Singapore Journal of Legal Studies
[1992] pp. 164 - 182

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

[Continued from [1991] S.J.L.S. 431-446]

III. PUBLIC LAW AND THE CHANGING PUBLIC SECTOR

THE foregoing discussion in Part II[52] shows that, in the context of Singapore, the old English Order 53 still applies; and, with it, the application of public law remedies is still very much tied to personal rights. Additionally, it seems fairly clear that the scope of public law depends very much on the scope of public law remedies. Essentially, whether an applicant may succeed in a public law action depends not so much on asking if an issue of sufficient public interest is involved. It depends, in essence, on whether in law a precedent can be found to warrant the application of prerogative orders.

A. *The Changing Public/Private Mix*

One question which has hence arisen is whether this approach towards defining the limits of public law is still relevant in today's climate of the shifting function and nature of government.

There is little denying that the decade of the 1980s has seen a general changing of the public/private mix in the economy here and elsewhere. In the United Kingdom, until the end of the 1970s, the publicly-owned industrial sector produced some 11.5 per cent of the Gross Domestic Product.[53] The 1979 General Election became a watershed when the Conservative party won the election and thus began a process of reducing the public sector involvement. This was done through a programme of privatisation (which essentially means transferring ownership of state enterprise through sale to the private sector).[54] Generally, privatisation in the United Kingdom may

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52 See [1991] S.J.L.S. 431-446.

53 Dunsire, "The Public/Private Debate: Some United Kingdom Evidence" International Review of Administrative Sciences 29.

54 See generally, Kay, Mayer and Thomson, *Privatisation and Regulation - The UK Experience* (1986).

be described as having taken place in two stages.[55] The first phase was between 1979 and 1983, when most of the industries sold off were in some sense competitive, but not including the public utilities. The second phase came in a more organised manner between 1984 and 1985. This was an important phase since most of the major non-competitive public utilities like water and gas were sold off. By this time the government had given firm indication that the privatisation would continue until all the state owned commercial industries had returned to the private sector.[56] By 1988, it was estimated that nearly 40 per cent of the state-owned sector of the industry had been transferred to the private sector, involving around 650,000 public employees.[57]

Similarly, in Singapore, the winds of privatisation, which have swept the world elsewhere, have also caught on here. The first firm indication of the mood to roll back the boundaries of the state was given by the then Minister for Finance, Dr. Tony Tan in a budget statement in 1985. He said that the government had undertaken a review of its role in business activities and decided, *inter alia*, that the "Government will divest its shares in companies where it does not have a vast majority stake and where it is not essential for Government to have effective control." The Minister further indicated that "in the 1980s, the engine for economic development should be the private sector and not the Government."[58]

This commitment on the part of the Government to disengage its commercial interests from the public sector is evident in a number of initiatives taken. For instance, within nine months of the announcement of the guidelines given by the Finance Minister in 1985, the Government through one of its holding companies sold off 100 million shares in Singapore Airlines.[59] This was followed by the appointment of a high powered Public Sector Divestment Committee (PSDC) to look into the prospect of privatisation within the Government. A report issued by the committee later recommended a full and vigorous programme of privatisation where possible. This includes for instance, government linked companies and statutory boards.[60] In principle, the government has accepted much of the PSDC's proposal. A number of

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55 Graham and Prosser, "Privatising Nationalised Industries: Constitutional Issues and New Legal Techniques" 50 MLR 16. Although three phases have been described by the authors, the third stage may not be described as a phase of conscious design since the authors of the article seem to think that the third phase is characterised more by confusion than by anything else. This is a matter of opinion which may not find much consensus in views. One will find the classification of the phases as described in the above passage more acceptable generally.

56 *Ibid.*, p. 17.

57 Dunsire, *op. cit.*, p. 33.

58 Singapore Parliamentary Debates, 1985, cols. 481-482.

59 Thynne and Afiff, *Privatization, Singapore's Experience in Perspective* (1988), p. 3.

60 See the PSDC Report, 1987.

feasibility studies have been carried out. The statutory boards which have undertaken feasibility studies include Singapore Telecom, Public Utilities Board, Port of Singapore Authority and Singapore Broadcasting Corporation, to name a few. It appears that the Government is keen to go ahead with the eventual sale of commercially oriented boards.

The programme of divestment represents a shift in the nature of the government's philosophy towards public services. It used to be fashionable for a government to assume much responsibility in meeting the welfare and utility demands of its citizenry. However, as was the case in the United Kingdom, the Government's ability to deliver public services efficiently came under much strain when escalating costs and relative inefficiency in management began to take its toll. This resulted in much re-examination of the way public services ought to be managed and funded. The chosen path thus seemed to the planners to be the market economy, where efficiency and cost-effectiveness are particularly honed by competition. Likewise, in Singapore, the statement of the Minister of Finance in 1985 seems to have indicated rather clearly that the chosen path lies in increasing private sector involvement. Whereas privatisation and sale to the private sector in the United Kingdom have been motivated to a large extent by a need to reduce public sector borrowing requirements and to improve overall efficiency and profitability, these reasons do not find much application in Singapore. By and large, most state enterprises in Singapore have been rather efficiently run and are profitable. In 1988, the statutory boards alone chalked up an estimated surplus in revenue of $4.19 billion. It would seem therefore that for Singapore, the shift to the private sector stems from the belief that market competition would raise the standard of public services to an even higher level.

This shift in orientation towards relying more on the private sector in general, and market competition in particular, has had much impact on the transformation of some of the public organisations in Singapore.

Presently, there are three types of organisations which form the underpinning of the Singapore government. These are the ministerial department, the statutory board, and the government company. In the case of the ministerial department, it is established by a determination of the Prime Minister, with the approval of the Cabinet.[61] The structural arrangements of the ministerial organisational type allow a minister to be in charge who in turn is both accountable to the Cabinet and to Parliament. This ensures control and accountability in the Westminster sense and it reflects the relative importance that the Government has attached to the work assigned to a ministry. This may include for instance, matters which relate to foreign affairs, health, education and defence.

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61 Thynne, "The Administrative State", in Woon, *The Singapore Legal System* (1989), p. 75.

Compared to the ministerial departments, statutory boards are created by specific Acts of Parliaments. The Act which sets up the statutory board defines its functions and duties. Statutory bodies generally perform the function of providing such public services as water, electricity and gas. Additionally, statutory bodies also perform regulatory and adjudicatory functions which include hotel licensing and tenants' compensation. Unlike ministerial departments, statutory boards are characterised by relative autonomy in pursuing its organisational goals. The minister's direction in this case comes in the form of broad policy direction to the board. To that extent, the minister's accountability to Parliament is only confined to policy matters and not operational matters.[62]

Finally, the company entity characterises the third type of governmental organisation. The company derives its existence as a corporate body through registration under the Companies Act. Unlike the Government department or the statutory board, a typical company issues shares which constitute property of value which may be owned or sold off in the open market. In consequence, the company structure provides a suitable vehicle by which the government may move into commercial undertakings. This explains the present structure of Singapore Airlines and Neptune Orient Lines.

In its divestment programme therefore, the Government will have to transform its undertakings which are commercially viable into something which may eventually be sold off in the market. The transformation process follows three broad strategies.[63] First, the entity concerned may be commercialised without any accompanying change to its legal-structural characteristics. This strategy may affect all three types of organisation, and it basically entails a programme of restructuring which will make the administration more revenue and cost conscious in its operational arrangements. The underlying rationale here is to make the department more market oriented and thus subject it to an element of competition. One way of achieving this is to deregulate or demonopolise an aspect or an area of an enterprise activity. By lifting the protective barrier, a gauge will be created by which the performance index of the enterprise may be measured. A recent example of this may be found in the deregulation of the sale of telecommunication equipment in Singapore. Alternatively, the enterprise may be divided organisationally where the regulatory or the facilitatory aspect is separated from the business aspect.

Secondly, public organisations may be corporatised. This essentially entails transforming the legal structure of the enterprise into a corporate body which in law may own property, and may sue and be sued. The process

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62 See Pillai, *State Enterprises in Singapore* (1983), p. 97.

63 Thynne, "Public Enterprise Transformation: Changing Patterns of Ownership, Accountability & Control", in Ng and Wagner (eds.), ***Marketisation***, Institute of Southeast Asian Studies, Singapore (1990).

of incorporation may either take the form of the creation of a body by an Act of Parliament, in which case it becomes a statutory board, or the form of a company registered under the Companies Act. Hence, where a government organisation is a ministerial department, the process of corporatisation may either result in the transformation of the department into either a statutory board or a company. A case in point is the transformation of the Management Services Department in the Ministry of Finance into a private management company.

Thirdly, the final strategy in the transformation process lies in selling the enterprise to the public. Once a government department or a statutory body has been turned into a registered company, it may then be divested through the sale of its shares to the investing public. Thynne notes that as with the other two strategies, the divestment strategy is often perceived as an appropriate response to management inefficiencies and the wider issues of budget deficits and other related issues.[64]

B. *Questions about Public Law*

The strategies adopted by the government show that the process of divestment must finally lead to the transformation of the public enterprise into a commercially viable company which may then be sold off. This necessarily entails a substantial change in the legal structure of the enterprise. The structural change becomes most significant, in public law terms, when the enterprise becomes a registered corporate entity under the Companies Act. This is because a company registered under the Companies Act operates within the realm of "private law".

The remark just made in the preceding paragraph requires a little further elaboration. The English system of civil laws that we have inherited is founded largely on the theory of rights. As a result, a claimant in a civil action must establish that his rights in law have been violated by another person. This violation of his rights will then form the basis of his cause of action in the civil suit. Where the court is able to establish that a person's rights have indeed been violated, the remedies will follow. This may take the form of private law remedies such as damages, injunction and declaration.

In the case of civil law litigation, both the causes of action and the remedies are found in private law because the claims do not generally involve issues of abuse of public power or functions, both of which are normally derived from statute. Generally, private law, based on the common law, seeks to regulate relationship between individuals within a civil society. Such relationships for instance find expression in tort, contract, and property rights.

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64 *Ibid.*

On the other hand, public law attempts to regulate the relationship between the state, or public power, and the individual.

Hence, the questions that the courts ask in a public law matter differ from those asked in a private law action. For instance, in private law, a person challenging another person's right to a piece of land would have to show that he has a prior proprietary interest which has been infringed upon. His cause of action would be trespass of proprietary rights. However, in public law, challenging the minister's decision to acquire a piece of land under statutory powers would depend, not so much on whether a proprietary right exists, but on whether the power to act has been duly exercised. In the case of public law, the ability to sue does not necessarily depend on private law rights alone. The test, as we have seen earlier, is one of standing, and whether standing exists depends again on whether the remedy asked for covers the issue at hand. Hence, the tenants who challenged an order demolishing their building as being unfit for human habitation have been held to have *locus standi* to challenge that order because they had a direct and substantial interest.[65] While that direct and substantial interest may be sufficient for a remedy of *certiorari* in public law, it may not be recognised in private law as being sufficient to give rise to a cause of action.

In the case of a transformation of a public enterprise either from a government department or a statutory board into a company under the Companies Act, the change can be rather substantial in public law terms. Generally, the Companies Act, although an enactment of Parliament, merely provides the statutory framework through which an organisation may attain corporate personality. This is essentially an innovation of the English Parliament which allows the creation of a legal persona merely by registration. The conferment of corporate personality status merely means in law, that a company may enter into binding contracts, own property in its own name, sue and be sued. In other words, the company is akin to an ordinary person subject to the same obligation in private law. This means that when a statutory board or a government department becomes corporatised into a company, it generally leaves behind its public law obligations.

The difference in obligation may perhaps be illustrated further. In *Malloch* v. *Aberdeen Corporation*,[66] the education authority terminated the employment of the applicant without giving him a hearing. There was no question of lack of competence or misconduct in this case. He did however, as a matter of conscience, object to placing his name on a general register established by the Secretary of State. In consequence, his employment as an unregistered teacher became unlawful and he was subsequently dismissed. The question which the House of Lords had to decide was whether the

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65 *Chief Building Surveyor* v. *Mahanlall Co.* [1969] 2 M.L.J. 118.
66 [1971] 2 All E.R. 1278.

applicant had a right to be heard by the authority before being dismissed even though his status as an unregistered teacher was unlawful. Their Lordships held that the authority was under a duty to give the applicant a fair hearing before dismissing him. Lord Wilberforce, who delivered the leading judgment, said that if the element of public employment or service existed, and was supported by statute, the essential procedural requirements of natural justice must be followed, and failure to observe them might result in the dismissal being declared void. His Lordship went on to say that the right of hearing should be excluded only in pure master and servant cases where the public element did not exist. The exclusion of master and servant relationship from the ambit of natural justice is seen specifically in *Vasuden Pillai* v. *The City Council of Singapore*[67] where the Privy Council held that the daily-rated employees who were dismissed by the Singapore City Council without being given the opportunity of being heard were not entitled to the protection of natural justice since the employees' relationship with the City Council was only one of master and servant.

It appears therefore that as the enterprise transforms itself into a company, the right to the protection of natural justice may be taken away from the employee. Apart from that, there are other aspects which are transformed as well. To begin with, the relationship changes from one between the public and the individual, to one between two private individuals. To put it differently, when the Public Utility Board (PUB), (presently a statutory board), becomes a company registered under the Companies Act, it will relate to the rest of society in the same way as any other private individual. In other words, it will enjoy freedom of contract and may choose not to enter into any binding agreement to lay an electricity line if it does not want to. There is presently nothing in private law, short of statutory compulsion, which can compel the PUB to act against its wishes. On the other hand, if the PUB remains as a statutory body, a refusal to act may result in a public law action of mandamus compelling the board to perform its statutory duty.

Additionally, the transformation of a public enterprise into a company established under the Companies Act substantially alters the nature of the entity's power. A minister or his officer in his department normally derives his power to act from the statute which the ministry is responsible for administering. For instance, the Criminal Law (Temporary Provisions) Act,[68] specifically empowers the minister to detain a person in the interest of public safety. Equally, in the case of a statutory body, the powers and the functions of the board are spelt out in the Act which sets the board up. In either case, one notes that both powers are usually derived from some Acts of Parliament and consequently these bodies acquire a public status. It is public

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[67] [1968] 2 M.L.J. 16.

[68] Cap. 67, 1985 Rev. Ed., Act, s. 30(a).

because such powers under normal democratic convention ultimately come from the people through their representatives in Parliament. Accordingly, there is an expectation that the powers so derived must be exercised according to the mandate given by the people in general. In other words an element of accountability is involved. This element of control and accountability may then be made subject to scrutiny by the courts in the exercise of its review powers. In the case of a company, however, the powers to act come not from any specific Act of Parliament, but from the memorandum and articles of association. These documents are essentially contractually derived and they govern the conduct of parties who subscribe to the agreement. Consequently, the company assumes a private character since it is an entity which emerges out of individual consensual arrangements. It appears therefore that when a public enterprise, be it a ministerial department or a statutory board transforms itself into a company, the change is more than just cosmetic. The source of power changes from a public enactment to a private arrangement. In the process, the changeover to a company regime generally extinguishes the element of public obligation. Indeed, in the case of a company registered under the Companies Act, the obligation of the board of directors lies not with the general public, but with the company itself. As such, unlike ministerial departments or statutory boards where the minister in charge is accountable to Parliament under the Westminster arrangement, the directors of a company are primarily responsible only to the shareholders.[69]

The transformation to a company structure fundamentally affects the application of public law. Generally, public law is primarily concerned with the issue of *vires.* A court when confronted with a public law question, will be interested in determining whether the decision taken by the public body is made within the scope of the powers given. This is normally done by looking at the statutory instrument. Where the public body has gone beyond the powers defined, or has acted *ultra vires,* the court will issue prerogative remedies to redress the grievance. An aggrieved person who petitions for judicial review simply draws the court's attention to the wrong

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69 In a parliamentary debate between Mr. Hon Sui Sen and Mr. Hwang Soo Jin, the question was asked whether efforts had been made by the government-owned Development Bank of Singapore to salvage its investments in a company which went into insolvent liquidation. Mr. Hon, the minister replied: "Mr. Speaker Sir, I would like to say that in matters where the Development Bank of Singapore makes loans, I have no responsibility for its operations. I of course have a responsibility in view of the government's investments in DBS to see that it is a viable operation and that it is not running into difficulties. Beyond that, I would consider that any details concerning DBS operations are not really a matter for me to answer ... I am not responsible for the day to day operation of the Development Bank of Singapore. Therefore I will not be able to answer the question. I would suggest that these are matters which the shareholder can place before the board of directors at the annual general meeting of the Development Bank of Singapore." Parliamentary Debates, vol. 30 (1971), col. 1432.

doing of the public body. When the court decides to exercise its powers of supervisory jurisdiction, this is done primarily with the view of protecting and vindicating public interests. Indeed this function of the court stems from its constitutional role of ensuring that the intent of Parliament is not subverted. This contrasts with private law actions where the concern lies with protecting individual rights, and where issues do not generally involve questions of public powers. Thus, the transformation of a ministerial department or a statutory board carries much significance since it removes these bodies from the supervisory jurisdiction of the court in public law.

C. *Some Implications*

The transformation of a public enterprise to a company registered under the Companies Act conveys some implications which require further examination.

First, although public enterprises may have been transformed into private corporations, it does not necessarily mean that the government would eventually divorce itself entirely from the undertaking. Principally, there are two avenues by which the government may continue to have a presence. In the first place, the government may decide to have a controlling interest in the company, in which case it becomes a government-linked company. Alternatively, the transformed entity may be required to issue "golden" shares which will allow the government to intervene in the operation of the company under certain circumstances. This device was used in the incorporation of the Singapore Mass Rapid Transit, and will probably be used when the Public Utilities Board is privatised in 1993. Whether an entity becomes a state-owned company or a hybrid company in which the state owns the "golden" shares, the point remains that the government will continue to be involved in the company.

This continued involvement on the part of the government often raises the issue of control. As it stands, under the present Parliamentary convention, a minister is not generally expected to take the rap or be answerable for the performance of state-owned companies. This seems to be the case in Singapore. Equally, when the government carries out certain activities through a company, this makes it difficult for the court to exercise its supervisory jurisdiction over the work of the government. It does seem strange that where a statutory body previously owed an obligation to its employee to provide a fair hearing or, in some cases, to publicly account for its policies, that obligation no longer exists once that body assumes the mantle of a company. It does not matter if the government continues to remain as the principal actor.

Second, while the transformation affects the form in which public services are being delivered, it does not alter the fact that some of these services continue to have community wide significance. In particular, enterprises

which provide services such as telecommunications, water, and electricity continue to play an important part in the life of the country. Those who provide such services will continue to wield a significant amount of power. This is particularly true where the enterprise operates as a monopoly. Where such services are divested to the private sector, the new owners will be placed in relatively powerful positions. Consequently, the transformation to a company-type organisation to deliver services merely alters the organisational form of the entity without changing the substance of its delivery. In other words, one would say that this transformation gives a new meaning to executive powers. These new entities will have to be regulated particularly if they are placed in a situation of monopoly.[70] Clearly, making judicial review generally inaccessible in respect of the company-type arrangements removes one of the pillars of regulation and control.

Third, if one accepts that at the heart of the constitutional conventions, the courts are concerned with the balance of powers, then the transformation of the form of executive powers would and should have an impact on the way in which the issues of the interests and rights of the citizens should be addressed in public law. This submission is particularly relevant when one considers the background against which public law emerged.

Hitherto, the growth of public law in the United Kingdom has been premised on the growth of the welfare state; a state in which the government vastly expanded its bureaucratic machinery principally to provide for the welfare needs of its citizens. In consequence, the bureaucracy came to assume substantial powers over the people whom it was supposed to serve. The courts were naturally concerned that such massive power might be abused by the authorities. This led to a series of decisions which has been hailed by Lord Diplock as forming the nascence of public law whose primary objective is to keep the state in check.

However, as was indicated earlier, the 1980s have witnessed a change in the nature of governmental powers, especially when traditional functions of governments have been progressively farmed out to the private sector. Although there has been a refashioning of the way in which public goods are being delivered, the interests of the consuming public remain basically the same: does the consumer have a right to expect high standards in public services which are now delivered by private agencies? and if he is not happy with the services, should his remedies be just confined to private law remedies alone? At the heart of the change in the way in which public services are being provided lies the changing perception of the nature of government and of governmental powers. Such changes in the nature of public powers

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70 The Government has announced that it will set up a statutory board which will serve as a regulatory agency to protect the interests of the consumers and to check on Telecoms after it is privatised. See *The Straits Times*, 25 October 1991.

will invariably have an impact on public law. This puts us at the very foundation of public law. Given the limitations which presently exist in prosecuting a public law suit, it may perhaps be pertinent to reconsider the purpose which public law is designed to achieve.

IV. RETHINKING PUBLIC LAW

The preceding discussion leads us to a re-examination of the purpose of public law. This rightly begins by looking at the way the word "public" is used. The English language unfortunately, and very much unlike the language of mathematics, suffers from a lack of precision and open-texturedness. Quite often, concepts such as the word "public", have been bandied about without so much as going beyond the common usage to attempt any serious definition of the nature and meaning of the word. This common gloss over the meaning of a word invariably results in users employing words ridden with concepts which either operate at the level of hidden premises, or when formally expressed, contain presuppositions which are seldom fully explained or explored so that the full meaning of the word may be conveyed. The net effect thus is often some confusion as the body of literature around a subject begins to grow. Moreover, engaging and meaningful discussions may be carried out at cross purposes.

An examination of such conceptual questions sets the groundwork for a meaningful discussion where the parameters are clearly defined and it serves as a useful compass which would help to give an account of the proper things to say and think about how the facts related to the subject should be conceived.[71]

A. *Meaning of Public*

How then should the word "public" be conceived? I would propose that there are two broad senses to the use of the word "public", and I might add for the moment that it is the failure to articulate which sense is being used that has often been the source of confusion in the private/public distinction debate.

First, "public" may be viewed in the positive empirical sense. This may be seen at different levels. At one level, "public" refers to the whole body politic, or the aggregate of the citizens of a state, county or community. In other words, it refers to or relates to the people in a country or community as a whole.[72] Seen in this context, it may be said that "public" is the

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[71] In making this remark, I profess to share the view of Lewis on this point. See, Lewis, *op. cit.*, p. 103.

[72] *Black's Law Dictionary* and *Collins English Language Dictionary.*

embodiment of the community of people, the community of which is normally, although not necessarily, defined by some geographical or territorial boundary. At another level, "public" may be used in the adjectival manner to mean something which pertains to a state, nation or community of people; and proceeding from, relating to, or affecting the whole body of people.[73]

It is the employment of the word in this second manner just defined which directly connects public with the concept of the state. The rise of independent nation states in the West which came in the wake of the collapse of feudalism and papal supremacy, led to the evolution of the state as an entity. Because every independent country constituted itself into the self-supporting entity of the state, ultimate sovereignty in the country vested not in any body or person, (for these were seen as organs of the state), but in the state itself.[74] In other words, the nation state, which is seen as an embodiment of the body politic of the community, reposes its sovereignty in the state which then represents the community as a legal organisation through different organs, carrying the manifestations of a legally organised community.[75] Seen from this perspective, the different organs of the state, or the functionaries who wield official powers which are ultimately derived from the sovereign of the state, represent the body politic who in our earlier definition make up the "public".

It follows from the foregoing discussion that the use of the word "public" may proceed in the positive empirical sense. This would simply mean the identification and the mapping of institutions which carry the common characteristics symbolic of embodiment of the body politic and of power-wielding on behalf of the state. In this regard, it becomes apparent why "public" in one sense has been normally associated, both by the trained person and the layman, with the ministerial departments, state enterprises, local governments, and tribunals, to name a few, as defining the normal contours of the state.

Secondly, the word "public" may be used in the normative manner. The normative sense distinguishes the "what should" be type questions from the "what is" type questions just discussed.

The crux of the issue in this part of the discussion may be simply put. The state, as we have just seen, is the embodiment of the public, the body politic within the country. This body politic undergoes a metaphysical transformation, in the Hegelian sense, which gives it an existence as an entity, synonymous with or representing the public. The basis of this representation may be traced to the developments in social contract theory. In essence, the theory postulates that society is formed by the agreement

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[73] *Ibid.*
[74] See Lloyd, *The Idea of Law* (1976), p. 172.
[75] *Ibid., p.* 173.

of those who compose it. In forming a collective existence, the individuals in their original agreement agree to give up a part of their freedom in exchange for better conditions of living. What this entails is that the individual has subordinated a part of his freedom to the legitimate authority which then reserves the right to dictate how and when the individual should or should not behave. This legitimate authority is reposed in the state since, by definition, the state is the sovereign. Although the social contract theory is seen more as a historical fiction these days, it nevertheless offers a neat and logical framework in explaining the foundations of human society. That said, the social contract approach has created much dispute over the terms of the contract. One perennial question thus is: how far can and should the state encroach on personal interests under the agreement? This quintessentially represents the second notion of the word "public". It is the notion that "public" stands for the right of the legitimate authority to interfere with the rights of the individual in the name of societal interest. In real terms it may mean for instance, the act of the individual in not contracting with another solely on the basis of race, should be seen as falling into the public domain such that it ought to attract the intervention of the state. Used in this sense therefore, the word "public" acquires a normative aspect.

B. *The Courts and the Doctrine of Separation of Powers*

The distinction between the private and public realm in defining the extent of state intervention in the body politic finds most expression at the level of law. In most civil societies, law represents the instrument both of order and social change, and it largely defines the ideological component of the state. It is law, therefore, which mirrors the general climate of the division between the public and the private realm. In other words, where public law begins and where private law ends may be defined by the normative sense of the word "public". It may be said that public law begins where society feels strongly enough about the particular issue to warrant some interference into private arrangements.

The scope of the application of laws is primarily determined by the courts in most societies. This relatively trite statement, however, serves to underscore the significant role the courts play in the private/public distinction. In the context of the constitution, the courts and the legislature differ in one main respect: that is, while Parliament engages in written enactments, the courts engage generally in ensuring both the protection of the laws and, in the case of the written constitution, the legality of parliamentary and executive actions. It is this specific function just mentioned that sets the courts apart as a custodian of civil liberties. Invariably, in adjudicating issues of legality, the courts would of necessity be called upon to decide boundaries

of state activity in relation to the private citizen. This for instance may include determining whether a particular public body is under any statutory obligation to perform any public duty; or whether the public body concerned has acted in a way so unreasonable that the action may be deemed to have gone beyond the jurisdiction conferred. Seen in this perspective, it becomes clear why, in relation to the courts, some of the basic issues may be cast in the mould of the private/public distinction. At the end of the day, the judges would be forced to arbitrate on fundamental questions which involve redefining the ambit of the public interests or the private realm, as in defining the extent to which the state may be allowed to encroach on individual rights.

That judges have been called upon to decide such fundamental questions involving the powers of the state and the individual, may be understood in terms of the separation of powers doctrine. This doctrine has had much influence in fashioning the way the courts think. In essence, the separation of powers doctrine advocates the clear separation of the three distinct forms and functions of powers of government as a means of protecting civil liberty. The doctrine rests on the hidden premise that the concentration of power is an anathema to freedom. In consequence, English judges have since as early as 300 years before arrogated for themselves the monopoly of judicial powers to particularly counterbalance the weight of the executive power. This has two basic implications. First, the English courts have assumed the sole right to interpret laws, and second, it suggests at its most basic level, the independence of judges in exercising their sole right to interpret laws. It is this primary assertion by the courts of monopoly over the interpretation of laws, a manifestation of the separation of powers doctrine, which has led the courts to keep the authorities in check, particularly in the United Kingdom during the post-war period when the state was a leviathan nursed by a welfare ideology.

The origins of the doctrine of separation of powers as defining the conduct of the courts may be traced to the belief in pluralism as a means of providing a stable balance in government. Judicial powers asserted by the courts exist to provide a countervailing influence to both legislative and executive powers. As stated in the foregoing, one important manifestation of the assertion lies in the sole right of the courts to finally decide on questions of law. Often, for the judges, what is at stake in the power struggle among the judiciary, the legislature and the executive, in the sense of separation of powers, is the protection of the liberty of the individual. This concern becomes particularly acute where liberties are guaranteed in a written constitution. By reserving for itself the right to decide on questions of law, the courts are able to serve as a useful check against unnecessary encroachment on the rights and liberties of the citizens by the legislative and, more importantly, the administrative organs of the state.

It is, one would suspect, this commitment to the separation of powers doctrine as a means of controlling power that will lead the courts to seek new meaning to the nature of the executive, through the instrumentality of law. In other words, in as much as the state has transformed itself in the era of privatisation, the court may well be led to redefine the meaning of the state to include private enterprises in order to ensure the protection of the underlying presumption of the separation of powers which it is submitted still forms the underpinning of the constitutional role of the courts.

C. *Public Law as a Means of Controlling Power*

We come back then to the basic question in this part by asking how public law should be conceived, or alternatively, what are the ends of public law. Conventional wisdom intuitively sees public law as that branch of jurisprudence which seeks to regulate and control activities which by tradition have been performed by the state. As a consequence, the main focus of textbook writers has invariably been on a positivistic description and analysis of the laws on state administrative agencies, such as ministerial departments and public enterprises, and the performance of its functions. Such scholarship would of necessity involve the identification and classification of both statute and common laws into rather fixed categories which have commonly been treated as belonging to the traditional departments of administrative law. This type of scholarly exercise, unfortunately, suffers from two major limitations. First, there is the real danger that succeeding works on public law which build on past scholarship may suffer incrementally from a sense of taxonomical rigidity. One consequence is the fixing of one's mindset of public law as a subject that merely covers the usual predefined areas. This, and this is the second limitation, would naturally affect the way one thinks in public law. Establishing *a priori* categories of the subject itself, may blind us to the prospect of new horizons that may indeed be open to the public law type reasoning and application.

Indeed, one sad lamentation has been the slowness of public law in redefining the way public obligation and accountability may be looked at with the passing of time. This is particularly true, in the light of change in the way public goods are being delivered in the era of privatisation. As a result of worldwide trends towards privatisation, public tasks are increasingly being handled by private entities that do not by tradition come within the scope of public law type reasoning. Indeed, these transformations which have taken place to public sector enterprises raise serious doubts about the meaning and nature of executive government and the doctrine of separation of powers. They give new definition to the meaning of public power, not just government power which hitherto has been the primary concern of administrative law. In consequence, how does public law view this devel-

opment, and in particular, view it in relation to the role of the courts? Can and should the scope of judicial review be expanded to subject these private entities, which now assume some of the executive functions, to some form of public control and regulation so that the interests of society may be better protected? It has been more than a decade since the Thatcher-Reagan privatisation bandwagon began to roll. Yet it was only in recent years that serious consideration was given to the question of the role of public law in relation to private law entities which perform substantially public tasks, or have public duties.

In view of the changing face of government, and of the way in which public services are being delivered by private agencies, there is a need to re-examine the way in which public law is conceived. One might alternatively begin by asking what purpose public law is designed to achieve. One theory which has been strongly made out in the foregoing suggests that another way of thinking about public law lies not just in plainly describing and analysing the laws of administration, but rather in thinking more of public law as a way of controlling power, and not just government power. This requires that the courts should not see administrative power as falling within the confines of government administration, but as any form of power, particularly of decision making, which may potentially carry community-wide significance and which may warrant the interference of the court at the instance of a concerned citizen on policy grounds. In this sense, public law takes on the normative dimension described earlier. Seen in this light, public law takes on a different sweep; it moves away from the static to the dynamic and from the positive to the normative. In other words, this perception sees public law not so much as body of legal principles as such, but as an instrument wherein powers with community wide significance within the state, whether it comes in the guise of a government agency or a private entity performing some public functions, fall under the supervision of the courts.

This approach will invariably free the courts from the kinds of conceptual difficulties which have, as we have seen in the first part of this article, bedeviled judges. For in defining what public law cases are and where prerogative remedies ought to extend, the courts have invariably been forced to perform mental gymnastics which ranged from looking to the source of power to the scope of public law remedies. This invariably resulted in looking at the form of public law rather than its substance.

The suggested approach of looking at public law as a means of controlling power, as long as it is in the public interest, without reference to whether the subject is a public body or whether public law remedies extend to it, helps us to overcome the limitation just mentioned. It is dynamic because such a perception of public law does not foreclose other categories which might come within the reach of the courts; and normative because it allows

for the extension of the scope of public law type reasoning whenever public interests are threatened, without being affected, as we have seen, by any rigid categories of public law. Of course, what the public interests are will be a function of the prevailing values as it affects the perception of the courts.

Admittedly, this proposition of seeing public law as a means of controlling power strongly suggests a liberalising of the role of the courts in relation to the public interest. This suggestion may find objection on a number of grounds. First, it has been said that the court is not an appropriate forum for resolving issues that are polycentric in nature. This argument states that some issues which appear before the courts may have community-wide significance so that the court's resolutions may have important ramifications within the society. In such a case, it would appear that the courts should refrain from making such decisions. However, liberalising the scope of public law and the role of the court in respect to it, may not necessarily result in the court finally deciding the issue. Reforms may be made to public law remedies for instance, where the courts are given powers to require the appropriate bodies to review the matter where the applicant is able to establish a *prima facie* case. In the process, the courts will thus be able to provide a suitable remedy to the aggrieved person without necessarily having to engage itself in matters for which it is not competent or qualified.

Second, an objection may be raised on the basis that the courts being an unelected institution, and thus being unaccountable in the same manner that members of Parliament are, should not be allowed to effectively legislate from the bench without at the same time being made to answer for the exercise of those powers. This objection is particularly forceful in relation to judicial review of administrative action carried out under specific Acts where wide discretionary powers and ouster clauses are clearly intended by Parliament. In fact, this has been one main criticism against the House of Lords decision in the *Anisminic* case.[76] The underlying concern here rests on the premise that giving liberal powers to the courts to interfere without at the same time providing adequate control of the judiciary may well lead to a subversion of the public interest which the government and Parliament by democratic convention represent. While one would readily admit that the courts should respect the intention of Parliament where this has been clearly spelt out in the relevant Acts,[77] it would be a fallacy to assume, as this line of argument appears to suggest, that the courts do not represent the aspirations of the people. Indeed in the context of the written constitution, (which Singapore has) the courts perform the custodian role of ensuring that the other organs of government do not overstep and abuse power at

[76] [1969] 2 A.C. 147.

[77] See Sin, "Judges and Administrative Discretion - A Look at *Chng Suan Tse* \. *Minister of Home Affairs & Ors*." [1989] 2 M.L.J. ci.

the peril of society or particular members of society. This function which the courts perform is equally consistent as such with the notion of the people's interest, particularly when set against the background of Parliament being a potential forum which manifests the tyranny of the majority, and the courts, being an institution which seeks to provide a proper balance amongst the disparate elements.

V. CONCLUSION

The analysis in the foregoing leads us to a number of submissions. First, public law is or should be about control of power by the courts in performing its constitutional function. Public law is not just a collection of cases which by precedence define the limits of governmental action, but rather, it is an instrument which allows the court to protect societal interests which rise above individual rights. In other words, the focus of public law should be on the substance of power rather than its form.

Secondly, much as one would like to see public law playing a wider role, the development of public law has been rather restrictive. Traditionally, the approach towards public law proceeds broadly from rights in remedies and standing. Such an approach tends to prevent public law from adopting a higher profile in protecting the community's interest. Perhaps, this concentration on rights in remedies and standing may be attributable to a lack of ready acceptance, until recently at least, of a separate branch of discipline in public law. In fact, for a very long while, relatively few attempts had been made to define what public law really was and ought to cover. It was only with the onset of the recent procedural reforms and the House of Lords decision in *O'Reilly* v. *Mackman*[78] that some efforts were made to examine the nature of public law. Even then, some of the tests used to define public law cases, are not really satisfactory. Be that as it may, Singapore still maintains a rights in remedies and standing approach.

Thirdly, recent trends see a shift towards increasingly using the Companies Act registered corporate vehicle to deliver public services. This is part of the privatisation movement which currently holds sway in public policy making. The move, however, raises some concern over the question of openness and control of government. In particular, if the public enterprise is operated within the framework of a company type organisation, control by way of judicial supervision becomes severely restricted. This problem becomes particularly acute when the enterprise changes its form and does not change its substance, *i.e.*, the principal players. Even if a non-governmental agency were to own the privatised enterprise, the lack of judicial control may potentially increase the vulnerability of citizens, particularly

78 [1982] 3 W.L.R. 1096.

if the privatised entity is a utility-providing monopoly.

Finally, this lack of judicial supervision of a private entity reflects a serious need to rethink the nature of public law and what it seeks to achieve. In privatising, it is clear that some of these private law entities may not be any less influential than when they previously existed as public enterprises. Yet, it seems strange that the courts are prepared to intervene in one and not the other. All this is because one organisation has a greater "public element". This seems too arbitrary. It would require a redesignation of the meaning of government and what new rights and interests deserve the protection of public law. This is necessary if one is to give any useful expression to public law as an instrument of power control for the body politic.

In the final analysis, if the courts are to protect the public interest, Parliament must reform the present system of public law in Singapore. The subject of reform is not within the scope of this paper. All that I hope to demonstrate is the relative inadequacy of our system of public law and the need to rethink the ends of public law here. Nevertheless, one useful start could be liberalising the standing requirements to bring a public law action and the freeing of the restrictions presently found in our public law remedies. The reform may well apply public law type reasoning to private law entities. Such changes in public law are certainly welcome so long as they protect the interests of the people in the long run.

[Concluded]

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