Abstract

Public interest litigation allows access to justice. India, Hong Kong South Africa and United Kingdom that have adopted an active behavioral attitude were able to achieved socio-economic justice. Conversely in Malaysia, the inactive behavioral attitude of its public law had limited the growth of the litigation and restricted access to justice. Therefore, a move towards a proactive behavior in the Malaysian jurisprudence and legal framework is necessary to permit a wider access to justice. Hence, the active behavioral of the judiciary and legal framers in India, Hong Kong, South Africa and United Kingdom are the sources of references needed.

1. Introduction

In general, public interest is a proceeding in the court of law for the enforcement of public or general interest whereby the public or class of the community has interests that affect their legal rights or interests. The important element in this litigation is whether the action is beneficial to the general public and necessary for public purposes. Generally, public interest law seeks to defend the rights of citizens to development. With development, it tries to ensure that there is a promotion of human dignity and constant improvement of the well being of the entire population, on the basis of society’s full
participation in the process of development and a fair distribution of its benefits. This allows a person to growth in a healthy environment. Thus, the right to development must imply that there has to be respect for all human rights in the development process, be it economic, social, cultural, civil or political.

As right to development is important to the public, a flexible rule on standing in this proceeding is necessary so as to provide an easier channel for the public to get access to justice. Hence, locus standi should be given to an organisation or a group of individuals, who have no personal gain or private motive to take an action for any wrongful act of the authority to see that public injury does not take place and avoid acts or omissions that violate the constitution or the law. This is line with the mandate of this litigation, i.e., to promote public interest which states that violations of legal or constitutional rights of a large number of poor, down-trodden, ignorant, socially or economically-disadvantaged persons should not go unredressed. For that reason, it is the duty of the court to intervene if there is any complaint by the public against the authority for any wrongful act that violates the constitution or law. Nevertheless, the court must take precautions against the public that they approach the court with no personal interest to ensure that there is no abuse of the court’s process.

As far as Malaysia is concerned its public law behavioral attitude on the development of public interest litigation is not well develop. The rigid rule on locus standi has discouraged the progressive move of public interest litigation cases. Further, with unclear definition on who is an ‘adversely affected person’ under Order 53 rule 2(4) of the Rules of Court 2012 it adds on to the slow movement of public interest in Malaysia. The inactive behavior of the Malaysian apex court has affected the growth of public interest litigation. As a result, an injustice occurred. For this reason, it is vital to find new ways of getting access to justice for violation of rights, in particular violation of fundamental rights. Hence, it is necessary to carry out a comparative study on the jurisprudence and legal framework in other common law countries that are progressive and dynamic such as India, South Africa and Hong Kong.

This study aims to establish the need for a progressive jurisprudence, constitutional and legal framework on public interest litigation to provide wider access to justice. Based on a qualitative research method, it will examine the availability of the public law jurisprudence and legal framework of the progressive system in India, Hong Kong, South Africa and United Kingdom on access to justice. The role of the courts and the current jurisprudence applied by the countries mentioned will be examined to confirm that an active behavioral of the judiciary and legal framers are capable of providing an access to justice to the general public for public purposes. The outcome of the study is the creation of a proposed model on the jurisprudence and legal framework on the enforcement of public interest litigation in the new millennium.

2. Public interest litigation

2.1. Position in Malaysia

Public interest litigation has become an essential tool in protecting the public. Due to the flexible rules on standing this form of litigation has become a popular instrument to check upon unlawful or unconstitutional actions or arbitrary act of the authority. Such approach allows the public who is not a busy body and with no personal interest to a complaint against the authority against those actions. The flexible procedure provided under this litigation could equally provide and protect the basic human rights, constitutional as well as legal to all as required by the rule of law. Hence, public interest or social action litigation could be used as an influential platform to ensure that basic human rights to be meaningful, especially to the deprived and vulnerable sections of the community and to the public generally. The jurisprudence in this area is continuously developing so as to warrant the achievement on the great ideas of socio-economic justice and good environment for human living. Thus, the courts have to fashion new
methods and strategies for providing access to justice to a large section of the society which was deprived and vulnerable.

As far as the rule of standing in Malaysia is concerned prior to the case of Lim Kit Siang there was a liberal behavioral pattern of the judiciary. Nevertheless, the situation changed, and the jurisprudence has retreat from liberal to strict approach when the Supreme Court in Lim Kit Siang took a stringent test on the rule of standing. Post Lim Kit Siang discourages the development of public interest litigation and stopped the transformation of judicial activism with far reaching changes both in nature and form of the judicial process. As a result, the rule on standing in Malaysia is unclear. Even though under Order 53, rule 2(4) Rules of Courts provides that an adversely affected person has locus standi to apply for judicial more liberal threshold locus standi test was applied by the Court of Appeal in QSR Brands Bhd v Suruhanjaya Sekuriti & Anor. In this case, the Court of Appeal had referred to Gouriet v Union of Post Office Workers, where Lord Wilberforce said that in applications for prerogative writs in the environment more liberal or rigid interpretation, it all depends on the attitude of the court. Nevertheless, with different approaches taken by the Malaysian court on this matter before and after the decision of the Supreme Court in Lim Kit Siang, the test on locus standi in Malaysia has been confusing. A different scenario is found in India, UK, South Africa and Hong Kong.

2.2. Position in India

As far as Indian jurisdiction is concerned, the constitutional framers have shown a forceful behavior in drafting and implementing the Indian Constitution. Accordingly, the constitution is capable to be used as a channel to provide the legal basis to start public interest litigation. For example, Article 14 of its Constitution provides for equality and equal protection before the law while Articles 32 and 226 make available a flexible procedure for anyone to make a complaint on any breach of constitutional or legal rights or arbitrary act of the authority. These provisions together with the active actions of the judiciary offer a platform for the public-spirited citizen with no personal interest to file an action against the authority for any unlawful act or decision. Applying the principles under rule of law and also some relevant provisions of the Constitution, the Indian Courts are creative to allow public interest actions.

In People’s Union For Democratic Rights v Union of India, the Supreme Court had stressed the importance of public interest litigation. It was decided in this case that the public interest litigation was intended to bring justice within the reach of the poor, and its aim was to promote and vindicate the public interest, which demanded that violations of constitutional or legal rights of the poor, ignorant or economically-disadvantaged group should not go unnoticed and unredressed.

In Bandhua Mukti Morcha v Union of India it was held that the public interest litigation was a challenge, besides an opportunity to the authorities to make basic human rights meaningful to the deprive and vulnerable sections of the community apart from assuring them social and economic justice according to the law. Meanwhile, in Hussainara Khatoon (1) v Home Secretary a petition for habeas corpus was filed to the Supreme Court on behalf of some of those under trial who had undergone more than the maximum sentence period of imprisonment. It was held by the Supreme Court that keeping a large number of people behind bars without trial was not a reasonable, just and fair procedure according to Article 21. Besides, it was also a denial of human rights and withholding of basic freedom. The Court further held that since speedy trial was necessary in criminal cases, any delay of such rights amounted to denial of justice which was implicit under Article 21.

In Chaitanya Kumar v State of Karnataka social interest litigation was filed to challenge the grant of contract given to some persons on the ground that the executive action was arbitrary. It was ruled,
amongst others that if it was established that the executive was acting arbitrarily, the Court must set aside the contract.

The flexible attitude could also be seen in the decision of Mallappa Murigeppa Sajjan v Karnataka. In this case the governmental order suspending a tribunal constituted under the Karnataka Land Reforms Act was challenged by the members of the tribunal. Until further orders, the suspension prevented the members of the tribunal from functioning indefinitely. The Court stated that since the members were legally and validly appointed as members of the tribunal and being in the position of judges, they had a status. Thus, the order made by the government affected their status as members. Hence, the Court held that the members had locus standi to challenge the order.

With the liberal move, it encourages the public, having no personal gain or interest to approach the Court for the enforcement of the constitutional or legal rights of socially or economically-disadvantaged persons who on account of poverty or ignorance of their rights are unable to file a petition to the Court. Besides, case law also shows a growing number of cases filed against an arbitrary act or abuse of powers by the authority. Although the Indian Courts have recognised the departure from the strict rule of locus standi applied in a private action and broaden the rule on standing, no specific or precise definitions and tests on locus standi were formulated with regards to individual or group seeking judicial remedy in the public interest litigation.

According to Bakshi (2002), in defining the rule of locus standi no ‘rigid litmus test’ can be applied because the broad public interest litigation is still developing that leads to a rapid transformation of judicial activism with far reaching changes both in nature and form of the judicial process. This is in line with the statement made by Bhagwanti, J (as the learned Chief Justice as he then was):

“Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public-spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal rights have been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief.”

As far as the India legal system is concerned with the flexible behavioral attitude applied by the judiciary there is a remarkable development and dynamic progress in the public interest litigation in India. The continuous dynamic behavioral activism of the Supreme Court judgment helps develop jurisprudence in this area.

2.3. Position in United Kingdom

In United Kingdom the rule on standing has been flexible, i.e., an individual making an application for judicial review is to show that he has “sufficient interest in the matter to which his application relates.” Here, the term “sufficient interest” was given a wider meaning than those formulated in Boyce’s case. As a result, the liberal interpretation propounded by Lord Denning in his decisions prior to Gouriet’s case was restored.

In Reg. v Metropolitan Police Commissioner ex parte Blackburn, the applicant made an application requiring the Metropolitan Police Commissioner to take action against a widespread exhibition of pornographic materials. Although the application was dismissed on the ground that it was not for the applicant, nor the court to instruct the Commissioner to perform his duties, all the courts agreed that the applicant had locus standi as he had “sufficient interest in the matter to which the application relates” within the meaning of Order 53 r 3(5).
Meanwhile, in Inland Revenue Commissioner the issue raised was whether the association had sufficient interest to take an action against the Inland Revenue. It was held that the question of sufficiency of interest was no longer a threshold requirement under Order 53. It was further ruled that the question must be determined together with the legal and factual contexts, i.e., on the basis of the available evidence before the court. This was so because Order 53 r 3 (5) required “sufficient interest in the matter to which the application relates.” In this case, the Court said that it must consider the whole question of the statutory duties of revenue and the breach or failure of those duties of which the federation complained. However, even though the House of Lords agreed with the Court of Appeal that the Federation had the necessary locus standi, but judicial review was refused in this case. This was because in the present case giving of tax amnesty was not ultra vires or unlawful act by the Inland Revenue as it was part of its management and collection of taxes.

Even though the term “sufficient interest” still remained vague in this case as the Court did not provide a clear definition of it, the Court has changed its approach on the problem of locus standi, i.e., instead of being a threshold requirement, it is now one of the matters to be considered for the purpose of judicial review. Therefore, the above ruling brought about a behavioral change in legal policy to liberalise the law on standing in recent years. The change from the restrictive approach on locus standi to that of a liberal one was said to be the greatest achievement in the English administrative law.

Ever since the decision of the House of Lords in Inland Revenue Commissioner, the ruling on ‘sufficient interest’ is flexible for the purposes of judicial review. The condemnation of the House of Lords on the practice of treating standing as a preliminary issue has inclined the courts to decide adversely on the merits of the case, taking standing for granted, where this offers an easier route to the solution.

The relax behavior approach of the court could further be seen in the recent decisions of R v Inspectorate of Pollution, ex p Greenpeace Ltd (no. 2) and R v Foreign Secretary ex p World Development Movement. In the former, Greenpeace took an action on issues regarding pollution protection, while the latter was an action filed by the World Development Movement Ltd to challenge the grant given to build a power station on the Pergau dam in Malaysia which could not be given under the Overseas Development and Cooperation Act 1980. Locus standi was raised in both cases as the organisations in the relevant cases were raising matters of public interest, the former on pollution affecting public while the latter on the unlawful use of power by the government.

The above pronouncements illustrate that the English courts have adopted an active approach. The flexible behavioral allows the system to move forward towards a unified test on standing based on the sufficiency of interest. The courts too are willing to prevent technicalities from impeding judicial review to avoid public authority from committing illegalities and unlawful actions. The new approach put into practice helps develop public law jurisprudence on locus standi, which includes public interest litigation, to meet problems and challenges in the new millennium.

2.4. Position in South Africa

In South Africa, the South African Constitution 1997 made an express provision on locus standi on public interest litigation. According to section 38 of its Constitution anyone can take an action for public interest litigation if there is any allegation on infringement of fundamental rights by the authority. In addition, based on the wider principle of constitutional legality the South African Courts were able to broaden its scope of judicial control over the use of public powers. Consequently, all public powers are scrutinised, and rights of the people in South African could be better protected. This was illustrated in Groot broom case. It is also important to note that the imposition of positive duty on the State under Section 7(1) of the Constitution to respect, protect, promote and fulfill the rights of the people embodied
in Chapter 2 thereof also guarantees the rigorous enforcement of fundamental rights in South Africa and promotion of public interest litigation. The vigorous behavioral attitude of the South Africa constitutional framers the legal system was able to develop actively public interest litigation to allow an access to justice.

2.5. Position in Hong Kong

In Hong Kong the Basic Law provides standards to be observed, i.e., the Labour standard, Civil and Political standard and Social standard. These standards are to be considered when the court review powers of public authorities to determine the legality of administrative decisions. To assure that these standards are according to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economics, Social and Cultural Rights, and International Labour Conventions as applied to Hong Kong shall remained enforced (Article 39), and the relevant provisions are in the Hong Kong Bill of Rights (Cap. 383). With the kind of constitutional framework available the judiciary in Hong Kong is able to adopt a proactive behavioral approach in developing public interest litigation. This was demonstrated in Ng Ngau Chai v The Town Planning Board, Society for Protection of the Harbour and Clean Air Foundation Ltd v The Government of the HKSAR. With the energetic behavior applied Hong Kong is able to put into practice public interest litigation into its system.

3. Conclusion

The analysis and evaluation from India, United Kingdom, South Africa and Hong Kong illustrated the active behavioral attitude in moving public interest litigation in their legal systems. In so doing, their legal systems were capable of providing an access to justice to the general public for public purposes. Subsequently, these jurisdictions are capable to allow a positive development that imply the need of respect for all human rights in the development process, be it economic, social, cultural, civil or political. This strengthened the mechanism used in their legal systems to faced new challenges in the new millennium.

As far as the Malaysian jurisdiction is concerned, even though the decision in Lim Kit Siang is a retreat from the flexible rule of the law of standing and Order 53 rule 2(4) that did not define who is an “adversely-affected person”, there is still room for the development of public interest litigation here. This is possible if the Malaysian court choose an active and dynamic behavioral approach in interpreting the rule of standing provided under Order 53 rule 2(4) as suggested by the Court of Appeal in QSR. Besides, the court could use its creativity too to interpret some relevant provisions from the Malaysian Federal Constitution as the foundation to implicit standing in the public interest litigation cases, such as Article 5(1) and Article 8(1) read together with provision from paragraph 1 to the Schedule of Courts of Judicature Act. Hence, if the phrase “adversely-affected” or the relevant constitutional provisions and paragraph 1 powers are construed accordingly, there is room for public interest litigation in Malaysia. Besides, the constitution and legal framers should also make a paradigm shift of behavioral attitude towards an energetic constitutional and legal framework that is progressive on the enforcement of public interest litigation that is contemporaneous in the new millennium.

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