

Liberalization of the Traditional Rule of Locus Standi in the United Kingdom and Malaysia: A Comparative Study

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Abstract

The classical and restrictive rule of *locus standi*, which is inherent in all legal systems, is aimed at to limit the access of the citizen to the court of law by insisting that only a 'person aggrieved' can maintain an action seeking remedy for the violation of the public or private rights so that wasteful challenges by busybodies can be excluded and limited judicial resources are not being misused. In the United Kingdom, Lord Denning MR in a series of epoch-making decisions in *Blackburn's cases*, given mainly in the early 1970s, broadened the ambit of access to justice by evolving the concept of 'sufficient interest' in place of 'aggrieved person'. The liberalizing approach to the rule of *locus standi* was ultimately approved in 1977 in a new Order 53 of the Supreme Court Rules by stipulating a common standing test of 'sufficient interest in the matter' to which the application for judicial review relates. This neo 'sufficient interest' test has received a more progressive interpretations by the superior courts of the United Kingdom to allow access to judicial review not only to a particular applicant for himself but also to three other types of applicants claiming surrogate, associational or citizen standing from the realization that the possibility of instituting such applications challenging the illegalities of the executive or a public authority will induce the authority concerned to act with greater responsibility which will have the effect of maintaining the rule of law and furthering the cause of justice. But in the common law country of Malaysia, the liberalization issue of *locus standi*, set in motion in early 1980s in the cases of *Lim Cho Hock*, *Mohamed bin Ismail* and *Tan Sri Haji Othman Saat*, was held back by the then Supreme Court of the country in 1988 in the *UEM case* maintaining restrictive approach towards *locus standi* in public law which is in somewhat out of tune with the change taken place in this regard in other jurisdictions notably in the United Kingdom. It was not kept in mind that the liberalization of the rules of standing over the years in various jurisdictions owes essentially to the creative and innovative interpretation of the few outstanding judges. Therefore, it has been proposed that the apex court of Malaysia should reconsider its conservative stance in an appropriate case for stretching the standing rule to enable a public spirited individual acting *bona fide* to institute an action for judicial redress of a public wrong or injury so that the executive or public authority can be kept on its toes and public laws are not violated with impunity.

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Introduction

The Latin term '*locus standi*', the expression which is used in the courts of the United Kingdom and applied under different name of 'standing' in the courts of the United States of America³, is often translated to standing to sue (*scilicet*) in a court of law. In essence, it is the right of an individual or a group of individuals as the applicant, plaintiff or appellant to institute a legal proceeding in a court of law for adjudication. Thus the question of standing "is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues"⁴ *i.e.* whether the litigants should be permitted to enter the court portals to bring an action for decision. The traditional and individualistic *locus standi*- the *laissez faire* approach in the judicial process originated from the old English decisions during an era when private law dominated the legal scene-insists that only a person who has individually suffered a specific legal injury can maintain an action for judicial redress. For, "remedies are correlative with rights"⁵. In 1880, the traditional view of *locus standi* found the first classical and strict exposition in the hands of James LJ of the Court of Appeal in *Ex parte Sidebotham*⁶ when he said that a person aggrieved must be a man who "has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, wrongfully refused him something or wrongfully affected his title to something".⁷ Thus the root principle of law joined to seek justice for redressing grievance before the courts, is *ubi jus ibi remedium*- where there is a grievance, there is a remedy-and, as such, only those whose own rights are at stake will have the necessary standing before the court. It is held that there are three standing requirements, namely injury (*i.e.* an actual or imminent invasion of a legally protected concrete and particularized interest), causation of injury (*i.e.* the nexus between the defendant's actions and the plaintiff's injuries) and redressability (*i.e.* the favourable court decision to redress the injury).⁸ In the words of Mauro Cappelletti, "The traditional doctrine of standing (*legitimatío* and *causam*) attributes the right to sue . . . to the private individual who 'holds' the right which is in need of judicial protection."⁹

Although standing questions arise in purely private law¹⁰ situations as an area of jurisprudence, it arises for study principally in the public law¹¹ domain and, as such, in public law in the UK has also traditionally contained a number of restrictive rules concerning *locus standi*. As it is stated that-

³ Justice George Seah in *Government of Malaysia v Lim Kit Siang*, [1988] 2 MLJ 12, at page 44.

⁴ *Warth v Seldin*, [1975] 422 US 490, at page 498.

⁵ William Wade and Christopher Forsyth, *Administrative Law*, Ninth Edition (Oxford, 1994), at page 679.

⁶ [1880] LR 14 Ch. D 458.

⁷ *Ibid.* at page 465.

⁸ *Lujan v Defenders of Wildlife*, [1992] 504 US 555.

⁹ Mauro Cappelletti and Bryant Garth (ed.), *Access to Justice, Vol. III, Emerging Issues and Perspectives* (Sijthoff & Noordhoff, 1979) page 520.

¹⁰ Private law means the law which regulates men's dealing with their fellow men as private citizens.

¹¹ Public law means the law which regulates the exercise of government *e.g.* constitutional law, administrative law and criminal law.

public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in assertion of public right.¹²

But it has been held in 1903 by Justice Buckley in *Boyce v Paddington Borough Council*¹³ that-

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with ... and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.¹⁴

In the absence of such a *locus standi* a person may commence a proceeding for enforcing the public right only after obtaining the consent of the Attorney General- the law officer of the government and the guardian of public interest. In such a proceeding, the Attorney-General stands behind the real individual instituting the proceeding and the individual concerned is required to bear the costs. The proceeding is called a relator action as it is brought at the relation of the Attorney General who becomes the plaintiff.

But if the Attorney-General, who always has standing to enforce the public law as representative of the Crown in its *parens patriae* role, declines to give his consent to a relator action or if he does not take action against a public authority who commits a wrong to the public in general and if no citizen has standing to call the certain abuse of power into account, then the public authorities can regard the law with impunity- a result which would, to use the words of Justice Webster 'make an ass of the law'¹⁵, there would be a serious gap in the system of public law. The issuing of various kinds of prerogative orders- *mandamus*, *certiorari* and prohibition which exist for public as well private purpose and provide the nucleus of a system of public law remedies-were hedged in by strict conditions differing from one writ to another and which, to quote the words of Lord Atkin as said in *United Australia Ltd. V Barclays Bank Ltd.*¹⁶, often "stand in the path of justice clanking their medieval chains."¹⁷ For, the "rules for the prerogative remedies.... were tightened in an illogical way by making them stricter for *mandamus* than for *certiorari* and prohibition."¹⁸

¹² Lord Wilberforce in the case of *Gouriet v Union of Post Office Workers*, [1978] AC 435 at page 477.

¹³ [1903] 1 Ch 109.

¹⁴ *Ibid.*

¹⁵ *Steeple v Derbyshire CC* [1985] 1 WLR 256 at page 296.

¹⁶ [1941] AC 1.

¹⁷ *Ibid.*

¹⁸ William Wade, *supra* note 3, at page 680.

Thus the traditional restrictive rules concerning *locus standi* are that private rights can only be asserted by individuals who are personally aggrieved but for the violation of public rights it is only the Attorney-General himself, moving either *suo motu* or by the grant of a fiat for a relator action (although the Attorney-General never lent his name where the proceedings were against a minister or government department), has the right to bring an action.

The British rule in Malaysia until 1 August 1957 also passed on to Malaysia a colonial legal heritage and the Anglo-Saxon model of adjudication founded upon observance of procedural technicalities such as *locus standi* laid down by the courts of law (prior to the enactment of Order 53 of the Rules of the Supreme Court in 1977 and Section 31 of the Supreme Court Act, 1981) and adherence to adversarial system of litigation. In the words of Lord President Salleh Abas 'the rules as to *locus standi* applicable in Malaysia is that accepted in England before the enactment of Order 53 of the English Rules of the Supreme Court....there is no justification to depart from the rule of *locus standi* accepted by the highest court in England prior to Order 53'¹⁹ (the rule is as stated by Justice Buckley in the case of *Boyce*²⁰ and accepted by the House of Lords in the *Gouriet's case*.²¹ It seems that the basis of these observations of Lord President Salleh Abas is section 3 of the Civil Law Act, 1956 which provides that so long as other provision has not been made or may hereafter be made, the courts in Malaysia shall apply the common law and rules of equity as administered in England on 7 April 1956. Thus there are two fundamental rules of *locus standi* in Malaysia. First, the plaintiff, applicant, and appellant in order to acquire *locus standi*, has to establish infringement of a private right (i.e. legal interest). Secondly, public rights can only be enforced moving *suo moto* by the Attorney-General as representing the public. But where the private plaintiff relies on an interest in the enforcement of a public right, standing will be denied unless the Attorney-General consents to relator action or the plaintiff can demonstrate some special interest beyond that possessed by the public generally.

However, in case of private law, the restrictive rule of *locus standi* can be applied with some strictness but that cannot be applied with the same strictness in case of public law. For, restrictive rules regarding standing may in general prove inimical to a healthy system of public law. If a person having a good cause is told off at the gates because of not having personal grievance that would be tantamount to ignore public good for which the state exists and the executive would be left free to violate the law. The 19th century insensitive rule of *locus standi* in public law started losing its rigidity to meet the demands of the time in the latter half of the 20th century in the United Kingdom, first with the change of the attitude of the courts in a series of cases (i.e. four successive *Blackburn's cases*), and then in the formalization of the spirit of these decisions in 1977 in a new Order 53 of the Supreme Court Rules. But the apex Federal Court of Malaysia

¹⁹ [1988] 2 MLJ 12.

²⁰ *Supra* note 1.

²¹ *Supra* note 12.

has eventually taken consciously a conservative stance on the issue of the liberalization of the rule of *locus standi* in the arena of public law which tantamount not only to abdicate of judicial authority of arbitering legalities and illegalities but also to allow the executive or public authority to act with impunity.

Nevertheless, the objectives of this paper are to show how the British traditional rules of *locus standi* have been liberalized from the late 1970s and the Malaysian Courts have not responded to the trend of liberalization of the rules of *locus standi* set in the UK. On the basis of this comparative study, arguments would be put forward to liberalize the rule of *locus standi* in Malaysia to advance the cause of justice in the public law arena and strengthen the rule of law. But at the outset the justification of the *locus standi* rules and opposition to the liberalization of the standing rules, on the ground of flooding the court with the litigations, would be dealt with.

Justification for the Traditional Rule of *Locus Standi*

It seems that the traditional restrictive rule of *locus standi*, which is an essential outgrowth of Anglo-Saxon jurisprudence, has been designed to serve the following four objectives:

In the first place, it is devised to act as a procedural barrier so that only the person who is wrongly deprived of his right, the main actor having a genuine grievance and legitimate interest, can initiate judicial proceedings for obtaining redress against the wrong-doer. The basis of a person's coming to the court for the enforcement of his private rights has aptly been observed in 1977 by Lord Edmund Davies in the case of *Gouriet v Union of Post Office Workers*²² thus: 'It has long been established that no citizen can of his own initiative sue in our courts on his own behalf save to assert and protect his private rights or to repel a right asserted against him by another.'²³

Secondly, *locus standi* is a built-in mechanism in every legal system to prevent the abuse of its judicial process by the busy-bodies (who interfere in things which do not concern them), cranks and other mischief-makers with a view to gain cheap popularity and publicity through instituting multiple frivolous and vexatious litigations thereby wasting court's time and misspend of limited judicial funds. Consequently, the *locus standi* rule provides "access screening" by weeding out those actions which are deemed insignificant enough to decide that reduces the demand on judicial services by dissuading the bringing of actions of a similar nature. Thus the courts are protected from the imposition of an undue burden and aggravation of delay in judicial decision-making.

Thirdly, since speedy implementation of policies, designed for the common good, is not to be impeded or delayed by squandering challenges, the rule of standing serves the purpose of protecting public bodies from wasteful litigation. As a result, they can act

²² [1977] 3 All ER 70, [1978] AC 435.

²³ *Ibid.*

without the threat of constant challenges to their decisions at the whim of any individual or group in the society which disagrees with those decisions.

Fourth and finally, the standing rule relates to standing as a function of the adversary procedure, where there is a *lis* between the two contending parties (to a civil suit) in which each party involving in the 'mimic battle' produces his own evidence tested by cross examination by the other side and the judge sits like an umpire and decides the case only on the basis of such materials produced before him by both the parties. Self-interest is considered as the motivating force for ensuring diligent preparation and best possible presentation of respective positions. As it was held by the Supreme Court of the United States in the case of *Baker v Carr*²⁴ that 'concrete adverseness... sharpens the presentation issues upon which courts so largely depend.'²⁵ Chief Justice (Malaya) Abdul Hamid in *United Engineers (M) Berhad v Lim Kit Siang*²⁶ also observed that "If the motivation of self interest is non-existent so that the ensuing dispute is not with respect to contested rights and obligations of the parties themselves, then the assurance of diligent preparation and argument cannot exist."²⁷

Ground of Opposing the Liberalization of the Rule of *Locus Standi*

It is apprehended that if the door of the court is kept wide open by liberalizing the rule of *locus standi* for any member of the public or any association to enter its portals to enforce public duty or to vindicate public interest, the court will be flooded with unimportant and pointless litigation by the busybodies and cranks. As back in 1699, it was observed in *Iveson v Moore*²⁸ that 'if one may have an action, for the same reason a hundred thousand may'²⁹ and the courts would be flooded with claims. In 1911, fear was also expressed in *Dyson v Attorney-General*³⁰ that liberalizing the rule of *locus standi* would open the floodgates to litigation.

It is true that sometimes the politicians and others, having failed to achieve their objectives through the political and the administrative processes, may try to abuse the process of the court to further their aims or to delay legitimate administrative action. But, in general, the litigants are unlikely to spend their time and money unless they have some real interest at stake.³¹ In the rare cases, an ordinary person acting *pro bono publico* may incur expenses out of his own pocket for going to a lawyer and preparing a regular writ petition for being filed in the court. The considerable personal expenditure, time and other inconveniences (like meeting lawyer and attending courts) involve in litigating

²⁴ [1961] 369 US 186.

²⁵ *Ibid.*, at page 284.

²⁶ [1988] 2 MLJ 12.

²⁷ *Ibid.*, at page 27.

²⁸ [1699] 1 Ld Raym 486.

²⁹ *Ibid.*

³⁰ [1911] 4 KB 110.

³¹ Bernard Schwartz and H. W. R. Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Oxford, 1972) page 291/354.

a case act, in most cases, as deterrents to take recourse to a legal action. 'Misery is the companion of the law suit.' (Rabelais). Thus it may be a rare incident that a citizen will take up the peoples' causes at his own expense. In this context, it may be mentioned that there are certain constitutions³² which contain the expression 'any person' instead of 'any aggrieved person' as to apply for a writ of *habeas corpus* or a writ of *quo-warranto*, but there is no evidence that this has let loose the floodgates of litigation in those domains. The fear of a spate of actions, brought by busybodies posing as public spirited persons, has been nailed by various authorities. For example, K. E. Scott in 1973 maintained that 'The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the court room.'³³ Although over recent years successive decisions of the United States' Supreme Court have liberalised standing rule so as to afford a hearing to any person with a real interest in the relevant controversy, it has been found that there has been no flood³⁴.

Thus, it is evident that the liberalization of the traditional rule of *locus standi* will not result in any significant increase in the number of litigation and, as such, there is no need to 'be scared by the fear that all and sundry will be litigation-happy and waste their time and money and the time of the court through false and frivolous cases.'³⁵ In the rare cases, a generous and public-minded citizen may take resort to the legal proceeding or wish to sue merely out of public spirit. It is needless to say that the courts are adequately protected against overzealous litigants insofar as they retain their discretion whether to exercise the power of judicial review or not.

Liberalization of the Traditional Rule of *Locus Standi* in Public Law in the United Kingdom

Trend of Liberalization Set by Lord Denning

It was Lord Denning, the Master of the Rolls of the Court of Appeal, who set the ball of liberalizing the rules of *locus standi* rolling in the late 1960s and early 1970s. He sowed the seed of liberalization with *obiter dicta* in *Reg v Metropolitan Police Commissioner ex parte Blackburn*³⁶ (1968), *Blackburn v Attorney-General*³⁷ (1971) and *Attorney-General (on the relation of Mcwhirter) v Independent Broadcasting Authority*³⁸ (going straight to the crux of the complaints of the applicants by simply passing over the requirements of *locus standing*) which germinated into a *ratio decidendi* in 1976 in the case of *Reg v*

³² Article 102 (2) (b), the 1972 Constitution of Bangladesh, Article 199, the 1973 Constitution of Pakistan.

³³ K. E. Scott, 'Standing in the Supreme Court: A Functional Analysis', (1973) 86 *Harvard Law Review* 645 at pages 673-74

³⁴ Sax and O'Connor, "Michigan Environmental Protection Act of 1970: A Progress Report" (1972) 70 *Mich. L. Rev.* page 1003.

³⁵ Justice Krishna Iyer in *Fertilizer Corporation Kamgar Union (Regd.) v Union of India*, AIR 1981 SC 344 at page 585.

³⁶ [1968] 2 WLR 893; [1968] QB 629.

³⁷ [1971] 1 WLR 1037.

³⁸ [1973] QB 629 (C.A.); [1973] 1 All ER 689.

Greater London Council, ex parte Blackburn & another.³⁹ In *Reg v Metropolitan Police Commissioner exp. Blackburn*⁴⁰, in which Raymond Blackburn applied in 1968 for a *mandamus* to compel the Commissioner of Police to enforce the law against gaming clubs and pornography, the plaintiff was allowed to sue and was heard even though he himself was not affected other than his particular concern as a citizen with thousands of others that the Commissioner of Police was not doing his legal duty to enforce the law concerned. For, the Attorney-General did not apply for *mandamus* and would not have given Blackburn leave to use his name only to able the Commissioner to defy the law with impunity. Three years later, in 1971, Blackburn again challenged, in *Blackburn v Attorney-General*⁴¹, the legality of the British Government's proposed entry into the European Common Market on the ground that it would compromise Britain's parliamentary supremacy. Although it was held, solely on merit, that the Court of Appeal could not impugn the treaty-making power of the Crown, Lord Denning M. R. expressed an *obiter dictum* observing that he would not rule Blackburn's action for declaration out on the ground that he had no standing. The next case in which Lord Denning expressed an *obiter is Attorney-General (on the relation of McWhiter) v Independent Broadcasting Authority*⁴² in which McWhiter sought an injunction against the Broadcasting Authority restraining it from showing a film which did not comply with the statutory requirements. Although the duty sought to be enforced against the Broadcasting Authority owed to the general public and not to any specific individual or class or group of individuals, Lord Denning held that McWhiter had sufficient interest to bring the action since he had a television set for which he paid licence fee and susceptibility would be offended, like that of many others watching television, if the film was shown in breach of the statutory requirements on the ground that:

... as a matter of high constitutional principle ... if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort any one of these offended or injured can draw it to the attention of the courts of law and seek to have the law enforced.⁴³

He further held that:

in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has sufficient interest, can himself apply to the court itself... for a declaration and, in a proper case, for an injunction... [as] a most important safeguard for the ordinary citizens... [to] see that those great powers and influences are exercised in accordance with law.⁴⁴

³⁹ [1976] 1 WLR 550.

⁴⁰ *Supra* note 35.

⁴¹ *Supra* note 36.

⁴² *Supra* note 37.

⁴³ *Ibid.*, at page 649.

⁴⁴ *Ibid.*

The aforesaid public-spirited Blackburn and his wife in 1976 filed another case before the Court, *Reg v Greater London Council ex parte Blackburn and another (Mrs. Blackburn)*⁴⁵, for a prerogative order of prohibition preventing the Greater London Council from licensing indecent films by applying an unduly indulgent test of obscenity. Lord Denning MR held that Blackburn and his wife had sufficient interest to bring the action as he was an inhabitant of London; his wife was a rent-payer and both as parents of children likely to be harmed by the exhibition of pornographic films.⁴⁶

Therefore, it appears that Lord Denning MR, taking into account the facts that all citizens have an interest in securing that the government or the public authority does not act in an unlawful manner, and its illegal actions do not go unchallenged in the interest of strengthening the rule of law and advancing the cause of justice, accorded standing to a public spirited citizen, Blackburn, to challenge certain actions in the public domain without inquiring in to his injury, but only to his sufficient interest regarding the matter. Thus his approach resembles the "*actio popularis*" of the Roman law which allowed any person to institute an action where there was a violation of a public law.

Holding the Trend of the Liberalization of the Rule of *Locus Standi* Back

This trend of liberalizing the rule of *locus standi* set by Lord Denning MR of the Court of Appeal was held back in 1977 by the House of Lords in *Gouriet's case*⁴⁷ when Lord Denning's decision in the Court of Appeal- that if the Attorney General "does not give his consent, then any citizen of the land- any one of the public at large who is adversely affected- can come to this court and ask that the law be enforced."⁴⁸ was reversed and the House of Lords held that the Attorney General's refusal to give his consent to a relator action was not reviewable by the courts and without such consent, no member of the public could maintain any action. The majority held that either the plaintiff's rights must be at stake, or, if the matter does not concern private rights, the plaintiff must suffer or be about to suffer special damages peculiar to him.

Thus the Gouriets's case restored the law on *locus standi* to what had formerly been stated by Buckley J in Boyce's case⁴⁹ arresting the new trend of liberalizing the rule of *locus standi* set by Lord Denning in the aforesaid four cases decided between 1968 and 1976. After the reversal of his decision by the House of Lords, Lord Denning wrote:

I must confess that whenever an ordinary citizen comes to the Court of Appeal and complains that this or that Government Department- or this or that local authority-or this or that trade union- is abusing or misusing its power- I always like to hear what he has to say.⁵⁰

⁴⁵ [1976] 1 WLR 550.

⁴⁶ *Ibid.*, at pages 558- 559.

⁴⁷ *Supra* note 20

⁴⁸ *Ibid.*, at page 719.

⁴⁹ *Supra* note 11.

⁵⁰ Lord Denning, *The Discipline of Law* (Oxford, 1979), at page 144.

Admittedly, he was influenced by the words of T. P. Curran of the Middle Temple, who as back as in 1790, had said that-

The ordinary citizen who comes to the court... is usually the vigilant one... when he has a point which affects the rights and liberties of all the citizens, then I would hope that he would be heard: for there is no other person or body to whom he can appeal.⁵¹

It is contended that both the Court of Appeal and the House of Lords failed to recognize the distinction between private law and public law. For, they did not keep in mind that the defendant trade union in taking decision to instruct its members not to handle mail from England to South Africa was not exercising any governmental powers; it was acting as a private citizen and, as such, could only be sued in a civil action under private law. It was not amenable to any remedy in public law.⁵² Judicial review is indeed available only in public law as a remedy for the conduct of a public officer, executive or person exercising statutory or governmental power which is *ultra vires*, void or unlawful.

Restoration of the Liberalization Trend of the Rule of *Locus Standi* in 1977 Under a New Order 53 of the Supreme Court Rules

About six months after the pronouncement of the House of Lords' decision in the *Gouriet's case*⁵³, the liberalizing approach to the rule of *locus standi*, argued and pressed for by Lord Denning MR, was finally recognized in 1977 through the introduction of an amendment in the (UK) Rules of the Supreme Court, 1965 with a new Order 53, on the recommendation of the Law Commission made in its Report on Remedies in Administrative Law, 1976.⁵⁴ This Order 53 of the Supreme Court Rules, (nowadays the Civil Procedure Rules, 1998, Part 5), which came into force on 11 January 1978, provides for a new standard single form of proceeding by way of an application for judicial review in which the public law remedies of *mandamus*, *certiorari* and prohibition and private law remedies of injunction and declaration are made available. The court has also been empowered to give the appropriate relief according to the circumstance of the case by way any of the private and public law remedies.⁵⁵ It provides for the standardization of the different requirements of standing for the various remedies by stipulating a common standing test of 'sufficient interest in the matter' to which the application for judicial review relates⁵⁶ i.e. standing is to be related to the facts of the case, not to the previous practice of relating to the particular remedy sought. This term 'sufficient interest, which replaced the old judicially created rule of 'aggrieved person' and later received a statutory

⁵¹ Quoted in *ibid.*

⁵² Lord Diplock and Lord Wilberforce in *Inland Revenue Commissioners v National Federation of Self-Employed* [1982] AC 617 at page 639.

⁵³ *Supra* note 20.

⁵⁴ Law Com. No. 73 Commd. 6407 (1976).

⁵⁵ Rules 1 & 2, the Supreme Court Rules, 1977.

⁵⁶ Rule 3(5), *ibid.*

support through the incorporation into the Supreme Court Act, 1981,⁵⁷ owed its origin to an interlocutory observation made by the court in *R v Cotham*⁵⁸ and to its use by Justice Avory in his judgment in *Ex parte Stott*⁵⁹ embracing all kinds of phrases, 'a party', 'a person aggrieved', 'a person with a particular grievance' etc.

Thus with the introduction of the new procedure, the former different restrictive rules as to the *locus standi* of the applicant, which used to complicate the subject of remedies, have virtually been abolished, and, as such, the rule of standing has been rationalized and simplified by introducing not merely a standard procedure for all public law remedies but also a common standing test of sufficient interest i.e. some genuine interest greater than that of the public at large. Furthermore, relator action ceases to have much meaning as the private citizens need not have to proceed by way of relator action making the Attorney General as the dominant complainant (i.e., he can proceed without enlisting the aid of the Attorney-General) to challenge the legality of an administrative or executive decision provided he can show a good case. Therefore, it appears that all the changes introduced by the Order 53 are far-reaching and decisive.

Judicial Interpretation of the Common Standing Test of Sufficient Interest

The new rule of *locus standi*, requiring sufficient interest to be made out as a requirement for judicial review, was first interpreted in the landmark case of *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd.*⁶⁰ (popularly known as Fleet Street Casual Workers' case) by the House of Lords in 1982. The testing of an applicant's standing in this case was made a two-stage process, namely, the leave stage and the merits stage.⁶¹

In the leave stage (i.e., the first stage), an applicant must apply *ex parte* for leave to file an originating motion seeking judicial review in which he is required to show an interest sufficient in law to justify further proceedings by a Divisional Court of the Queen's Bench Division. In other words, an applicant will be given leave to apply for judicial review if he can show that he has a *prima facie* case (i.e. an arguable case). According to Lord Diplock, the 'whole purpose' of the leave requirement was to filter out hopeless cases.⁶² In a similar manner, Lord Scarman held that the leave requirement was a matter for judicial discretion and was designed solely filter out hopeless cases or cases brought by 'busybodies'⁶³, cranks and other mischief makers having no interest

⁵⁷ Section 31(3), the Supreme Court Act, 1981 provides for the test of 'sufficient interest in the matter.'

⁵⁸ [1898] 1 QB 802, at page 804.

⁵⁹ [1916] 1 KB 7.

⁶⁰ [1982] AC 617; [1981] 2 ALL ER 93.

⁶¹ *Ibid.*, at page 630C (Lord Wilberforce), page 642E (Lord Diplock), page 645E (Lord Fraser).

⁶² *Ibid.*, at page 643.

⁶³ *Ibid.*, at page 653.

in the matter so that the process of the court could not be abused. Thus it is the leave stage which provides the necessary filter against inundation and wasteful claims or those which would be detrimental to the administration or cause substantive hardship. It performs almost the identical function of preventing an abuse of the judicial process. Lord Diplock commented on the leave stage thus:

If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.⁶⁴

In the second-stage, when the matter comes to be argued, i.e. at the full hearing before the Divisional Court, pursuant to leave having been granted *ex parte* for judicial review, the applicant is required to show that he has a meritorious claim upon evidence of the alleged substantive breach of statutory duty or grave illegality or abuse or grossly improper behaviour of the government or a public authority. It will always remain open for a respondent to contest and assail the *bona fide* or even the appropriateness of the claim of the applicant for seeking the relief. Both Lord Wilberforce and Lord Roskill emphasized (with whom Lord Fraser agreed) the need in most cases to proceed to a hearing on the merits before the question of standing could be examined.⁶⁵ If the applicant can show a strong case on the merits, the court will strive to accord *locus standi*. In other words, the provisional finding of sufficient interest is subject to revisal on the *inter partes* hearing where the court's approach is more searching than that of the *ex parte* stage of leave and it will always remain open for a prospective respondent to contest the claim of sufficient interest on facts and also to assail the *bona fide* or even the appropriateness in a particular case of the applicant seeking relief.

Thus *locus standi*, instead of being a threshold, has now become one of the matters to be taken into consideration for the exercise of judicial review i.e. the issue of *locus standi* would be fully decided at the hearing of the substantive application itself by taking into account the entire legal and factual context of the case. Thus the majority view is that merits are also inextricably linked to standing.

It should be stressed here that it is difficult to agree with the above majority view of the House of Lords to link the question of standing with the merits of the case and "develop a fact-based method of assessing *locus standi*, at the second stage, necessitating close attention to evidence and merits."⁶⁶ For, Order 53 of the Supreme Court Rules docs

⁶⁴ *Ibid.*, at page 644 A-B.

⁶⁵ *Ibid.*, at page 633 (Lord Wilberforce) and at page 662 (Lord Roskill)

⁶⁶ Richard Gordon, *Judicial Review: Law and Procedure*, (London, 1996) at page 75.

not speak of rules *nisi* or absolute; it only speaks of sufficient interest to be decided at the *ex parte* first stage. As rule 3(7) of Order 53 provides that "The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates." Therefore, one may tend to agree with the minority view of Lord Fraser who observed that sufficient interest should be logically anterior to discussion of the merits.⁶⁷ In this context, the observations of Wade are worth-quoting: "The novel aspect of the second-stage test... is that it does not appear to be a test of standing but rather a test of the merits of the complaint."⁶⁸ It is noticeable that the separate issues of *locus standi* and merits have been fused by the majority decision of the House of Lords and 'the reasoning process becomes indistinct'.

However, it is to be mentioned that Lord Diplock spoke of 'a virtual abandonment of the former restrictive rules as to the *locus standi*'⁶⁹ of persons seeking prerogative orders against authorities exercising governmental powers. He approved of Lord Denning's 'high constitutional principle', as observed in *Ex parte Blackburn*⁷⁰, for cases involving 'a government or a public authority's violation of the law'⁷¹ and expressed the same point in his own words thus:

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, 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.... the.... officers or departments of central government.... are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.⁷²

Therefore, it appears that the restrictive rules as to the *locus standi* have greatly been liberalized for the vindication of the rule of law and in requiring government to observe its own laws.

Approach of the British Courts to *Locus Standi* After the Inland Revenue Commissioner's Case

In general, the decisions of the British courts, subsequent to the Inland Revenue Commissioner's case,⁷³ reflect a liberal view as to the issue of *locus standi* on an application for judicial review. As in *R v H. M. Treasury, ex parte Smedley*⁷⁴, (ended at the level of the Court of Appeal only), in which Smedley as a taxpayer challenged the British Government's proposal to pay a large sum of money- in excess of 120 million

⁶⁷ *Supra* note 59, at page 645C.

⁶⁸ William Wade, *supra* note 3, at pages 692-693.

⁶⁹ *Supra* note 59, at 640C.

⁷⁰ *Supra* note 36.

⁷¹ *Ibid.*, at page 649.

⁷² *Supra* note 59, at page 644.

⁷³ *Supra* note 59.

⁷⁴ [1985] 1 ALL ER 589.

pounds- to subsidise the European Economic Communities' budget by means of an Order-in-Council, to be approved by both Houses of Parliament, without seeking an Appropriation Act (the applicant contended that an Act of Parliament should be passed instead), it was held by L. J. Slade of the Court of Appeal that the applicant 'only in his capacity as a taxpayer, has sufficient *locus standi* to raise this question by way of an application for judicial review; on the present state of the authorities, I cannot think that any such right of challenge belongs to the Attorney-General alone.'⁷⁵ But the remedies sought, by way of certiorari and declaration, were refused on merits as the matter challenged of was not within the jurisdiction of the court; it was a matter for Parliament to decide. Nevertheless, it is noticeable that a private citizen was accorded *locus standi* to challenge the legality of the executive's decision without enlisting the support of the Attorney-General.

It should be stressed here that judicial approach to *locus standi* is sometimes more deeply coloured by the perceived importance of the issue of public policy raised than the sufficiency of the interest of the applicant. Public interest considerations may readily tip the scales in the applicant's favour.

As in *Gillick v. West Norfolk and Wisbech Area Health Authority*⁷⁶, the House of Lords allowed a mother of five daughters under the age of sixteen to sue the Department of Health and Social Security for a declaration that contraceptive advice to be given to her daughters without her knowledge, as proposed in Departmental circular on family planning services, would infringe her rights as a parent, even though no such advice had been given and she was in no different position from any other similar parent.⁷⁷ It is evident that since the plaintiff's standing was not self-evident, the court found itself adjudicating the public policy question of whether under age teenagers should receive contraceptives.

Similarly, in *Reg v Felixstowe Justices, ex parte Leigh and Another*⁷⁸, it was held that a journalist or possibly the press through him, as a guardian of the public interest in open justice, had a sufficient interest to give him *locus standi* to apply for a declaration that the justices hearing the case were not entitled to withhold their names for security reasons as a matter of policy.

In 1994, in *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg*⁷⁹, in an application for certiorari, prohibition and a declaration that any purported ratification of the Treaty on European Union would be unlawful, *locus standi*

⁷⁵ *Ibid.*, at page 595.

⁷⁶ [1986] AC 112.

⁷⁷ *Ibid.*

⁷⁸ [1987] 1 QB 582.

⁷⁹ [1994] 4 All ER 329.

was also given by LJ Lloyd of the Divisional Court on the basis of the applicant's sincere concern for constitutional issues.

Sometimes a pressure group, like an association or federation, has been allowed to bring proceedings for the protection of interests which are germane to the organisation's purpose (i.e. to persuade government to promote its particular interest or to refrain from the conduct which would jeopardise that interest).

As in *R v Swale BC ex parte the Royal Society for the Protection of Birds*⁸⁰, a conservation society was given standing to challenge the decision to planning permission for the development of an environmentally sensitive area.

Similarly, in *R v Inspectorate of Pollution ex parte Greenpeace No. 2*⁸¹, standing was given to the Greenpeace International, having consultative status with the UNESCO and the aim to protect natural environment, to challenge an official decision to vary authorisations for the discharge of radioactive waste from its Sellafield plant in part on the grounds that it did have particular experience in environmental matters and access to experts in the relevant realms of science and technology, would be able to "mount a carefully selected, focused, relevant and well-argued challenge." The other ground of according *locus standi* was that if standing was denied, the persons whom Greenpeace represented might not have an effective way to bring issues before the court. However, the application failed on merits.

In *R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd*⁸², Lord Justice Rose granted standing to the World Development Movement, a credible pressure group having consultative status with the UNESCO and objective to ensure that the funds furnished by the United Kingdom were used for genuine purposes and to ensure that the disbursement of the British aid budgets was allocated where aid was needed most, to challenge the two decision of the Secretary of State for Foreign Affairs in relation to the granting fund of 316 million pounds as aid under the Overseas Development and Cooperation Act, 1980 for the construction of the *Pergam Dam* in Malaysia on the grounds that it was neither a good a value for the British tax-payer nor the construction the Dam itself was a beneficial project to the Malaysian economy.⁸³ His Lordship observed:

Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law.... the importance of the issue raised....the likely absence of other responsible challenger....the nature of the breach of duty against which relief is sought....and

⁸⁰ [1991] JPL 39.

⁸¹ [1994] 4 ALL ER 329; 1 WLR 386.

⁸² [1995] 1 ALL ER 611; [1995] 1 WLR 388.

⁸³ *Ibid.*

the prominent role of these applicants in giving advice, guidance and assistance with regard to aid....⁸⁴

Therefore, it is evident that, in fact, after January 1978, the strict rule of *locus standi*, which insists that only a person who has suffered a special legal injury can maintain an action for judicial redress in public law, has been extended and liberalized by the British Courts on the jurisdictional basis, conferred on them by the new Order 53 of the Supreme Court Rules. The Courts in many of these decisions have taken the view that any member of the public or pressure group acting *bona fide* and having sufficient interest can maintain an action for redressal of a public wrong or public injury caused by an act or omission of the State or a public authority in violation of the Constitution or the law. For, this liberalization of the rule of *locus standi* has made it possible 'to effectively police the corridors of power and prevent violations of public law' by not allowing the breach to perform a public duty go unchecked which would have obviously promoted disrespect for the rule of law. It appears that the British court's approach to the rule of *locus standi* is very close to the concept of public interest litigation (developed first in the USA in the 1960s and then in India in the 1970s) in which public spirited individuals are allowed to bring matters of public interest before the courts for redressing the injury to the public.

Malaysian Court's Approach to the Liberalisation of the Traditional Rule of *Locus Standi*

In Malaysia, the liberalization of the traditional rule of *locus standi* was discussed and decided until 1988 mainly in the four cases of *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh*⁸⁵, *Mohammed bin Ismail v Tan Sri Haji Othman Saat*⁸⁶, *Tan Sri Haji Othman Saat v Mohamed bin Ismail*⁸⁷ and the *Government of Malaysia v Lim Kit Siang and United Engineers (M) Berhad v Lim Kit Siang*⁸⁸ (collectively called the *UEM case*). The following discussion will show how the liberal view adopted by the Malaysian Courts regarding *locus standi* especially in the second case of *Mohammed bin Ismail* in 1982 was brought to an end in 1988 by then Supreme Court in the fourth case of the *UEM*, the case which now stands as the *locus classicus* on the law of *locus standi* in Malaysia in which by a majority of three⁸⁹ to two⁹⁰ a restrictive rule as to whether or not a particular person has the *locus standi* to institute a public law action was imposed. This restrictive stance on standing has been followed and abided by the Malaysia courts in subsequent cases.

⁸⁴ *Ibid.*

⁸⁵ [1980] 2 MLJ 148.

⁸⁶ [1982] 2 MLJ 133.

⁸⁷ [1982] 2 MLJ 177.

⁸⁸ [1988] 2 MLJ 12.

⁸⁹ Lord President Salleh Abas, Chief Justice (Malaya) Abdul Hamid, Justice Hashim Yeop A Sani,

⁹⁰ Justice Seah, Justice Abdoolcader.

Setting the Liberalisation Issue of *Locus Standi* in Motion

In the first case of *Lim Cho Hock*⁹¹ on *locus standi*, the plaintiff, who was a Member of Parliament for the parliamentary constituency of Ipoh, a member of the Perak State Legislative Assembly for the constituency of *Kepayang* and a ratepayer within the area of the Ipoh municipality, challenged the legality of the appointment of the *Menteri Besar* of Perak as the President of the Ipoh Municipal Council by the State Authority in violation of sections 10(7) and 165(1) of the Local Government Act, 1976 and sought a declaration, *inter alia*, that the offices of *Menteri Besar* and President of the Council could not be held by the same individual. Justice Abdoolcader of the High Court found no reason to deny standing to the plaintiff as a ratepayer to institute and seek the declaratory relief under Order 15 rule 16 of the Rules of the High Court, 1980 in respect of a public officer such as that of the President of the Council as the question of appointment assailed by the plaintiff raised a substantive issue for determination by the court.⁹²

The above decision of Justice Abdoolcader can be compared with the decision of the British Court of Appeal in *Reg v Horsham Justices, ex parte Farquharsom and another*⁹³ where Lord Denning MR in 1982 referred to the principle he had endeavoured to state in earlier cases decided in between 1968 and 1976 and later endorsed by Lord Diplock in the House of Lords in the *Inland Revenue Commissioners' case*⁹⁴ that there was the right of even a single public-spirited taxpayer to bring a matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped.⁹⁵ In essence, Justice Abdoolcader gave a liberal contour to the expression 'any person aggrieved' in public law by allowing standing to a public spirited ratepayer to challenge a public wrong allegedly committed by the 'State Authority' regarding the appointment in a public office in violation of a public law- the Local Government Act, 1976. For, the ratepayer, having an interest in seeing that the government observes its own laws, raised 'a substantial issue [of public law] for the determination by the court.' Therefore, it seems that the liberal interpretation given to the expression 'any person aggrieved' for maintaining in public law an action for judicial redress of a public wrong amounts to, what is now called in the UK, a common standing test of 'sufficient interest [replacing the old judicially created rule of aggrieved person] in the matter to which the application for judicial review relates' enacted by Order 53 of the Supreme Court Rules, 1977. Thus the liberalization of the rule of *locus standi* was set in motion in Malaysia, by a High Court Judge, Justice Abdoolcader.

In the second case of *Mohamed bin Ismail v Tan Sri Haji Othman Saat*⁹⁶, the plaintiff who was one of 183 applicants solicited the alienation of State land and kept waiting on

⁹¹ *Supra* note 83.

⁹² *Ibid.* at pages 149-151.

⁹³ [1982] 2 WLP 430.

⁹⁴ *Supra* note 58.

⁹⁵ *Supra* note 91 at page 446.

⁹⁶ *Supra* note 84.

the side-lines for some eight years with no response whatsoever, challenged in the High Court the legality of the alienation of the land in question to others including the *Menteri Besar* of the State and some members of the State Executive Council who constituted in effect the approving authority for the alienation of the State land. In dealing with the challenge of the defendant to the plaintiff's standing to sue, Justice Wan Yahya held in September 1981 that anybody could bring an action not only on the ground that he had 'sufficient interest' in the subject matter of the procedure, but also as a citizen to challenge any unlawful act of the administration even if he has not greater interest than a person having regard for the due observation of the law. As he observed that:

if they [public authorities or their officials] transgress any law or constitutional directive, then any public-spirited citizen, even if he has no greater interest than a person having regard for the due observation of the law, may move the courts and the courts may grant him the appropriate legal remedy available at their discretion.⁹⁷

In *Mohamed bin Ismail's case*, although the plaintiff alleged an abuse of power and sought to impugn the validity of the alienation of the land in question to the defendant there was, as Justice Wan Yaha maintained, actually a private law element involved as the plaintiff was not given, contrary to his expectation, a formal reply by the Council for eight years and large pieces of land in the vicinity were being carved out and allotted to the aforesaid influential and rich dignitaries. However, after observing that the plaintiff had a substantial interest in the subject matter of the proceedings, Justice Wan Yahya liberalized further the span of the individual standing in public law. Referring to the role of the court "as a public watch dog", which cannot be "expected to turn a deaf ear to the . . . public cry against . . . abuse of administrative powers by authorities or their officials",⁹⁸ Justice Wan Yahya observed that in the courts -

the mendicant may in appropriate circumstances challenge the act of a Minister if the exercise of such act appeared to be unlawful, or against public interest. I would hold that the English authorities on the subject of 'sufficient interest' in a judicial review equally apply to our courts.⁹⁹

Thus Justice Wan Yahya liberalized the rule of *locus standi* in Malaysia by placing it on a much broader basis, 'sufficient interest, for challenging an unlawful act of the administration- which had been done by Lord Denning MR in Blackburn cases, as mentioned earlier decided between 1968 and 1976. The decision of Justice Wan Yahya can be considered as a milestone in giving momentum to the liberalizing issue of *locus standi* in Malaysia.

⁹⁷ *Ibid.*, at page 136.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, at page 136.

However, the then *Menteri Besar* of the State of Johor, preferred an appeal before the Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail*¹⁰⁰ against the decision of the High Court only on the issue of the respondent's *locus standi*. Justice Abduolcader in delivering the judgment of the Court dismissed the appeal holding that the respondent, having 'a real interest' in the subject-matter of the proceeding, had *locus standi*.¹⁰¹ Thus he upheld the decision of the High Court in giving *locus standi* to the respondent, and also approved the discussion in the judgment of the *Lim Cho Hock's case* (made at pages 149-151) 'on the question of *locus standi*' and endorsed 'the concept of liberalizing scope of individual standing.'¹⁰² But when Justice Abduolcader propounded the approach that the court should take being confronted with the question of *locus standi*, he set down a restrictive approach which is in conformity with the observations made by Justice Buckley in *Boyce's case*,¹⁰³ but at variance with his own stance taken earlier in the *Lim Cho Hock's case*¹⁰⁴ and in approving the decision of the High Court in *Mohammed bin Ismail's case*¹⁰⁵. As he observed:

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 substantially affects the plaintiff's interests or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice.¹⁰⁶

It is noticeable that the above observations of Justice Abduolcader as the judge of the Federal Court, insisting on infringement of an individual right or some 'genuine interest' in having legal position declared as the basis of the right to institute an action in a court of law, made his position obscure and blurred in respect of the liberalization of the rule of *locus standi*. But the position of the High Court Judge, Justice Wan Yahya, regarding the liberalization of the rule of standing is clear-cut and unambiguous when he spoke of 'sufficient interest' in challenging before a court of law an unlawful action of the public authorities or their officials.

It may arouse one's curiosity that Justice Abduolcader alluded the necessity of keeping in tune with the time in the development of the approach to the question of *locus standi* thus:

Even if the law's pace may be slower than society's march, what with increased and increasing civic consciousness and appreciation of rights and fundamental values in the citizenry, it must nonetheless strive to be relevant if it is to perform its function of

¹⁰⁰ [1982] 2 MLJ 177.

¹⁰¹ *Ibid.* at pages 178-179.

¹⁰² *Ibid.* at page 179.

¹⁰³ *Supra* note 13.

¹⁰⁴ *Supra* note 83.

¹⁰⁵ *Supra* note 84.

¹⁰⁶ *Supra* note 87.

peaceful ordering of the relations between and among persons in society and between and among persons and government at various levels.¹⁰⁷

Holding the Trend of Liberalising the Rule of *Locus Standi* Back

The third case, *Government of Malaysia v Lim Kit Siang and United Engineers (M) Berhad v Lim Kit Siang*¹⁰⁸ (which is collectively called the *UEM case* decided in 1988) stands, as mentioned earlier, as the *locus classicus* on the law of *locus standi* in Malaysia. The *UEM case* is of great consequence as it did not endorse the trend of liberalizing the rule of *locus standi* in respect of a public right set mainly by the two judgments in the cases of *Lim Cho Hock*¹⁰⁹ and *Mohamed bin Ismail*¹¹⁰ in 1980 and 1982 respectively.

Since the *UEM case* is the *locus classicus* and of great magnitude on the rule of *locus standi*, it would be pertinent to state briefly the facts of the case for the sake of convenience of evaluating the decisions given by the Supreme Court. The respondent, Lim Kit Siang, instituted the proceedings by way of writ as a Member of Parliament, the Leader of the Opposition Party (DAP) in the House of Representatives, a frequent road and highway user and a taxpayer against the United Engineers (M) Berhad and the Prime Minister and two ministers, the Minister of Finance and the Minister of Works, for a declaration under Order 15 rule 16 of the Rules of High Court, 1980¹¹¹ that the letter of intent issued in December 1986 by the Government to the UEM for the privatization of the North-South Highway was invalid on the grounds of impropriety and misconduct in the award of the tender for the project and for a perpetual injunction to restrain the UEM from signing the contract with any agent or servant of the Government pending the decision on the merits of the case. It 'was contended that UMNO would benefit by the award of the contract to the UEM and this amounted to an advantage to members of UMNO who participated in the decision-making process at the Cabinet meeting concerned, which resulted in the contravention of section 2 of the Ordinance' (No. 22 of 1970: page 32). On refusal to grant an interim injunction against the UEM to restrain it from signing the North and South Highway Contract by Justice Edgar Joseph JR of the High Court, appeal was preferred to the Supreme Court. In deciding to grant the interlocutory injunction and directing an early trial of the suit, a three-judge bench of the Supreme Court accorded *locus standi* to the appellant thus:

We have considered a number of authorities both English and local as to the question of *locus standi*. We need only to say that on the facts of this case the appellant clearly has *locus standi* to bring this suit.¹¹²

¹⁰⁷ *Ibid.*

¹⁰⁸ [1988] 2 MLJ 12.

¹⁰⁹ *Supra* note 83.

¹¹⁰ *Supra* note 84.

¹¹¹ Order 15 rule 16 of the Rules of the High Court, 1980, analogous to Order 25 rule 5 of the English Rules of the Supreme Court, 1883 provides that: '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 any consequential relief is or could be claimed.'

¹¹² [1988] 1 MLJ 51 at page 53; Appeal Record in Civil Appeal No. 434 of 1987, at page 174.

An interim injunction was also granted. In dealing with the two applications of the UEM and the Government to have the interim injunction set aside and the suit struck out on the ground mainly for lacking *locus standi*, Justice V. C. George of the High Court held that Lim Kit Siang had the necessary *locus standi* to prosecute the suit, refused to vacate the injunction and dismissed both the applications.

The matter then came again on (second) appeal before the Supreme Court. Lord President Salleh Abas in delivering the leading judgment of the Court (his judgment along with the judgments of the Chief Judge (Malaya) Abdul Hamid and Justice Hashim Yeop A Sani constituted the majority view: majority of three to two) reversed the former decision of the Supreme Court on *locus standi* given only some four and a half months ago by declining to accord the respondent *locus standi*, either as a politician, a road and highway user or a taxpayer¹¹³ as the allegation of corrupt practice 'raised relate to the criminal law' and the rule as to *locus standi* applicable in Malaysia is that accepted in the UK before enactment of Order 53 rule 3(7) of the Rules of the Supreme Court, 1977. Lord President Salleh Abas declined to entertain the respondent's claim that-

the NSH (North-South Highway) contract was based on the ground of its excessive costs and unfairness to UEM's rivals, by observing that it is not for the court to interfere in the matter because the wisdom and policy decision of the government belongs to the Government. We cannot tell the public authority how to exercise its power.¹¹⁴

Another judge, Chief Judge Abdul Hamid (of Malaya), considered "that the time is now ripe for us to restate our position on the law of standing in this country"¹¹⁵ and, as such, held that-

where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy, the general rule is that no private individual can bring an action to enforce the criminal law [i.e. public law], either by way of an injunction or by a declaration or by damages. It should be left to the Attorney-General to bring an action either of his own motion or at the instance of a member of the public who 'relates the facts to him.'¹¹⁶

According to Justice Hashim Yeop A. Sani, 'The courts have no jurisdiction in any circumstances to cloth a plaintiff with the right to represent the public interest.'¹¹⁷

It may be submitted that the respondent, a public spirited citizen, Leader of the Opposition, Member of Parliament and taxpayer, was espousing the cause of a public

¹¹³ *Supra* note 86.

¹¹⁴ *Ibid.* at page 27.

¹¹⁵ *Ibid.* at page 32.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* at page 40.

wrong by instituting the proceeding not to enforce the criminal law (*i.e.* punish the offenders); but to make judicial review of the legality of the Government's proposed award of a billion dollar North-South Highway construction contract to the private company, the UEM, having its alleged links to the Ruling Party. As Justice Abdoolcader in his dissenting opinion observed that-

— There is no question of any interference with the public duties of the government as what is sought is to question the propriety of the transaction between the government and UEM involving the expenditure of public money on the basis of certain allegations raised in respect thereto.¹¹⁸

— Another Justice, Justice George Seah, who gave dissenting opinion along with Justice Abdoolcader, seems to have maintained the correct position regarding *locus standi* of the respondent in the *UEM case*. As he said:

...as an elected Member of Parliament the respondent, conscious of his duty and responsibility to the electorate of Tanjung, Penang, the *Dewan Rakyat* and the peoples of Malaysia, clearly has a real interest in the subject matter of this suit and therefore, has *locus standi* to institute this proceeding [*bona fide*, alleging government wrongdoings in about to award a contract in the construction of the proposed North-South Highway to UEM where an enormous sum of public moneys running into billions of ringgit would be spent illegally]¹¹⁹

He further held that-

In the field of public law where the court has a discretion whether or not make an order preventing conduct by a public officer or governmental authority that has been shown to be *ultra vires* or unlawful, the question of what qualifications a plaintiff must show before the court will entertain his application for a declaratory order or judgement seems to me to be one of practice rather than of jurisdiction.... the rule of *locus standi* must be developed to meet the changing times.¹²⁰

Accordingly, he maintained that 'the test of *locus standi* in a public interest litigation is as laid down by the Federal Court in *Tan Sri Haji Othman Saat's case*, *viz*, whether the plaintiff has a real interest in the subject-matter of the suit.'¹²¹ Thus the minority decisions of Justice Abdoolcader and Justice George Seah went along with the liberalisation of the rule of *locus standi* in public law.

It should be stressed here that if any member of the public is to institute an action for challenging the legality and propriety of governmental action ventilating a public grievance and for judicial redress with the consent of the Attorney-General when he

¹¹⁸ *Ibid.*, at page 50.

¹¹⁹ *Ibid.*, at page 34.

¹²⁰ *Ibid.*

¹²¹ *Ibid.* at page 36.

himself as the repository of the public interest did not sue *ex officio*, it is impractical and unrealistic to expect that he, as the principal legal adviser to the Cabinet and/or Minister of the Government of Malaysia under Article 145(2) of the Federal Constitution, would give his consent to institute such a proceeding in a court of law. As a matter of practice, he never takes *ex officio* proceedings and no proceedings have ever been taken against the Federal Government which places governmental action beyond the scrutiny of the courts. Justice Abdoocader, who had previously been the author of the two cases of the *Lim Cho Hock* as a High Court Judge and the *Tan Sri Haji Othman Saat* as a Federal Court Judge, in his dissenting opinion (in the *UEM* case) aptly questioned the efficacy of relator action terming it attractive as a theoretical possibility with no conceivable hope. As he observed:

...if the complaint merited action by the Attorney-General or by his fiat to a relator, he would himself in the first instance have had the cause of complaint aborted before its overt manifestation. 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.¹²²

However, if the comments of the then Lord President Salch Abas made in the *UEM* case is examined, then it would be evident that he himself endorsed the liberalization stance on *locus standi* in public law in two earlier important Malaysian cases of *Lim Cho Hock*¹²³ and *Tan Sri Haji Othman Saat*.¹²⁴ As he observed: 'In my judgment, these two cases represent the high water marks of law of *locus standi* in Malaysia, beyond which the court should be careful to tread.'¹²⁵ But, unexpectedly the Lord President reinforced the restricted rule of standing in delivering his judgment. As he observed that the liberalization of the rule of standing in the UK was achieved by the adoption of new Order 53 and its statutory underpinning *i.e.* section 31 of the Supreme Court Act, 1981. Accordingly, there is no justification in Malaysia 'to depart from the rule of *locus standi* accepted by the highest court in England prior to Order 53.'¹²⁶

On the other hand, another Judge, Chief Judge of Malaya Abdul Hamid, was articulated and unambiguous in his frame of mind to put an end to the liberalization of the rule of *locus standi* that was endorsed in the 1982 decision of the Federal Court in the *Tan Sri Haji Othman's* case. As he observed that 'Clearly, the main hinge upon which the judgment of the learned judge [of the High Court] rested as regards the *locus standi* point was the judgment of the Federal Court in *Tan Sri Haji Othman Saat v Mohamed*

¹²² *Ibid.*, at page 45.

¹²³ *Supra* note 83.

¹²⁴ *Supra* note 85.

¹²⁵ *Supra* note 86, at page 24.

¹²⁶ *Ibid.*

bin Ismail. . . I consider that the time is now ripe for us to restate our position on the law of standing in this country.¹²⁷ Although the appellants did not challenge the correctness of the decision of the *Tan Sri Haji Othman Saat*'s case regarding the liberalization of the rule of *locus standi* and, as such, it was not strictly an issue in the case, it seems that in order to deny standing to the respondent, the learned Judge felt that 'the time is now ripe' in view of 'the obvious public importance of the case' to 'restate' 'the law of *locus standi*' in Malaysia. Accordingly, the learned justice restated the test to ascertain the question of standing thus: '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'¹²⁸ as propounded by their Lordships in the *Gouriet's case*¹²⁹ and also *Boyce's case*¹³⁰ prior to the enactment of new Order 53 of the Supreme Court Rules, 1977 in the United Kingdom. He further elaborated the matter thus:

the same standing rules apply whether the remedy sought is a declaration or an injunction. And, either the plaintiff's 'rights' must be at stake, or when, as in the present case, the matter does not concern private rights, the plaintiff must suffer or be about to suffer damage peculiar to himself.¹³¹

Then he considered it imperative to make mention of, and touch on, the liberalization issue of *locus standi* propounded in the *Tan Sri Haji Othman Saat*'s case thus:

In the *Tan Sri Haji Othman Saat* case, a liberal approach in considering the requirement of *locus standi* was advocated. . . I would hesitate to say that a mere 'legitimate grievance' or 'a real interest' in the suit will suffice to show standing to sue.¹³²

The denial of *locus standi* to the respondent led Justice Abdoolcader to make the following comments-

To deny *locus standi* in the instant proceedings would in my view be a retrograde step in the present stage of development of administrative law and a retreat into antiquity. The merits of the complaint are an entirely different matter. . . 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.¹³³

¹²⁷ *Ibid.*, at page 29.

¹²⁸ *Ibid.*, at page 31.

¹²⁹ *Supra* note 20.

¹³⁰ *Supra* note 11.

¹³¹ *Supra* note 86.

¹³² *Ibid.* But Chief Judge added that 'Be that as it may, I would say that the decision in *Tan Sri Haji Othman Saat*'s case was correct having regard to the facts of that particular case (at page 31).

¹³³ *Supra* note 86, at page 45.

However, it should be emphasized that the majority decision in the *UEM case* has not only taken the rule of *locus standi* in respect of public right back to the pre-1977 position in the UK consciously ignoring all the post-1977 development there in this regard, but also rejected the liberalization stance of the High Courts and approved by the Supreme court adopted in 1980 and 1982. Thus the majority decision in the *UEM cases* closed not only the door to the liberalization of *locus standi* rather it opened the door for breeding complacency and malaise in the public administration, as there would be no check on the exercise of public power except what little control the Attorney General might exercise in rare cases if he might not want to go along with the misuse or abuse of power. As a result, the courts of law would require to fold their hands to entertain for consideration on its merits any complaint of a legitimate public grievance or allegedly unconstitutional conduct of the administrative authorities resulting in the disastrous impact of encouraging the abuse of power by the government or of a public authority.

Post UEM Judicial Trend Regarding *Locus Standi*

The restrictive approach taken towards *locus standi* in the public law arena by the majority decision of the apex court of Malaysia in the case of the UEM has consistently been echoed by the High Courts and the Court of Appeal in the later cases in determining the issue of standing. For, so long the majority decision of the UEM stands, the courts below the Federal Court are duty bound to follow it. This reality has been affirmed by the High Court of Johor Bahru in 1998 in the case of *Goh Joon v Kerajaan Negeri Johor & Ors*,¹³⁴ when it after reviewing the decisions of other judges from the common law jurisdictions observed “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.”¹³⁵

However, in *Abdul Razak Ahmad v Kerajaan Negeri Johor & Another*,¹³⁶ the plaintiff, an advocate and solicitor, challenged the legality of the ‘floating city’ on the basis that it contravened the Town and Country Planning Act, 1976 and claimed a declaration of his right to examine the agreement concluded between the Johor State Government and Johor Coastal Development Sdn Bhd (JCD) undertaking the project. After referring to the majority decision of the *UEM case*, Justice Haider of the High Court (Johor Bahru) observed that “Though it would seem to appear that the project is in breach of the structure plan as the area of the project is reserved for recreational facilities that, by itself . . . does not suffice to give the possessor the *locus standi*.”¹³⁷ He further added “even if there has been a contravention of the Act, the plaintiff has no *locus standi*” to seek a declaration from the court that the project was illegal unless

¹³⁴ [1998] 7 MLJ 621.

¹³⁵ *Ibid.*, at page 644.

¹³⁶ [1994] 2 MLJ 297.

¹³⁷ *Ibid.*, at page 303.

he could show that he has or will suffer any damage peculiar to him by reason of such contravention or that he has been adversely affected over and above that of the ordinary taxpayer, ratepayer or resident of Johore Bahru¹³⁸. The plaintiff was not only denied the *locus standi* to seek a declaration that the project was illegal, he was also denied the right to make a search and examine the agreement between the sanctioning authority and the private developer as it could not be characterized as a public document.

It seems that he had no less concern and understanding to protect the environment of the city of Johor Bahru (of which he was a resident) in comparison with the Green Peace International in the case of *R v Inspectorate of Pollution ex parte Green Peace No. 2*.¹³⁹

In *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru*¹⁴⁰ (decided in 1995), in which the plaintiff challenged the validity of the grant of permission by the Datuk Bandar for the construction of the water city claiming *locus standi* as a ratepayer to the municipality, the High Court denied him *locus standi* as a ratepayer on the grounds that his house was not located near the floating city, and that he did not suffer any special damage out of the alleged purported breach of the relevant law by the defendant. Judge Abdul Malik bin Ishak further held that "To give *locus standi* to a ratepayer like the plaintiff would open the floodgates and this would in turn stifle development in the country. There is no genuine private interest for the plaintiff to protect."¹⁴¹ Furthermore, the Judge went so far as to characterize the plaintiff, an advocate and solicitor, as a person 'more concerned about the publicity' which 'must have been good to him,' 'a trouble shooter', 'a maverick of a sort out to stir trouble'.¹⁴²

Even in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals*¹⁴³, where the native respondents challenged the legality of the procedure to approve a billion dollar dam, Bakun Hydroelectric Project, within their natural habitat in *Bakun* (the Bakun Case), Justice Gopal Sri Ram of the Court of Appeal observed that the respondents lacked substantive *locus standi* as they did not suffer any special injury. It was a matter entirely reserved by the Federal Constitution to the Attorney General of Malaysia in whom vested the unquestionable discretion whether to institute the penal proceedings.¹⁴⁴ However, in this case, Justice Gopal Sri Ram made an attempt to expound the doctrine of *locus standi*. He observes that *locus standi* are of two types - initial or threshold *locus standi* and substantive *locus standi*. According to him, 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 and that this is usually tested at the stage of striking out application. He goes on to say that although a litigant may have the threshold *locus*

¹³⁸ *Ibid.*, at page 304.

¹³⁹ *Supra* note 79.

¹⁴⁰ [1995] 2 MLJ 287.

¹⁴¹ *Ibid.*, at 298.

¹⁴² *Ibid.*,

¹⁴³ [1997] 3 MLJ 23.

¹⁴⁴ *Ibid.* at para 82.

standi, he may for various substantive reasons be disentitled to declaratory relief (that is substantive *locus standi*) such as his inability to meet those settled principles relating to the court's discretion in granting declaratory or injunctive relief.¹⁴⁵

In *Majlis Peguam Negara Malaysia & Ors. v Raja Segaran* [Unreported], Civil Appeal No. W-02-47-2000, the Court of Appeal appears to observe in favour of broadening the rule of standing in cases of violation of the Constitution. For, it speaks of according both threshold and substantive *locus standi* to a plaintiff if he can show a *prima facie* contravention of a provision of the Constitution.¹⁴⁶

Amendment of the Order 53 of the Rules of High Court in Malaysia and the Cases Decided Thereafter

It may be recalled here that Order 53 of the (UK) Supreme Court Rules, 1977 provides for a single form of proceeding by way of an application for judicial review in which the public law as well as private law remedies are made available by stipulating a common standing test of 'sufficient interest in the matter' to which the application for judicial review relates. In 2000, in Malaysia the Order 53 of the Rules of the High Court, 1980 was amended which came into effect on 02 September 2000. The amended Order 53 provides that public law remedies of prerogative orders and private law remedies of deceleration, injunction and damages shall both be available in an application for judicial review. But unlike the order 53 of the (UK) Supreme Court Rules, 1977, the new (i.e. amended) Order 53 of the Rules of the High Court of Malaysia did not incorporate into it the common test of "sufficient interest in the matter to which the application for judicial review relates". It speaks of a strait-jackpot formula of person adversely affected, interchangeable with the expression of any person aggrieved, as a condition for bringing an application for judicial review against any public authority. As rule 2 of the new Order 53 provides that "Any person who is adversely affected by the decision of any public authority shall be entitled to make the application".¹⁴⁷ But no definition of the term adversely affected has been given in the new order 53. It seems that, unlike 'sufficient interest', adversely affected does not connote 'liberal access under a generous conception of *locus standi*.'

However, the expression 'adversely affected' has been interpreted by Justice Gopal Sri Ram of the Court of Appeal in February 2006 in the case of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor*¹⁴⁸ in which the appellant, the target company in a takeover bid, challenged the legality of the refusal of the Securities Commission to allow an extension of time for the appellant's board to take the usual steps with regard to the takeover bid in accordance with the Take Over Code. Justice Gopal Sri Ram maintained

¹⁴⁵ *Ibid.* at paras 58, 59 & 60.

¹⁴⁶ Infoline, The Newsletter of the Malaysia Bar, January/February, 2002, pages 18, 20.

¹⁴⁷ Rule 2, New Order 53, the Rules of the High Court of Malaysia.

¹⁴⁸ [2006] 3 MLJ 164.

that the expression “adversely affected”, the single test of threshold *locus standi* for all the remedies that are available under new Order 53, “calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words ‘adversely affected’.”¹⁴⁹ Then he dealt with the three spectrum of cases where the interest of the applicants are different in the legality of the action impugned thus:

“At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned. . . This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense . . . has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. . . . At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as *de minimis*. In the middle of the spectrum are cases which are in the nature of a public interest litigation.”¹⁵⁰

Then Justice Gopal Sri Ram denied the appellant threshold locus standing which, according to him, means the “legitimate grievance” of the individual to “cross the threshold and enter the court” (i.e. leave stage) that is “quite different from the doctrine of ‘substantive *locus standi*’, . . . determined by court at the very end of the case, when it comes to decide whether on the facts and circumstances discretion ought to be exercised in the applicant’s favour.¹⁵¹ He continued to observe that

“on a reading of the applicant for leave to issue judicial review the court is satisfied that the applicant has neither a sufficient personal interest in the legality of the impugned action. . . nor is the application a public interest litigation, then leave may safely be refused on the ground that the applicant is not a person ‘adversely affected’. . . the applicant lacks a sufficient personal interest in the legality of the impugned action . . . as target company has no role whatsoever to play by virtue of the Take-over Code . . . It is a private interest litigation. . . . Indeed, this is a case that does not even come within the *de minimis* rule.”¹⁵²

Although one would agree with the contention of Justice Gopal Sri Ram that the expression ‘adversely affected’ calls for a flexible approach, it is not possible on the part of the courts below the Federal Court to give a liberal interpretation of the term so long the majority decision of the then Supreme Court in the *UEM case* regarding the issue of *locus standi* is in force. The expression ‘sufficient personal interest,’ coined by him in giving ‘flexible approach’ to the person adversely affected, is interchangeable with “any person aggrieved”, in fact means, what Justice Buckley observed in *Boyce’s case*

¹⁴⁹ *Ibid.*, at page 172.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, at page 170.

¹⁵² *Ibid.*, at pages 172-173.

and affirmed by the majority decision in the *UEM case* i.e. in order to make the right to institute an application for judicial review by an individual seeking relief against the public authority, interference with his public right should also involve infringement of some private right or the suffering of special damage peculiar to himself from the infringement of the public right.

In a very recent case of *Karpal Singh Ram Singh v. Ketua Hakim Negara*,¹⁵³ decided in March 2011, the applicant, a Member of Parliament for Bukit Gelugor and an advocate and solicitor who is widely known for his anti-establishment stance, applied leave for judicial review, under Order 53 of the Rules of the High Court, 1980, for issuing an order of *mandamus* against the respondent, the Chief Justice of Malaysia, directing him to respond to the request of the applicant that the respondent recuse himself from determining the merits of the complaint made against him under section 13 of the Judges' Code of Ethics 2009, with a view to holding an enquiry pursuant to section 14 of the Code and section 9 of the Judges' Ethics Committee Act, 2009 on the ground that 'no man should be judge in his own cause.' Although Justice Aziah binti Ali of the High Court of Malaya conceded that the applicant did have a right, as a citizen, a Member of Parliament and an advocate and solicitor, to lodge a complaint under section 12 of the Code, but she refused to accord the applicant *locus standi* to obtain the relief sought. For, he could not show that his personal right would be injured if the respondent failed to perform his statutory duties as required by proviso (a) of section 44(1) of the Specific Relief Act, 1950.¹⁵⁴

It may strongly be argued that Karpal Singh Ram Singh as a lawyer has a special and deep interest in the matter as lawyers constitute an integral part of the administration of justice in Malaysia. The decision of the High Court not to issue writ of *mandamus* has disastrous impact of making the highly dignified and prestigious office of the Chief Justice, who as the head of the Malaysian Judiciary and *paterfamilias* of the judicial fraternity symbolizes and epitomises the independence of the judiciary, controversial and of lowering public faith, confidence and in the impartiality of the highest court of the land.

It may be submitted that the Malaysian Courts in deciding to grant or deny any citizen or association to institute public law proceedings must obviously be guided by the relevant provisions of the law, Constitution or precedent keeping in mind the advancement of the access to justice for challenging the legality and propriety of the actions of the government or statutory authority and getting such illegalities stopped in the interest of the maintenance of the rule of law. The judges as the moulder of the law cannot and should not consciously stick to the restrictive rule of *locus standi* in public law, on the pretext of 'peculiar circumstances most suited to a particular national ethos', and ignoring the liberalization taken place in the UK and other jurisdictions, to

¹⁵³ [2011] 4 CLJ 179 [HC].

¹⁵⁴ *Ibid.*

impede the judicial review so as to protect illegalities and derelictions committed by the government or statutory authorities. The restrictive approach of the majority justices of the apex court in Malaysia towards the rule of *locus standi* in public law led M.P. Jain, a leading authority on Malaysian Administrative Law, to comment:

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. The law has been frozen at the pre-1977 staging Britain.¹⁵⁵

Comparison Between the Rules of *Locus Standi* Obtaining in the UK and Malaysia

It may be recalled here that in the UK the restrictive rules on *locus standi*, originally propounded by the judges to regulate the access to justice, were in force until the early 1970s. The first rule of *locus standi* was that private rights could be asserted by an individual in a proceeding if he was aggrieved- suffered or imminently will suffer an actual or imminent invasion of a legally protected interest. The second rule was that the public rights could only be asserted by the Attorney-General as the guardian of the public interest to enforce the performance of public duty and the compliance of public law. In two cases, a plaintiff could sue without joining the Attorney-General as laid down in *Boyce's case* approved by the House of Lords in *Gouriet's case*, namely a) if his own private right was at the same interfered with or b) in respect of his public right suffered special damage peculiar to himself as equivalent to 'having a special interest in the subject-matter of the action.' In the absence of standing to sue, he was required, however public spirited he may be, to obtain the consent of the Attorney-General. If such consent was obtained, the suit was called a relator action in which the Attorney-General became the plaintiff whilst the private citizen his relator.

On the other hand, since Malaysia is a common law country, its Federal Court followed and ultimately in 1988 stucked to the above restrictive rules of *locus standi* prevalent in the United Kingdom before 1977. In other words, in Malaysia there is presently a stringent requirement that the applicant, in order to acquire *locus standi* in the public law arena, has to establish infringement of a private right or suffering of a special damage. However, after 1977, the following points of difference can be drawn between the rules of *locus standi* in the United Kingdom and Malaysia:

1. Lord Denning MR of the Court of Appeal (the UK) developed mainly in three Blackburn cases of 1971, 1973 and 1976 the principle of 'sufficient interest' in place of 'person aggrieved' by dispensing with the requirement of private injury

¹⁵⁵ M. PAGE Jain, *Administrative Law in Malaysia and Singapore* (Kuala Lumpur: Malayan Law Journal Pte Ltd, 1997), at page 765.

caused to the complaining citizen by a government department or a public authority in the performance of its public duty for drawing "it to the attention of the courts of law and seek to have the law enforced."

On the other hand, in Malaysia Justice Abdooleader, as a Judge of the High Court in the case of *Lim Cho Hock* (1980)¹⁵⁶ and Justice Wan Yahya of the High Court in the case of *Mohammed bin Ismail* (1982)¹⁵⁷, took the lead in liberalizing the restrictive rule of *locus standi* in public law. Justice Abdooleader laid down the principle of 'a substantial issue [of public law] for the determination by the court' in *Lim Cho Hock* and a real interest (or a 'substantial interest') in the subject matter of the proceeding in respect of a public right in *Tan Sri Haji Othman Saat*¹⁵⁸. Thus the expression coined by him were amounted to introduce the test of sufficient interest in place of the restrictive rule of aggrieved person. But Justice Wan Yahya explicitly liberalized the rule of *locus standi* by coining the expression "sufficient interest" for challenging an unlawful act of the administration.

2. The liberal rule of sufficient interest advanced by Lord Denning of the Court of Appeal was rejected by the House of Lords in 1977 in the *Gouriet's case*¹⁵⁹ and, as such, previous law on *locus standi* as formally articulated by Justice Buckley in *Boyce's case*¹⁶⁰ was reinstated.

Similarly, the liberal stance taken by Justice Abdooleader and Justice Wan Yahya regarding locus standing was discarded by a majority decision of the apex court of Malaysia in 1988 in the *UEM case*.¹⁶¹ Consequently, the former restrictive rule of *locus standi* as to institute an action in public law was brought back.

3. In the United Kingdom, the restoration of the original law of *locus standi* by the then highest court, the House of Lords, in 1977 in *Gouriet's case*¹⁶² was short-lived. For, six months after the pronouncement of the judgment in the case, the law on *locus standi* was changed by the introduction of a new procedure of judicial review under the new Order 53 of the UK Supreme Court Rules. The new procedure of judicial review combines in itself the applications for the prerogative orders of *mandamus certiorari* and prohibition with applications for declaratory and injunctive remedies for obtaining all forms of relief at the wide restriction of the Court. Under Order 53, a private citizen making an application for judicial review (challenging the legality of the actions of a public officer, executive or person exercising statutory power) is required to show that he has 'a sufficient interest in the matter to which his application relates.' Thus the meaning of *locus standi* not only becomes liberated by the use of the expression of 'sufficient interest' in the new procedure, the expression has also been given a wider meaning in most

¹⁵⁶ *Supra* note 83.

¹⁵⁷ *Supra* note 84.

¹⁵⁸ *Supra* note 85.

¹⁵⁹ *Supra* note 20.

¹⁶⁰ *Supra* note 11.

¹⁶¹ *Supra* note 86.

¹⁶² *Supra* note 20.

of the cases¹⁶³ decided after the introduction of Order 53. Consequently relator action ceases to have much meaning. But the Malaysian Rules of the High Court, adopted in 1980 about three years after the enactment of the Order 53 of the (UK) Supreme Court Rules, 1977, does not contain the expression 'sufficient interest' as stipulated in rule 3(7) of the (UK) Supreme Court Rules. This led the majority Justices of the Federal Court of Malaysia in 1988 in the *UEM's case*¹⁶⁴ to take a conservative stance on the law of *locus standi* in the public law arena by sticking to the restrictive rules of *locus standi* adopted by the highest court in the UK prior to the introduction of Order 53 of the Supreme Court Rules, 1977. Although in 2000, the Order 53 of the Rules of the High Court, Malaysia, was amended to provide that both public law and private law remedies be available in an application for judicial review, unlike Order 53 of the (UK) Supreme Court Rules, 1977, it stipulates rigid pattern of person 'adversely affected' for instituting application for judicial review against the public authority.

The Case of Liberalizing the Restrictive Rule of *Locus Standi* in Malaysia

It is maintained that the rule of *locus standi* 'is not governed by any statutory enactment but is a rule of practice and procedure laid down by the judges in the public interest.'¹⁶⁵ In the same vein Lord Diplock in 1982 observed in the case of *Inland Revenue Commissioners*¹⁶⁶ that 'The Rule as to "standing for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They are made by judges."¹⁶⁷ Like all rules of practice, the rules of *locus standi* are obviously amenable to change by the judges at their discretion to suit the changing times. As Lord Diplock said, 'by judges they [the rule as to standing] can be changed, and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities that have been taking place continuously, ... since the rules were originally propounded.'¹⁶⁸ Therefore, in the absence of any statutory provision concerning *locus standi*, it is entirely the matter of discretion for the judges to decide the extent to which it is to be changed taking into account probably 'the economic, political and cultural needs and background of individual societies within which'¹⁶⁹ they function. Thus the liberalization of the rule of *locus standi* has not in general taken place by the traditional norms of constitutional or legislative process, but by judicial activism on the basis of practical expediency in

¹⁶³ The liberal interpretation of the expression 'sufficient interest' can be seen in the judgment of the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed and Small of Business Ltd* [1982] AC 617, [1981] 2 All ER 93 and the Court of Appeal's decision in *Reg v Metropolitan Police Commissioner, ex parte Blackburn*.

¹⁶⁴ *Supra* note 86. Lord President Salleh Abas at page 24 and Chief Judge Abdul Hamid at page 31.

¹⁶⁵ Justice Seah of the Supreme Court of Malaysia in the *UEM case*, *Supra* note 86, at page 33.

¹⁶⁶ [1981] 2 All ER 93.

¹⁶⁷ *Ibid.* at page 103.

¹⁶⁸ *Ibid.*

¹⁶⁹ Justice Gopal Sri Ram of the Malaysian Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals*, *Supra* note 141, at page 40.

various jurisdictions particularly in India, Pakistan and Canada.¹⁷⁰ Therefore, it appears that the judges of the Federal Court of Malaysia should liberalize the traditional rule

¹⁷⁰ For example in India, Justice J.V.R. Krishna Iyer and Justice P.N. Bhagwati, the two celebrated and extraordinary Justices of the Indian Supreme Court, pioneered the liberalization move of the rule of *locus standi* which amounts to rejection of *laissez faire* notion of the traditional jurisprudence as to standing.

In 1976, Justice Krishna Iyer in *Mumbai Kamagar Sabha v Abdul Tai* (AIR 1976 SC 1455) sowed the seeds of liberalization of the standing rules which led to the advent of public (or social) interest litigation in India. It got underway in *Railways v Union of India*, wherein an unregistered association of workers was permitted to institute a writ petition under Article 32 of the Indian Constitution for the redressal of common grievances. Justice Krishnan Iyer articulated the reasons for the liberalization of the rule of *locus standi* in *Fertilizer Corporation Kamgar v Union of India* (AIR 1981 SC 344) thus: '*locus standi* must be liberalized to meet the challenges of the times. *Ubi jus ibi remedium* must be enlarged to embrace all interests of public-minded citizens or organizations with serious concern for conservation of public resources and the direction and correction of public powers so as to promote justice in its triune facets.' (page 53, para 38)

The ideal of liberalization of the rule of *locus standi* was blossomed at the hands of Justice P.N. Bhagwati in *S. P. Gupta and others v President of India and others* ([1982] AIR SC 149), commonly known as a Transfer of Judges Case, when he accorded *locus standi* to the lawyer petitioners (as the priests in the temple of justice) having special interest in the independence of judiciary to challenge the validity of the circular issued by the Minister of the Government of India asking consent of the Additional Judges of the High Court for appointment in any other High Court in India together with their order of preference for 3 High Courts. He held that even in cases where an act or omission of the State or of a public authority caused no specific injury to a person or determinate class or group of persons but to the general public, any member of the public having special interest in the subject-matter, 'some concern deeper than that of a busy-body', could maintain an action for redress (*Ibid.* at page 191), he could not be told off at the gates of the courts. For, 'if breach of such public duty were allowed to go unredressed because there is no one who has received a special legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law. It would also open the door for corruption and inefficiency because there would be no check on exercise of public power except what may be provided by the political machinery.' (*Ibid.* at page 185) Furthermore, Justice Bhagwati felt the necessity 'to democratize judicial remedies, remove technical barriers against easy accessibility to justice and promote public interest litigation so that the large masses of people belonging to the deprived and exploited sections of humanity may be able to realize and enjoy the socio-economic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes.' (*Ibid.* at page 190). Whilst ordinary traditional litigation is essentially a dispute between 2 litigating parties and of an adversary character, public interest litigation is not brought for the purpose of enforcing the right of one individual against another but is intended to promote and vindicate public interest which demands that the constitutional and legal rights of the poor and ignorant should not go unnoticed and unredressed. (Justice Bhagwati). Accordingly, Justice Bhagwati held that any *bona fide* member of the public having sufficient interest may approach the court to vindicate the interest of the economically or socially disadvantaged persons unable to approach the court where injury was to them either individually or their class or group.

In Pakistan, Chief Justice Muhammad Haleem of the Supreme Court of Pakistan in 1988 in *Benazir Bhutto v Federation of Pakistan* (PLD, 1988 SC) liberalized the standing rules when he observed that it would dispense with the traditional standing requirement to allow a class or group of persons otherwise unable to seek redress from a court, to seek to enforce their fundamental rights. On the basis of this rationale, surrogates are now allowed to act on behalf of aggrieved persons. In 1994, the Pakistani Supreme Court in *Shehla Zia v WAPDA* (PLD 1994, SC 693) held that that the Supreme Court might grant relief in a public interest litigation to the extent of stopping the functioning of such an entity which crest pollution and environmental degradation. Like the Indian Supreme Court, the Supreme Court of Pakistan has also taken the view that any member of a public or social organization espousing the cause of the poor and the down-trodden should be permitted to move the Court even by merely writing a letter without incurring expenditure of his own, described it as an appropriate proceeding falling within the purview of relevant Article of the Constitution (known as epistolary jurisdiction).

In Canada, the Federal Court of Appeal in 1984 in *Finlay v Minister of Finance of Canada* ([1984] 1 FC 516), granted a citizen standing, who was neither directly affected nor a tax-payer, to challenge the validity of federal and provincial transfer payments under the Canada Assistance Plan. In upholding this decision, the Supreme Court of Canada in *subnomine Finlay v Canada* ([1986] 2 SCR 607) observed that the interest of the applicant was too remote or speculative to grant standing under the general requirement that the plaintiff must have sufficient private or personal interest in the subject matter. But the Court went on to hold that in appropriate public law cases, as a matter of judicial discretion, standing might be given to a private individual notwithstanding the fact that a constitutional or Charter of Rights and Freedom issue was not involved. (*Ibid.*)

of *locus standi* in public law to accord any member of the public acting bona fide and having sufficient interest with standing to maintain an action, which is not vexatious, frivolous nor an abuse of the process of the court, for the redress of a public wrong committed or a public injury done in violation of the Constitution or administrative law taking into account the following grounds:

In the first place, if a public-spirited individual or association having an interest in being governed according to the law (not having any real grievance or injury at all), is not accorded standing to challenge excess or abuse of constitutional or legal powers by the executive or public authority, such an authority will feel encouraged to act with immunity in the exercise of its constitutional or legal jurisdiction. This would obviously be the violation of the fundamental principle that the government or the public authority should be subject to the rule of law.

Secondly, if an individual or association, having deep concern to protect public interest cannot approach the court (because of restrictive rule of *locus standi*) seeking enforcement of a public duty or redress of a public injury, then no one might bring the matter to the court. For, Attorney General, who is entwined in the government as the principal law officer, can hardly be expected to take any action regarding the matter.

Thirdly, effective access to justice is seen as the most basic requirement of a system that purports to guarantee legal as well as fundamental rights/liberties as embedded in the idea of constitutional government. But the restrictive rule of *locus standi* in public law impedes the access to justice particularly for seeking judicial review of the actions or omissions of the governmental departments or statutory authorities. 'Judicial review, as observed in *Ganda Oil Industries Sdn Bhd v the Kuala Lumpur Commodity Exchange*¹⁷¹, 'is available only in public law as a remedy for the conduct of a public officer, executive or person exercising statutory or governmental power which is *ultra vires*, void or unlawful.'¹⁷²

Fourthly, if the court refuses to intervene or grant relief to a plaintiff on the ground of lacking *locus standi* in spite of the fact that unlawful administrative or executive actions have taken place, then that would amount to abdication of judicial authority (or folding its hand in despair) so as to protect illegalities and derelictions committed by the executive or public authorities.

Fifth and finally, the rules of *locus standi*, which Malaysia inherited as a common law country, were developed in the United Kingdom since late 19th century when private law dominated the legal scene and public law was in its infancy. But the second half of

¹⁷¹ [1988] 1 MLJ 174.

¹⁷² *Ibid.*

the 20th century has not only witnessed tremendous increase in powers and influence of the government and public authorities, but also the development of third generation of human rights (i.e. solidarity rights) including the right to a healthy and sustainable environment. Therefore, any person, association or organization should be given to institute an action for the protection of the air, water and other natural resources from being polluted, impaired or destructed. As the Rio Declaration, 1992 on Environment and Development provides that environmental issues are best handled with the participation of all concerned citizens. It further states that 'effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'¹⁷³

Therefore, time is now perfect and ideal for the Federal Court of Malaysia to liberalize the rule of *locus standi* in public law in an appropriate case either by bringing back the concept of 'sufficient interest' or by giving liberal and purposive interpretation of the expression 'person aggrieved' to mean not only a person who is personally aggrieved but also a person who himself feels aggrieved in catching sight of the public wrong done to the other fellow persons by the government or the local authority in violation of constitutional or legal limits of power or a person who is genuinely interested (i.e. not acting for a personal gain, profit, political motivation or other oblique consideration) to make certain that the public wrong done or public injury caused should go unredressed and unchecked with a view to ensure that the governmental department or public authority is subject to the rule law.

Conclusion

The foregoing discussion reveals that the two rules of *locus standi* were developed in the 1900s in the UK as the guard of the courts to stand for regulating access to justice so that the courts are not swamped with frivolous and vexatious litigation to abuse the legal process, public money are not wasted and cases gained entry are best argued by parties whose personal rights are in issue. As in *R v Somerset DC and ARC Southern Ltd., ex parte Dixon*¹⁷⁴, it has been held that the doctrine of standing performs the almost identical function of preventing an abuse of the judicial process and nothing more. The first traditional rule of *locus standi* was that private rights could be asserted only by an aggrieved individual-suffered or threatened violation of a legal right. The second rule was that the public rights could only be enforced by the Attorney-General as the *parens patriae* except in two cases a) where an individual's own private right was simultaneously interfered with and b) suffered special damage in respect of public right. There existed different restrictive rules of standing for different remedies of prohibition, *certiorari* or *mandamus*. These restrictive rules of *locus standi* were enforced in the United Kingdom until early 1970s. Although the restrictive rule of *locus standi* is appropriate in the private law arena, it cannot be applied with such a degree of precision and clarity in the field of public law.

¹⁷³ Principle 10, the Rio Declaration on Environment and Development, 1992.

¹⁷⁴ [1997] JPL 1030.

Ultimately, it was realized that in order to enable the court to perform its role as a public watch dog and the final arbiters of legalities and illegalities, it could no longer be kept as a 'closed shop' for the enforcement of the public rights. It was Lord Denning MR who took the lead mainly in the three *Blackburn cases* of 1971, 1973 and 1976 by developing the principle of 'sufficient interest' in place of 'person aggrieved' to free the courts from the shackle of traditional restrictive rule of *locus standi* in public law for performing the effective role of a sentinel on the *qui vive*. In fact, *locus standi* was sometimes more deeply coloured by the perceived importance of the issue raised than sufficiency of the interest of the applicant. In 1977, the House of Lords in *Gouriet's case* took exception to Lord Denning's liberal rule of 'sufficient interest' and its ruling against the liberalization issue restored the former restrictive rule of *locus standi* in public law only for a brief period of six months. For, the British law on the *locus standi* underwent substantial changes in 1977 through the enactment of the groundbreaking reformist Order 53 of the Rules of the Supreme Court, 1977 (presently part 54 of the Civil Procedure Rules, 1998) which later incorporated into Section 31(3) of the Supreme Court Act, 1981. Rule 3 (7) of Order 53 introduced a common standing test of 'sufficient interest.' An applicant will be given leave to apply for judicial review if he has an arguable case and at the full hearing, if he has a meritorious claim; the court will strive to accord him *locus standi* so long as he is not a mere busybody with no legitimate grievance. Under the new law, the various tests for personal standing for various alternative forms of prerogative remedies and other powers were substituted by a uniform and liberal requirement of standing by enacting a general standard formula of an application for judicial review showing 'a sufficient interest in the matter to which the application relates' and empowering the court to give the requisite relief according to the circumstances of the case by way of any of the prerogative orders as well as declaration, injunction and damages. It seems that the judgments of Lord Denning in *Blackburn cases* acted as the driving force behind these reforms as it is evident from the coining of the expression 'sufficient interest' test for ascertaining standing of a significantly wider participation of private applicants. This means that apart from the individual himself, the reformed law provides for representation of wider components of the population by allowing representation of group interest or even claims in the name of the public interest and, as such, the British Courts accept claims by three other types of applicants-those claiming surrogate, associational or citizen standing. Thus the liberal interpretation of the reformed rules of *locus standi* by the House of Lords, particularly in the case of *Inland Revenue Commissioners*¹⁷⁵, is a reflection of the realization that the citizens must be given an opportunity to challenge the illegalities of the governmental institutions or authorities otherwise their unlawful conduct would go unchecked, unabated and rule of law would be trammelled. Thus the liberalization of the rule of *locus standi* has moved forward in the UK by means of legislation and progressive judicial interpretations at the service of public good.

¹⁷⁵ *Supra* note 58.

On the other hand, the restrictive rules of *locus standi*, which had been in force in the United Kingdom until 1977, are in force in Malaysia by virtue of the provisions of section 3 of the Civil law Act, 1956. The liberalization of the rules of *locus standi* advanced by the more progressive interpretation of Justice Abdoocader in 1980 in *Lim Cho Hock's case*¹⁷⁶ as a High Court Judge and Justice Wan Yahya of the High Court in *Mohammed bin Ismail's case*¹⁷⁷ (which was approved by Justice Abdoocader in the *Tan Sri Haji Othman Saat's case*¹⁷⁸ as a Judge of the Federal Court) introduced in Malaysia the test of sufficient interest in place of the restrictive rule of aggrieved person. This liberal stance was cast aside by the majority decision of the Supreme Court in the *UEM case*¹⁷⁹ on the pretext that there was no provision in the Malaysian Rules of the High Court, 1980 equivalent to Order 53 rule 3(7) of the UK Rules of the Supreme Court, 1977. Thus former restrictive rule of *locus standi* as to institute an action in public law arena was re-established and has consistently been followed and abided by the High Courts and the Court of Appeal in subsequent cases on *locus standi*. It seems that the Malaysian judges are not knowingly willing to learn from the change taken place in other jurisdictions including India, Pakistan and Canada in respect of the liberalization of the rule of *locus standi* in public law by means of progressive judicial interpretation. Perhaps, they do not consciously want to appreciate the fact that the rules of *locus standi* are rules of practice made by the judges and 'by judges they can be changed' responding to the changing and ever demanding needs of the time and public interest. For, the judges as the 'architect-thinking of the structure' as a whole building for society'- infuses life and blood into the dry bones of the law and makes it a working and living organism through creative and purposive interpretation. Accordingly, it can be expected that the Federal Court of Malaysia in an appropriate case in near future shall reconsider the conservative stance taken in the *UEM case* to liberalize the rule of *locus standi* in public law to allow any *bona fide* litigant having an arguable case to mount an effective challenge for the redress of a public wrong or injury taking into account Lord Acton's immortal words, "power tends to corrupt, and absolute power corrupts absolutely". This will convey a message to the executive or the local government institution that the court shall not sit idly by folding their arms and do nothing when there is an abuse of power and mal-governance. Thus the mere exposure to the chance or possibility of instituting legal action against the executive or a local government institution by a public-spirited citizen, which is in line with the purpose of judicial review as to control the administrative action, is likely to induce the authority concerned to observe the legal limits of power (who presently feel themselves immune from legal control) as public law would no longer remain merely a paper parchment, a testing illusion and a promise of unreality. As Justice V.R. Krishna Iyer in the *Fertilizer Corporation Kamgar v. Union of India*¹⁸⁰ aptly said that 'Law is

¹⁷⁶ *Supra* note 83

¹⁷⁷ *Supra* note 84.

¹⁷⁸ *Supra* note 85.

¹⁷⁹ *Supra* note 86.

¹⁸⁰ (1981) AIR SC 344.

a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction.¹⁸¹ Another celebrated and eminent Indian Justice, Justice Bhagwati, has eloquently put it in *S. P. Gupta and others v President of India and others*¹⁸² that 'It is only by liberalizing the rule of *locus standi* that it is possible to effectively police the corridors of power and prevent violations of law'¹⁸³, promote rule of law and advance the cause of justice. Furthermore, if the traditional rule of *locus standi* is liberalized in a future case in line with stance taken by the two dissenting judges in the *UEM case*, then the famous saying of Chief Justice Hughes of the US Supreme Court would come true. 'A dissent in a court of last resort 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.'¹⁸⁴

¹⁸¹ *Ibid.*, at page 585.

¹⁸² [1982] AIR SC 149.

¹⁸³ *Ibid.* at page 213.

¹⁸⁴ Quoted in AIR 1976 SC 1207 at page 1277.