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PUBLIC LAW: AN EXAMINATION OF PURPOSE *(Part I)*

In an era where the private sector increasingly assumes functions which hitherto have been performed by the state, questions are being asked whether public law in its present form should not be revised to better safeguard the interests of the citizens. It is against this backdrop that the article seeks to examine some of the basic questions of public law. Part I will consider approaches used both in England and in Singapore in defining the scope of public law. Part II will seek to examine some implications which may result from a recognition of the present limits of public law when placed against the changing functions of the state, and to consider the purpose for which public law ought to achieve.

I. INTRODUCTION

WHEN we speak of public law, there is by necessary implication and contrast a separate body of laws called private law. Yet, where does and should private law end, and where does public law begin or ought to begin, is by no means easy to resolve and is a difficult subject in jurisprudential thought. A part of this difficulty stems from the historical tradition of English common law. Up until recently, common lawyers never formally recognised that a separate category, called public law, could ever develop within the common law. There was a belief that there should only be one body of laws which everyone, including the government, should be subject to. This may be traced to the Diceyan inheritance of the rule of law.[1] This belief, however, changed with the massive expansion of the role of the state. In consequence, the courts have increasingly been forced to recognise that the application of common law principles to the public authorities must be moderated to take public interests and public policies into consideration.[2] This led to what Lord Diplock confidently referred to as the development of a body of principles at common law which have special

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1 See generally Dicey, *An Introduction to the Study of the Law and the Constitution* (10th ed., 1982).

2 See generally *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C.1004; *Anns* v. *Merton London Borough Council* [1978] A.C. 728. *Anns* v. *Merton London Borough Council* has been overruled in *Murphy* v. *Brentwood D.C.* [1990] 2 All E.R. 908. It may be said that *Murphy's* case, narrowly read, merely overrules *Anns* v. *Merton* on the basis that there can never be a recovery of economic loss against a local authority. The position, nevertheless, remains that in recovering against a public authority in the tort of negligence, the court will still distinguish between planning cum policy level acts as opposed to operational level acts. See Craig, Administrative Law, (2nd ed., 1989), pp. 448-458. See also *Rowling* v. *Takaro Properties Ltd.* [1988] 1 All E.R. 163, *Hoffman-La Roche & Co. A.C.* v. *Secretary of State for Trade and Industry* [1975] A.C. 295; *"The Amphitrite"* [1921] 3 K.B. 500.

application to public agencies, or public law.[3] Hence, as an illustration, the "duty principle" as it applies to a state agency,[4] and the requirement that fair procedure must be observed by a public body.[5]

While the development of a separate body of legal principles proceeds on the assumption that the powers of public bodies must be checked to prevent abuse, what is not clear, however, is the delineating boundary between acts which come under private law and acts which are subject to the regime of public law. This divide essentially operates in the grey area. Traditionally, one intuitively sees public law as applicable to state agencies like government departments and statutory bodies. However, this view no longer holds true in recent years as government entities equally come in the guise of private entities. Government companies registered under the Companies Act, for instance, operate in the private law regime. An illustration of this may be found in the transformation of the Singapore General Hospital into a government company. This choice of a "private law" entity raises some interesting questions which involve a re-examination of the boundaries of public law.

The subject of control of public power is particularly pertinent in the era of privatisation. With the hiving off of state enterprises through sale to the private sector, a transformation has taken place in the way in which public goods are being delivered. Traditional functions of government, such as provision of health, broadcasting, telecommunications and utility services, have increasingly been taken over by the private supplier. In consequence, the state progressively reduces its profile in these departments, limiting itself to the role of performing the regulatory functions. The choice of a private supplier in delivering public services raises equally interesting questions concerning the scope of public law.

With the mingling of the private and the public realms not only in government, but also in the way in which public services are being delivered, some difficulties arise which are directly relevant. First, how should the criteria with which the "public" aspect, both with respect to the identification of the types of institutions and the application of laws, is delineated be defined. Secondly, notwithstanding the special quality of public authorities, should public/private distinctions in law be effectively developed by the courts in the face of the age old Diceyan tradition of the rule of law. Thirdly, an enquiry into the nature of the public/private distinctions in public law follows a growing concern about the changing character of public duties and power in relation to the role of the state and dominant private enterprises. This leads directly to the question of the purpose which public law is designed to achieve.

It is against this broad canvas that this article seeks to explore the nature of the public/private distinction in public law and the ends for which public law seeks to attain. A caveat must be added at this point. The writer has

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3 *O'Reilly v. Mackman* [1983] A.C. 237 at 279.

4 See *Anns* v. *Merton London Borough Council, supra,* note 2.

5 See *Ridge* v. *Baldwin* [1964] A.C. 40.

no pretensions of providing a comprehensive exegesis on the complexities which a subject of this nature throws up. This would require a monograph. In fact, the objectives are more modest and narrow in scope. This article will examine (a) the present approaches used to define the scope of public law; (b) some implications which may result from a recognition of the present limits when placed against the background of the changing functions of the state; and (c) the purpose which public law ought to achieve.

The central submission may be stated thus: that public law[6] is premised essentially on the control of exercise of power; not just governmental power, but any power which in the interest of society ought to be subject to some form of control. This submission carries the implication that amid the entanglement of the public/private spheres of involvement in state activity in recent years, there is scope for the development and extension of public law type reasoning into private regimes as a means of ensuring greater public accountability and control within the body politic.[7]

II. BOUNDARIES OF PUBLIC LAW

The proposal of conceiving public law as a means of controlling administrative power requires a re-examination of the way in which the courts determine what public law type cases are.

A. *Private/Public Distinctions in England*

Under the current reform in England, Order 53 of the Rules of Supreme Court (hereafter RSC) regulates the procedure for judicial control of administrative action. The provision, part of which had been incorporated into section 31 of the Supreme Court Act, 1981, requires that leave of the court be obtained in applying for prerogative orders, injunctions and declarations. In deciding whether or not declarations or injunctions will issue, the court will take into account the nature of the matters in respect of which relief may be granted by the prerogative remedies; the nature of the persons or bodies against whom relief may be granted; and all the circumstances of the case. In any event, the court will not grant leave to apply for review unless the applicant has sufficient interest in the matter.[8] It would appear, therefore, that an applicant for judicial review

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6 While public law may include areas like criminal law and international law, for the purposes of this article, I have narrowly used public law in the constitutional and administrative sense.

7 For a general discussion on the public/private divide in England, see Woolf, "Public Law-Private Law: Why the Divide? A Personal View" (1986) Public Law 220. Additionally, the question whether the common law should import the continental notion of the public/private divide drew some discussion. Harlow examined the issue and questioned the utility of the distinction in "Public and Private Law: Definition Without Distinction" in (1980) 43 M.L.R. 241. For a response to Harlow's arguments, see Samuel, "Public and Private Law: Private Lawyer's Response", (1983) 46 M.L.R. 558.

8 S.31, Supreme Court Act, 1981.

must satisfy, depending on the circumstance of the case, both functional and institutional requirements.[9]

The scope of these provisions as interpreted by the courts has some significance. In *O'Reilly* \. *Mackman*[10] the prisoners who were charged with disciplinary offences, wished to challenge the decision of the Board of Visitors on the grounds that they had committed a breach of the rules of natural justice and sought declarations that the findings and consequent penalties were null and void. The issue before the House of Lords was whether the court could grant declaratory relief to actions begun by ordinary writs and not by way of Order 53 procedure. The House of Lords held that in view of the new proceedings the application by the prisoner should be struck out as an abuse of the process of the court. Lord Diplock in his judgment, which carried the unanimous endorsement of the House, reasoned that the reformed procedures provided many safeguards for the public body, including the requirement of the application of leave of court which must be carried within a specified period of time so that the authorities will not be kept unduly in the dark as to whether their action is valid or not. This decision has the effect of making any application for a public law type remedy against a public body follow the requirements prescribed by Order 53 of the RSC and section 31 of the Supreme Court Act, 1981. One writer even goes so far as to say that the decision requires the vindication of public law rights only by the proper application for judicial review."

The *O'Reilly* case brings into question the fundamental nature of the divide between private and public law.[12] By requiring applicants who have their "public law" rights infringed to comply with the requirements of Order 53 in pursuing their remedies, particularly if a declaration or injunction is sought, their Lordships have formally cast into the open the debate on the distinction between private law and public law. While the nature of the remedy sought by the applicant determines whether Order 53 applies, the nagging question still remains. What is the meaning in law of a public law case? Alternatively, another way of posing the question is to ask the methods by which public law may be distinguished from private law. There are several techniques used by the courts although not all of which are entirely satisfactory.[13]

One technique is to regard the statutory source of power as determining whether a case falls within the public or the private category. This is commonly done by asking whether the body concerned is constituted under an act

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9 Craig, *Administrative Law, op. cit., supra,* note 2, p. 498.

10 [1982] 3 W.L.R. 1096.

11 Beatson, *"Public and Private in Administrative Law",* (1981)103 L.Q.R. 103, 34 at 39. See also, Harlow, *Law and Administration* (1986), p. 267.

12 For some discussion on the *O'Reilly* case, see Iyer, "Certiorari as a Public Law Remedy" in A.J. Harding (ed.) *The Common Law in Singapore and Malaysia,* (1985), 295 at p. 305-311.

13 In this part I am indebted to Beatson for his excellent article which has helped me greatly in the preparation of this part of the essay, *op. cit.* See also Craig, *op cit.,* pp. 418-421.

of Parliament. A body which exercises statutory power will come, by this definition, within the regime of public law and, therefore, be subject to the prerogative writs, and or other remedies. An example of the use of such a defining yardstick may be found in *Cocks* v. *Thanet* D.C.[14] where the House of Lords in applying *O'Reilly,* held that since a statutory duty exists under the Housing (Homeless Persons) Act 1977, it becomes a public law issue and thus a claimant for damages for breach of statutory duty must proceed under the Order 53 procedure.

Several limitations exist in using source of power as a defining yardstick. To begin with, the scope of public law as it exists in relation to the supervisory jurisdiction of the courts extends not only to statutory bodies, but also to non-statutory ones as well. One example may be found in *R. v. Criminal Injuries Compensation Board, ex pane Lain,*[15] where it was held that the supervisory jurisdiction of the court extends to the compensation board, a body constituted under the prerogative, since it was a body of persons of a public rather than a private character. Thus, to say that the definition of public law should look only at the statutory source of power would be unrealistic since it does not take into account existing precedents.

To say that all authorities drawing on statutory sources of power should operate strictly within the ambit of public law, as this view suggests, reveals a failure in recognising that not all cases involving public authorities raise public law issues. It is entirely conceivable that a public authority, as a corporate entity may be involved in an activity which may put it in the same position as a private person. For instance, a statutory board may enter into a contract for services with another private party, and in consequence be as liable as that other private party should it fail to discharge its obligations.[16]

Additionally, using the statutory source of power approach in defining the boundaries of public law does not give sufficient recognition to the role of public law in controlling not just the powers of public authorities but also the powers of the private agencies performing public functions. In other words, the use of statutory source of power to define the entity as one subject to public law regime may just prove to be too rigid and inflexible.

Another technique suggested for determining the boundary of public law is to ask whether the body concerned is one which exercises governmental powers. This test seems appealing in differentiating between public law and private law cases, since it is only logical that government activities should come within the public domain. In fact, governmental powers

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[14] [1982] 3 All E.R. 1135.

[15] [1967] 2 Q.B. 865, see also *K. v. Panel on Takeovers and Mergers, ex pane Data/in,* [1987] Q.B. 815, where the court held that a self-regulatory organisation founded on contract is also subject to the supervisory jurisdiction of the courts.

[16] See also the *Pride of Derby* case [1953] Ch. 149 where it was held that a local authority was as liable in nuisance for pollution from sewage works, and is in no better position than a private person.

would serve as a useful starting point in drawing up a catalogue of public law cases. However, this test is not entirely satisfactory either. First, as Beatson has rightly pointed out,[17] the use of the governmental powers test as defining the ambit of public laws does not adequately explain the extension of the applicability of natural justice to trade unions and tribunals. Secondly, the use of the test of governmental powers does not seem to take into account the existence of quasi-governmental bodies that came in the form of statutory corporations. Thirdly, the test does not provide an adequate measure of just what governmental powers are. Are governmental powers merely to be confined to departmental bodies or does it extend to private contractual bodies which perform some governmental functions?

Despite the relative uncertainty, it did not prevent the English courts however, from invoking governmental powers as a reason for extending public law reasoning. This may be seen in *R.* v *Panel on Takeovers and Mergers, ex parte Data/in Pic.*[18]* The Panel in this case, an unincorporated association, serves as a regulatory body on takeovers and mergers, and administers and enforces a code of conduct which it promulgates for this purpose. The applicant, Datafin, complained to the Panel on the conduct of one of its members, suggesting a breach of the code. The complaint was dismissed by the Panel and the applicant sought a review of the decision.

The *Datafin* case is unusual because an application for judicial review was made against a body which does not exercise statutory, prerogative or common law powers. The code which it administers does not have the force of law. However, those who wish to benefit from the facilities of the securities market have had to abide by the code by reason of necessity. One issue which came before the court was whether the review function of the court extends to a body discharging such functions. Datafin unsuccessfully sought the High Court's leave to apply for judicial review to quash the Panel's decision and in consequence, the Court of Appeal came to consider the applicant's case.

The Court of Appeal was unanimous in holding that the Panel on Takeovers and Mergers was amenable to judicial review. Lloyd L.J., in particular, said:

> I would accept ... that the source of power in the present case is indeed governmental. I agree with Mr Lever when he says that there has been an implied devolution of power. Power exercised behind the scenes is power nonetheless. Having regard to the way in which the panel came to be established, the fact that the Governor of the Bank of England appoints both the chairman and the deputy chairman, and the other matters to which Sir Donaldson has referred, I am persuaded that the panel was established 'under the authority of the Government...[19]

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[17] Beatson, *op. cit.*, p. 50.

[18] [1987]Q.B.815.See, Forsyth, "The Scope of Judicial Review: 'Public Duty'not'Source of Power'" (1987) P.L. 356.

[19] [1987] Q.B. 815 at p. 819.

The *Datafin* case suggests that public law type of reasoning would extend to cases where there is some form of governmental underpinning in its overall set up to give the body concerned the character of "publicness". Here, the Panel, although administering a code which does not have the force of law, performs a function which has been devolved by conscious design by government and should thus come within the supervisory jurisdiction of the courts. Much as the *Datafin* case may be applauded by those who wish to see a further extension of the boundaries of judicial review, it is, nevertheless, a less than satisfactory advancement since this involves a tenuous extension of the meaning of government and more fundamentally, it does not resolve the difficulty raised earlier in defining the precise limits of the definition of government.

A third technique suggests looking at the scope of remedies to decide whether the issue at hand forms a part of public law. Under the current reforms, section 31(2)(a) of the Supreme Court Act, 1981 provides that the court in considering the application is required to take into account the nature of the matters in respect of which relief may be granted by the prerogative order. An applicant seeking to challenge the decision of a body would have to justify to the court why a particular prerogative relief should be extended to the issue at hand in order to bring it within the public sphere. This may be seen in *Law* v. *National Greyhound Racing Club Ltd.*[20] where regard was had to the issue of whether the prerogative relief may be extended to what is effectively the national governing body of a sport. In that case, the court said, *inter alia,* that even though the club controlled most of the greyhound racing in the country and could by its decision, admit, suspend or deprive its members of certain privileges, the jurisdiction which the court had under Order 53 to grant injunction or declaration on an application for judicial review was confined to activities which are public in nature, as opposed to those which are purely private or domestic in nature. In this case, since the authority of the association over the appellant was purely contractual, it did not involve any public element to justify the application of prerogative order, which, by tradition, did not include such bodies.

Beatson argues, quite rightly, that using the scope of remedies approach, as suggested, does not provide a satisfactory guidance in determining what are the limits of public law:

> Where one is dealing with the governing body of a trade or profession, why should the 'public' or 'private' nature of the body depend on the historical accident of whether the body is regulated by statute, charter, or contract especially in view of the important procedural consequences that might follow from this.[21]

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[20] [1983] 3 All E.R. 300.
[21] Beatson, *op. cit.,* p. 52.

Additionally, as was evident in *R. v. ex pane Lavelle,*[22] ruling out the availability of public law remedies does not by the same token suggest that substantive public law issues do not figure in the deliberations as well. One obvious example may be found in the breach of a statutory duty where a claimant's recourse may well be a suit for damages. In assessing whether a breach of statutory duty has taken place, consideration may be had to principles concerning the limits of the exercise of discretionary powers - the kind of reasoning that one finds in public law. To say that such are private law cases by virtue of the remedies sought may well result in creating a rather artificial distinction. It would be tantamount to saying that a breach of natural justice is a public law case if the remedy sought is certiorari, but not if only private law remedy is sought. To maintain that distinction would be missing the point. Whether the remedy sought is a public law or a private law remedy does not alter the nature of the cause of action, *i.e.* a breach of public law obligations.

The final technique, according to Beatson, "involves challenging a power which has been committed to the jurisdiction of the authority in question."[23] This approach attempts to set public law cases apart by looking at the decision-making functions of the agency concerned. In *Cocks v. Thanet B.C.* for instance, the Council's decision on the question of re-housing raised questions of public law significance. The test appears to be one of determining whether the decision-making function raised any particular issue which relates to the power of the decision being committed by the statute to the housing authority. This may include, for instance, an obligation by the housing authority to decide whether they have reason to believe the matters which will give rise to the duty of inquiry. This is essentially considered a public law function. In this case, where the decision is challenged on the grounds that the authority has failed to discharge its decision-making function, then under the current law reforms, public law procedures ought to be employed.

This approach does not differ very much from the first test mentioned in the foregoing, *i.e.*, using the statutory source of power approach in determining whether or not the issue is one which relates to public law. Ultimately, as Beatson has appropriately pointed out, at the remedial level, the use of the jurisdiction test comes down to whether the statute which forms the basis of the agency's jurisdiction imposes a duty to the public or to the individuals.[24] However, such an approach does not take into account the position of non-statutory regulatory bodies, as was seen in the *Data/in* example where a purely contractual body operating within what was essentially a private law realm was ruled to be subject to public law principles.

Another notable limitation is that the test fails to take into account the fact that a breach of public law duties may equally result in creating private

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[22] [1983] 1 All E.R. 241.
[23] Beatson, *op. cit.*, p. 53.
[24] Beatson, *op. cit.*, p. 54.

law rights at the remedial level. One notable example may be found in the improper dismissal of a public employee. In this case, the rights of the public employee to sue in private law may well depend on him proving an invalid exercise of public law powers. This would involve challenging the jurisdiction of the body concerned. As such, it should equally be treated at the remedial level as a private law case. It is odd that the person concerned should be compelled to proceed under the Order 53 procedure, as required by the *O'Reilly* case simply because his case may involve challenging the public law jurisdiction of the authority.[25]

Indeed, although the *O'Reilly* case impliedly, if not expressly, recognised the evolution of a separate category of public law, both at the substantive, remedial and the procedural level, the problem that it creates is by no means easy to resolve. The problem that one refers to here is mapping out the precise boundaries of public law. Following the *O'Reilly* case, the English courts would generally consider it an abuse of the judicial process if a case classified as one which belongs to public law, does not observe the Order 53 procedure; one exception being where judicial review is sought as a collateral issue.[26]

What then are public law cases which may allow for the application of prerogative orders, as opposed to private law cases which generally do not. The foregoing discussion demonstrates some of the approaches employed to determine that question. As we have seen, the approaches suggested are not entirely satisfactory. It is clear from the discussion of the various approaches that the position is unsatisfactory. First, most of these approaches basically still beg the question of what public law essentially is. For instance, in using the exercise of governmental powers as the defining yardstick, one comes against the problem of using a concept which contains hidden premises which are never spelt out. Just what Lloyd L.J. in the *Data/in* case meant by the source of power being governmental is not clear. There is, however, an underlying assumption that the readers would intuitively know what governmental powers are about. This presupposition works on the belief that the forms in which governmental powers are expressed do not change. What if it does?

Secondly, the approaches suggested are not sufficiently comprehensive to take into account those cases of judicial review which do not fit the description which the approaches give. For instance, to say that cases of public law are defined simply by reference to a statutory source of power of its own does not take into account those cases where judicial review have, indeed, been applied to non-statutory bodies. Tribunals that emerged out of contractual arrangements are subject to the requirements of natural

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[25] Lord Diplock in *O'Reilly* v. *Mackman* has stated that an exception may be made to the rule, *i.e.*, where public law issue is raised as a collateral attack on the authority, Order 53 procedure need not be strictly observed. This exception was successfully raised in the case of *WandsworthL.B.C.* v. *Winder* [1985] A.C. 461 where the tenant successfully defended a claim by the local authority for overdue rent based on the revised charges, on the ground that the authority had acted ultra vires.

[26] *Ibid.*

justice, and thus, subject as much to judicial review as are statutory tribunals.[27] In consequence, using a particular approach to sift out public law issues will only result in choosing a yardstick that may be both unrealistic and inflexible.

Thirdly, most of the techniques discussed above do not distinguish whether the public law issues are being canvassed at the substantive level or at the remedial level. For instance, while it may be true to say that an application for an Order 53 remedy would involve a public law issue, it is by no means true that all public law issues would necessarily require the Order 53 procedure to be followed. As was pointed out earlier, there may be cases where the establishment of a private law right to sue may require the plaintiff to prove an invalid exercise of public decision-making power. The remedies sought could be damages while it would be well be conceivable for the court to apply public law type reasoning at the substantive level to arrive at a decision. In such an event, would the example just considered be classified as a public or private law matter?

B. *Public Law in Singapore*

The position in Singapore in respect of the public/private law distinction differs in part from the position taken in the United Kingdom. Order 53 of the Singapore RSC incorporates the old Order 53 of the English Rules of the Supreme Court. Whereas there has been a reform of the powers of the courts and of the procedural requirements under Order 53 of the English Rules of Supreme Court, no such reforms exist in Singapore. Presently, the Rules merely require that an application for an order of mandamus, prohibition, or certiorari shall not be made unless leave of the court has been granted.[28]

One question which has surfaced for consideration is whether the amendments to the English Order 53 and the cases which have been decided after it, have any effect on the status of the Order 53 provision in Singapore. The court in *Re Application by Dow Jones (Asia) Inc.*[29] took the opportunity to deliberate on the question. Dow Jones was subject to a restriction in

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[27] For instance, members of trade unions, private associations and clubs cannot be expelled from membership without being given the opportunity of fair hearing. This as Wade suggests is because the implied terms of the membership provide as such. In *Dawkins* v. *Antrobus* (1881) 17 Ch. D. 853, for instance, a member of a mutual insurance society was expelled for suspicious conduct. The court held that the expulsion was absolutely void. In that case it was said: "This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals." See also *Fisher* v.A>ane(1878) 11 Ch.D. 853. In Singapore, see *Haron Bin Mundir\. Singapore Amateur Athletic Association* (unreported) where it was held that although the relationship between the applicant and the association is one that is founded on contract, natural justice must still be observed by the domestic disciplinary tribunal in the conduct of its hearings.

[28] Order 53 r.l(l) of the Rules of Supreme Court.

[29] [1988] 1 M.L.J. 222.

sale and distribution in Singapore following an order issued by the Minister under the Newspaper and Printing Presses Act.[30] The order was made on the ground that the applicant was meddling in local politics. The applicant sought leave to apply for certiorari and declaratory reliefs, *inter alia*, to quash the orders of the Minister and to declare that the orders were invalid and without legal effect. The application was made under Order 53 of the RSC. The Attorney-General took preliminary objection on the ground that the applicants were not entitled to seek orders for declarations in proceedings brought under Order 53.

Sinnathuray J., referring to the English decision of *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses Ltd.*[31] decided that Order 53 was not an appropriate procedure to seek declaratory relief. His Honour observed that there are substantial differences between the present English Order 53 and the Singapore Order 53. First, the Singapore Order 53 has not been amended to bring it in line with the recent English reforms. Secondly, and as a corollary of the first, while applications for declaratory relief may be brought under the new Order 53 in England, no such similar application may be entertained here since the Singapore Order 53 does not make any provision for such application. It would appear that in seeking declaratory relief the appropriate provision lies in Order 15 rule 16. Thirdly, as regards prerogative orders, the procedure in Singapore is still based on the old English Order 53.

The *Dow Jones* case decidedly has an important bearing on the way in which public law is and will be perceived in Singapore. To appreciate the remark just made, one must begin with the English reforms to judicial review procedures. Section 31 of the English Supreme Court Act, 1981, quite clearly contemplates that prerogative orders, declarations and injunctions shall be made under a new procedure known as application for judicial review, or the present Order 53. While leave of court is still required, all that the applicant needs to do under the new provision is to show that he has sufficient interest in the matter to which the application relates.[32]

Prior to the reform, an applicant had to decide which remedy it is that he is pursuing. This was necessary because of the diversity of standing requirements which applied to the remedies.[33] For instance, it would appear that to petition for the relief of certiorari, the applicant would have to show that he is a person aggrieved or has a particular grievance.[34] In the case of mandamus, the applicant must show that his private right has been

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30 Cap. 206, 1985 Rev. Ed.

31 [1982] A.C. 617. See also, Cane, "Standing, Legality and The Limits of Public Law" (1981) C.L. 322.

32 This is spelt out in section 31(3) of the Supreme Court Act which states that "No application or judicial review shall be made unless the leave of the High Court has been obtained in accordance with the rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a *sufficient interest* (emphasis added) in the matter to which the application relates.

33 For a general discussion on the requirements of standing on the old procedures, see Craig, *op. cit.* pp. 349-355.

34 *Reg.* v. *Thames Magistrates' Court, Ex. pane Greenbaum* (1957) 55 L.G.R. 129.

infringed. This was clearly stated in *R.* v. *Paddington Valuation Officer, ex parte Peachey Property Corporation Ltd.*[15] where Lord Denning M.R. said that the court would listen to anyone whose interests were affected, but not a mere busybody interfering in things which did not concern him. Whether an application was made for certiorari, prohibition or mandamus, it was fairly clear that there was no uniform standard as regards standing. In other words, the same right which may enable an applicant to a relief of certiorari may well be insufficient for a declaratory relief.

The requirement of proving sufficient interest in applying for leave demonstrates a mark departure from the old standard. In *I.R.C.* v. *National Federation of Self-Employed and Small Businesses Ltd.,* the court took the opportunity to consider the question of standing based on the newly introduced term of sufficient interest. In that case, the I.R.C. made a deal with the relevant unions and workers whereby if the casual workers were to file the necessary tax returns, some form of amnesty would be granted to those who have been evading taxes. The National Federation of Self-Employed and Small Businesses Ltd. (hereafter the National Federation) objected to this arrangement and sought a declaration that the arrangement was *ultra vires* to the I.R.C., and a mandamus to compel the I.R.C. to collect the taxes. The I.R.C. objected to the action by claiming that the National Federation had no *locus standi* to bring the suit, since the question of taxes does not directly affected them. The House of Lords found for the I.R.C. The reasoning, however, has to be examined closely since it has a direct bearing on the issue of standing.

Although not all of the Law Lords agreed that the National Federation had sufficient interest, and thus having a *locus standi* to sue, they were generally agreed that the new provision had swept away many of the constraints of the old procedures. Lord Diplock said:

> Before the new Order 53 was substituted for its predecessor, the private citizen who sought redress against a person or authority for acting unlawfully or *ultra vires* in the purported exercise of statutory powers had to choose from a number of different procedures that which was the most appropriate to furnish him the redress he sought. The major differences in procedure, including *locus standi* to apply for the relief sought, were between the remedies by way of declaration or injunction obtainable by a civil action brought to enforce public law and the remedies by way of the prerogative orders of mandamus, prohibition or certiorari which lay in public law alone....
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> Your Lordships can take judicial notice of the fact that the main purpose of the new Order 53 was to sweep away these procedural differences ...to substitute for them a single simplified procedure for obtaining all forms of relief...[36]

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[35] [1966] 1 Q.B. 380.

[36] [1982] A.C. 617 at pp. 637 and 639.

Lord Roskill in same case said further that relief by way of declaration, or injunction was made a form of judicial review to be granted in an appropriate case.

One should also note that the judges in the *National Federation of Self-Employed and Small Businesses Ltd.* case are not clear on whether a uniform test of standing applies to both the prerogative orders and remedies. Lord Diplock and, possibly, Lord Roskill and Lord Scarman, thought that a uniform test applies throughout. Lord Wilberforce was more cautious in holding that although the new procedure simplified the application, the differences in law relating to the different prerogative remedies may still apply. This sentiment was similarly shared by Lord Fraser.

Leaving aside the differences in opinion, it would appear that the new provision makes it easier for the courts to adapt to new situations in public law.[37] This approach frees the court of having to deal with earlier authorities in deciding whether the appropriate remedies ought to extend in suitable cases. This rather liberal approach may be seen in the cases which have been subsequently decided. In *R.* v. *Her Majesty's Treasury, exparte Smedley*,™ a taxpayer was said to have standing to challenge the decision of the government in respect of payments authorised by Parliament to be made to the E.E.C. Equally, in *R.* v. *Felixstowe J.J., exparte Leigh*[39] the court held that a journalist as a "guardian of the public interest" in open justice had sufficient interest to obtain a declaration that justices could not refuse to reveal their identity.

The English reforms, therefore, made much progress in changing the perception of standing and remedies in administrative law. By comparison, the position in Singapore following *Re Application by Dow Jones (Inc.) Ltd.* is still tied to the old English Order 53; with all the attendant diversities and complexities appropriately described in the *National Federation of Self-Employed and Small Businesses Ltd.* case. The position maintained by Sinnathuray J. in the *Dow Jones* case carries several implications.

First, an applicant will have to decide in advance whether his grievance comes within the scope of the particular remedy sought. Failure to determine whether a remedy is suitable may result in having his application being rejected by the court. As an illustration, in *re Ong Eng Guan*[40] it was held that prohibition or certiorari could not be issued against a commissioner appointed to inquire under the Commission of Inquiry Act to restrain him from acting on the ground of bias. The reason given was that neither certiorari nor prohibition lie as a matter of past practice in respect of a challenge to the appointment of the Commissioner of Inquiry. Similarly, in the case of mandamus, an applicant will have to prove that he has a "specific legal right" to enforce a public duty against a person holding public office. Thus where the applicant had no specific legal right, the court

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[37] See generally Craig, *op. cit.*, 363-364.
[38] [1985] Q.B. 657.
[39] [1987] Q.B. 582.
[40] [1959] M.L.J. 92.

will not issue a writ of mandamus.[41] This may be seen in *R.* v. *Commissioners of Customs and Excise, ex pane Cooke and Stevenson*,[42] where the court refused to grant mandamus on the ground that the applicant bookmakers had no specific legal right.

Secondly, the *Dow Jones* case shows a remedies based approach towards defining the limits of public law. The use of this approach and its limitations, in defining public law under the current English reforms had been discussed earlier. The arguments canvassed there carry equal application in the context of Singapore as well. Essentially, using this approach to determine the limits of public law is not very appealing. Why should an applicant's chances of seeking relief depend on the historical accident of the remedies? It seems strange that certiorari would issue in general to a statutory body but not to a private body even if both are performing the function of providing similar public services. Perhaps the most important objection lies in such an approach not being able to adapt itself as easily to the changing function of government. This approach relies heavily on precedents essentially in deciding the ambit of public law. In consequence, such precedents place much constraints on the liberty of the courts to exercise supervisory jurisdiction in the public interests. This, perhaps, explains why it is difficult to reconcile *O.S.K. & Partners* v. *Tengku Noone Aziz*[43] with *Ganda Oil Industries Sdn. Bhd* v. *Kuala Lumpur Commodity Exchange.*[4]* In the former case, the Federal Court justified the application of certiorari by rather tenuously arguing that because the Kuala Lumpur Stock Exchange is regulated by the Securities Act and subject to the control and direction of the Minister, it has a "public flavor" superimposed on it and thus is subject to the supervision of the court. In the *Ganda Oil* case, however, the Supreme Court held that certiorari would not issue to the Kuala Lumpur Commodity Exchange (KLCE), even though the two exchanges seem to be similar in nature, because the power which the KLCE exercises is contractual in nature notwithstanding the Minister's control in the policy making function of the exchange.[45]

A third implication which arises from the *Dow Jones* case relates to the continuance of the distinction between rights and remedies in public law. Maintaining such a distinction may not always be satisfactory, particularly if some public interests are to be vindicated. Traditionally, in private law claims, no distinction is made between the right to sue and the merits. A person with a cause of action in tort or contract may sue on that basis alone without having to justify to the court why he should be able to sue. The position, as we have seen, is different with actions in public law. To proceed with a claim in public law, the applicant must first of all establish that he has some standing to sue. Standing in

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[41] See generally Jain *op. cit.,* p. 451 *et seq.*
[42] [1970] 1 All E.R. 1068.
[43] [1983] 1 M.L.J. 179.
[44] [1988] 1 M.L.J. 174.
[45] Jain, *op. cit.,* pp. 463-465.

such an application would usually be granted only if the applicant is able to prove that he has some rights.

Cases have indicated that one feature of this approach suggests that the courts will almost always insist that only those with some legal rights, as in a private law cause of action, would be accorded standing.[46] In *Gouriet* v. *Union of Post Office Workers,*[41] Gouriet applied to the Attorney-General for his consent to act as plaintiff in a relator action for an injunction against the union of postal workers to restrain them from refraining to handle mail between the United Kingdom and South Africa. The Attorney-General refused to consent to Gouriet's request. One issue which came before the House of Lords was whether the applicant in his private capacity who does not assert his private right may assert his public right. The House of Lords held that he may not. Lord Wilberforce said:

> It can be properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public.[48]

The position stated by his Lordship is again echoed in the Malaysian case of *United Engineers (M) Bhd.* v. *Lim Kit Siang.*[49] In this case, Lim Kit Siang, brought a suit against the government of Malaysia, the Finance Minister and the company, United Engineers (M) Bhd., alleging that the contract given to the company for civil works in the country was unfairly and illegally awarded by the government. Lim Kit Siang, apart from his standing as a leader of the opposition in Parliament, had a personal legal right in the matter. The Supreme Court of Malaysia, by a majority, held that Lim Kit Siang had no standing to sue. Abdul Hamid C.J. said:

> ... I would prefer the test of standing propounded by their Lordships in the *Gouriet* case; that is to say, 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 to himself...[50]

The cases show that the vindication of public rights in law depends very much on the ability of the applicant to prove, at the application stage, that his private rights have been threatened. Such an approach clearly restricts the scope and application of public law. A concerned citizen, for instance, would generally find it extremely difficult seek an injunction and a declaration against a broadcasting authority for screening objectionable movies

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[46] Craig, *op. cit.,* pp. 9-10, 201, 351-355.
[47] [1978] A.C. 435.
[48] *Ibid.,* at p. 477.
[49] [1988] 2 M.L.J. 24.
[50] *Ibid.,* at p. 31.

unless he is also at the same time asserting his private legal right. In the example given, it does not appear how establishing private legal rights can have any bearing at all. For when it comes to the merits of the case, the courts in the tradition of public law reasoning, would be very much concerned with the way the decision had been arrived at. By maintaining the duality of distinction between rights and remedies, the courts have confined the availability of public law to a rather narrow class.[51]

(To be continued)

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[51] Craig, *op. cit.*, 365-367.

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