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Public Interest Litigation in Alternative Dispute Resolution: A proposed mechanism in tribunal for consumer claims

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Abstract

Alternative dispute resolution (ADR) as a means of settlement in the Tribunal for Consumer Claims assists consumers and business operators in negotiating an agreed settlement in relation to consumer's claim. However, it is limited in its function in upholding consumerism values whereby the weaker consumers weaker may only give in to stronger business operators since legal representation is denied in Tribunal for Consumer Claims. Using the qualitative approach this paper argues that public interest litigation public interest litigation should be considered in the existing framework of the Malaysian Tribunal for Consumer Claims in order to uplift the rights of consumers.

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Keywords: Public interest litigation; tribunal; alternative dispute resolution

1. Introduction

Alternative dispute resolution (ADR) is a means of settlement in the Tribunal for Consumer Claims to assist consumers and business operators in negotiating an agreed settlement in relation to consumer's claim. The tribunal indirectly facilitate to the fast disposal of disputes between the two parties. However, this paper discusses the need for public interest litigation mechanism in the tribunal whereby consumers in general or NGOs can litigate violations of consumer laws without having to prove *locus standi*, a

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traditional concept which is still maintained in some countries including Malaysia. Adopting the comparative study where selected countries are chosen, this paper suggest the modus operandi in which public interest litigation can be applied in the tribunal so that the tribunal can offer more effective protection of consumers' rights.

2. *Locus standi* v. public interest litigation

In Malaysia, the courts and tribunals were unwilling to permit anyone to the right of forum unless he was able to show violations of some personal rights. In other words, only a person who has suffered legal injury can maintain an action and no third party can be permitted to have access to the court to seek redress on behalf of the person injured. Hence, the right to appear in court or tribunal is limited to persons who are peculiarly and especially affected by the damage, over and above the rest of the members of the public. This traditional rule of standing subverts the rule of law. The changing society and increased complexities of business strategies demand responsive change in the traditional doctrine of *locus standi*. If the law fails to respond to the demands of a changing society, then a large segment of society will be deprived of their right of access to justice. Such failure to respond to the needs of a changing society is an abuse of legal process.

3. The almost forgotten rights of consumers

Right to be heard and redress are not properly captured in consumer laws in some countries as there is an absence of comprehensive mechanism to safeguard the consumers in these aspects. Consumer laws in many countries provide the substantive and procedural law to protect consumers against unethical practices in the sale and purchase of services. However, consumers themselves who became victims and are aware of their rights, thus, seeking for remedies under the law can uphold most of the rights. In such instance, could one say that basic needs are being satisfied, right to information and to be heard has been uphold; and right to redress is available? The application of *locus standi* in courts where, the rights of consumers to basic needs, information, be heard and redress is confined and limited to persons who are peculiarly and especially affected by the damage, over and above the rest of the members of the public.

4. Expansion to the concept of public interest litigation

The concept of public interest litigation was first introduced in the USA. In USA, the surge of public interest litigation commences in 1960 when the liberal USA examined what it was doing for its poor. In the USA, public interest litigation has been invented to provide legal representation to groups and interests that have remained unrepresented or underrepresented in the legal process. These include the poor and the disadvantaged. Public interest litigation is also available to ordinary citizens who because they are not able to appoint lawyers, have access to courts locked to them and also do not have access to administrative agencies and other legal forums in which basic policy decisions affecting their interests are made. (Cappelletti, M., 1981) Over the years, public interest litigation has been described with many different terms: human rights litigation, strategic litigation, test case litigation, impact litigation, social action litigation, and social change litigation. (Bakshi, P.M., 1998; Hussain, S.M., 1994). Following the development of public interest litigation in USA, many judges also follow suit, and as a result there are judges pioneering public interest litigation in India, Bangladesh and Pakistan. A clause was finally introduced into the Federal Nature Protection Act in Germany, after nearly two decades of academic debate on the admissibility of class actions by environmental interest groups. Now, in Germany, recognised non-governmental organisations (NGOs) can initiate legal proceedings against certain

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