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Environmental Public Interest Litigation in Malaysia: The New Face

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ABSTRACT. Environmental issues gained popularity in these recent years not only at the international level but also on the local Malaysian platform. The awareness of the importance of conserving and preserving the environment keeps increasing since the world is now in an endangered environmental crisis. The clashes between the need for state development and preserving the environment especially faced by developing countries like ours, is a continuous and unsettled battle. Moreover, the victim, the environment, is a silent creature that has no place in the court of law to address its grievances. That is why public interest litigation is the hope for this silent victim. The public should be given the *locus standi* to address the environmental issues since the matter concerns the interest of the public at large, though not directly affected by the said development. Environmental public interest litigation is not a new subject. However, the development in Malaysia is not very encouraging and is considered the least explored area of public interest litigation since the decision of the Supreme Court in Government of Malaysia v Lim Kit Siang and United Engineers (M) Bhd v Lim Kit Siang [1988] 2 MLJ 12 also known as 'UEM case'. However, the new hope for the growth and development of environmental public interest litigation emerged after the Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145 decided by the Federal Court. It is crucial now for the judges sitting in the upper courts to exercise their judicial activism creatively and wisely. Employing doctrinal and analytical methods, this study aims to contribute to the growth of environmental public interest litigation discussion. Thus, it will also serve as a foundation for future research on environmental litigation.

Keywords: Public interest litigation, Environmental issues, locus standi, Fundamental rights, Judicial activism

INTRODUCTION

Public Interest Litigation (PIL) falls under public law, which governs the relationship between the citizens and the State. Public interest litigation is a court proceeding that affects the interest of the public or a class of the community. In the case of public interest litigation, 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. This motivation stems not from personal interest causing personal loss or property damage, like in the case of breach of contract but from a sense of public-spiritedness and ontological inclinations (Tan, 2004). Understanding the nature of public interest litigation, the rights to a healthy environment, for example, are not just matters of individual concern but affect a larger public community.

In developing countries like Malaysia, the need for development and preserving the environment always clashes. The decision of the ruling government to allow the massive development projects despite concerns that arose and were reported by the public-spirited individuals seems to give the idea that the government is untouchable and it is an

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entity above the law. Tort-law action to protect environmental cases is just like the act of gambling and causes greater uncertainty which will mostly benefit only the State (Squintani, 2018). Hence, public interest litigation is a powerful tool to control the government as well as to check and balance the use of that power. It is for the executive to realise that good governance is important, and their action may be questioned in a court of law.

In general, the majority Supreme Court's narrower and restrictive approach of *locus standi* in the UEM case in 1988 is still open to disapproval from many public-spirited legal practitioners and environmental activists. The Supreme Court's rigid approach to locus standing hindered the development of public interest litigation in Malaysia. The same rigid approach of *locus standi* by the Court of Appeal was adopted in Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors [1997] 4 CLJ 253. Both decisions of the apex court delivered a red flag to public-spirited individuals making them reluctant to pursue their cases in the court of law because they would be presumed mere busybodies who intervene in the power exercised by the government.

Despite many critics of these two leading cases, the authors believe the decision of the Supreme Court and Court of Appeal was decided based on the needs of development at that current time. The rules as regards standing to bring the claim into court are not governed by statutory enactments; it is the practice laid down by the judges in the public interest (Keong et al, 2016). Like other rules of practice, they are liable to be altered by the judges to suit the changing times. Moreover, environmental public interest litigation is a good law that should be in conformity with justice, equity, goodness, social development, and national condition that reflect people's will and interests (Lin, 2018). It is hoped that more environmental cases are presented before the court so that it will demand judicial creativity from the judges to give a new face to environmental public interest litigation.

METHODOLOGY

The author(s) employed a doctrinal and analytical methodology in this study while focusing on the data already available from various sources such as various legislations, journals, and available decided cases discussing the growth and the importance of public interest litigation in environmental issues.

RESULTS AND DISCUSSION

The Issue of *locus standi* in Public Interest Litigation

In general, *locus standi* refers to the right of an individual to bring the case to court (Thio, 1971). The issue of standing in public interest litigation is always the main problem as to why most environmental cases are turned down by judges. Generally, only an individual whose interest was infringed is entitled to bring the case to the attention of the court and seek any available remedies. However, this is not normally the case in environmental cases. In most cases, public-spirited litigants who are concerned with their rights as public or non-governmental organisations (NGOs) are the litigants in environmental cases. The nature of their claims is mainly to question and challenge the decision of the

government to allow development that will affect the healthy environment. This standing to sue is regarded as a direct barrier to equal justice for environmental advocates that greatly hinders the progression of environmental litigation (Bonine, 2021).

The landmark case on strict application and interpretation of locus standing in public litigation have been decided by the Supreme Court in Government of Malaysia v Lim Kit Siang, United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12. Lim Kit Siang, in his capacity as a member of Parliament, the then leader of the Opposition, taxpayer, motorist, and a frequent user of highways and roads in Malaysia, instituted proceedings against United Engineers (M) Berhad ('UEM'), the Minister of Finance, the Minister of Works and the Government of Malaysia ('the Government'). He sought a declaration that a letter of intent issued by the Government to UEM in respect of the North-South Highway was invalid. He also sought a permanent injunction to restrain UEM from signing the North-South Highway contract with the government. In response, all the defendants applied to strike out the action on the grounds that Lim Kit Siang did not have *locus standi* to institute the action. The court held that Lim Kit Siang had no locus standing to challenge the validity of an award of the tender to UEM by the government. He had no locus either as a politician, a road and highway user, or a taxpayer to bring the action as his private rights as a citizen were not affected over and above those of an ordinary road user. The decision in the UEM case showed that an individual only has *locus standi* to sue if he can prove that he has suffered special damage peculiar to himself.

Since most environmental cases in Malaysia are concerned with the decision of the government, an application for judicial review under Order 53, rule 2(4) Rules of Courts 2012 is the most frequently opted by litigants. Even though the Order provides that an adversely affected person has *locus standi* to apply for judicial review, the question to interpret who is an *"adversely affected"* person is always a problem. Moreover, bound by the *stare decisis* common law rule, lower court judges are inclined to follow the rigid and strict adherence of locus standing by the majority Supreme Court's decision in the UEM case.

It was not surprising when the Court of Appeal in Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors [1997] 4 CLJ 253, refused to declare that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 ('Amendment Order'), subsidiary legislation made under Environmental Quality Act 1974 ('EQA') which sought to exclude dams from this federal law was invalid. The respondents argued that 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 as no environmental impact assessment (EIA) report was presented to them. The argument was rejected by the Court of Appeal. The court held that the respondents lacked substantive *locus standi*, and the relief sought should have been denied because there was no special injury suffered by the respondents. Gopal Sri Ram JCA, in his judgment, divided *locus standi* in public law litigation into two, i.e., the initial or threshold locus standi and the substantive *locus standi*. The explanation of the principal differences between these two kinds of locus standi is as follows:

"Threshold locus standi refers to the right of a litigant to approach the court in relation to the facts which form the

substratum of his complaint. It is usually tested upon an application by the defendant to have the action struck out on the ground that the plaintiff, even if all that he alleges is true, cannot seek redress in the courts. Although a litigant may have threshold *locus standi* in the sense discussed, he may, for substantive reasons, be disentitled to declaratory relief. This, then, is substantive locus standi. The factors that go to a denial of substantive *locus standi* are so numerous and wide-ranging that it is inappropriate to attempt an effectual summary of them. Suffice to say that they range from the nature of the subject matter in respect of which curial intervention is sought to those settled principles on the basis of which a court refuses declaratory or injunctive relief….."

Although the respondents in Kajing Tubek case had been deprived of their life under Article 5(1) of the Federal Constitution, such deprivation was in accordance with the law, and the respondents, therefore, have not suffered any injury as to necessitate a remedy. It again shows that the judges strictly followed the rule of *locus standi*.

Hashim (2013), in her writing, opined that the rigid rule on *locus standi* and the unclear definition of *"adversely affected"* person under Order 53 rule 2(4) of the Rules of Court 2012 had discouraged the progressive move of PIL in Malaysia. This will defeat the real purpose of litigation - i.e., violations of legal or constitutional rights of poor, downtrodden, ignorant, socially, or economically disadvantaged persons should not go unredressed. The higher appellate courts need to reform the rigid rule of locus standing and opt for a more liberal approach for the sake of present and future generations (Maidin & Abdulkadir, 2012).

The Federal Court's decision in Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145 breathed a new life into and opened the door for public interest litigation in Malaysia. The Minister approved the 15% water tariffs increase application by Syarikat Bekalan Air Selangor (SYABAS). Concerned with the decision that will affect all water consumers in both Selangor and the Federal Territory, the Malaysian Trade Union Congress (MTUC) requested a copy of the water concession agreement and audit report that justifies the 15% increase in water tariffs in Selangor and the Federal Territory. The request for access to the documents was refused by the Minister. Unsatisfied with the refusal, MTUC applied for a judicial review application. The court, considering the legal and facts of the case decided the case as public interest litigation on the view that MTUC had shown real and genuine interest and was adversely affected by the Minister's decision to refuse access to documents. The court preferred and followed the Court of Appeal's single test of threshold *locus standi* in QSR Brands Bhd v Securities Commission [2006] 3 MLJ 164. YAA Hasan Lah Federal Court Judge delivered the judgment as follows:

"In our view, for an applicant to pass the 'adversely affected' test, the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage."

The courts, both local and foreign, have recognised the need for the law to remain relevant to achieve its objective. The English courts, over the years, had adopted a more liberal approach, especially in matters of public interest.

The Right to a Healthy Environment is Considered a Fundamental Right

Since the 1970s, the world has encountered massive industrial and economic development. Man realised this when nature was blatantly disturbed, and the quality of the environment conspicuously deteriorated for the sake of development. Since then, states have been making efforts to save it, and greater emphasis is being given to protecting the environment, the silent victim. From time to time, the idea that the environment is the common heritage of mankind is gaining strength, and the right to a healthy environment is gaining prominence. The right to a healthy environment is now considered a vital aspect of the right to life, for, without a healthy environment, it would not be possible to sustain an acceptable quality of life or even life itself (Ansari, 1998).

At the international level, Principle 1 of the Stockholm Declaration provides:

"Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."

The preamble of the Stockholm Declaration has also linked the enjoyment of a healthful environment with the right to life. In 2015, the concept of sustainable development was made known worldwide by the United Nations through the set-up of The Sustainable Development Goals or Global Goals. All states, big and small, rich and poor, developed and developing, in principle, have accepted the idea of sustainable development. Their constitutions provide the right to life as a fundamental right. India, for example, had put greater emphasis on the recognition of this right in its constitution. India has provided the right to a healthful environment as a separate fundamental right in its constitutions. Malaysia is one of the international players and should also take more proactive measures to give more emphasis on the right to a healthy environment.

As far as the Malaysian position is concerned, the right to a healthy environment is not explicitly provided and recognised in the Federal Constitution. This right, however, is implicitly recognised in the ambit of Article 5, which guarantees the right to life and liberty. Significant remarks were given by Gopal Sri Ram JCA in the Court of Appeal Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261:

"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… *It includes the right to live in a reasonably healthy and pollution-free environment.*"

The liberal and broad interpretation of Article 5 taken by Gopal Sri Ram JCA in Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 has been celebrated by public interest litigators and NGOs

whose main concern is to protect the environment. The current trend shows that this broad interpretation is now widely cited and referred to as an authority by the prosecution in many punitive environmental non-compliance cases. For example, in Public Prosecutor v Megatrax Plastic Industries Sdn Bhd [2021] MLJU 1817 and Public Prosecutor v Seri Ulu Langat Palm Oil Mill Sdn Bhd [2022] MLJU 1648 both concern offences under Environmental Quality (Industrial Effluent) Regulations 2009, Environmental Quality (Clean Air) Regulations 2014 and the Environmental Quality Act 1970 respectively.

It cannot be denied that the right to a healthy environment is now recognised globally through international agreements, constitutions, environmental legislation, and court decisions. Even in a country like Malaysia, where the constitution does not explicitly include the right to a healthy environment, courts have often ruled that this right is implicit in the right to life as per Article 5 of the Federal Constitution. Therefore, Malaysia is in needs to reconceptualise the right to a healthy environment not in an implied manner but must expressly be available in the document of destiny (Masum et al., 2021). In addition, the recognition of this constitutional provision will be a catalyst that will potentially create a catalytic effect that will help the existing environmental legal framework (Ling, 2013).

In Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors [1997] 4 CLJ 253, notwithstanding the findings of the Court of Appeal, the three respondents were affected by the Bakun Hydroelectric project. For many years, lack of standing to sue remains a fighting stance for environmental justice litigation and limited efficacy available under tort law and environmental statutes in remedying the harms done to environmental justice communities (Todd, 2020). It is, therefore, interesting to see how the court will next approach public interest litigation suits relating to environmental protection on the grounds that Article 5 of the Federal Constitution accorded the right to a healthy environment. The lawyers indeed play a pivotal role to advocate and propound this notion which is crucial to materialise the new face of environmental public interest litigation in Malaysia.

The Need for Judicial Activism for Promoting and Encouraging Environmental Public Interest Litigation

It is good to first understand the nature of judicial activism. Judicial activism can be understood as a creative judicial decision that breathes life into the law, a decision that involves inductive reasoning, that is positive and considers the social needs of the time whilst at the same time paying heed to the principles of justice and the legal and constitutional framework within which that decision is made (Yunus, 2012).

The judicial myth propounded by Lord Green as early as 1944 was that the function of the judiciary is only to interpret and enforce the law. The judiciary is not concerned with policy, and it is not for the judiciary to decide what is in the public interest. This judicial myth is not true because there will be occasions when judicial activism is very much needed. This includes whenever there is a need to propound a new principle of law or the need to depart from precedents to keep with the current and prevailing conditions and social values. These situations demand judicial creativity from the sitting judges to arrive at a just and fair decision. The author(s) supported the idea that the judiciary

does, on needy occasions, create a new law that will give a new face to public interest matters.

Therefore, total independence of the judiciary is the *sine qua non* to judicial activism. The government and legislature should not interfere with the judicial discretion and judicial independence practised by the judiciary as this will only hinder their creativity from interpreting the law. The sitting judges also need to be impartial and should follow their conscience ethically while hearing and deciding the public interest litigation rest before them. Moreover, environmental public interest litigation would normally question the validity of the government's decision. It is generally accepted today that judicial activism is a legitimate exercise of the judicial function. The contention that the Attorney General's Chambers would turn up and oppose the application for leave in most cases that involved public interest litigation had caused public interest litigation to suffer an early demise is not true. This was shown by the then Chief Judge of the High Court of Malaya at the Asian Legal Business Malaysia 2014 In-House Legal Summit, Yang Amat Arif (YAA) Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin in his own words (Makinudin, 2022):

"I would also like to highlight here the importance and the effect of the decision of the Federal Court delivered in the case of Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145. I am of the view this is a momentous decision as far as public interest litigation in this Country is concerned. The judgment of the Federal Court, in this case, clarifies precisely the distinction between threshold locus standi and substantive locus standi. It removes the obstacle that established a difficult standard for locus standi as laid down in the case of Government of Malaysia v Lim Kit Siang, United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12. Thus, the way is now cleared for public interest litigation to be taken up more liberally against any form of high-handed decisions of those in authority."

Tun Arifin bin Zakaria in his speech on the opening of the legal year 2017, also emphasised the environmental rule of law (Zakaria, 2017) significantly. He further emphasised that though the right to development has long been recognised internationally, the protection of the environment should also be equally and similarly recognised as part of human rights. In simple words, while all people have the right to pursue development and enjoy its benefits, that right is neither absolute nor unfettered. It is necessary to ensure that they do not cause significant damage to the environment. In short, development should be in harmony with the environment and cannot be pursued to substantially damage the environment. He also recommended and found it necessary for Malaysia to amend Article 5 of the Federal Constitution to expressly include a right to a clean and healthy environment, as found in numerous other modern constitutions.

This shows that the apex court judges exercised judicial creativity, taking into consideration the public interest involved in the case. More cases of environmental issues need to be addressed and initiated into the court of law so that the judges need to give greater emphasis on them. This will eventually demand judicial creativity from the judges to consider the legal issues and facts of the case within the ambit of public interest litigation. It is also important to understand that our judiciary is not only comprised of the judges who dispose of environmental cases. The door now welcomed environmental legal practitioners and counsels to advocate the need to relax *locus standi* and the right to

a healthy environment.

CONCLUSION

The narrow interpretation and strict application of standing and right to sue is a direct barrier to the development of environmental litigation, where public interest litigation and judicial review appear to be the common methods for the public to address environmental justice. The call to relax the right to sue, especially in environmental cases, in fact, is not new and certainly not one raised only by academic groups. Individuals from expert committees to ministers have all raised this clarion call in the past (Ling, 2013).

The authors believe that with the rapid development of the social field and technology and the increasing concerns surrounding the environment, now more than ever, environmental public interest litigation has become a crucial method to protect the environment. Given the positive and encouraging development of superior judges in exercising their judicial activism, Malaysia is now in the race with time to uphold environmental justice. The readiness by superior judges in accepting a more liberal approach of the right to sue in environmental cases and broad interpretation of the right to life to include also the right to a healthy environment are now more appealing to public-spirited citizens, environmentalists, and non-governmental organisations for addressing and accessing the justice. It is essential now for the environmental lawyers to advocate and persuade the judges to agree with the relaxation of *locus standi* and to give recognition to the right to a healthy environment as recognition given to the right of development.

Finally, quoting the Supreme Court of India in Malik Brothers v Narendra Dadhich AIR 1999 SC 3211:

"Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights, and vindicating public interest. The real purpose of entertaining such an application is the vindication of the rule of law, effective access to justice for the economically weaker class, and meaningful realisation of fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual."

Relaxing the strict interpretation of *locus standi* does not necessarily provide easy access to environmental justice. The other direct and indirect barriers, which are considered more exacting than the strict rule of *locus standi*, are the aspects relating to available remedies for environmental justice, evidence, costs, and related expenses, which can also be a barrier in environmental litigation. All these require the judiciary to adopt a liberal approach by appreciating that environmental litigation is specific and special in nature and, therefore, should not be subject to the draconian rule of the common law. Moreover, Malaysian courts should consider the steps taken by other jurisdictions, especially neighbouring states like India and the Philippines, in relaxing the right to sue for environmental cases and recognising the right to a healthy environment in their constitution.

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