THE STATE INTERVENTION OF DISPUTE RESOLUTION SYSTEM AND THE SIGNIFICANT USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN MALAYSIA

1. INTRODUCTION

This study discus on the background of employment conflict resolution system in Malaysia. It will also explore the theories on the employment conflict; the importance of state's roles and the state approaches in the intervention of dispute resolution system. The organisation of this study follows with the significant use of Alternative Dispute Resolution (ADR) in employment conflict.

2. THE BACKGROUND OF EMPLOYMENT CONFLICT RESOLUTION SYSTEM IN MALAYSIA

Malaysia basically transplanted the British approach in its labour administration and labour law since its' early years of independence. Post- independence, the labour administration development has been coloured by the increasing economic and social obligations the first development began from the creation of the Labour Department in 1904. Since then, a further eleven departments under the Ministry of Human Resources were established (Aminuddin, 1949). Other departments were also set up; Department of Industrial Relations and Department of Trade Union in labour administration to promote sound employment relations and to support collective bargaining.

There is no denying that the significant roles of these three departments/ institutions in resolving the employment conflict in Malaysia, which are Department of Labour, Department of Industrial Relations and Industrial Court as Aminuddin discussed their significant functions. She noted that Labour Department enforces laws on labour standards for promoting workers' welfare, protects workers from exploitation and provides minimum standard of benefits for all workers as covered by Employment Act 1955. The enforcement and dispute settlements in the issues such as disputes between workers and employers over payment or non-payment of wages, allowances, retrenchment, and retirement benefits are done through the labour court (Aminuddin, 1949; 16). The Department of Industrial Relations manages and settles disputes between employers and employee through conciliation and maintenance of harmonious relationship between them by various means. In addition, Industrial Relations Act 1967 provides for one agency for arbitration – the Industrial Court (Ayadurai, 1996). Ahmad and George (2002) noted that there are three main types of disputes which Industrial Relations Act addresses; 1) Recognition disputes; 2) Unfair

Dismissal; and 3) Trade Disputes. The significance of the promulgation of the Industrial Relations Act 1967 is that Malaysia essentially changed its labour law from a system of voluntary arbitration to compulsory arbitration.

Generally, the industrial relations in Malaysia have been influenced by 'extensive control of the states that guaranteeing a high level of managerial prerogative with the workplace, minimal overt conflict and very limited bargaining power for labour' (Todd and Peetz, 2001: 1365). Arudsothy described the Malaysian industrial relations system as 'a corporalist industrial system where the active player is the government and the autonomy of the trade unions extremely restricted' (Arudsothy, 1990; 328). Kurvilla and Erikson (2002) noted that 'the importance of IR stability via effective conflict management as the key basis for these workplaces IR regulations and legislation' (Kurvilla and Erikson, 2002; 195).

3. EMPLOYMENT CONFLICT AND STATE INTERVENTION

This discussion will highlight the significant of the roles of state in shaping the industrial relations system in general and determines the roles state plays in employment conflict resolution. It also provided contention on how the state's approach to its roles in industrialized and developing countries.

Conflicts at workplaces over the terms and conditions of employees are always persistence. As one kind of manifest expressions of discontent, dispute is also called 'organisational misbehaviour' by Ackroyd and Thompson (Ackroyd and Thompson, 1999). Aminuddin (1949: 13) summarized the work of Derek Torrington on the sources of conflict in the workplaces as follows; 1) the aggressive impulse which is inborn in mankind, 2) divergence of interests between managers and workers, 3) competition for a share of limited resources; and 4) organizational tradition. Where conflicts are not resolved or nothing has been done by either one or both parties to achieve a resolution, it may lead to various problems such as absenteeism, low productivity, higher turnover and industrial actions.

The state as defined by Salamon (1987: 219) as 'the politically based and controlled institutions of government and regulation within an organized society'**.** Therefore**,** the state holds an important role in shaping the character and content of national systems of industrial relations. Further, Salamon (1987) described that 'the government may intervene in industrial relations in four main ways; as employer, law maker, conciliator and regulator'. However, Stuart and Martinez-Lucio (2008) argues that the use of the concept of emerging globalisation has diluted the state's responsive capacity and at the same time has been used against the defence of its role. The notion created by Sexton that there are related between the ways of solving conflicts and the ways in which industrial relations is viewed (Sexton,

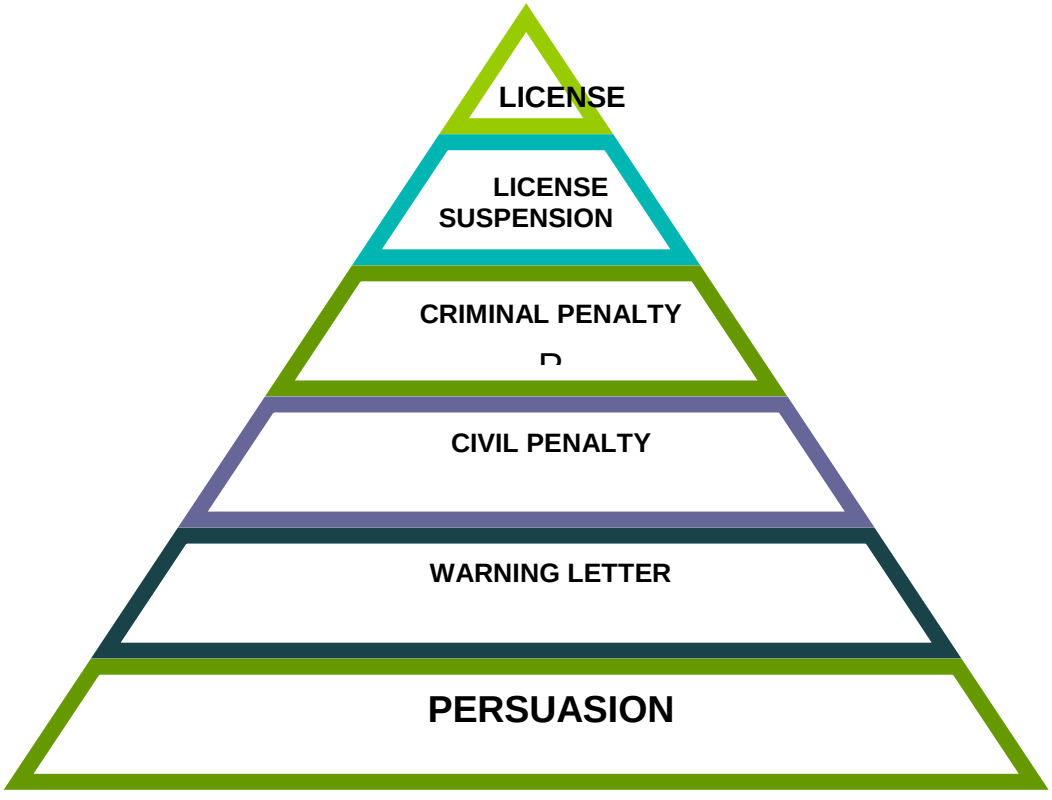
1996). Further Sexton summarised Lee's view of the difference between Asia and Western models of dispute resolution. Sexton noted that the divergence between Asia and Western model's is through the function of business in society. Basically, the concept of community for Asia's society is characterized by harmonious relations between humans, and between humans and nature. However, he described that the Western community concept is based on legal or common law founded on individualism and Puritanism (Sexton, 1996).

Most of the arrangements made by the countries are designed to fit in with the national system of industrial relations. In some countries, consequences of legalisation employment conflict have been increased to enhance the segmentation and specialisation between public resolution institutions (Teague, 2006) and in some countries enforced to resolved employment conflict at workplace or organizational level (Jefferys et al., 2010). According to Teague (2009: 502) these different types of intervention are an indication that a range of public agencies have been established such as 'to act as a safety net for the collective bargaining system; when employers and trade unions failed to reach agreement through the bargaining system these public agencies have been used to help resolve dispute'. In contrast, Sexton (1996) generated a different view based on his general analysis from several work papers on dispute resolution. He made an argument that even though the institutional is one of the most important elements in the dispute resolution system, the state intervention and the bargaining system do not seem to support the settlement of dispute, but it continuously sustains them and to certain extent make the situation worst. As for Malaysia, there are two departments which handle dismissal cases. This lead to confusion or wrong idea of where and what public really want for their right. The worker's intention is crucial at this stage to choose the right department for the right remedy.

The high number of employment relations activities which regulated by laws has affected to the number of legislations that influenced the labour market behaviour. Indeed, the laws influenced the growth of procedures and settlement arrangements of workplace dispute (Teague, 2009). These also are divergence from the contrasting industrial relations systems in the countries where experienced divergence due to institutional change over a period of time and transform to the different kind of system which contribute to the current procedures, policies and diffusing innovations (Teague, 2009). However, the growth of labour laws will result to a mass of employment rules and policies which may result in more difficult enforcement (Teague, 2006). In view of this, Teague (2006) proposes to put emphasise on the importance of an effective compliance rather than adversarial enforcement.

In solving the enforcement problem, Teague (2006) agrees with the idea of an enforcement pyramid as proposed by Ayres and Braithwaite (1995), which focuses on the meaning of responsive regulation as a way to effective compliance. He further described that the firms which comply with regulations voluntarily are on the bottom of the pyramid (please see graph). In the middle are the firms that comply with regulations voluntarily as result from the assistant and support provided through various schemes or programmes. Lastly, at the top of the pyramid are traditional deterrence strategies that involve sanctions and penalties to gain compliance. This pyramid shows that more emphasis is placed by the state to encourage firms comply with employment laws voluntarily rather than adversarial enforcement at top of the pyramid which represented the non-compliances.

The best method of compliance is through persuasion. The dispute resolve amicably, avoid costly and time consuming. The harmonious relationship between parties also can be maintain through this method. In the next section, it will explain on how the use of ADR by the state in 'persuade' disputed parties to resolve the conflict amicably.



Compliance Pyramid

Sources: Ayres and Braithwaite (1995)

4. THE SIGNIFICANT OF ALTERNATIVE DISPUTE RESOLUTION (ADR) THROUGH STATE INTERVENTION

As explained in earlier section, there are few departments handle employment dispute in Malaysia. In the section, the discussion will explore the significant use in alternative dispute resolutions by the state through various types of 'intervention'.

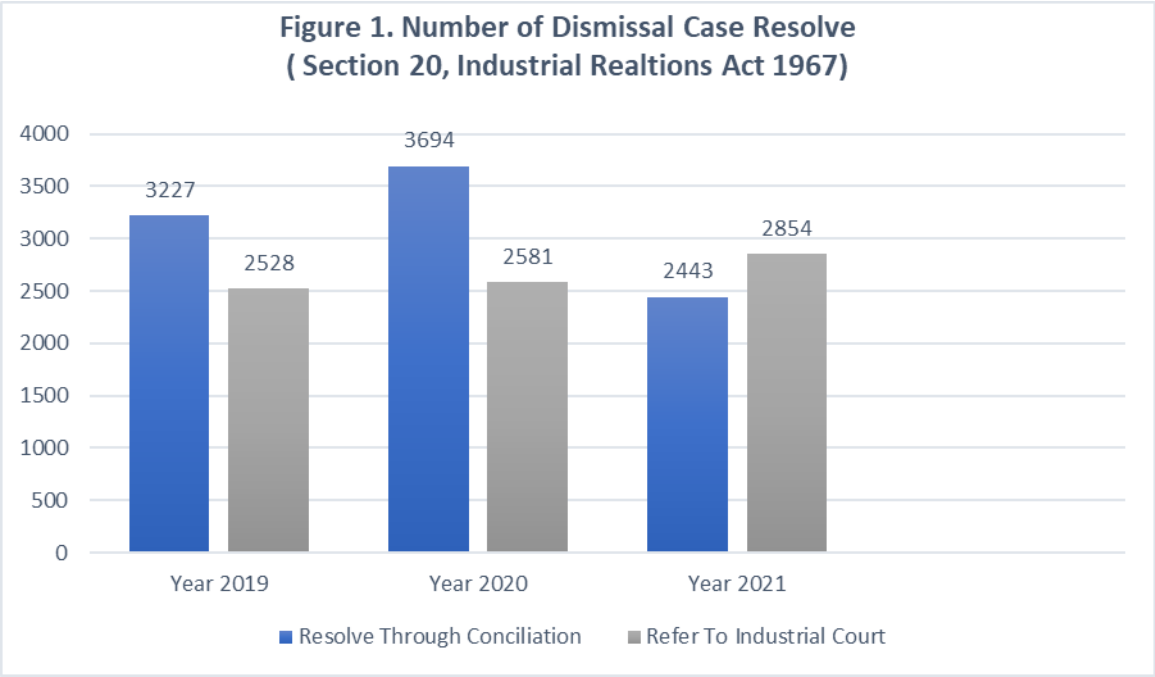
The methods of alternative dispute resolution are becoming increasingly popular mechanism to resolve disputes (Zack, 1997; Abraham, 2006; Purcell, 2010). As defined by Purcell (2010) that a narrow definition of ADR is the use of third parties engaging in conciliation, mediation and arbitration prior to a court hearing or simply a 'third party intervention' (Jefferys et al., 2010). The types of dispute resolutions arrangements used is heavily influenced by the wider arrangements for designing employment relationship within each country which derived from the historical development of the institutions of industrial and employment relations over the past few years (Purcell, 2010).

A broader definition of ADR allows governments and respective parties to narrow on the areas where the disputes resolution mechanism can be developed. The increased reliance on a variety of ADR can decrease the costs incurred by government and speed up time consumes (Zack, 1997). Thus, Sexton (1996) the ADR should be used in conditions such as during the time when the economic and psychological costs are increasing more than expected due to damages suffered; when the formal channel become more expensive or the possibility of harming the survival of the company or agency by continuing the disputes through the more formal channels. The litigation cost per case in Malaysia is around RM15,000 to RM25,000. This cost is expected to be higher in different cities and cases.

It is widely agreed that the notion of ADR is generally faster and cheaper for parties than a formal court hearing (Denenberg and Denenberg, 1994; Sexton 1996; Zack, 1997, Colling, 2004; Purcell, 2010). Besides, the costs of the ADR procedures certainly appear to offer advantages in terms of speed. Purcell argued that (2010), the trend data on growth in ADR used for countries such Germany and Greece, showed a 'benchmark' on the successful use of the conciliation conducted in either formal or informal ways. In other words, the indicator to the success of judicial ADR depends on the number of tribunal or court hearing (Purcell, 2010).

This indicator also used by the institutions and agencies to measure their performances and to determine the need for new strategy to meet their target. Currently, the Key

Performance Indicator (KPI)[1] for year 2022, Industrial Relations Department Malaysia target at least 65 percent from the number of dismissal cases received under section 20, Industrial Relations Act1967 through amicable settlement. This number of settlement is an indicator for effective conciliation done by the department.



In the graph above, in 2019 the Industrial Relations Department manage to resolve around 56.7% cases from total case 5,755 through conciliation which remaining 2528 cases were refer to the Industrial Court for Arbitration. The same ranging around 58.8% in 2020 the cases were resolve through conciliation and 41.1% were refer to the Industrial Court. However, in 2021, the number of case resolve has declined to 46%.

There are many ADR techniques used in dispute resolution which centred around closer coordination among the dispute resolution agencies so that discussion and debate can occur. The increase of individual employment right lead to growth number of dispute regarding the job and other aspect of employment which display need to reasonable means of dispute resolution (Denenberg and Denenberg, 1994). New closer methods of working with firms are required so that they can establish clear ground rules on what constitutes acceptable and unacceptable practice in relation to particular employment rules.

[1] Key Performance Indicator (KPI) is an annual performance target set by the management.

As the Covid -19 pandemic has spread around the globe, the impact on the employment disputes are massive. The state has to create new ways to accommodate those affected workers to resolve the dispute fast as the pandemic not only cost financially but also emotionally and mentally. In Mei 2021, Ministry of Human Resource has launched new digital channel for all employees in Malaysia to report any employment grievances to the department. Through this application, all disputes can be resolve in effective way and faster than normal procedure. This kind of intervention not only beneficial to workers, also to the employer. In some cases, the employer did not aware the employment regulations that need to comply and this can help them to better understanding of employment regulations in Malaysia.

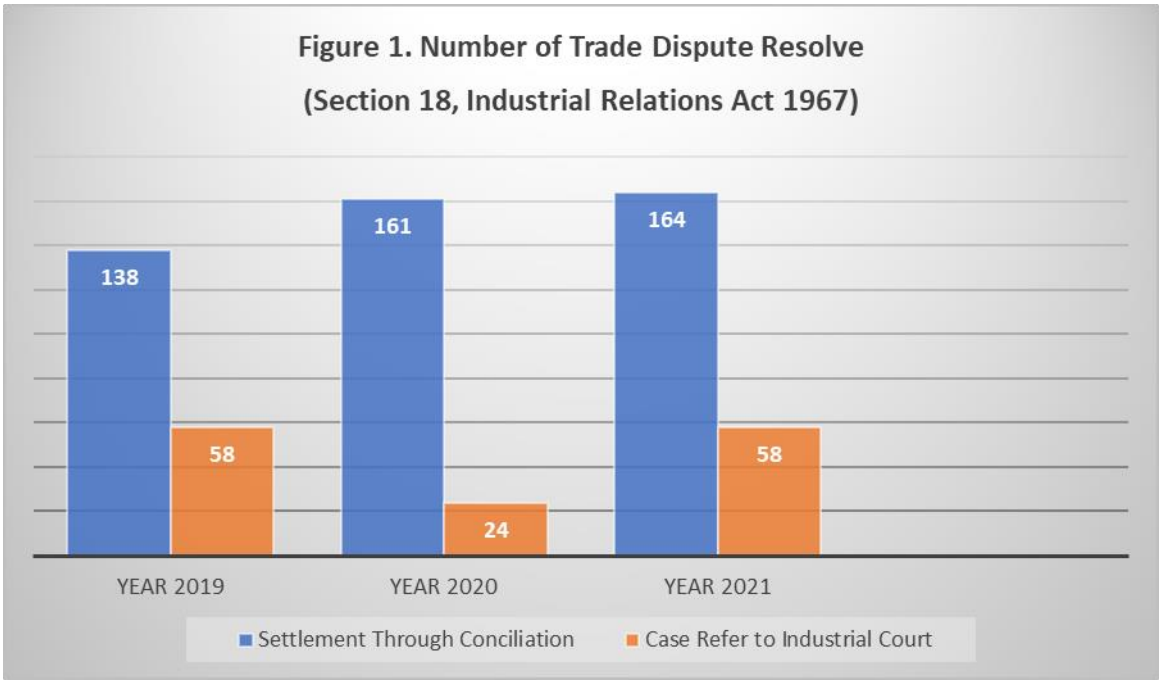
The conciliation and mediation machinery provided by the institutions which endeavours to settle a controversy by assisting the parties in reaching a voluntary agreement and the ultimate decision is made by the parties themselves. As conciliator (or mediator) with his expertise and prior experience in employment relations issues, has to draw a diplomatic technique and furnish kind of information to the parties that will assist them in evaluating the consequences of the alternative decisions they have. When an aggrieved worker made an application to the third party for a decision which is legally binding called Arbitration (Aminuddin, 1949; Ayadurai, 1996; Zack, 1997; Abraham, 2006; Purcell, 2010). However, Purcell (2010) explored the fact that arbitration is always used a 'last resort' special consideration is given to conciliation and mediation. Even though, arbitration was not often used by the experts. Purcell (2010) argued that in some countries, the use of arbitration depends on the decision of the parties to the particular dispute. For instance, in 2020 only 1804 cases were resolve through hearing compared 5292 cases were Agreement Award in the Labour Court Malaysia. The same pattern in 2021, were only 1295 cases for court hearing and 3342 cases were resolve mutually through Agreement Award[2]

Apart from conciliation, mediation and arbitration there are recourses through agencies such as Labour inspectors or ombudsmen (Zack, 1997: Purcell, 2010), fact-finding (Zack, 1997) and non-judicial ADR (Purcell, 2010). The non-judicial ADR, for instance, is also used as alternative ways of ADR which resolve problems and conflict through negotiations, problem solving or / and grievances and displinary procedures in the places of work. The effectiveness of managing workplace procedure connected to the outcomes of court cases. In another point of view by Sexton, J. (1996), the successful of conflict and dispute solving method has strong influenced by the approaches, attitudes and values of the parties. There

[2] Agreement Award is an award for mutual settlement through mediation or conciliation prior labour court hearing in the Labour Court.

are many types of models have been introduced to resolve conflicts. As in Industrial Relations Department, Harmonious Visitation is conducted monthly basis by the officers to workplaces randomly. Sometimes, the workplace is selected based on case by case. The notion is by solving the issues arise at the workplace rather than it become difficult disputes. Differently in Labour Department, have use various methods such as; regular Statutory Inspections and through an inspection after complaint receive.

In other words, Purcell (2010) described that ADR viewed as 'educational role as well as a quasi-judicial one'. By the intervention of such an impartial third party and through discussion conducted at the negotiable table and various techniques and initiatives, all thoughts of industrial action and court hearing can be avoided. The Industrial Relations Department has been practice this measure to resolve disputes between union and workers' union. As shown in Figure 2, in 2019 the Industrial Relations Department manage to intervene the trade dispute under Section 18, Industrial Relations Act 1967, resolve it through conciliation by 70.4% from total number of disputes. The remaining balance 58 cases were referring to the Industrial Court for Arbitration. The rate increase to 87% in 2020 and slightly decrease to 73.8% in 2021. The decreasing pattern is due to economic impact after Covid-19 pandemic. The intervention of state to resolve trade dispute at this stage is important as to limit the impact to the workers, employer and the industry.



Agreed with Teague, Purcell (2010) noted by creating awareness of ADR to the employees is to preserve and promote their confidence in the ADR system where almost all the dispute resolution is provided by the public institutions. The important part of department task is to recognize best practice diversity programs and promote them across firms in order to reduce the possibility of employment grievances based on diversity.

5. CONCLUSION

Firstly, the study explores the background of employment disputes resolution in Malaysia, where development in labour administration and regulations responded to changing social, economic and political circumstances. Industrial relations in general increasingly become more complicated with the emergence of better educated and trained workforce. Secondly, the state plays as important role in IR system as Salamon demonstrated the government's power is undeniable which can intervene in four different ways. Employment legislations continued to be a mean by which IR continuously upgraded and made relevant to changing circumstances. The state, as Purcell argues to improve voluntarily compliance rather than adversarial enforcement through various means of dispute resolutions mechanism. Lastly, it explores that there was a significant impact in ADR or 'third party intervention' use in dispute resolutions in countries with regards either voluntary or compulsory IR system. The variety of ADR arrangements available to reach a minimum number of cases heard in court or tribunal. This study suggest that more studies could be conduct by relevant department to know to what extend the effectiveness of ADR in the workplaces.

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