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THE TREND OF JUDICIAL THINKING IN REVIEWING CORPORATE DECISIONS IN MALAYSIA

Che Norlia Mustafa♣
Universiti Kebangsaan Malaysia

ABSTRACT

It is common knowledge that one of the primary functions of the judiciary is to safeguard the fundamental rights of citizens and non-citizens alike. This is obvious in a situation of the individual versus the government, where the court is relatively unequivocal (save in national security matters) about using its power of judicial review on the executive, legislative, administrative or public authorities. Cases involving an individual citizen and the government as well as its administrative bodies are well-documented. *Marbury v Madison* (5 U.S (1 Cr.) 137 1803) is a celebrated example within common law jurisdiction. In terms of individuals versus corporate and other private bodies, such as companies and regulatory (including self regulatory) bodies, the number of cases which successfully challenged corporate decisions is scant, if not nil. The courts, at least in Malaysia, have been very reluctant to intervene in matters involving corporate decisions or maladministration. It is argued in this paper that the judicial stance in dealing with such cases in Malaysia is somewhat rigid and conservative even though the rights and interests of the claimants are often severely infringed and at times abrogated.

Keywords: corporate decisions, amenability issue, judicial review, Malaysian judicial stance

1. INTRODUCTION

Malaysia is not insulated from the impact of global economic changes that have forced governments around the globe to revisit and reform their traditional practices, norms, regulations and regulatory instruments in order to accommodate the needs of the rapidly changing marketplace. Public services that were previously managed by governmental bodies have been privatised for the purpose of enhancing efficiency while at the same time saving the government from the huge financial burden that is concomitant with such a grand socio-economic agenda. This economic 'revolution' has caused a significant shift in the relationship between the state and the individual. The focus is no longer on the concept of the state owing a duty to the public. Instead, this responsibility lies with non-government entities whose decisions bear a tremendous impact on the lives of the people.

♣ Corresponding author: Che Norlia Mustafa: Faculty of Law, Universiti Kebangsaan Malaysia, 43600, Bangi, Selangor. Email: norlia@ukm.my

The legislation seems to be rather ineffective in addressing issues that have plagued our modern society: particularly, the question of who should be made responsible for any decisions made by corporate bodies that have adversely affected the rights and interests of an individual or a group of individuals? Are the corporate bodies legally accountable to the affected parties in the way that the government and other public authorities are? If so, what is the degree of that accountability? Should the courts be morally compelled to review the decisions of these bodies? Shall the same rules and principles that are applicable to public bodies be equally applied to corporate bodies in ensuring that no rights and interests of the individuals are infringed without proper redress or remedies? Should the courts re draw or for that matter, obliterate the line of division that has traditionally segregated the public law from the private law, hence public bodies from private bodies? It is in the light of all these questions that this paper seeks to discuss the extent to which the courts in Malaysia are willing, ready and able to expand its supervisory jurisdiction over these corporate bodies. The trend of Malaysian judicial thinking on this issue shall be evaluated against the approaches taken by foreign courts, especially, the United Kingdom and the United States of America.

2. DEFINITION

Judicial review is defined as "…the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties"(Halsbury Laws of Malaysia, Vol.9, para. 160.059). It is also acclaimed as the "backbone of administrative law…and the most potent weapon available to an aggrieved individual to challenge the validity of the decision-making process of public authorities" (Ahmad, et al. 2006) This power of judicial supervision is thus administered by the High Court on other courts in the lower judicial hierarchy, as well as other entities of lesser judicial category which are entrusted with the task of executing public duties. Strictly speaking, these are the only entities whose proceedings and decisions are susceptible to judicial review and the susceptibility is due because they are public authorities. What is it that is so 'public' about these bodies so as to render them amenable to judicial review and to the public law sanctions? How does one define public authority? What differentiates a public authority from a non-public or private/corporate body? Is there any fixed and fast rule of differentiation? Or to make things more complicated are there any other bodies which lie somewhere in between these two categories? And what will be their position vis-à-vis those whose rights and interests are affected by their decisions?

3. THE PUBLIC-PRIVATE BODIES DIVIDE

The problem of labeling an authority public or private is not restrictively a Malaysian phenomenon. Similar problem is encountered by the courts in other jurisdictions such as the United Kingdom. The difficulty originates from the distinction made in the law governing these bodies. Historically, in England, the public law-private law dichotomy was unknown until 1977 when reforms of the procedure for judicial review application were legally introduced (Alder 1997). The complexities of modern day developments have in a way induced not only the legislature but also the courts to treat the non-discriminatory approach to determining the justiciability or amenability issue as something of a distant past. Justification for this

differential treatment may be found in Justice Laws's opinion in the case of *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 524, in the following words:

> "Public bodies and private persons are [both] subject to the rule of law….But the principles which govern their relationship with the law are wholly different….. The freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books….But for public bodies the rule is the opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn all of its dealings constitute the fulfillment of duties which it owes to others; indeed it exists for no other purpose."

However, further down in his statement, the learned judge quite convincingly drew a distinction by saying that, though both are subject to the rule of law, the rule which regulates their relationship with the law is not the same. However, further down in his statement, the learned judge quite convincingly drew a distinction by saying that, though both are subject to the rule of law, the rule which regulates their relationship with the law is not the same. The dichotomy is thus based on the 'different-ness' of that regulatory rule which dictates the manner in which these bodies should deal with the law. Laws J proceeded to distinguish the nature of duties owed by public authorities to others and posited that they existed not for their own sake. Rephrasing it, these bodies owe their very being to the rights enjoyed by others. The court in the case of Somerset had indeed diluted miserably the principle enunciated in the landmark case of *R v Panel on Take Overs and Mergers, ex parte Datafin plc and another* [1987] 1 All ER 564, which witnessed a shift in the line of judicial thinking from the rigid dichotomy orthodoxy to a more liberal way of looking at the issue. Interestingly, despite the fact that judicial reluctance in intervening in the private affairs of commercial enterprises or corporate bodies is relatively less prominent in the United Kingdom compared to that demonstrated by the courts in Malaysia, there have been calls for further liberalization of judicial attitude in that jurisdiction when confronted with issues pertaining to the exercise of its supervisory power over such bodies.

4. JUDICIAL REVIEW OF CORPRATE DECISIONS – A GENERAL PICTURE

As mentioned earlier in this work, there was no such thing as the public-law and private law divide in the United Kingdom prior to the 1977 amendment of the rule governing the application for judicial review. In fact, public law had, since the beginning, been much influenced by the rules and principles governing the relationship between the commercial players, notably, the companies and their shareholders. The doctrine of ultra vires which provides the spinal support for judicial review in its application to public authorities (such as local councils) was adopted from the 19th century-company law (Alder 1997). But since then onwards, the problem of ascertaining whether the courts should interfere with the decisions of those bodies categorized as 'private' seems to have been perennial. The on-going debates over the issue of where the boundaries between what is private and what is not should be drawn have left not only those in the legal fraternity confused evermore, but also those in the business circle, the laymen and even the government itself more baffled than before. What causes the confusion?

Arguably, if there is anyone or anything that should be blamed, it would be the once unthinkable changing economic and market needs of the day which revamp the existing landscape that had hitherto been characterized by the simple state-citizen and state-market relationships. All these have forced the government to devise a scheme that might have never entered its mind before. The robust changes in the day to day business around the globe prompted by technological advances, the growing monumental burden of managing and maintaining public utilities and facilities have left the government with no option but to resort to non traditional methods of resolving the problems brought about by those changes.

The 'non-traditional' methods referred to herein include the privatization of public services, the liberalization of markets, the introduction of the private funds initiative scheme taking in the forms of 'build, operate and transfer' (BOT), 'built, leased and transfer' and so forth. Hence, the emergence of gigantic statutory and non statutory corporations that are taking over the functions of public service providers from the traditional bodies such as local councils, has now become the order of the day. The government has suddenly found itself trapped between its social responsibilities on the one hand, and economic prudence, on the other; and quite unfortunately, it is the latter that has to be given priority. To curb the over utilization and misuse of powers by these new species of 'economic or commercial operators', bodies such as the Panel on Take Overs and Mergers, commissions (such as the Independent Television Commission in Britain), the Stock Exchange, the Securities and Investment Board plus other self- regulatory bodies are put in place – with some being statutorily created, whilst others, extra legally constituted. These bodies are assigned with the task of supervising the manner in which the new 'service providers and managers' should conduct their affairs and when such affairs should be conducted. This is the very mechanism installed by the government for the purpose of keeping the needs of the public and the legitimate rights of those unique corporations, on a right balance. But, as with other things in life, these mechanisms do not exist without their pros and cons. Having been endowed with the power to regulate other entities, the question that is left to be answered is, who or what is the most appropriate body that should be conferred with the power to supervise them in turn?

It appears that the answer to that question is none other than the courts. But the essential question is not so much of whether the courts are the most appropriate bodies to police the exercise of powers by these new regulatory entities; the question is with how much vigour or intensity should the courts pursue the objective of assuring that these entities are acting within the parameters of legality and justice, or in other words, acting in line with the principles established by the Rule of Law? This is where the dilemma of fixing the boundaries between private and public bodies lies. The string of cases, whether within or outside Malaysia, seem to illustrate that the courts have been having problems with finding the right formula in determining whether or not to extend its supervisory jurisdiction to the corporate or private arena. Arguably, the question of "to review or not to review" may linger on for some time to come as the nature of modern day commercial and private undertakings prove too special and complicated for anyone else except the players in this sophisticated game themselves to understand.

5. THE MALAYSIAN JUDICIAL APPROACH TO THE ISSUE

Despite the fact that, economic wise, Malaysia is no less advanced than other countries in the world (for instance, in terms of the steps taken by the government in addressing economic challenges, namely the privatization of public utilities and undertakings through the creation of corporations such as PERNAS (Perbadanan Nasional Berhad – a public limited company registered under the Companies Act 1965, and whose largest shareholder is the Ministry of Finance; MAS (Malaysian Airline System); HICOM (Heavy Industries Corporation of Malaysia) and PETRONAS (the National Oil Corporation)) yet in the legal aspect, it has been rather slow in addressing the problems that tag along with those steps. The privatization scheme adopted by the government in remedying the ever growing burden of economic management of the state brings with it some difficulties which have never been encountered before by the people. The setting up of the new economic regime entails new legal problems, notably the legal position of these corporations vis-à-vis those affected by their decisions. Where Malaysia is concerned, the number of cases that have successfully challenged the decisions of corporate bodies is very small, if none at all. The case of *OSK & Partners Sdn. Bhd v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179 is one of the exceptionally few cases in which the court was willing to penetrate the private law domain when it decided that the respondent (the Kuala Lumpur Stock Exchange) was a body amenable to judicial review by making the 'hybrid-ness' of such corporations the basis of judicial intervention.

In that case, the appellant, was a stockbroker carrying on business as a member of the Kuala Lumpur Stock Exchange. A fine of five thousand Ringgit was imposed by the Respondent's Committee on the appellant by virtue of Article 27 of the Respondent's Articles of Association, alleging that the appellant had breached certain rules of the Stock Exchange. An application was made by the appellant against the decision of the Committee on the grounds that the said decision was ultra vires the Committee's power, that there was a breach of natural justice and that it had erred in law in the application of the said rules. At the High Court, it was decided that the Committee was not a body against whom certiorari would lie on the grounds that (a) the Stock Exchange (and its Committee) was essentially a private body; (b) the relationship between the parties was strictly contractual in nature; (c) the Committee was not under any express or implied duty to act judicially when exercising disciplinary powers and (d) the functions of the Exchange were not in any way manifestly public in nature as it was no more than an exclusive business club. The decision was nevertheless overturned by the Federal Court which ordered the case to be remitted to the High Court for continued hearing of the substantive motion for certiorari and prohibition.

It is interesting to note that the approach taken by the High Court was much narrower than that adopted by the Federal Court. The latter had preferred a broader approach in determining whether the Stock Exchange was a body susceptible to judicial review. Justice Abdoolcader in relying on the reinterpretation of the well known judgment of Atkin L.J *in R v Electricity Commissioners, ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 K.B 171, opined that "where a body has the power to determine questions affecting the rights of subjects then the courts can supervise it through the prerogative orders". Neither did the Court agree with the argument that the contractual nature of the relationship between the appellants and the Stock Exchange immunized the latter from an action in public law. According to

Abdoolcader J, despite that this body derived its powers solely from contract, but so long as there was an infusion of a public element, that would suffice to render it amenable to the supervisory jurisdiction of the court. Further that the Stock Exchange Committee being a body responsible for determining the rights of persons licensed under the Securities Industry Act, 1963, had therefore, a duty to act judicially in the exercise of that power. Thus, the tests that need to be satisfied in order for the judicial power of the courts to be made operative on private bodies are (i) the existence of some public element and (ii) the possession of legal authority to determine questions affecting the rights of persons (subjects). In concurring with the statement made by Lord Widgery in the case of *Reg. v Board of Visitors of Hull Prison, Ex parte St. Germain and Others* [1978] Q.B.D 678, Justice Abdoolcader had expanded the boundaries of the supervisory jurisdiction so as to reach into the realm which the High Court had earlier on refused to tread. Hence, it appears that the categorization of judicial and quasi judicial bodies, and public or private bodies was made redundant by the Federal Court in the OSK case. It may thus be argued that the said principle should have been adopted by later courts in *pari materia* cases as their guiding light in determining the judicial path that ought to be traveled when private rights of the subjects are at stake.

However, sadly enough, the principle in OSK case was short lived. The judicial pendulum on this issue has been swung back to its prior position within quite a short space of time. Decisions in cases such *as Ganda Oil Industries Sdn. Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor* [1988] 1 MLJ 174, illustrates the state of judicial reversion in point. In this case, the appellants had applied for an order of certiorari to quash the decision of the Kuala Lumpur Commodity Exchange fixing the price of crude palm oil at $1,350/- per metric ton in respect of 617 lots purchased by the appellants on the floor of the Exchange. The grounds given were that the respondents had exceeded their jurisdiction and had acted in bad faith. The fundamental issue which the court had to resolve was whether the Kuala Lumpur Commodity Exchange was indeed a body that was susceptible to judicial review, hence the applicability of the remedies accruing therefrom. The Supreme Court held in the negative. After considering a host of other cases dealing with similar issue, the court gave its judgment in the following words:

> "In the instance case, ministerial control is only in respect of policy matters and not the day to day administration and business of the Exchange. The relationship between the parties who are members of the Exchange is clearly contractual and the exercise of the power of the KLCE under Regulation 11 of the General Regulations is also an exercise of a power derived under the contract. The act which is the subject of the challenge is, by its nature, not and should not in our view be made amenable to judicial review" [1988].

The 'source of power' (not the nature of functions nor the recipient of decision) was again employed by the court as a basis to restrict itself from reviewing corporate decisions. The Supreme Court in this case seems to have ignored the centrality of individuals' rights and interests by merely hiding behind the mask of technicalities. By treating the ministerial control (thus the involvement of a public element) as merely peripheral, the Supreme Court in Ganda Oil case had followed the line of thinking applied in *Regina v National Coal Board, ex parte*

National Union of Mineworkers and Others [1986] I.C.R 791(which was decided a year earlier than the more liberal and oft-quoted Datafin case). It should be noted though, that the Supreme Court in *Ganda Oil* did not make any attempt to distinguish the key facts of the case before it from those in the preceding case of OSK. The decision thus leaves us beleaguered as to the true position of corporate bodies with regard to their amenability to judicial review. We are left to grope alone in this judicial twilight zone in identifying the exact extent to which the courts in Malaysia are serious enough to lift the technical veil of such entities.

However, a relief, though momentary, might be found in the decision of the Court of Appeal in a more recent case of *Tang Kwor Ham v Pengurusan Danaharta Nasional Bhd*. [2006] 4 AMR 89. The appellant in this case had applied to the High Court for a leave for judicial review of the decision made by Danaharta. His application was denied on the ground that Danaharta was essentially a private body and its decision was therefore beyond the reach of public law. On appeal, Justice Gopal Sri Ram decided that Danaharta's decision was amenable to judicial review on the ground that although it was a private body, yet "in truth and substance" it was an instrument of government. Though without expressly saying that there was an infusion of public element in the way the court in OSK did, it may be argued here that the pendulum has now been swung forward again by the Court of Appeal to the position set by the OSK case. But this position was not here to remain, as the Federal Court in allowing the appeal by Danaharta decided that Section 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 clearly excluded the court from exercising its judicial review power over the decision of this body [2007] 4 CLJ 513. From this it appears quite clearly that the most supreme court of appeal in Malaysia is not very keen in crossing the traditional border which separates the private and the public law territories, and in this particular case it was 'fortunate' enough for the Court to decide in the way it did, as there is this Section 72 of the1998 Act which served as the 'culprit' which barred the Court from deciding otherwise. It should be noted that the test applied by the High Court in this case should have been adopted (that is, the 'pith and substance' test – the one that was applied in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, in ascertaining the true nature of the subject matter in question) instead of relying too rigidly on the technical method of statutory interpretation.

Another interesting point worth discussing here is the manner in which Justice Gopal Sri Ram had creatively differentiated the case from those earlier cases which took the narrow view of this amenability issue, by saying that there should be a distinction between amenability and justiciability. While at the same time dismissing the applicability of the principle in the case of *Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors* [2003] 1 MLJ 98, on the ground that it was an *obiter dicta,* the judge proceeded to explain the nature of the said body by relying on the case of *Tenaga Nasional Berhad v Tekali Prospecting Sdn. Bhd* [2002] 3 CLJ 624, which categorized such bodies into three different separate categories, namely: (i) companies performing purely private functions but in which the government owns substantial shares (such as MAS - this type of companies are not amenable to judicial review), (ii) hybrids (such as Tenaga Nasional and Telekom Malaysia – whether they are amenable or not to judicial review depends on the nature of their acts or omissions) and (iii) Companies solely owned by the government (such as the Danaharta) – this type of companies are funded by the public and therefore are amenable to judicial scrutiny). Speaking of companies falling within the

first category abovementioned, perhaps it is also worth commenting on the case of *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713. Though the main issue raised therein was not directly concerned with amenability of corporate decisions to judicial policing (the focus was on the question of whether the relevant Collective Agreement contravened the equality provision of Article 8 (2) of the Federal Constitution), the ruling in that case somehow implies the rigid position taken by the court in cases involving corporate decisions. Hence, it might be argued that the province of judicial review for that matter seemed to have been quite firmly demarcated. One might therefore hypothesize that the chances of seeing such a decision reviewed by courts in Malaysia are rather slim if not absent.

From the authorities cited above it may be argued that the courts in Malaysia have preferred to adopt the traditional and conservative approach in dealing with the issue of amenability of corporate decisions save in certain exceptional cases. Although some guidelines might be taken from the categorization of these corporations as illustrated in the aforementioned case, the inconsistent perception held by the superior courts, notably the highest court of appeal (the Federal Court), regarding the test to be applied in determining the true nature of the said bodies, would suggest that there is still a long way to go before the approach is liberalized. The questions now are: should there be a fixed and universal approach for determining the position of corporate decisions in this area of the law? If there is, would it be workable? Or should the 'business judgment' rule be religiously observed and be allowed to 'intimidate' the courts from being too intrusive in corporate matters? If that is the case, would an affected party have any justice should the private law fail to offer any meaningful remedies?

From a variety of discourses held so far in various jurisdictions, there appear to be some similarities in the problems facing the courts in this country as well as those in the United Kingdom and also in the United States of America, in demarcating the boundaries beyond which the courts should not step in. Those similarities lie in the fact that it is rather difficult for the courts to strike a right and acceptable balance between the conflicting interests of the individuals and of the corporations as both are existing in two quite separate worlds where different norms and rules of morality and practicality apply. Amazingly enough, despite the fact that American courts are well known for their robust judicial activism, yet the perplexity of hammering the final nail to the coffin of judicial review of corporate decisions remain unresolved. The courts in many a case failed to come to a consensus as to when they should intervene in such matters. For example, no definite answer has so far been provided by the courts with regard the issue of what circumstances would warrant the application of that standard of 'compelling justification' established in the case of *Blasius Indus., Inc. v Atlas* (564 A.2d 651(Del. Ch.1988). Cases such as *Stahl v Apple Bancorp, Inc* (579 A.2d 1115 (Del. Ch.1990), *Chesapeake Corp. v Shore* (No.CIV.A. 17626, 2000 WL 193119 (Del.Ch.Feb. 11, 2000) are among those instances which illustrate the point. Thus, one will find that the maxim of *forum non convenience* may sometimes have to be invoked by the courts in order to create that balance. That having said, it does not mean that the judicial scale should be sliding too often and too leniently in the corporate direction to the extent of trivializing the rights of the individuals, hence, making a mockery of the rule of law cherished by all those living in a democratic country.

However, looking from another perspective, it might be relevant to ask, "if judicial review were to be allowed liberally in corporate cases, are the courts competent enough to assess the 'reasonableness' of corporate decisions? Or would there in the long run be any negative impact on the corporate sector should the court resolve to invalidate corporate decisions? In the corporate world, time means money, thus, would not the intensity of review be an obstacle to speedy business decision-making? All of these questions will have to be answered before anyone could jump to any conclusion in arguing for or against judicial intervention in corporate matters.

6. CONCLUSION

There is no doubt about the role of the courts as the guardian of individual rights no matter where, when, how and by whom such rights are being abrogated. However, as has been discussed in the above paragraphs it is quite difficult to rationalize this ideal without entangling oneself in the mess of striking that fine boundary between the reality of corporate world and the need for the protection of individual rights and liberties. The Malaysian courts are not alone in treading this treacherous path and as cases from other jurisdictions have already illustrated, it appears that the dilemma facing the courts around the world (or at least in those in the Common Law legal tradition) will not easily fade from the scene. Thus, it may not be too presumptuous to conclude that the rigid and non interventionist attitude taken by the Malaysian courts in reviewing corporate decisions, thus far, is here to remain until and unless there is an extraordinary judicial figure that is creative, bold and fiercely liberal to depart from that long-established tradition.

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