals were often unsuccessful in their attempts. The first of such cases is *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh*,[263] wherein the Member of Parliament and State Assemblyman challenged the practice of appointing the Chief Minister as the President of the Ipoh Municipal Council. Other attempts were also not so successful such as seeking the court to interfere in the award of a contract to a company close to the government[264] or a ruler in prejudging an application for clemency.[265]

In fact, the oft-filed complaints in courts against administrative abuse of power and arbitrary decision-making are related to the public authorities acting in bad faith or *mala fide*. Indeed, *mala fides* on the part of decision-maker would vitiate any discretionary power exercised by any authority.[266] In the words Suffian LP:

> It (the Government) must act bona fide, fairly, honestly and honourably, and if it does not, the aggrieved party will probably make a noise in the press, in Parliament and in public. What if he comes to court? If it is established that Government has acted *mala fide* or

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[263] *Supra*, n 3.
[264] *Government of Malaysia v Lim Kit Siang, supra,* n 1. See also *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor., supra,* n 3.
[265] *Karpal Singh v Sultan of Selangor, supra,* n 3.
[266] *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33; *Mohan Singh v Attorney General* [1987] SLR 398.

> has in other ways abused this discretionary power, the court may, in our judgment, review Government's action and make the appropriate order...[267]

In this respect, this issue of *mala fide* is often pleaded in land acquisition cases where the law provides that when any declaration by the State Authority that the land is required for any purpose as stated in Form D, such declaration in Form D shall be conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified therein.[268]

However, such declaration could still be vitiated by *mala fides* as so held in the decisions of the Privy Council in *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johore*[269] and *Yeap Seok Pen v Government of State of Kelantan*.[270]

But proving *mala fide* is a near impossible feat. A case in point is *Yeap Seok Pen* where the appellant, a Malaysian of Chinese origin entered into an agreement to purchase the land and shophouse in which her father had carried on a goldsmith's business as tenant for some 45 years. As the land was outside a Malay reservation area, no consent from the State Authority was necessary for the transfer between natives of Kelantan. The transfer was subsequently presented for registration, but before the registration was completed the respondent State Authority took steps to acquire the land on behalf of the Kelantan Foundation. The declaration of intended acquisition stated that the land was needed for 'office and commercial space for the Kelantan Foundation'. The Kelantan Foundation is an educational foundation established by statute and by virtue of s 19 of the Kelantan Foundation Enactment No. 1 of 1974, it is provided that the declaration shall have effect as if it were a declaration that

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[267] *Government of Malaysia & Ors v Loh Wai Kong, ibid*, 36.
[268] See s 8 of the Land Acquisition Act 1960.
[269] [1979] 1 MLJ 49. See also the decisions of the Court of Appeal in *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor* [1998] 2 MLJ 498 and *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607 which held that striking out applications under Order 18 Rule 19 were not appropriate in cases where it involved allegations of *mala fide* on the part of the acquiring authority.
[270] [1986] 1 MLJ 449.

such land is needed for a public purpose within the meaning of the Land Acquisition Act 1960.

It was submitted by the appellant's counsel, Mohamed Dzaiddin bin Abdullah (who later became the Chief Justice of Malaysia) that the real reason was not to use it for the purpose of the Foundation but to prevent it falling into the hands of a non-Malay purchaser even though she is a native of Kelantan. He said this was the reason for delaying the registration of the transfer. It was also not disputed that the Foundation could have used other properties given earlier by the State Government or developed by the Foundation in another area in Kota Bharu for this purpose. Therefore, of all the thousands of properties in Kota Bharu why should hers alone, which had been occupied by her family for 45 years and which she had just bought, be picked for acquisition by the State Government for the Foundation? Also the Foundation could have easily built on the land alienated to it or bought or rented one of the properties to be built by the State Economic Development Corp. When the aggrieved purchaser went to court to nullify the acquisition, she no doubt received judicial sympathy but the Federal Court and Privy Council found that the appellant had not discharged her burden in proving that the State Government had acted *mala fide* when acquiring her property and that the fact that other properties were available was not enough to prove mala fide on the part of the State Authority.

It is therefore not surprising to note that to date there is yet a single case in which administrative acts have been impugned by *mala fides*. If the burden of proof upon affected parties is so huge, what more for public-spirited citizens to come to court and allege *mala fides* on the part of administrative and public bodies?

(iii) *Fundamental Liberties*

The framers of both the Malaysian and Singapore Constitutions have enshrined certain fundamental liberties in Part II and Part IV of the Malaysian and Singapore Constitutions respectively. These provisions are considered to be sacrosanct as they can only be amended by at least two-thirds majority in

Parliament.[271] These provisions have also been described as the 'most fundamental of all fundamental rights provisions to all persons, not just citizens.'[272] The courts have also been urged to 'keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by.'[273] Gopal Sri Ram JCA also said: 'Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation.'[274]

At a glance, it appears that the fundamental rights of Malaysians and Singaporeans are much better protected than the Englishmen under an unwritten constitution. But as Raja Aziz Addruse argued, it is ironic that the freedoms said to be fundamental are less guaranteed when they are part of a written constitution which can be easily amended by the executive which always maintains two thirds majority in Parliament.[275] In other words, to quote

[271] See art 159 of the Malaysian Constitution; art 5 of the Singapore Constitution and *Loh Kooi Choon* and *Teo Soh Lung*. But for the Malaysian and Singaporean Parliaments to amend the Fundamental Liberties is not difficult as the governments have always had two-thirds majority in the legislature since attaining Independence. As Raja Aziz Addruze said in *Fundamental Rights and the Rule of Law Their Protection by Judges*, INSAF, Journal of the Malaysian Bar, March 2000, xxix, 29, 45: 'On this view, the fundamental rights, though said to be guaranteed by the Constitution, are but illusory. They form part of the Constitution only for so long as the Government designs to let them remain. There is nothing to stop the Government, through its two-thirds majority control of Parliament ... from taking away altogether all or any of those rights.'

[272] Andrew Harding, *Law, Government and the Constitution in Malaysia* [Malayan Law Journal, 1996], 209.

[273] Per Gopal Sri Ram JCA in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*, *supra*, n 84, 288.

[274] *Supra*, n 84, 288. Likewise, this liberal approach was also advocated by Edgar Joseph Jr in *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697: 'In construing constitutional documents, it is axiomatic that the highest of motives and the best of intentions are not enough to displace constitutional obstacles. Whenever legally permissible, the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by the Constitution, enjoying as they do, precedence and primacy.' Similarly, their Lordships in the Privy Council case of *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 said that Part IV of the Singapore Constitution (Part II of the Malaysian Constitution) should be given 'a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the [fundamental liberties] referred to' while taking cognisance of the fact that the decisions of Indian courts and the United States Supreme Court on these matters would be of little help in the interpretation of the Singapore Constitution.

[275] See Raja Aziz Addruze, *Fundamental Rights and the Rule of Law Their Protection by Judges*, *supra*, n 271.

Shakespeare's Macbeth, is the purported enforcement of guaranteed rights 'a tale told by an idiot, full of sound and fury, signifying nothing'?

It is submitted that public interest litigation can make a difference in this area which may spawn public interest litigation in the coming years. It can also help inculcate in the executive total respect for these fundamental liberties which are akin to the human rights of the citizens as so defined in s 2 of the Human Rights Commission of Malaysia Act 1999.

Among the nine fundamental liberties set out under Part II of the Constitution,[276] transgressions of liberty of person and freedom of religion are bread and butter issues affecting the ordinary men in the street which in my opinion are likely to spur the growth of public interest litigation in the coming years.

(iv) *Freedom of Religion*

Art 11 and art 15[277] of the Malaysian and Singapore Constitutions respectively provide that every person has the right to profess, practise and propagate his religion[278] provided that it is not contrary to any general law relating to public order, public health or morality.[279] Every religious group also has the right-

(a) to manage its own religious affairs;
(b) to establish and maintain institutions for religious or charitable purposes; and
(c) to acquire and own property and hold and administer it in accordance with law.[280]

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[276] Singapore, however, does not have a similar right to property under art 13 of the Malaysian Constitution.
[277] But see Maintenance of Religious Harmony Act (Cap 167A).
[278] Art 11(1) of Malaysian Constitution is subject to clause (4) of the article which states that State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
[279] Art 11(5) and art 15(4) of the Malaysian and Singapore Constitutions respectively.
[280] For a good analysis on art 11, see chapter 20 of *Constitutional Law in Malaysia and Singapore*, 2nd Edition (Butterworths).

Indeed, in a multi-religious society, religion can be an extremely explosive and volatile matter if not handled carefully. This is exacerbated in Malaysia where politics and religion are inter-woven in government machinery and administration. Often, public grievances originated from the minorities whose ability to profess and practise their religion is overshadowed by the sheer amount of resources employed by the majority in propagating theirs. In most cases also, the government ignores minority rights and is insensitive to minority needs, until violence erupts.[281]

In this respect, the current practice of delaying approvals for the construction of places of worship for those who profess the non-Muslim faith is incompatible with art 11. The approval process often takes a long time and in some cases, years for the authorities to approve the conversion of land use to religious use as well as building plans for these places of worship. In some states, such applications will first have to be referred to the District Security Committee and then to the State Security Committee for deliberation; the composition of these committees may comprise entirely those who profess the Muslim faith with representatives from the Islamic Affairs Department.[282]

It is disheartening to note that as Malaysians, those who profess the non-Muslim faith should be considered as a security threat that applications for their places of worship have to be referred to the Security Committee and their right to freedom of worship should be decided by those who do not profess their faith. If such rights continue to be inhibited and restrained under the guise of maintaining 'public order', history reminds us that this will be a recipe for disaster as dissatisfaction over the curtailment of this freedom often invokes extreme passions and reactions from those affected. Unless we change the mind-set of the people and take pride in our unity in diversity, the threads that hold our cohesive society will one day be susceptible to severance; a disservice

[281] See Soli J Sorabjee, Attorney General of India, *Legal and Judicial Protection of Minorities*, The Commonwealth Lawyer, Journal of the Commonwealth Lawyers Association, Vol 11, No 3, 37.

[282] Recently, the Iban bible known as *Bup Kudus* was also initially banned because the Islamic Development Department (Jakim) felt the use of *Allah Tala*, which was similar to Muslims' *Allah Taala*, was inappropriate. [The STAR, 26 April 2003]

indeed to our forefathers who built this land on religious diversity and mutual tolerance for one another's religion.

Unless our leaders display political maturity and adhere to constitutional tenets when dealing with such a delicate issue, this remains a prospect of a prima facie case for public interest litigation.

In the like manner, the Muslims being the minority race in Singapore would frown upon the infamous suspension of four primary schoolgirls from attending school in early 2002 for wearing *tudung* or headscarf as an invidious privilege of the majority. The government has been accused of practising double-standards when Sikhs are allowed to wear turbans to school, leading some to surmise that this decision may be in contravention of arts 12[283] and 15 of the Singapore Constitution which guarantee equality before the law and freedom of religion. In fact, the Singapore government's policy of accommodative secularism which practises even-handed, neutral treatment of religions and non-anti-atheistic approach[284] is commendable and the same goes to its record of not discriminating the minorities on the grounds of race, creed, colour and religion in the areas of employment and education.

However, it may have erred in this instance.[285] Wearing a *tudung*, like a Malay boy wearing a *songkok* (a hat usually worn by Muslims in this region),

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[283] See Thio Li-ann, *Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs* [2002] Sing JLS 328, 358.

[284] *Ibid*, 363. See also generally Thio Li-ann, *The Secular Trumps the Sacred: Constitutional Issues Arising Out of Colin Chan v PP* [1995] Sing LR 26, 34-38.

[285] Religious tolerance is not to be preached or learnt by compulsion. It is to be nurtured from young. If our children are taught at this tender learning age that it is acceptable for Sikhs to wear turbans to school while wearing *tudungs* by Muslim schoolgirls is a proscribed act, this is as good as telling the non-Muslim school children to keep clear from those who wear a *tudung* now and later on in their adult days. After all, not all Sikhs wear a turban and not all Muslim women wear a *tudung*. Apart from mis-learning to be intolerant and illiberal against other religions, these young minds will grow up accepting it as a matter of fact that the so-called equal treatment for all religions and races is nothing but a fallacy. It is also incompatible with status accorded under art 153A of the Singapore Constitution to the Malay language, spoken almost entirely by the Muslims, as the national language of the island. It is imperative that from young our children mix with other races and learn to live harmoniously and peacefully with one another in a variegated society, so that Singaporeans can truly say they 'will stand together and see the lions roar'!

is actually an innocuous practice compared to wearing a *purdah*.[286]

Again, is this the harbinger of and catalyst for the birth of public interest litigation in Singapore even though the Malaysian lawyer and politician, Karpal Singh was denied an employment pass by the Ministry of Manpower to represent the families of these schoolgirls? [287] It is submitted that had this matter been brought to the courts, the parents of the affected children could have been able to meet the liberal standing rule of 'sufficient interest' currently applied by the Singapore courts.[288]

(v) *Effects of the Boom Years*

Malaysia has virtually been transformed economically under the Mahathir administration. During the boom years of late 1980s to mid 1990s, jungles were cleared for development and mega projects were undertaken. Malaysia is clearly a great success story of how a developing country could have chalked up such achievements in a short period of time. But like every success story, it does not come without a price.

The clearing of jungles and felling of trees not only brought about environmental concerns, but also damage to properties and loss of lives.[289] The manner in which mega privatisation projects were awarded without subjecting the same to a public tendering process such as contracts awarded by the Public Works Department and the manner in which public funds were used to bail out ailing privatised entities also sparked allegations of favoritism in high places.[290] Since 1983, Malaysia has privatised 434 projects ranging from power utilities, telecommunications, highways, ports, water, TV stations to

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[286] *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61.
[287] See *Malaysian lawyer won't get to fight* ***tudung*** *case*, The Straits Times, 13 September 2002.
[288] *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts, supra*, n 2.
[289] See *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors, supra*, n 224.
[290] It is said the reason that sparked off one of the worst political crises in Malaysia which resulted in the dismissal of the former Deputy Prime Minister, Dato' Seri Anwar Ibrahim was the latter's allegation that public contracts were given to the cronies of the leadership.

parking fees and rubbish disposal totalling $56.68 billion.[291] Private lands belonging to thousands of landowners were compulsorily acquired to make way for such projects. Allegations were also made that lands designated for parks and recreation were sacrificed for more luxurious development.[292] Public and statutory bodies also became more actively involved in various enterprises entering into all sorts of joint ventures with the private sector to the extent that they sometimes forgot about the very purpose of their existence and incorporation. In this respect, some statutory bodies would act *ultra vires* by embarking on businesses and ventures which were not within their powers to undertake. Loans were also given to finance such mega projects by public trust funds, and nobody knew the criteria used for approving such loans.

This was also the time which recorded a record number of public interest litigation cases being filed which also represents the bulk of reported public interest litigation cases in Malaysia. But only a handful made it into the law reports.[293] The success rate was dismal.

In *Lim Kit Siang,* the Opposition leader failed to stop the signing of the North South Highway contract on the ground that the contract was illegally and unfairly awarded to the company through the hands of the Finance Minister, the Minister of Works and the Government of Malaysia. In *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor*,[294] the lawyer turned politician and then turned environmentalist failed to obtain the declaration that he had the right to search and examine the privatisation agreement relating to the proposed development called the 'floating city', even though the same judge had earlier

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[291] Raja Aziz Addruse quoting an internet source in his paper, '*Government and Executive decision making: Is there a need for greater transparency and openness?*' delivered at the 11th Malaysian Law Conference, 8 – 10 November 2001 and published in INFOLINE, January 2003 Issue 10, 15.

[292] *Lee Freddie & Ors v Majlis Perbandaran Petaling Jaya & Anor, supra,* n 142.

[293] See *Government of Malaysia v Lim Kit Siang, supra,* n 1; *Razak Ahmad lwn Ketua Pengarah, Kementerian Sains, Teknologi & Alam Sekitar; supra,* n 3*; Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor, supra* n 3; *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru, supra,* n 3; *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1995] 3 CLJ 114, [1995] 100 MLJU 1; *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor* [1998] 5 MLJ 129; *Yap Ea Teck v Yang Dipertua Majlis Daerah, Kota Tinggi, Johor* [1995] 55 MLJU 1; *Kajing Tubek & Ors v Ekran Bhd & Ors, supra,* n 3; *Goh Joon v Kerajaan Negeri Johor & Ors, supra,* n 223.

[294] *Supra,* n 3.

declared that as a ratepayer he was entitled to a copy of the EIA report in respect of the said project.[295] He also failed later to obtain a declaration that he was entitled to a reply from the City Council to his letter enquiring of the said project.[296]

At the same time, others took the unconventional path of challenging the validity of the laws that enabled the statutory body to undertake the project. In *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors*,[297] the plaintiff failed to obtain, *inter alia*, a declaration that the Johore State Islamic Economic Development Corporation Enactment 1976 which established the Johore State Islamic Economic Development Corporation, the statutory body which entered into a joint venture with a private company to compulsorily acquire more than 6,000 acres of land belonging to a Singapore company, was invalid as it contravened the Incorporation (State Legislatures Competency) Act 1962. The court was correct in its decision as the plaintiff had not first obtained leave from a Federal Court judge pursuant to art 4(4) of the Federal Constitution to challenge the validity of the state law. In *Kajing Tubek*, the three respondents also failed to impugn the validity of the subsidiary legislation made under the EQA when the Court of Appeal ruled that the subsidiary legislation had no application to the *Bakun* project anyway as the applicable law was the state law of Sarawak. At the time of writing this paper, it was reported that a lawyer had also filed an application to challenge the implementation of *hudud* (Islamic) law in the state of Kelantan.

All these cases have shown that where the community interest is at stake, there is always a community-minded person to invoke public interest litigation for a remedy. Though he might not have been successful in his pursuits, he had obviously made his point and conveyed a message to the executive that hesitancy to take the government to courts may now be a thing of the past. This augurs well for the development of public interest litigation as an administrative safeguard in Malaysia.

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[295] *Razak Ahmad lwn Ketua Pengarah, Kementerian Sains, Teknologi & Alam Sekitar, supra,* n3.
[296] *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru, supra,* n 3.
[297] *Supra,* n 293. See also *Krishnan Moorthy a/l P Manickam v Pengarah Tanah dan Galian Negeri Johor* [1996] 4 CLJ 233, [1996] 289 MLJU 1.

D. *Locus Standi*

Having said that, it cannot be gainsaid that the above cases were dismissed primarily by the courts' strict rules of locus standi. Locus standi means 'place of standing', that is a place to stand in court or a right to appear in a court of justice on a given question.[298] In short, this 'barrier erected by the judge'[299] appears to be the biggest impediment to the institution of public interest litigation actions.

(i) Our Rules of Standing Antiquated?

MP Jain[300] is of the view that 'the Malaysian law as to locus standi to seek judicial review of administrative action is ancient and antiquated and out of tune with modern developments in judicial thinking in the common law world.' It is therefore not inapposite to examine the development of the law in regard to locus standi in Malaysia and Singapore as Lord Denning put it: 'In administrative law the question of locus standi is the most vexed question of all.'[301]

The leading authority on locus standi is the majority decision of *Lim Kit Siang*. The decision was described in the strong dissent registered by Abdoolcader SCJ as 'a retrograde step in the present stage of development of administrative law and a retreat into antiquity.' This decision immediately stilled the winds of change that were blowing in late 1970s and early 1980s towards

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[298] *Lee Freddie & Ors v Majlis Perbandaran Petaling Jaya & Anor*, *supra*, n 142. For an excellent study on locus standi, see Thio Su Mien, *Locus standi and Judicial Review* [Singapore: Singapore University press:1971].

[299] To borrow the words of the dissenting judge Seah SCJ in *Government of Malaysia v Lim Kit Siang*, *supra*, n 1, 33: 'The Latin phrase 'locus standi' as used by the courts in England, or 'standing in courts' as the term is commonly understood by the lawyers in the United States of America, seems to indicate that a person is allowed by the judges to appear and be heard in a legal proceeding. It is a procedural barrier erected by the judges to prevent the court's time and public money from being wasted by multiplicity of frivolous and vexatious litigations brought by busybodies whose actions are bound to *fail in limine* and also to prevent abuse of the legal process.'

[300] *Administrative Law of Malaysia and Singapore*, *supra*, n 95, 765.

[301] Lord Denning, *The Discipline of Law, supra*, n 26, 144.

a more liberal approach to the question of locus standi in public interest litigation.

(ii) *'Aggrieved Person' and 'Sufficient Interest'* Tests in the Pre *Lim Kit Siang* Era

In England, the liberalisation of the standing criteria did not receive statutory support until the coming into force of s 31 of the English Supreme Court Act 1981. The 1981 Act introduced the sufficiency test in that an applicant for judicial review is one who has a sufficient interest in the matter to which the application relates. Prior to that particularly in the early 20th century, the test applied was one of an 'aggrieved person', that is, a person who had suffered a particular loss in that he had been injuriously affected in his money or property rights.[302]

In the first reported public interest litigation case in Malaysia, namely *Lim Cho Hock*,[303] a ratepayer was clothed with legal standing. This was a change in judicial attitude from the 1966 decision of *District Council Central, Province Wellesley v Yegappan*[304] which held that even as a ratepayer and even if there has been a contravention of the Act, the plaintiff has no locus standi to seek judicial review under O 53 unless he can show that his legal right or interest has been affected by the project.

Then came *Tan Sri Haji Othman Saat*[305] before the same judge, Abdoolcader FJ who now sat at the Federal Court. In this case, the applicant, a fisherman, together with 183 others applied to the State Executive Council for pieces of land. No formal application form was submitted even though it was taken up. He did not hear anything from the respondent until some eight years later when he found out large pieces of land in that vicinity were being carved out and allotted to the first respondent as well as other rich and influential dignitaries. However, the allocation to these nine or ten persons did not cover

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[302] *Ibid*, 115.
[303] *Supra*, n 3.
[304] [1966] 2 MLJ 177.
[305] *Supra*, n 3.

the entire eligible land in Mersing, but it was argued that they did jeopardise the applicant's chances as there would now be fewer pieces of land for alienation. The alienation was also alleged to have been carried out by the Executive Council in the presence and with the participation and connivance of the Tan Sri Haji Othman Saat, the Chief Minister.

Relying on the decision of the English Court of Appeal in *R v Inland Revenue Commissioners*[306] which held that an applicant for judicial review need only establish that he had a sufficient interest in the matter, Wan Yahya J went even further to rule that the applicant 'and indeed every citizen, especially one with expectation for alienation of State land, should be properly construed as a person having sufficient interest in applying for a declaratory decree.'[307] His lordship went on to say that even in our courts the mendicant might in appropriate circumstances challenge the act of a Minister if the exercise of such act appeared to be unlawful, or against public interest.

Upon appeal, Abdoolcader J in delivering the judgement of the Federal Court toned down Wan Yahya's application of 'sufficient interest' as the barometer for locus standi. Neither did the appellate court continue to adopt the restrictive approach of 'person aggrieved' as the rule of standing and the right to proceed. Instead the court held that the applicant had the locus standi to maintain his action because he had suffered special damage peculiar to himself from the interference with the public right. His lordship went on to say that this is the second limb of the exposition in *Boyce* v *Paddington Borough Council*[308] which if read liberally would appear to include everyone with a legitimate grievance.

However, if *Tan Sri Othman Saat* were heard today, it would have failed to overcome the test of locus standi expounded in *Kajing Tubek* because the other 183 applicants were not before the court to challenge the alienation. Based on this reasoning, the applicant had not suffered any special injury over and above the injury common to the others.

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[306] [1980] 2 All ER 378.
[307] *Mohamed bin Ismail v Tan Sri Haji Osman Saat & Ors* [1982] 2 MLJ 133, 136.
[308] [1903] 1 Ch 109, 114.

In any event, these two decisions of *Lim Cho Hock* and *Tan Sri Othman Saat* were later described in *Lim Kit Siang* as the high water marks of the law of locus standi in Malaysia. This change in judicial attitudes for a less restricted scope of individual standing was also reflected in the case of *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors*.[309]

Here, the applicant, a member of the Malaysian Bar, sought leave to apply for an order of certiorari to quash the decision of the Board of Film Censors in approving the film publicity material bearing the title 'Happy Bigamist' and a certain statement in the advertisement of the film which conveyed the message 'two wives in one house policy feasible'. This was published, displayed and advertised by the first respondent to promote the film. The applicant contended that this would have the effect of depraving the sanctity of a monogamous marriage and the fundamental concept of 'one man one wife'. He also prayed for an injunction to restrain the first respondent, their servants or agents from publishing, displaying or in any way utilising the said film publicity material. The court granted him locus standi on these grounds:

- the applicant was a ratepayer;
- that he had contracted a monogamous marriage; and
- he strongly adhered to the sanctity of a monogamous marriage which has the backing of an Act of Parliament, namely, the Law Reform (Marriage and Divorce) Act 1976.

His lordship, however, stopped short of holding that as a member of the Malaysian Bar, the applicant had the standing to sue, but did say, *obiter*, that a member of the Malaysian Bar could not depend solely on his status to gain a greater privilege than any other ordinary member of the public in the matter of 'standing to sue'. This is unlike the position in India which conferred such status on an advocate such as the socially-motivated advocate, MC Metha.[310] His lordship then went on to say that 'in order to have the locus standi to invoke the jurisdiction of judicial review, the applicant should claim, if not a

[309] *Supra*, n 7.
[310] *MC Metha v Union of India* [1987] 4 SCC 463; *MC Metha v Union of India* [1987] 1 SCC 395; *MC Metha v State of Orissa* AIR [1992] SC 382; *MC Metha v Union of India & Ors* [1996] 4 SCC 351.

legal or equitable right, at least sufficient interest in respect of the matter to be litigated.'[311]

As can be seen, the trend[312] then was to adopt the test of 'sufficient interest' until the arrival of *Lim Kit Siang* which ossified the central ideas of liberalisation in locus standi.

(iii) *Government of Malaysia v Lim Kit Siang*

In this celebrated case, the Opposition Leader 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 for a permanent injunction to restrain UEM from signing the contract with the government.[313] The plaintiff had filed his suit in the Penang High Court earlier and had also applied for an interim injunction against UEM to restrain it from signing the contract. The application was refused by Edgar Joseph Jr J.[314] On appeal to the Supreme Court, the court, in an oral judgment ordered the interim injunction to be issued with liberty to apply.[315] UEM and the government then

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[311] *Supra*, n 7, 325.

[312] See also *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193.

[313] The gravamen of the plaintiff's complaint was that UEM was a company owned and controlled by another company called Hatibuti Sdn Bhd which in turn was owned and controlled by UMNO. The UMNO leaders allegedly involved in the present case were the Prime Minister, the Deputy Prime Minister, the Minister of Finance and the Minister of Agriculture, and therefore: (i) the Prime Minister, the Deputy Prime Minister, the Minister of Finance and the Minister of Agriculture, being leaders of UMNO, taking part in the deliberations of the Cabinet that considered the proposal by UEM (in which UMNO has a substantial interest) in respect of the privatisation of the Highways that resulted in the Cabinet deciding to proceed with the privatisation of the Highways amounted to their being guilty of an offence under s 2 of the Emergency (Essential Powers) Ordinance No 22 of 1970; (ii) the Minister of Finance, being a leader of UMNO and a trustee of Hatibuti Sdn Bhd, his being authorised to do so and approving the award of the Letter of Intent in favour of UEM, ran foul of the same s 2; (iii) the Minister of Works who, after his Ministry had evaluated the tenders, approved the award was biased in favour of UEM; and (iv) that the tender exercise by which the contract was awarded to UEM was not carried out fairly.

[314] [1988] 1 MLJ 35.

[315] See [1988] 1 MLJ 50, 53. The oral judgement quoted in extenso reads as follows: 'The learned judge's interpretation of section 29 of the Government Proceedings Ordinance is too wide. Apart from what the statute expressly prohibits, he ruled that the Court cannot grant an

applied to the High Court to have the interim injunction set aside and the suits struck out on the ground 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 VC George J who dismissed them.[316] Both UEM and the government appealed to the Supreme Court and one of the questions was whether the respondent had locus standi to bring and maintain the action against the Government.

The Supreme Court by a majority of 3:2 decided that the rule as to locus standi applicable in Malaysia is that accepted in England before the enactment of the English O 53.[317] In doing so, the majority followed *Boyce v Paddington*

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injunction against a party having a transaction with the Government as in the present case. That will have the effect, he said, of indirectly prohibiting the Government from signing the agreement. With respect we are unable to agree with the learned judge's extension of the scope of that section. We have considered a number of authorities both English and local as to the question of locus standi. We need only say that on the facts of this case the appellant clearly has locus standi to bring this suit. For the purpose of the application we do not consider the question of the lawfulness or otherwise of the contract is relevant at this stage. We therefore allow the appeal. Costs in the cause. We would grant the Order in terms of prayers (1) and (2) of the said Summons-in-Chambers with liberty to apply to the Court below. We would order that this suit be heard early before another judge. Deposit to be refunded to the appellant.'

[316] See [1988] 1 MLJ 50.

[317] In the words of three majority judges of the Supreme Court:

'In my judgment, the court should be slow to respond to a politically motivated litigation unless the claimant can show that his private rights as a citizen are affected. Similar caution was expressed by Salmon LJ in Blackburn's case [1971] 1 WLR 1037 saying that he deprecated 'litigations the purpose of which is to influence political decisions'. Thus as a politician, the respondent's remedy in this matter does not lie with the court, but with Parliament and the electorate.' [per Salleh Abas LP, *Government of Malaysia v Lim Kit Siang, supra,* n 1, 25]

'But in Malaysia, there is no provision in our Rules of the High Court equivalent to O 53 r 3(7) of the English Rules of the Supreme Court. Thus, in my view, there shall be a stringent requirement that the applicant, to acquire locus standi, has to establish infringement of a private right or the suffering of special damage: see *Gouriet v Union of Post Office Workers* and also Boyce's case and this I consider to be the relevant test to apply when determining the question of standing.' [per Abdul Hamid CJ (Malaya), *Government of Malaysia v Lim Kit Siang, supra,* n 1, 40]

'Therefore, however much one may admire Mr. Lim Kit Siang for being public spirited to raise in court a subject which he thinks is of national importance, one must not be blind as to what is the proper law to apply to see whether he has the qualifications in law to do so. To shut out from our minds what is the proper law to apply just to enable him to ventilate his grievance would be an abdication of our duty as interpreters of the law.' [per Hashim Yeop Sani SCJ, *Government of Malaysia v Lim Kit Siang, supra,* n 1, 152]

Borough Council[318] as accepted by the House of Lords in *Gouriet v Union of Post Office Workers & Ors*.[319]

In other words, the procedure of judicial review introduced by the English O 53 which enlarged the meaning of locus standi to 'sufficient interest' has no application in Malaysia. They ruled that *Lim Cho Hock* and *Tan Sri Othman Saat* were best explained on the basis the plaintiff had a genuine private interest to be furthered and protected. The court stated that these two important judgements represented the high water marks of the law of locus standi in Malaysia, beyond which the court should be careful to tread. The court finally ruled that it was entitled to depart from its previous decision as the wording and tenor of the earlier short oral judgment of the Supreme Court clearly showed that the earlier court did not consider its ruling to be a definitive or conclusive one and therefore there was nothing in the oral judgment which inhibited the court from considering the problem of locus standi again.

(iv) *Post Lim Kit Siang Era*

The restrictive approach propounded in *Lim Kit Siang* is therefore the leading authority on locus standi in Malaysia. Thereafter, the majority decision has been followed in key public interest litigation cases,[320] and out of the 8 public interest litigation cases filed after *Lim Kit Siang*, only one went on to the Court of Appeal and no further.[321]

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[318] [1903] 1 Ch 109.
[319] [1978] AC 435.
[320] *Karpal Singh v Sultan of Selangor, supra*, n 3; *Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar, supra*, n 3; *Tengku Jaffar bin Tengku Ahmad v Karpal Singh, supra*, n 3*; Tun Datuk Haji Mustapha bin Datuk Harun v State Legislative Assembly of Sabah & Anor*; *supra*, n 3; *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor*; *supra*, n 3; *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru supra*, n 3*; Kajing Tubek, supra*, n 3; *Goh Joon v Kerajaan Negeri Johor & Ors, supra*, n 223*; Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & 5 Ors, supra*, n 3.
[321] *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors, supra*, n 3. This shows that public interest litigants often lack the stamina to pursue the matter beyond the court of first instance. For example, the applicant in the interesting case of *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru, supra*, n 3, also withdrew his application for leave to appeal even though strong remarks were made by the judge about the litigant. Unless a public interest litigation action is taken to the highest court, there is no opportunity for the Federal Court to re-look at the strict standing rules imposed by *Government of Malaysia v Lim Kit Siang, supra*, n 1.

However, in most of these cases, *Lim Cho Hock* and *Tan Sri Othman Saat* were cited against *Lim Kit Siang,* and it was an exercise in futility. With respect, *Lim Cho Hock* could not be justified on the ground that he had a genuine interest to protect. It was very clear in the judgement of *Abdoolcader J* that the applicant was granted standing primarily on the basis that he was a ratepayer.

In the light of *Lim Kit Siang,* being a ratepayer does not *prima facie* entitle the applicant standing. It follows that *Razak Ahmad v Ketua Pengarah, Kementerian Sains, Teknologi & Alam Sekitar*[322] is neither the authority for the point that the applicant was granted the declaration because he was a ratepayer. The applicant in this case managed to obtain a copy of the EIA report because the EIA report was held to be a public document as it was not objected otherwise by the Director General of the Department of Environment.

On the other hand, the position taken by Abdoolcader J in *Tan Sri Othman Saat* was in fact a more restrictive approach than his own stand taken earlier in *Lim Cho Hock.* His lordship's following dictum in *Tan Sri Othman Saat*[323] has been often quoted[324] to represent this conservative approach:

> The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute *which affects the plaintiff's interests substantially* or where the plaintiff has some *genuine interest* in having his legal position declared, even though he could get no other relief, should suffice.[325] [Emphasis added.]

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[322] *Supra,* n 3.

[323] *Supra,* n 3, 183.

[324] See, for example, *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor, supra,* n 3; *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru, supra,* n 3; *Kajing Tubek* and *Goh Joon v Kerajaan Negeri Johor & Ors, supra,* n 223.

[325] See also GS Nijar, *Public Interest Litigation* [1983] 2 CLJ 234, 236 where the learned writer seemed to think that by that remark his lordship had 'resiled from this liberal 'public interest litigation' view'. Lim Beng Choon J disagreed. His lordship said: 'I beg to differ with the statement of the writer of that article. I may be pardoned in saying that his Lordship has eminently endorsed the modem trends of the English courts to liberalise the technical rules

Then came *Kajing Tubek* where the Court of Appeal attempted to expound the doctrine of locus standi. Gopal Sri Ram JCA said that there are two kinds of locus standi - initial or threshold locus standi and substantive locus standi. According to his lordship, threshold locus standi refers to the right of a litigant to approach the court in relation to his complaint and that this is usually tested at the stage of striking out application. His lordship went on to say that having the threshold locus standi does not necessarily mean the litigant also possesses the substantive locus standi, that is, he may for various substantive reasons be disentitled to declaratory relief such as his inability to meet those settled principles relating to the court's discretion in granting declaratory or injunctive relief.

Be that as it may, the doctrine of judicial precedent demands the adoption of the majority decision of *Lim Kit Siang*, that is, for a public interest litigant to establish locus standi he has to show that he has suffered a peculiar damage as a result of the alleged public act and that he has a genuine private interest to protect or further.

However, all is not lost. Addressing a seminar entitled 'The Malaysian Judiciary and Environment' on 26 January 2002, Gopal Sri Ram JCA said extra-judicially:

> But there is another reason why the timorous souls of public law litigation in Malaysia should take heart. A cloud with a silver lining has now appeared in the Malaysian sky. It has a name. You may have heard about it. It is called *Majlis Peguam Negara Malaysia & Ors v Raja Segaran* [Unreported], Civil Appeal No W-02-47-2000. The judgment of the Court of Appeal has come down heavily in favour of a very wide rule of standing in cases of constitutional infringement. It amounts to this. If a plaintiff (which must include an applicant under the present Order 53) can show a prima facie contravention of a provision of the Constitution, he may be accorded

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which hitherto had emanciated the scope of locus standi in all his judgments touching on this matter. His Lordship has never countenanced the giant steps taken by the Indian Supreme Court of India since 1980 towards facilitating the institution of 'public interest litigation'. [*George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors*, *supra*, n 7, 235.]

> both threshold and substantive locus standi. This is despite the fact that his claim includes a prayer for a declaration that what the defendant has done or proposes to do amounts to a criminal offence. Therefore, we may, I think, safely wave a fond farewell to *Gouriet v Union of Post Office Workers* and *Imperial Tobacco Ltd & Anor v AG* [1980] 2 WLR 466 as they no longer apply to cases of constitutional infringement. It would also appear that the majority decision in *Lim Kit Siang* has suffered a fatal or, at the very least, a near fatal injury in the field of public interest litigation. Where it probably continues to survive, to a limited extent, is in purely private law claims.[326]

If this picture of the state of law is accurate, the decision of *Kajing Tubek* could have been different had counsel for the three respondents argued on the basis that their fundamental liberties under art 5 of the Federal Constitution had been infringed.

However, whether the decision of *Majlis Peguam Negara Malaysia & Ors v Raja Segaran* has created a cloud with a silver lining in the Malaysian sky remains to be seen. Neither has the case of *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors*[327] made the silver lining visible in an overcast sky. In the latter case, even though the High Court and the Court of Appeal held that there was a deprivation of property, an infringement under art 13 of the Federal Constitution, the point on locus standi was not raised because the Department of the Aboriginal Peoples' Affairs had earlier admitted in a letter that the land involved was the plaintiffs' ancestral land for which they should have been compensated under ss 11 and 12 of the Aboriginal Peoples Act 1954.

In his lordship's speech,[328] whether O 53 in its then previous form or its present form, is neither a jurisdictional nor an empowering provision to deny locus standi as the majority did in *Lim Kit Siang* on the ground that the Malaysian

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[326] *Infoline*, The Newsletter of the Malaysian Bar, January/February 2002, 18, 20.
[327] *Supra*, n 257.
[328] *Supra*, n 326.

O 53 differed from the sufficiency of interest test as stated in the English O 53. In other words, even though the present O 53 prescribes the threshold as 'adversely affected', the empowering provision is Paragraph 1 of the Schedule to the Courts of Judicature Act 1974. In his lordship's view, 'the majority ought not to have concerned itself with the English comparison at all. It has as much to do with us, as cheese has to do with chalk.'[329]

E. *Standing Criteria in Singapore*

However, this dual approach elucidated by Gopal Sri Ram JCA was in fact considered by the Singapore Court of Appeal in *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts*[330] where the court held that the appellants had sufficient interest, as citizens of Singapore, to challenge the order of the Minister of Information and Arts on the grounds that the order was in violation of the right to freedom of religion enshrined in art 15 of the Singapore Constitution. In other words, if a litigant's constitutional right is violated, then he will have the legal standing to assert his constitutional right. The following passage from the judgement of Kathigesu JA merits reproduction:

> In the present case, what is complained of is an alleged violation of a citizen's constitutional right under art 15 of the Constitution to profess, practise and propagate his religion. Such rights are constitutionally enshrined. If a constitutional guarantee is to mean anything, it must mean that any citizen can complain to the courts if there is a violation of it. The fact that the violation would also affect every other citizen should not detract from a citizen's interest in seeing that his constitutional rights are not violated. A citizen should not have to wait until he is prosecuted before he may assert his constitutional rights.

There is thus no need for the appellants to show that they are office holders in IBSA or members thereof. Their right to challenge Order 405/94

[329] *Supra*, n 326, 20.
[330] *Supra*, n 2.

arises not from membership of any society. Their right arises from every citizen's right to profess, practise and propagate his religious beliefs. If there was a breach of art 15, such a breach would affect the citizen qua citizen. If a citizen does not have sufficient interest to see that his constitutional rights are not violated, then it is hard to see who has.

As regards the argument that the empowering provision is Paragraph 1 of the Schedule of the Supreme Court of Judicature Act (Cap 322) of Singapore which is in *pari materia* with the Malaysian provision, the Court of Appeal held that it did not follow that because the High Court had the power to grant a declaration under Paragraph 1 that it had the power to grant one in an application under the Singapore O 53 RSC which was based on the old English O 53.

In any event, the Singapore Court of Appeal held that the test for locus standi in Singapore is one based on 'sufficient interest' even though Karthigesu JA did not elaborate any further except to hold that the Singapore courts would not follow a higher threshold test at the application for leave stage under O 53 as propounded by Lim Beng Choon J in *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors,*[331] preferring to adopt the tests applied by the English courts.[332] This indirectly means that Singapore has not adopted a similar conservative approach to locus standi as expounded in *Lim Kit Siang*. It is, therefore, also a moot point whether the use of term 'sufficient interest' by Kathigesu JA in his judgement is intended to mean that the rule on locus standi in Singapore is a liberal one akin to the test of 'sufficient interest' under the English O 53.

F. *O 53 Rules of High Court*

The amended O 53 r 2(4) which entitles only those who are 'adversely affected'

[331] *Supra,* n 7.

[332] The decisions of *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd, supra,* n 122; *R v Commissioner for the Special Purposes of the Income Tax Acts, exp Stipplechoice Ltd* [1985] 2 All ER 465.

by the decision of the public authority to make the application for judicial review has also stiffened the already restrictive rules of standing. The expression 'adversely affected' has not been defined even though the High Court in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur*[333] seemed to treat the words 'adversely affected' as one of 'sufficient interest'. It is submitted that this test of 'sufficient interest' will fly in the face of *Lim Kit Siang*.[334]

The standing requirement under O53 appears to be a stringent requirement, and it will be an uphill task even for liberally-minded judges to attempt any judicial manoeuvring around this statutory requirement.[335] With a stroke of a pen, the executive through the Rules Committee which is made up of members of the judiciary and the Bar has unwittingly obliterated public interest litigation which is proceeded under O 53. This is because the nature of the complaint alleged in public interest litigation cases is more related to an injury or injustice being done to the community than to the litigant personally.[336] Such litigant, no matter how vigilant he may be, will not be able to meet the statutory test of being 'adversely affected' by the administrative action. It follows too that the only available remedy for public interest litigation is declaration if this statutory standard of standing is to be circumvented.[337] But even then, it cannot be ruled out that conservative judges may even substitute the O 53 'adversely affected' requirement for the present standing rules laid down in *Lim Kit Siang* in respect of public interest litigation actions.

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[333] *Supra*, n 142.

[334] See *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & 5 Ors, supra,* n 3, a decision reported after *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur, supra,* n 142.

[335] Singapore judges, on the other hand, could still exercise their judicial creativity in this matter if they should choose to as Order 53 RSC is identical with the pre-amended Malaysian Order 53.

[336] See the first reported case on the application of Order 53 r 2(4) RHC in *Tekali Prospecting Sdn Bhd v Tenaga Nasional Bhd & Anor, supra,* n 59. In this case, the applicant was obviously being adversely affected by the acts of the 'public authority' which expression includes privatised entities such as the Tenaga Nasional Berhad.

[337] See also Dawn Oliver, *Public Law Procedures and Remedies – Do We Need Them?* [2002] Public Law 91 who argued against the necessity to have special public law remedies which have caused confusion to our system of judicial review.

G. *Impact of Lim Kit Siang on public interest litigation*

It would appear that *Lim Kit Siang* is still the law on locus standi in Malaysia. In most public interest litigation situations, there is no infringement of a litigant's constitutional rights. Administrative abuses and mischief can still be perpetrated without infracting a person's fundamental liberties. Therefore, the rigidity of the rule of locus standi in Malaysia will inevitably cause injustice to the citizenry. Administrative decisions are now virtually shielded from curial scrutiny when this is crucial in a democracy that is founded on the principle of rule of law.

Abdul Hamid CJ (Malaya) defended the narrow approach to locus standi taken in *Lim Kit Siang* on two grounds. Firstly, the standing rules would help in the allocation of scarce judicial resources and liberalising the rules would open flood gates to litigation and in support, his lordship relied on *Dyson v Attorney General*.[338] The other ground his lordship provided was that judicial resources being always strictly limited, priority should be given to a genuine grievance by an individual over a competing claim for access to the courts by a busybody.[339] Salleh Abas LP also defended his decision on the basis that every legal system is entitled to have a 'built in mechanism to protect its judicial process from abuse by busybodies, cranks and other mischief makers.'[340]

As regards the argument that a liberal approach to locus standi will open flood gates to litigation, Abdoolcader J said as far back as *Tan Sri Othman Saat* that '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.'[341]

As regards the second argument of invoking strict rules of locus standi to filter cases deliberately brought by busybodies (who can sometimes turn out to be pernicious litigants set out to harass governmental departments), Abdoolcader

[338] [1911] 1 KB 410.
[339] *Supra*, n 1, 27. As put succinctly by Scot, 'The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom.' (*Standing in the Supreme Court – A Functional Analysis*, 86 Harv, L. R. 645.)
[340] *Supra*, n 1, 20.
[341] *Supra*, n 3, 179.

SCJ responded that 'the principle that transcends every other consideration must ex necessitate be that of not closing the door to the ventilation of a genuine public grievance, and more particularly so where the disbursement of public funds is in issue, subject always of course to a judicial discretion to preclude the phantom busybody or ghostly intermeddler.'[342]

In any event, so long as the decision of *Lim Kit Siang* stands, the courts below are duty bound to follow it. In *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru*,[343] the litigant who sought to invalidate the planning permission granted for the development of a 'floating city' null and void was described as a 'trouble shooter, a maverick of a sort out to stir trouble.'[344]

In a critical analysis of this case,[345] MP Jain said that in comparison with the *R v Inspectorate of Pollution, exp Greenpeace Ltd (No 2)*,[346] Razak Ahmad had a better standing to protect the environment concerns of Johor Bahru of which he was a resident. He further criticised the decision for not referring to any recent cases in other common law countries to take note of the contemporary judicial trends on this point.[347] The judge then responded judicially. In *Goh Joon v Kerajaan Negeri Johor & Ors*,[348] after reviewing

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[342] *Supra*, n 1, 45.
[343] *Supra*, n 3.
[344] *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru, supra*, n 3, 298.
[345] I should declare that I was the counsel for the defendant in this case and therefore the views expressed herein in relation to this case are personal and do not reflect that of my clients or the firm associated with me.
[346] [1994] 4 All ER 329.
[347] *Supra*, n 95, 766.
[348] Of which I was also the counsel for one of the defendants, and similar caveat applies. In this case, the applicant sought to declare null and void a development agreement entered into between the State Government of Johor and a private company to acquire more than 6,000 acres of which his land formed only 0.3% thereof was mentioned therein. His right to the relief was extinguished by the time he brought the action as a decision which was gazetted had also been taken by the State Authority to withdraw from acquiring certain pieces of land including the litigant's. It was also contended that applicant was not genuine in that he was used as a tool and as a front for Stamford Holdings which had earlier failed to intervene the proceedings. It was further argued that the applicant was in fact a proxy of another party who was waiting in the wings ever ready to seek revenge and who has an axe to grind and that he was nothing more than a mere puppet whose actions were dictated by Stamford Holdings. (See *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Or, supra*, n 293) The judge held that the applicant was therefore nothing more than a 'mere busybody' and a 'mischief-maker' out to seek personal satisfaction for himself.

judicial decisions from other jurisdictions 'lest I be accused of not referring to the decisions of the other judges from the common law jurisdictions',[349] the same judge correctly said that these cases show 'that great strides have been made towards liberalising the locus standi rule. But in Malaysia, the law is as exemplified in *Government of Malaysia v Lim Kit Siang*, and I am bound by it.'[350]

H. *Abetment by the Rules of Court*

The impact of *Lim Kit Siang* on public accountability of administrative decision is, therefore, illimitable. It appears that administrative decisions are now beyond reproach and the culprits can always get away scot-free without explaining the reasons for their decisions even if hauled up to the courts. This is partly aided by the rules of court as most public interest litigation cases were being struck down even before reaching the threshold to the doorway of justice let alone satisfying the threshold locus standi. The need to consider the merits of the case has now been dispensed with. The favourite mode employed by the defendant public authorities is to invoke O 18 r 19(1)(a) RHC[351] on the ground

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[349] A direct response to MP Jain's earlier remarks *supra*, n 95 as regards *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru.* But see Gopal Sri Ram's view in *Kajing Tubek* that local courts must be extremely cautious in applying decisions of courts of other countries with regard to granting or refusing standing in those other jurisdictions, *supra*, n 248.

[350] *Goh Joon v Kerajaan Negeri Johor & Ors*, *supra*, n 223, 644.

[351] The equivalent provision in Singapore is O 18 r 19 of the Rules of Supreme Court. O 18 r 19 of the Malaysian Rules of High Court provides as follows:

'(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.'

The Singapore provision, however, omits the conjunction 'or' at the end of paragraphs 1 (a) and 1 (b).

that the applicant's action discloses no reasonable cause of action.

When proceeding under this ground, the defendant is not required to explain its administrative decision because O18 r 19(2) provides that no evidence shall be admissible on an application under O 18 r 19(1)(a).[352] In other words, the public authorities do not even need to file an affidavit-in-reply to the affidavit in support of the litigant's application. Even if an affidavit is filed, it cannot even be considered because the sub-rule states that no evidence is admissible.[353] The only evidence to be considered is the statement of claim or the affidavit in support of the originating summons.

Further, with some authorities on the point that the grounds under O 18 r 19(1) are disjunctive,[354] defendant public authorities would most definitely proceed under paragraph 1(a) of O 18 r 19, that is, the litigant's action does not disclose a reasonable cause of action.[355]

In this respect, neither can the inherent jurisdiction of the court be invoked to override O 18 r 19(2) to require the defendant to provide an affidavit in reply

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[352] *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 *Ibrahim bin Mohamad v Ketua Polis Daerah Johor Bahru & Ors* [1996] 5 MLJ 15; *Goh Joon v Kerajaan Negeri Johor & Ors, supra,* n 223.

[353] *S Manickam & Ors v Ismail bin Mohamed & Ors* [1997] 2 MLJ 90; *Ibrahim bin Mohamad v Ketua Polis Daerah Johor Bahru & Ors., ibid,; Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* (1996) 1 MLJ 113; *Shaik Zolkiffly bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased v Majlis Agama Islam Pulau Pinang and Seberang Perai* [1997] 3 MLJ 281; *Paul Law Ung Hua & Anor v Hong Wei Organisation Sdn Bhd* [1996] 4 MLJ 489; *Hii Teng Tuong, Alphonsus v Lok Min Wah & Ors* [1995] 4 MLJ 259; *Chang Kow Chin v Kammala a/p S. Kumarasamy* [1997]MLJU 5.

[354] *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* [1997]1 CLJ 775; *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129; *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd & Anor* [1999] 4 MLJ 629; *Leong Peng Kheong & Anor v Dawntree Properties Sdn Bhd* [2002] 2 MLJ 186; *Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38.

[355] The same judge who decided in *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor, ibid* seemed to suggest in the recent case of *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & 5 Ors, supra,* n 3, 228 that *Sambu* might have been decided otherwise had the defendant in *Sambu* had also relied on the inherent jurisdiction of the court to strike out the claim in addition to relying cumulatively on the O 18 r 19 (a), (b), (c) and/or (d).

to explain the allegations raised in the complainant's affidavit.[356] As so articulated by Abdul Malik Ishak J in *Ibrahim bin Mohamad v Ketua Polis Daerah Johor Bahru & Ors*,[357] '... the RHC is not meant to decorate the pages of the RHC but rather it should be vigorously applied and obeyed. The Rules Committee must have devised the rules for the expeditious despatch of litigation and, consequently, the Courts must simply not stand idle but instead rise up to the occasion and enforce it accordingly.'

I. *A Death Knell to public interest litigation?*

It is, therefore, irrefutable that *Lim Kit Siang* has almost extinguished any public interest litigation in Malaysia. The decision of *Lim Kit Siang* came at the most unpropitious time when liberalisation of standing criteria and the right to proceed was evolving favourably towards protecting the citizens against 'departmental aggression'. One therefore cannot blame Abdoolcader SCJ for registering his strong dissent for posterity in this manner:

> 'As a postlude, I would add this. If this judgment reads in *toto aut in partibus* like an indictment, let me immediately say it is meant to — against the doctrine of retrogression in the field of public law litigation in this age and at this stage of its evolution.'[358]

However, our courts cannot be blind to the liberalisation on standing rules that has taken place in most common law jurisdictions. Lord Acton's oft-repeated injunction that 'power tends to corrupt, and absolute power corrupts absolutely' will one day compel our courts to act. Not just to act, but to be actively involved in the promotion of good governance in public administration. A judiciary who is always mindful of upholding social fairness and justice will by exercising judicial creativity unfasten all these antiquated bolts and shackles of strict standing criteria. After all, the limits on locus standi are set by the courts. As so eloquently put by Abdoolcader J: 'Even if the law's pace may be slower than society's

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[356] *Ibrahim bin Mohamad v Ketua Polis Daerah Johor Bahru & Ors., supra*, n 352 relying on *Karpal Singh & Anor v PP* [1991] 2 MLJ 544.
[357] *Supra*, n 352, 20.
[358] *Government of Malaysia v Lim Kit Siang, supra*, n 1, 50-51.

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.'[359]

The courts must therefore be relevant to the needs of society. History warns us of disastrous consequences if public grievances and injustices are ignored. There will come a time when administrative abuses are so repugnant to common sense as to make the law look asinine that public opinion demands a change in judicial attitudes. The judges, as Abdoolcader SCJ said, cannot then just stand there and fold their arms and do nothing; otherwise they would indeed be hanging their 'heads in sorrow and perhaps even in mortification in not being able to at least entertain for consideration on its merits any legitimate complaint of a public grievance or alleged unconstitutional conduct.'[360]

Until such day, public-spirited and socially concerned citizens should not lose heart. A positive transformation may one day come about if concerned citizens continue to persevere in the wake of 'judicial persecution' as experience tells us that having the determination and grit to march on and take up a cause, however slow the pace may be, will pay off someday. As observed by a judge, while courts do not encourage litigation, the trend is to allow the plaintiffs to sue even though they may have no real grievance or injury at all.[361] If such citizens are deterred from bringing any more public interest litigation cases, how can there be an opportunity for public-spirited judges to undo these injustices caused by strict standing rules?

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[359] *Tan Sri Haji Othman Saat v Mohamed bin Ismail, supra*, n 3, 179.

[360] *Government of Malaysia v Lim Kit Siang, supra*, n 1, 46.

[361] Per Syed Ahmad Idid in *Tun Datuk Haji Mustapha bin Datuk Harun v State Legislative Assembly of Sabah & Anor* [1993] 1 MLJ 26, 34 where his lordship also said: 'I am inclined towards Lord Denning when he said in *R v Horsham Justices, ex p Farquharson & Anor* [1982] 2 WLR 430, that it would be a grave lacuna in our system of public law if a group or even a single public-spirited taxpayer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. In other words, it should suffice if the plaintiff has some genuine interest in having his legal position declared even though he could get no other relief.'

Public interest litigation pessimists can also draw much inspiration from the parting words of Abdoolcader SCJ in *Lim Kit Siang* where his lordship aptly quoted Khanna J in the *Supreme Court of India in the famous Habeas Corpus case (Additional District Magistrate, Jabalpurv Shivakant Shukla*:[362] 'A dissent in a court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct, the error into which the dissenting judge believes the court to have been betrayed.'[363]

J. *Why is there no public interest litigation in Singapore?*

We must now consider why there is no public interest litigation in Singapore? Is that a peculiarity that deserves admiration or an abnormality which invites condemnation?

What could be the reason especially taking into account Singapore is perhaps one of the most regulated societies in the world? From womb to tomb, the critics say there is endless intrusion by the government into the daily life of Singaporeans. It is a crime for not flushing a public toilet. It is also unlawful to consume chewing gum for fear that doors to public housing lifts and subway trains will be jammed. Therefore, is the non-existence of public interest litigation due to the government's deplorable record of respecting individual freedom and basic rights? Or is it because of public resignation, as alleged,[364] due to a compliant judiciary which has been used to bankrupt the government's political opponents?[365]

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[362] AIR 1976 SC 1207.

[363] *Government of Malaysia v Lim Kit Siang, supra*, n 1, 51.

[364] *Lee Kuan Yew v Vinocur & Ors* [1996] 2 SLR 542.

[365] See *Lee Kuan Yew v J B Jeyaretnam* [1978-1979] SLR 429 in which Mr Lee was awarded $130,000 for Mr Jeyaretnam's allegation that Mr Lee had abused his office as Prime Minister and lacked honesty and integrity; *Lee Kuan Yew v Seow Khee Leng* [1988] SLR 832 in which Mr Lee was awarded $250,000 for the remark by the opposition candidate that he was guilty of corruption; *Lee Kuan Yew v J B Jeyaretnam* [1990] SLR 688 in which Mr Lee was awarded $260,000 for Mr Jeyaretnam's remarks that he was guilty of dishonourable and/or criminal conduct; *Lee Kuan Yew v Derek Gwyn Davis & Ors* (1990) in which Mr Lee was awarded $230,000 for an article in the Far Eastern Economic Review accusing him of using his powers

To this, Senior Minister Lee Kuan Yew responded:

Some critics have alleged that our judges were compliant. The judges who heard these cases were senior members of the bench with their standing and reputation to uphold. Their judgments were published in the law reports and cited as precedents that can stand the scrutiny of over 2,000 lawyers at the Bar, and of teachers and students at the National University of Singapore law faculty ... The allegation that we use the judiciary in defamation suits to bankrupt our political opponents came to a head when the International Herald Tribune of Oct 7, 1994 carried an article by Christopher Lingle, an American lecturer at the National University of Singapore, attacking me: 'Intolerant regimes in the region reveal considerable ingenuity in their methods of suppressing dissent. Others are more subtle: relying upon a compliant judiciary to bankrupt opposition politicians'. I sued the editor, the publisher and the writer. With the foreign media present in strength to give them wide publicity, both the editor and publisher, through their lawyers, admitted it was untrue and apologised for it. The court awarded damages and costs against the IHT ... Far from oppressing the opposition or the press that unjustly attacked my reputation, I have put my private and public life under close scrutiny whenever I appeared as a plaintiff in court. Because I did this and also gave the damages awarded to deserving charities, I kept my standing with our people.[366]

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improperly under the Internal Security Act; *Lee Kuan Yew v Vinocur* [1995] 3 SLR 477 in which Prime Minister Goh Chok Tong was awarded $350,000 while SM Lee and Deputy Prime Minister Lee Hsien Loong were awarded $300,000 each for an article in the International Herald Tribune alleging nepotism and corruption by the three leaders; *Lee Kuan Yew v Vinocur* [1996] 2 SLR 542 in which Mr Lee was awarded $ 400,000 for an IHT article which alleged that he had relied on a compliant judiciary to obtain judgment against political opponents and bankrupt them; *Lee Kuan Yew & Anor v Tang Liang Hong & Ors* [1997] 3 SLR 91 in which a record $8.075 million in damages was awarded to 11 individuals including SM Lee and Mr Goh who were awarded $2.3 million and $1.4 million for his remarks, *inter alia*, that the Prime Minister, the Senior Minister and six other PAP members were lying when they labelled him an anti-Christian Chinese chauvinist. [Source partly from Pang Gek Choo, *Award much higher because injury greater,* The Straits Times 30 May 1997, 57 (Home Section.]

[366] Irene Ng, *SM book draws reviewers' pens and penknives*, The Straits Times 16 December 2000, Home Section, Pg. 12, H13.

A compliant judiciary? The admirers of this phenomenal feat would refer to *Goh Chok Tong v Jeyaretnam Joshua Benjamin*[367] where the High Court had the 'courage' to award damages for defamation in modest sums to the Prime Minister and discounted his entitlement to costs by 40%.[368] Critics will also be reminded of the two landmark decisions in public law delivered by the Singapore Court of Appeal in *Chng Suan Tze v Minister of Home Affairs*[369] and *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts*[370] which have put Singapore one step ahead in areas of law which Malaysian courts are currently being accused of retrogressing.

If so, I could only speculate that the reason is either of these – nobody dares to complain for the fear of being bankrupted by costs if he fails or the system of public administration in Singapore is so impeccable and efficient that there is nothing to complain about.

As regards the first surmise, such fear may exist even though it may be erroneously held. To the common people, human nature influenced by the devil's advocate will view the government's institution of defamation suits against political opponents, though based on good legal footing, as a form of punishment for having the temerity to stand up to the executive. That itself is enough to frighten off any aspiring public interest litigant who naturally fears being bankrupted by costs in the event of failure.

As respects the second surmise, it is undeniable that the system of public administration in Singapore deserves commendation. It has been given due recognition globally because having an efficient public administration is vital for Singapore to survive as a major financial centre in this region. The fact that the government always enjoys a handsome majority in every General Election also speaks for it notwithstanding that the absence of a legal challenge from the schoolgirls affected by the government's recent ban on *tudungs* may have been a disappointment to the enthusiasts of public interest litigation.

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[367] [1998] 1 SLR 547.
[368] Even though the quantum and the costs were increased upon appeal. See *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 3 SLR 337.
[369] *Supra,* n 2.
[370] *Supra,* n 2.

It might also be the case that the majority being Chinese are just not bothered with this idea of public interest litigation. As illustrated earlier, this is due to this '*chup ba bo dai chi zo*' attitude which is saving one's skin is better than getting into unnecessary trouble for helping in another person's affairs. The problem is compounded by the fact that public interest litigation is also not a lucrative area of legal practice, and even if there is a very public-spirited citizen who feels very strongly for a particular cause, unless he himself is a lawyer, may not be able to engage a lawyer or a good a lawyer to share his cause for a penny.

Moreover, due to its geographical size and a small civil service, it is easy to supervise the performance of public officers as there is not much room for any misfeasance by such officers without being noticed or reported to their superiors. Essentially, that left only policy decisions to be challenged, and there are not many either because they are mainly determined by the Cabinet whereby complaints of unfair and unreasonable decision-making process are rare. With a pro-government electorate, resistance is also minimal. Most of all, its government is serious in eradicating corruption and its leaders hold unblemished record of personal propriety and integrity. Being members of an educated society, the citizens are aware of their rights when dealing with administrative bodies. Equally, public interest litigation which is often invoked to assist the poor and disadvantaged in society may find little relevance in an affluent society like Singapore whose citizens can well afford financially to challenge any administrative mischief if their personal interest has been affected. Being an efficiently run and a small city in which the population virtually live in a concrete jungle, environmental matters which often trigger off public interest litigation elsewhere are not major issues in Singapore and the people are ambivalent about it.

All in all, the most probable explanation for the absence of public interest litigation in Singapore is the existence of a good public administration. Its civil service is recruited from the brightest and the best of society based on merit. Being also among the most highly paid civil servants in the world, they contribute to one of the least corrupted public services in the world.[371]

[371] See *supra*, n 4.

VI. EVALUATION AND CONCLUSION

A. *Is public interest litigation promoting Good Governance?*

If the absence of public interest litigation in Singapore is due to the presence of a good public administration, then good governance has rendered public interest litigation unnecessary until such time good governance begins to balk and decline. In other words, more public interest litigation usually means lower level of good governance in public administration, and *vice versa*. This should be the way of looking at it as public interest litigation is particularly active in states which do not practise good governance in public administration. This is particularly true in developing countries when this process is still evolving from its infancy. Public interest litigation and good governance are therefore connected matters which are determinants of a good public administration. The more developed the country, the higher the standards will be expected of a good public administration, and this should be the yardstick to measure the relevance of public interest litigation in the promotion of good governance.

B. *Does public interest litigation hinder Good Public Administration?*

Some[372] have argued that that undue constraints imposed by the courts on the decision-making process can impede the efficiency of public administration. Further, the time spent in responding to each and every argument put forward by the objectors would imperil the prompt implementation of the policy. Lord Millet went on to say that:

> Exaggerated emphasis on the protective rationale can lead to excessive costs and delay. And it is important not to overlook the fact that, in some contexts such as competition and anti-dumping cases, which bring major corporations into dispute with the Commission, some litigants are not content to pursue their own legitimate interests, but seek to prevent the decision-maker from making decision at all. Such litigants increasingly invoke the concept

[372] Lord Millet, *The Right to Good Administration in European Law , supra*, n 28, 312.

> of good administration to obstruct and delay administrative action. The principle of good administration is invoked in order to achieve no administration.[373]

These views are echoed by Peter Cane that 'judicial interference with the administrative process leads to the adoption of time-consuming 'defensive' administrative practices designed to minimise the risk that decisions will be successfully challenged rather than to improve the 'quality' of the decision. He also argued that the impact of judicial review is also weakened by the lack of knowledge on the part of the civil servants of the role of the courts in controlling government activity. They are also ignorant in particular of court decisions which are relevant to their work as results from empirical studies have shown that the administrative laws have no significant impact on the way discretionary governmental powers are exercised, and that non-legal factors are the most important determinants of the way in which particular powers are exercised.

Yet there are others[374] who went even further to say that one of the most profound recent changes in the Constitution results from the activities of the judiciary which have not only substantially exercised control over the executive but even infringed the sovereignty of Parliament. Michael Beloff argued that Parliament is now sidelined as the judiciary occupies a centre stage. As a result in the reduction as an effective watchdog over the judges, the executive felt a sense of obligation to intrude to make the machinery of judicial review modern and flexible.

It is therefore not surprising to hear calls to grant legal standing to NGOs representing various diffuse interests only if such right has been conferred by statute. As Carol Harlow so wrote:

> Claims to associational standing need to be carefully scrutinised and parsimoniously construed. It is, in short, legal, and not democratic stake, which groups seeking access to the legal process should be asked to prove. If this does not sound particularly 'democratic', there is no particular reason why it should. Courts are one of the pillars of

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[373] *Ibid,* 312-313.
[374] Michael J Beloff, *Judicial Review – Is It Going Too Far?, supra,* n 178, 15.

> a modern democracy, just as representative government is another. The contribution made by each to the democratic process does not have to be identical.[375]

C. *Public interest litigation does promote Good Public Administration*

It is submitted that the above observations should only apply to developed jurisdictions which already have advanced mechanisms in place to check administrative abuses and mischief. In such jurisdictions too, good governance is also the guiding principle in public administration which the government has no qualm of encouraging it.

These comments, however, hold no water in developing countries where the executive would erect barrier after barrier to avoid judicial review of administrative decisions. In such jurisdictions, judiciary is the only pillar the ordinary citizens can lean on to seek redress from administrative abuses and unreasonableness. It follows that by highlighting administrative abuses and excesses, public interest litigation actually helps promote good governance.

If the executive is gracious enough and have the fortitude in accepting defeats in courts as well as working hand in hand with the judiciary, in no time an efficient public administration imbued with a high standard of good governance will emerge. In this way, judicial control brings limitless benefits to the executive. A good public administration brings greater respect for the executive and would probably help the executive to win and win resoundingly in every General Election. It will also receive international acclaim for its fidelity to the rule of law and sincerity in coming to grips with administrative injustices which often grip poor and developing countries.

Adopting judicial decisions and implementing them in the operation and management of governmental departments will improve efficiency of public

[375] Carol Harlow, *Public Law and Popular Justice* [2002] 65 MLR 1, 18.

administration. It also makes the decision-makers more accountable for their actions. After all, most of the complaints are related to procedural impropriety and if these procedural defects can be remedied, then the substantive decisions will be less susceptible to legal challenge.

In this regard, it is inaccurate to say that undue constraints imposed by the courts on the decision-making process can impede the efficiency of public administration. If any constraints are imposed, that is because the public administration has not been efficiently run. Neither is it correct to say that the time spent in entertaining objectors delays in the implementation of the policy. At the first place, if the government had put in much thought in it before implementing a policy, it would have been unlikely to meet much opposition from the public. Sadly this is not the case as many a time, before the policy can even go into full swing, the government itself is having second thoughts about it. Sometimes polices are even changed overnight so much so that there is no certitude in government decisions.

But if any objector is a mere busybody and troublemaker, the courts have no difficulty in dealing with such characters. One must always bear in mind that there are sufficient safeguards against malicious and unfounded actions being filed in courts to obstruct or delay administrative action. The most lethal weapon is that such litigants will be mulcted in costs if not impoverished by costs if he persistently files hopeless actions to embarrass or unreasonably obstruct the administrative bodies.

Just because the impact of judicial review is diminished by the lack of knowledge and ignorance on the part of the civil servants of the role of courts in controlling government is no excuse for the courts to adopt a hands-off approach towards maladministration. On the contrary, the courts should not desist from asserting their role so as to educate the civil servants on the principle of rule of law and good governance. In fact, this educating process which is normally directed at those on the highest rung of the civil service which will in turn help educate their subordinates of these values. While it is conceded that sometimes non-legal factors do make more impact on the way discretionary powers are exercised, this is usually confined to individual and isolated cases. Administrative laws will obviously impact the manner in which these powers

are exercised if such laws are grounded on good governance. Moreover, if such laws had no impact at all, I could not understand why the executive have been so gung-ho at times in erecting all sorts of impediments to avoid judicial review of administrative actions.

I am unable to agree with Michael Beloff's argument that in recent years judicial review of administrative actions has gone too far to the extent of even infringing the sovereignty of Parliament, at least in Singapore and Malaysia. But how far can judicial intervention actually go? Judicial control over the executive who in turn has control over the citizens is the hallmark of a vibrant democracy. In a system which has no written constitution and which the Parliament is supreme, the oft-repeated complaint by the people is the curtailment on judicial control over executive action that is a threat to the fundamental principle of rule of law. *A fortiori*, in a system in which the constitution is supreme, the courts must ensure that the executive and the legislature do not act against the supreme law.

As respects the call to carefully scrutinise and parsimoniously construe associational standing, this may be relevant to a developed legal system such as Britain where the standing criteria and right to proceed are more flexible compared to those in developing countries. In this sense, the call to screen out any actions filed by NGOs is reasonable within the developed system of judicial review such as Britain. On the other hand, if this should be allowed to prevail in jurisdictions such as India, it will be a travesty of justice where the NGOs have been the champions of the oppressed and the poor.

In India, public interest litigation plays an indispensable role in correcting injustices and the NGOs are the instruments to it particularly when most of those affected are illiterate, poor and impoverished and can ill afford to litigate their cases. Thus NGOs representing diffuse interests are the most suitable third parties to intervene on their behalf. To take a miserly approach to locus standi in relation to the right to proceed by NGOs is tantamount to rob the illiterate, poor, impoverished and underprivileged sections of society of their only hope to seek redress through the NGOs. These proactive NGOs are also in a better position to stand up for these disadvantaged people as they possess the expertise and the funds as well as public-spirited lawyers to undertake this

task compared to individual litigants who often lack funds, the access to legal services and fear of reprisals to stand up for a community cause.

D. *Role of NGOs*

In *R v Inspectorate of Pollution & Anor; ex p Greenpeace Ltd (No 2),*[376] a company, BNFL, which reprocessed spent nuclear fuel, was granted by the respondent government departments variations of authorisation to discharge radioactive waste from the company's premises so as to enable the company to test its new thermal oxide processing plant. Greenpeace, a well-known environmental protection organisation with 2,500 supporters in the area where the plant was situated, sought judicial review by way of a certiorari to quash the decision of the respondents in granting an application of the company. BNFL contended that the applicant had no locus standi to make the application. In granting the applicant locus standi, Justice Otton had this to say which best sums up the role of NGOs in public interest litigation:

> The fact that there are 400,000 supporters in the United Kingdom carries less weight than the fact that 2,500 of them come from the Cumbria region. I would be ignoring the blindingly obvious if I were to disregard the fact that those persons are inevitably concerned about (and have a genuine perception that there is) a danger to their health and safety from any additional discharge of radioactive waste even from testing ... It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issues before the court. There would have to be an application either by an individual employee of BNFL or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less well-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties. Further, if the unsuccessful applicant had the

[376] [1994] 4 All ER 329.

> benefit of legal aid it might leave the respondents and BNFL without an effective remedy in costs. Alternatively, the individual (or Greenpeace) might seek to persuade Her Majesty's Attorney General to commence a relator action which (as a matter of policy or practice) he may be reluctant to undertake against a government department (see the learned commentary by Schiemann J on 'Locus Standi' [1990] Pub L 342). Neither of these courses of action would have the advantage of an application by Greenpeace, who, with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law), is able to mount a carefully selected, focused, relevant and well-argued challenge. It is not without significance that in this case the form 86 contains six grounds of challenge but by the time it came to the substantive hearing before me, the Greenpeace 'team' (if I may call them that) had been able to evaluate the respondents' and BNFL's evidence and were able to jettison four grounds and concentrate on two. This responsible approach undoubtedly had the advantage of sparing scarce court resources, ensuring an expedited substantive hearing and an early result (which it transpires is helpful to the respondents and to BNFL)... It follows that I reject the argument that Greenpeace is a 'mere' or 'meddlesome busybody'. I regard the applicant as eminently respectable and responsible and its genuine interest in the issues raised is sufficient for it to be granted locus standi.'

This approach taken by Justice Otton is obviously very liberal and his judgement also shows the importance of the role played by NGOs such as Greenpeace. In other words, if not for Greenpeace, his lordship was doubtful whether anybody else could have brought this action which is for the good of the residents in that area. It is submitted that there should not, therefore, be a distinction in the rules of standing between individuals and bodies who champion community and societal interests.

E. *Is public interest litigation stymied by strict rules of standing?*

Currently, it is said that unless one's constitutional rights have been infringed, no public interest litigation can be instituted against the administrative and public authorities. As stated earlier, as most of the complaints in relation to administrative decisions are in respect of the decision-making process, the current standing criteria under the amended O 53 RHC and *Lim Kit Siang* are insulating defaulting and recalcitrant public authorities from any judicial control. This breeds a culture of impunity which also suffocates the principle of good governance in public administration.

However, public interest litigation activists should not lose heart. It is only a matter of time that such strict standing rules will have to be liberalised to meet the current needs of the society. In the meantime, it is also not true to say that filing any public interest litigation action is useless. With a suit, the government does listen. In fact, it has to listen and take steps to defend it. That itself is sufficient to keep public authorities on their toes. For the same reason, notwithstanding the strict standing rules and now the statutory criterion of 'adversely affected' under O 53, so long as there are public interest litigation suits being filed in court, it remains a potent threat to the participants of maladministration. Each suit will be like prescribing medication for the diseased body. The recovery process may take time, but it is a panacea to correct complacency and malaise that are creeping into these judicially protected administrative bodies.

In this regard, there is no doubt that the strict standing rules in Malaysia have stymied if not obliterated public interest litigation actions since 1988. But if public interest litigants continue to refer administrative abuses and mischief to the courts, the courts would be duty bound to liberalise the standing rules in order to right the wrongs committed by administrative bodies. If they are seen to be powerless to act, citizens will lose their faith in the judiciary.

In fact, we already see a change in judicial attitude in this direction from the recent case of *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar*

v Datuk Bandar Kuala Lumpur[377] where the High Court followed the liberal approach taken by Lim Beng Choon J in *George John* who said that 'in order to have 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 the respect of the matter to be litigated.' [378] Here, the court held the applicant landowner was not a mere 'busybody' as he would have been adversely affected by the decision of the first respondent to develop the land adjacent to his land as approved. It was therefore held that the fact the first respondent had notified the applicant and requested for his views on the development was sufficient to confer locus standi on the applicant.

F. *Liberalisation of Standing Rules*

It is therefore timely that our courts should relax standing rules to keep ourselves in touch with the liberalisation that has taken place in most of the common law jurisdictions. A robust judicial approach to liberalise the rules of locus standi is required as we are living in a period when administrative actions affect every aspect of the ordinary life of the citizens. While each case will still involve balancing between public interest and private interest, this is not something which our judges are not used to doing.

Whether we like it or not, we have to recognise that foremost it is the government's duty to protect and uphold public interest and therefore it has to be acknowledged that certain matters have to be impervious to judicial control. But the liberalisation process has to start nevertheless to allow it to evolve through the natural course of events.

The Indian model will be unsuitable to meet our circumstances where it can be seen in a number of cases there that the Indian Supreme Court as well as many High Courts not only have entertained petitions and 'letters' by affected persons and NGOs but also acting *pro bono publico*. The rules of standing

[377] *Supra*, n 142. But see *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & 5 Ors, supra*, n 3.
[378] *Supra*, n 7, 326 (emphasis added).

there are so relaxed that it has reached a ludicrous level capable of harming even genuine public and economic interests which are vital to the nation's survival. A classic case is *DC Wadhwa v State of Bihar*[379] where a professor of politics 'deeply interested in ensuring proper implementation of the constitutional provisions' was allowed to approach the court against the practice of pursuing promulgation of Ordinances on a large scale as this was a fraud on the Indian Constitution. As wisely observed:

> If carefully and prudently used, the public interest litigation has great potential in correcting wrong, but if liberally and indiscriminately used in all kinds of cases, it may turn into an engine of destruction.[380]

But such reservation is no excuse for us not to re-examine the standing criteria and the right to proceed currently being strictly applied by our courts. It must not be forgotten that even if the public interest litigant succeeds to meet the threshold locus standi, it does not mean that the litigant will later succeed on the merits of the case. And even if he succeeds on the merits, it also does not mean that he is able to obtain the remedies sought.

Most of all, we pride ourselves as a true democracy founded on the rule of law but if the courts themselves self-impose strict standing rules in reviewing the decisions of the executive, then they are in fact abdicating from their duties as the constitutional rampart to the citizens. It is also a disappointment to the framers of our Constitution who have framed it based on the doctrine of separation of powers so that each arm of the government can check and balance against any abuse or injustice committed by the others.

It follows then that the executive cannot be blamed for this state of affairs of immunising administrative decisions from legal redress since our judges are the ones who have chosen to shield the executive from judicial control. This promotes bad governance and authoritarian rule as the administrative bodies can disregard the law with impunity. Neither can it logically reconcile with the words of Thomas Fuller said 300 years ago and quoted over and over again by

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[379] [1987] 1 SCC 378: AIR 1987 SC 579.

[380] Dr SN Jain: Standing and Public Interest Litigation., quoted by MC Thakker, *Lectures on administrative law* [Lucknow: Eastern Book, 1994], 607.

the courts that: 'Be you ever so high, the law is above you'.

G. *Conclusion*

In conclusion, a good public administration which is insulated from judicial control is bad for good governance. It will breed complacency and malaise in the public administration the moment the administrators are aware that their exercise of administrative powers affecting a wide spectrum of society can only be challenged by affected citizens but not public-spirited citizens. This will in no time turn a good public administration into a bad one as individuals are often powerless and impecunious to take on the executive. It is therefore of pivotal importance that the executive should always view public interest litigation as a partner and not 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. Public interest litigation which promotes good governance is an elixir for administrative ills in public administration.