

## Framework for Dispute Resolution in Malaysian Higher Education: A Cross-Jurisdictional Analysis

Oomola Sodiq O<sup>1</sup>, Bakare Kazeem Kayode<sup>2</sup>, Amasa Firdausa Aljannah<sup>1</sup>

<sup>1</sup>Ahmad Ibrahim Kulliyah of Laws, international Islamic University Malaysia. Gombak, Malaysia

<sup>2</sup>School of Business and Social Science, Albukhary International University, Alor Setar, Kedah, Malaysia

<sup>1</sup>sodiq\_oomola@iium.edu.my

<sup>2</sup>bakare.kayode@aiu.edu.my

<sup>1</sup>jannahfir@gmail.com

### ABSTRACT

Effective Complaint handling is fundamental to the growth of businesses and other institutions including the higher education institutions (HEIs). Education although argued to be mainly public good, higher education students are perceived as customers in a private enterprise and sometimes mixed goods. This perception reinforces the need to focus on the satisfaction of students on the quality of services they receive in Higher Education Institutions (HEIs). An effective complaint handling mechanism is therefore a means to ensure student complaints do not aggravate to conflicts. This aspect has not been adequately addressed in literatures; the laws of Higher Education Institutions in Malaysia have no clear provisions for complaint handling. Doctrinal method and qualitative techniques are employed in this work by online search of existing legislation in Malaysia, United States, United Kingdom, and other countries. Also, utilizing library materials, and internet sources like google scholar, Hein Online and, Jstor and Ebscohost (IIUM Discovery online) to discover literatures on this subject. This method reveals the global best practices in higher education complaint handling. The United Kingdom, United States and Australia are the models examined because these are foremost countries where University Ombudsmen offices were established and the complaint handling system in universities have developed overtime. Independence, accessibility, transparency, hierarchy of complaints (internal and external independent Ombudsmen) are some of the unique qualities in the complaint handling system in the countries especially in the United Kingdom. This paper therefore proposes a similar framework for Malaysia's HEIs. All papers must include an Abstract. The Abstract and Keywords text should be 11 point Calibri, full justified and contained within one paragraph. Begin the Abstract with the word ABSTRACT. Do not Indent. Do not cite references in the abstract. The abstract should be approximately 150 words. Avoid using abbreviations in the abstract.

**Keywords:** Higher Education, Dispute Resolution, Legal Framework, Cross-jurisdictional

## 1 INTRODUCTION

Social interaction often generate misunderstanding which could degenerate into conflicts or disputes if not properly managed. Since social interaction is an integral part of human function and cannot be curtailed, it is important to manage the conflicts that may arise therefrom. Just like other institutions, conflicts are inevitable in the Higher Education Institutions (HEIs). This paper therefore proposes a framework for effective dispute resolution and student complaint handling in HEIs in Malaysia. A cross-jurisdictional analysis of dispute resolution in higher education was examined in this paper. For the purpose of this study, the complaint handling mechanisms of Universities in the United States, United Kingdom and Australia are examined. A comparison of the methods in the three jurisdictions is made while considering the applicability in Malaysia.

### 1.1 Causes of Disputes in Higher Education Institutions

Internal and external factors could generate conflict in Higher Education Institutions. Diversity is an important feature of higher education as students, academic and non-academic staff come from different background and fields of study. This diversity is a source of different understanding and misunderstanding which could generate disputes and conflicts (Gmurzyńska, 2021). Conflicts has always been a feature of the academic community, the gravity of the conflict in universities may however differ based on the size of the University, the population of students and its nature, whether private or public (Klingel & Maffie, 2011; Volpe & Chandler, 2001).

Gmelch and Caroll believe that conflict should not be seen as abnormal in every sector including the Universities. The authors identified the following ten structural relationships in the university system that can potentially generate conflicts:

“Levels in the hierarchy; rules and regulations; degree of specialization; staff composition; nature of supervision; participation in decision making; sources of power; rewards and recognition; staff interdependence; and roles and responsibilities.” (Gmelch & Carroll, 1991)

The authors believed that these many layers of interactions, regulations, interdependence, and hierarchy make conflict inevitable in the academic environment. Emphasis was made on the notion that these conflicts do not necessarily have to be negative, but its recognition would assist in the adequate management of the conflicts. Student conflicts against faculty often involves course evaluation, supervision, “mentoring expectations.” (Volpe & Chandler, 2001).

The first quarter of the year 2020 witnessed the shutdown of many businesses, corporations, institutions including schools and higher education institutions. This is a pointer to the fact that external factors like the pandemic can potentially have a great effect on higher education (Gmurzyńska, 2021).

According to the United Kingdom Office for the Independent Adjudicator (OIA) Annual Report 2020, 12% of complaints received in the year 2020 are complaints arising from the impact of the Covid Pandemic. Most of the complaints concerns disruption in teaching and learning and the quality of course delivery (Office of the Independent Adjudicator for Higher Education, 2020, p. 7). Other external factors include “environmental influences,” “Organisational” and “family support” (Park & Choi, 2009; Street, 2010). Students who do not get the needed family support, or face from environmental challenges may find it more difficult to cope with school activities like their peers and this may lead to more complaints on conflicts in the school. The next section briefly examines the most common types of disputes in Higher Education Institutions.

### 1.2 Types of Complaints in Higher Education Institutions

According to the yearly reports of the United Kingdom Office of Independent Adjudicator for Higher Education, most of the complaints brought by students are majorly centred on the following issues: **Service Issues:** since higher education students are largely considered customers, it is pertinent to pay adequate attention to the quality of services provided by HEIs. Matters relating to the quality of programs and delivery of courses as advertised by universities. Each educational provider has the duty to ensure the content promised during promotion is

delivered. Matters under this category are mostly found justified by the OIA (OIA, 2015, pp. 17–18).

**Academic Appeal:** this has to do with assessments, grades, and progress in studies. This kind of complaints most times include matters of academic judgement. Settling such matters are restricted to the four walls of the University. External bodies like the OIA do not have the power to attend to matters of academic judgment which is discussed further in below. The internal complaint handling mechanism (University Ombudsman) should therefore be well equipped to handle such matters.

**Human Rights matters:** issues relating to sexual harassment, offering higher grades for an exchange of sexual activity are frequent sources of complaint in HEIs. Such issues must be handled with utmost care and privacy while ensuring justice. Internal University Ombudsman of each university must be well equipped to handle such cases. The external review body also has the duty to address such matters if not well handled as reported in the OIA 2020 Annual Report. A student complained of sexual harassment from his supervisor. The education provider changed her supervisor but nothing else was done to protect the student from the lecturer and the lecturer maintained his position. The student's complaint to the OIA was found justified. OIA recommended to the school to review its procedure for handling such complaints and awarder the student 5000 Pounds for the distress she had to go through.

**Visa Application matters:** this applies to international students. The education providers have to duty to attend to students' visa application process as at when due. In the OIA 2016 Report, a student was deprived the opportunity to extend his visa application due to the delay by the education provider, the student had to return to his country to make another visa application. In the same year, a student's visa sponsorship was unjustly denied by her university on the basis of "lack of academic progress." This made her unable to continue her studies. The student was awarded refund of tuition fees and compensation by the OIA. Numerous issues occur in visa application processes with universities (OIA, 2015).

## 2 TRADITIONAL METHODS OF RESOLVING DISPUTES

The traditional methods of resolving disputes in Higher education institutions were majorly through student affairs, human resources units, and other administrative units. According to Neil, decisions reached by these informal dispute resolution units have led to costly legal actions for Universities when students or other stakeholders seek to upturn the decision of the school (Katz, 2017). This and other reasons like student protests necessitated the need for a well-structured dispute resolution structure in HEIs following the practice in other sectors such as consumer products and workplace complaint handling methods.

The methods of resolving disputes traditionally in the academic environment involve the academic staff or faculty members. Volpe and Chandler adopted the term "pracademic" to describe such officers in the HEIs (Volpe & Chandler, 2001). Pracademics are both practitioners in a particular field and at the same time, lecturers in HEIs. An example of a pracademic is a consultant gynaecologist who both offer consultancy job to patients while also teaching medical students in a university teaching hospital. Pracademics play bridging roles (Posner, 2009). Pracademics take up the indigenous role of resolving disputes in the faculty alongside their roles as lecturers in their various departments due to their expertise in Alternative Dispute Resolution or experience with stakeholders (Volpe & Chandler, 1999).

As crucial as the role of these pracademics are, the question of neutrality comes to play as they need to interact with colleagues and other members of the faculty to ensure progress in their academic career. They also belong to committees, university senate and undertake different positions in the university community. They may even have friends and close acquaintances amongst colleagues and other stakeholders in the faculty. Volpe and Chandler discussed the challenges facing pracademics which include multiple duties; loss of individual voice; loss of trust and lack of neutrality. Some of these challenges facing pracademics are potential demerits of the system (Volpe & Chandler, 1999). A pracademic has personal goals and desire to climb the academic ladder alongside his colleagues. The

extra duty of resolving disputes will not be considered as a valid point for promotion if the pracademic does not have the requirement. This may therefore lead to inefficiency in either or both of the two jobs. A pracademic may be crippled or unable to express their personal grievances while lost in the duty of representing others and resolving disputes.

Moreover, the pracademic may lose the trust of their colleagues as well as the confidence of students. For students to easily access and be willing to share their grievances with someone, they must have confidence that their identity is protected, and their interest is paramount (Stone, 2004). This may be difficult to achieve with pracademic because of his relationship with other lecturers and faculty members. Ironically, the pracademic may also lose the trust of his colleagues especially on sensitive matters like examination questions and result moderation due to their closeness to students (Klingel & Maffie, 2011).

Neutrality, openness, impartiality, and independence are some of the fundamental principles of dispute resolution mechanisms. These qualities are vague in the role of a pracademic and goes to the core of the traditional system of dispute resolution in Higher Education. Therefore, there is the need for a distinct and appropriate dispute resolution mechanism in universities and other HEIs established based on the primary principles of alternative dispute resolution (ADR).

### **3 EMERGENCE OF OMBUDSMAN IN HIGHER EDUCATION: A CROSS-JURISDICTIONAL ANALYSIS**

In the 1960s, there was a great increase in the number of enrolments into universities and colleges in the United States. According to the Commission on Campus Government and Student Dissent, in 1969, 7000000 students enrolment was made into about 2800 colleges and Universities (American Bar Foundation, 1969). The high demand for higher education made the establishment of new HEIs very important. According to Wise, in 1969, one out of every twenty-eight American was enrolled in one university or college to earn a certification or the other (Wise, 1958). The expansion and growth in the HEIs made them more prone to disputes. In the process of devising ways of resolving campus disputes, various internal dispute resolution

mechanisms were employed one of which is the Ombudsman (Stuhmcke, 2001). Universities like Simon Fraser University and Eastern Montana University are the earliest universities to establish Ombudsman offices in 1965 and 1966 respectively (Smith, 2020).

The initial goal of the establishment of campus Ombudsman office is to address student complaints. Few years later, Ombudsman offices were established to serve the campus. An example of this is the Cornell University Ombudsman.(Cook, 1970) In Europe, Spanish Universities such as the University of Leon, Granada and Valencia universities are the foremost Spanish Universities to establish Ombudsman Offices in 1988.(Varga, 2015) Since its inception in the 1960s, the number of United States University Ombudsman has grown at an exponential rate. According to Stuhmcke, only about 20 universities and colleges had Ombudsmen who were faculty members in 1969, but 190 universities and colleges had Ombudsmen three years later (Stuhmcke, 2001).

The Spanish Organic Law, 2001 made it compulsory for each university to establish an Ombudsman Office. Before the promulgation of this law there were about 21 University Ombudsman offices. The enactment of the law increased the number the Ombudsman offices to over a double. As at, 2016, there were a total of 54 University Ombudsman Offices in Spain (Holtrop, n.d.).

Similarly, few Australian Universities had Ombudsman offices in 2001. However, there were offices with similar functions but with different names. "Dean of Students", "Grievance Manager", "Sub-dean of students", "Students Interest Adviser", "Complaints Commissioner" and "Guild Officer" are amongst the nomenclatures given to complaints handling units in Australian Universities. Central Queensland University, Queensland University of Technology, University of New England, and University of Technology Sydney have Ombudsman Offices (Stuhmcke, 2001).

The three most important functions of Ombudsmen in Higher Education according to Janzen are: to improve communications, ensure injustice is prevented and promoting human rights on campus. (Janzen, 1971) These duties are similar to the primary

roles of Ombudsmen as established in Sweden in early 19<sup>th</sup> century.

### 3.1 History of Ombudsman

Generally, the origin of Ombudsman is traced to Sweden where the concept of Ombudsman was developed and officially introduced into the Sweden Constitution of 1809 (Janzen, 1971) *umboðsmaðr* is an old nurse word which means representative, *umbud/ombud* also means “proxy” or “legal representative” (Janzen, 1971). The idea of Ombudsman man therefore stems from a space of representation of citizens in checking maladministration in government and other government agencies. An Ombudsman as an independent body is saddled with the responsibility of taking citizens’ complaint against government agencies (Aufrecht, 1998).

After the successful establishment of the Sweden Ombudsman, other countries like Finland, Denmark, and Norway, also institutionalised Ombudsman in 1919, 1954 and 1963, respectively. The idea of Ombudsman continued to spread to countries like New Zealand, Tanzania, United Kingdom, and India. All these countries had established Ombudsman offices by early 1970s. A few provinces in Canada like Alberta and New Brunswick in 1967 and Quebec in 1969 also adopted the Ombudsman system (Janzen, 1971). Although the operation of the Ombudsman system of each country may vary slightly, the form and purpose remained the same.

### 3.2 Legal Framework for University Ombudsman in the United States

For a long time, ADR processes have been a major instrument in resolving disputes in US Higher Education. In 1979, Centre for Mediation in Higher Education was established by non-profit dispute resolution organisation (i.e., American Arbitration Association). This was followed by the creation of National Association for Mediation in Education (NAME) in the 1980s. The goal was to strengthen the practice of mediation as a dispute resolution mechanism in Higher education. In 1990, the first National Conference on Campus Mediation program was convened at Syracuse University (Katz, 2017). Collison’s work discussed the need to employ dispute resolution processes like mediation, negotiation, and

conciliation to end student protests instead of the use of force or Police (Collison, 1990).

The main laws on United States Higher Education include: Higher Education Act 1965; Higher Education Opportunity Act 2008. Other important legislations on Higher Education include Age Discrimination Act of 1975; Americans with Disability Act of 1990; Drug Free Schools and Communities Act, 1986 (amended 1989); Copyright Act, 1976; Copyright Term Extension Act, 1998 and Immigration and Nationality Act 1952 (repealed the 1965 Immigration and Nationality Act) (“Higher Education Federal Laws and Regulation,” 2020).

### 3.3 United States Higher Education Act 1965 (as amended through P.L. 117-2) March 11, 2021

The Higher Education Act 1965 is a detailed law on the operation of Higher Education Institutions in the United States. The mention of Ombudsman in this law relates to complaint regarding student loan. The Student Loan Ombudsman is appointed by the Chief Operating Officer in consultation of the secretary to provide “timely assistance” to loan borrowers. (Higher Education Act, 1965, sec. 141) The Student Loan Ombudsman has the responsibility of receiving and reviewing informal complaints from loan borrowers “including, as appropriate, attempts to resolve such complaints within the Department of Education and with institutions of higher education, lenders, guaranty agencies, loan servicers, and other participants in the loan programs...” (Higher Education Act, 1965) Amongst the functions of the Ombudsman is to “compile and analyze data on borrower complaints and make appropriate recommendations.” (Higher Education Act, 1965). This is to show that the functions of the Student Loan Ombudsman is not only to receive and review complaints, but also to take proper records of the complaints with a bid to analyzing all the complaints lodged and student borrowers and make recommendations to appropriate authorities. Lastly, for the purpose of evaluation, the Ombudsman submits an annual report to the Chief Operating Officer. The Student Loan Ombudsman is limited to a particular aspect of higher education, the law does not empower the Ombudsman to address matters outside student loans.

The provisions of the Higher Education Act cited above led to the establishment of Federal Student Aid Ombudsman Group. The Ombudsman helps students in the following ways:

- to resolve discrepancies with loan balances and payments;
- to resolve issues with Federal Pell Grant disbursements or overpayments;
- to review TEACH Grant conversions to loans;
- to explain loan interest and collection charges;
- to identify options for resolving your issues related to consolidation, service quality, default status, bankruptcy, income tax refund offsets, and other concerns;
- to clarify requirements for loan deferment or forbearance and loan cancellation or discharge; and
- to identify loan repayment options. ("Federal Student Aid," n.d.)

The functions of the Ombudsman group does not include serving as student advocates or overturning the decisions of other educational institutions. The group does not also have the authority to address private loan complaints or complaints under investigation with the Department of Education. The work of the Ombudsman does not also include testifying as witnesses in a legal proceeding or accepting loan payments. The ombudsman office only has the duties stated in the list above which majorly revolves around resolving or clarifying matters relating to loan repayment. The office would refer a complainant to the next appropriate authority when necessary.

However, under the U.S Department of Education (ED), there is an agency named Office of Civil Rights (OCR). The mission of this agency is "to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights." (Education, n.d.-b) The office is saddled with the responsibility of ensuring every person has equal access to learning and no one faces discrimination on the basis of race, colour, national origin, age, sex, and disability. The office entertains complaints related to these forms of discrimination made against any educational institution funded by the Ministry of Education.

This office can also be regarded as an Ombudsman office with the specific duty of handling civil rights complaints based on civil right laws like the Title VI of

Civil Rights Act 1964 which prohibits discrimination on the basis of race, colour, or national origin. Education Amendment Act of 1972 in its Title IX prohibits discrimination based on sex. Also, Rehabilitation Act of 1973 and Americans with Disabilities Act of 1990 both prohibit any form of discrimination against persons with disabilities. During the pandemic, the activities of the office has been transferred online. Electronic forms are provided for complaints to fill and give details of the discrimination faced. (Education, n.d.-a) The complainant may be the person or who was discriminated against or any other person who notices any form of discrimination by an institution funded by the government.

### 3.4 University Ombudsman in the United States

Many universities such as Cornell University in the United States have Ombudsman offices dated back to 1969. The Ombudsman office marked its 50<sup>th</sup> anniversary in 2019 (C. University, n.d.). Boston University Office of the Ombuds is also ADR system in handling conflicts in the university very early on (B. University, n.d.). According to Neil, the Ombudsman office and other Complaint management platforms in the University like the "University Complaint Investigation and Resolution Office, the Law School Mediation Services," give the faculty and students access to "conciliation, coaching, mediation, and referrals" depending on the nature of their complaints and the kind of redress they seek. (Katz, 2017)

Office of Conflict Resolution at the University of Minnesota is known for exploring both formal and informal approaches in resolving disputes in the University. Ombuds services like gathering relevant data from complainants, engaging in difficult conversations with internal or external stakeholders and other more formal mediation processes are handled by the office. According to Neil, the OCR had a great impact in the reduction in complaint filing since it was established (Katz, 2017).

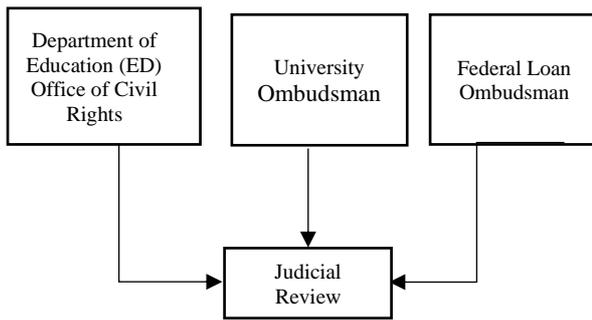


FIGURE 1

### Complaint Handling in the United States Higher Education Sector

The above diagram i.e., figure 1 illustrates the levels of handling complaints in the United States Higher Education system. Stage 1 represents the individual university ombudsman, the Federal Loan Ombudsman, and the Office of Civil Rights. Most Universities and Colleges in the United States have an internal complaint handling process since its introduction in the 1960s. Although the name differs from one university to another, the structure and functions remain similar. The nature of complaints influences where the students approach. For instance, a student who is faced with issues like discriminations based on religion, nationality or age would approach the Office of Civil Rights and students with complaints related to student loan would lodge complaint to the Federal Loan Ombudsman. The judicial review process comes in when student is dissatisfied with the resolutions made by any of these offices.

### 3.5 Legal Framework for University Ombudsman in the United Kingdom

The Further and Higher Education Act 1992 is the primary law on Higher Education in the United Kingdom. This law however has no provisions on student complaint handling. In 2004, the Higher Education Act was enacted not to repeal but to compliment the 1992 Act. The 2004 Act has a robust provision for the process and procedure for handling student complaints in Higher Education Institutions in England and Wales. The relevant provisions are discussed below:

Definition of Complaint: Section 12 of the Higher Education Act, 2004 defines qualifying complaint as an act or omission of an institution which is made by

a student or former student at that institution, or as a student or former student at another institution. There is however an exception to this provision. Subsection 2 of this section states that complaints which relate to academic judgment are not regarded as qualifying complaints.

A unique provision of the Higher Education Act 2004 is the compulsory requirement of all qualified Higher Education Institutions in England and Wales to comply with any procedure imposed by the designated operator. This gives the designated operator a force of law. The designated operator in this regard is the Office of Independent Adjudicator (OIA).

### 3.6 Designated Operator (The Body Corporate) OIA

Schedule 3 of the Education Act, 2004 provides the duties of the designated operator of student complaint scheme as follows:

“The designated operator must provide a scheme for the review of qualifying complaints which meets all of the conditions set out in Schedule 2. The designated operator must publish the latest version of the scheme in such manner as it thinks fit. The designated operator must not make any change to a provision of the scheme to which a condition set out in Schedule 2 relates unless the operator has first—  
(a) consulted interested parties about the proposed change, and  
(b) notified the Secretary of State or the Assembly (as the case requires the proposed change.)”

### 3.7 Conditions to be met by Student Complaint Scheme

The UK Higher Education Act 2004 provided specific criteria to be met by any Student Complaint Scheme in Higher institutions in the UK. They include registration under the Act, referral system, independence of complaint reviewers, clear decision of reviewers among other. The criteria is discussed in this section.

1. **Qualifying Institutions (QI):** The QI according to the Act are universities, colleges, or schools in England and Wales.(Higher Education Act, 2004)
2. **Referral system:** the second condition stated in the Act is that the Student Complaint scheme must ensure that the complaint it receives are in a form of referral. That is, the complaint scheme

does not have the power to entertain fresh complaints from students. However, the complaint scheme gets a referral from a QI about a complaint that has gone through an internal process (Higher Education Act, 2004).

3. **Independent and Suitable Complaint Reviewers:** Condition C has to do with the independence and capability of the complaint reviewer. The Student Complaint scheme must ensure that a reviewer appointed for his complaint is independent from the parties to the complaint and is also capable or suitable for handling the complaint.(Higher Education Act, 2004)
4. **Clear Decisions on Complaints Reviewed:** The fourth condition requires the reviewer to make decisions as to the justification or otherwise of the qualifying complaints. This condition includes the need for the decision to be made as promptly as possible.(Higher Education Act, 2004)
5. **Recommendations to the QI:** the next stage after the review is justified is for the reviewer to make recommendations to the governing body of the institution. These may be in terms to proposing to the institution to carry out a particular act or to refrain from it. Other recommendations may not be in that regard but also conveying some information to the governing body of the institution.(Higher Education Act, 2004)
6. **Notification of Decisions:** more so, the parties must be duly notified of the decisions and recommendations and the reason for making such decisions and the basis for those recommendations.(Higher Education Act, 2004)
7. **No Fees by the Complainants:** there is also a clear provision absorbing students from being made to pay any fee for lodging complaints. This is a very important provision. A requirement for students to pay before being able to make complaints may be a huge deterrent to the complaint handling process. Students might be discouraged to approach the University Ombudsman if they must pay for the services. "...the scheme does not require complainants to pay any fees in connection with the operation of the scheme."(Higher Education Act, 2004)
8. **Fees payable by QI according to expenses:** the scheme however may receive funding from qualifying institutions. This funding is based on

the cost incurred by the operator on a yearly basis.(Higher Education Act, 2004)

### 3.8 Exclusion of Academic Judgment

The Higher Education Act, 2004 defines a qualifying complaint as a complaint about an act or omission about a qualifying institution made by a student or former student of that institution. The only exception on this as provided by section 12 (2) is matters of academic judgement. "A complaint which falls within subsection (1) is not a qualifying complaint to the extent that it relates to matters of academic judgment."(Higher Education Act, 2004). What constitutes academic judgment has been contended in court a few times. Academic judgment is defined as a judgment where the decision of an academic expert is sufficient (Mitchell, 2015). It is not the duty of OIA to take up marking schemes and remark papers and interfere in the grading of a course. OIA may however examine whether the education provider followed its laid down procedures without any form of bias.

Academic judgment does not however refer to every action of an academic (Cardao-Pito, 2016). The case of *Cardao-Pito v. OIA* addresses the concept of academic judgment and the need to avoid overstressing the term (Cardao-Pito, 2016). In a paper published by OIA Deputy Adjudicator in 2015, Felicity Mitchel to mark the OIA 10<sup>th</sup> anniversary, the author discussed 10 principles derived from the judicial review cases since the appointment of OIA as a designated adjudicator. The seventh principle has to do with academic judgment which reads as follows:

The OIA cannot interfere with academic judgment, but that immunity relates solely to decisions of a purely academic nature. The OIA cannot put itself in the position of examiners in order to re-mark work or pass comment on the marks given, but it will look at whether a higher education provider has correctly followed its own assessment, marking and moderation procedures, and whether there was any unfairness in the decision-making process.(Mitchell, 2015)

The exclusion of an independent adjudicator from matters of academic judgement is not without purpose. One important purpose is to ensure that lecturers and academics are allowed to do their job

of teaching and grading without any form of interference. Another similar exclusion in the 2004 Act is matters relating to application for admission in qualifying institutions. The OIA is excluded from handling matters of application for admission. (Higher Education Act, 2004) The Act gives the University or the education providers the power to decide who they offer admission to without having to be questioned by a designated operator.

### 3.9 Stages of Complaint under the UK Regulation

The structure of complaint handling established by the United Kingdom Education Act, 1965 created broadly three stages of handling complaint. The first stage is handled by the internal process of each university. (Rule 7.1 OIA, 2018) Students who are dissatisfied with the outcome of the complaint handling by the University Ombudsman can then request a review by the designator operator (OIA). The last stage is the judicial review process. Figure 2 shows that student complaint cannot be originated at the Office of Independent Adjudicator. The OIA can only be approached by a student who has exhausted all the internal processes of his education provider (University, colleges and other HEIs). (Office of the Independent Adjudicator for Higher Education, 2020) A student who has completed the internal process and desires to proceed to the OIA for review must request a letter called “completion of procedure letter” from the education provider to be presented to OIA as a proof that the internal process has been concluded. Although, the diagram below represents the desired stages of complaint handling, sometimes, aggrieved may skip the first two processes and proceed to the court. When, this occurs, neither the University Ombudsman nor the OIA has the power to intervene in matters already a subject of legal proceeding or in a different ADR process unless such matters are put on hold. (OIA, 2018)

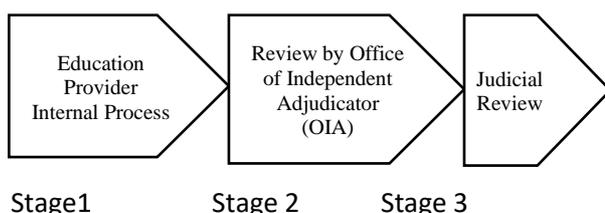


FIGURE 2  
Complaint Handling Processes in the United Kingdom

## 4 DISPUTE RESOLUTION IN AUSTRALIAN HIGHER EDUCATION INSTITUTIONS

Office of the commonwealth ombudsman was formed for the purpose of safeguarding the interests of the public in their interactions with the government institutions and private bodies. The office handles complaints, conducts investigations, performs audits and inspections, and encourages good administration (Stuhmcke, 2001; Usacka, 2003). In 2006, university complaint handling guideline was published. This guideline mandates all universities to have centralised complaint handling centre within the university. In 2016, Commonwealth Ombudsman further published a uniform guideline for Complaint handling in Australian Universities. The best practices guideline is targeted at executives, managers, and complaint handling staff of Australian Universities. Also, in 2019, the Australian Government Tertiary Education and Quality Standard Assurance (TEQSA) published a Guidance Note: Grievance and Complaint Handling which is basically policies and programs targeted at improving and standardising the process of complaint handling in Higher Education Institutions in Australia (TEQSA, 2019).

Unlike what is obtainable in the United Kingdom, there is no uniform national Higher Education Ombudsman in Australia. The University Ombudsman processes were proposed by the Commonwealth Senate Committee on Higher Education in 2001 with advantages of having such a unified national body however doubted the effectiveness of such establishment in Australia. the aim of achieving a more successful complaint handling and more acceptable outcomes (Australia. Parliament. Senate. Employment Small Business and Education References Committee, 2001; Jackson, Fleming, Kamvounias, & Varnham, 2010).

Examining the possibility of transplanting the OIA system of external university compliant review in Australia, Olliffe and Stuhmcke (2007) established the advantages of having such a unified national body however doubted the effectiveness of such in Australia.

Although these external Ombudsman Offices have more general functions like the Commonwealth Ombudsman, the offices discharge the function of

investigating the complaints of the students against the universities (TEQSA, 2019). Each Australian university has an internal complaint handling process. Any student with who is dissatisfied with the way his complaints are handled can proceed to external Ombudsman (Olliffe & Stuhmcke, 2007).

## 5 COMPARING THE DISPUTE RESOLUTION MECHANISMS IN THE THREE JURISDICTIONS

The first major mutual characteristics of the dispute resolution processes of the three countries is the clear legal framework provided. The laws clearly provide for the creation of internal processes and the UK Act 2004 further provides for the student complaint review which brought about the Office of independent adjudication for higher education (OIAHE). University Ombudsman is also common in all the universities of each country. The laws made it mandatory on each university to establish university.

Court process or judicial review is generally the last resort for students who are dissatisfied with the internal process and the review by the external adjudicator. To ensure transparency, awareness and provide room for improvements, all the ombudsman

offices in all the countries have the culture of publishing periodic reports.

The major differences in the processes of these countries exist in the external process, and the involvement of the education Ministry. In the US and the UK, the External processes are clearly provided. Although, there is still a slight difference in the two. In the UK, the external process is directly linked to the internal process. Students can only complain to the OIAHE only after completing the internal process. While in the United States, the link is not so defined. Students who have complaints related to student loan or civil rights issues and lodge same to the University Ombudsman will be duly directed to the Student Loan Ombudsman and the Office of Civil Rights respectively. But it is not compulsory that students must go through the university ombudsman before approaching these two offices.

The Education Ministry in the United States established the Student Loan Ombudsman and the Office of Civil Rights which shows the direct involvement of the government institution in the process of complaint handling in the United States HEIs. This direct involvement of the Ministry of Education is not applicable to other countries.

**TABLE I**  
**Comparison Of Higher Education Complaint Laws In Three Countries**

	United States	United Kingdom	Australia
Laws	United States Higher Education Act 1965 (Amended 2011)	Education Act 2004	2019 TEQSA Guideline
Internal Processes	University Ombudsman	University Ombudsman	University Ombudsman
External Adjudicator	Student Loan Ombudsman Office of Civil Rights (Dep. Of Edu)	Office of Independent Adjudication for Higher Education (OIAHE)	Commonwealth Ombudsman
Education Ministry Office	Office of Civil Rights	No specific office created	No specific office created
Stages of Complaint	Complaint to the UO Complaint to the Student Loan Ombudsman or the Office of Civil Rights Court Process	Complaint to the UO (Internal process) Complaint to OIAHE Judicial Review	Not applicable
Judicial Review	Last Resort	Last Resort	Last Resort
Periodic Reports	Annual Reports	Annual reports	Annual Reports

From Table 1. above, the reason for choosing these three countries is clearly displayed. They all have a standard process of dispute resolution in HEIs. The process in Australia is not as detailed as that of the US and the UK. But they all have clear legal framework, internal process, guided stages of complaint, judicial review, and periodic reports. These are important qualities of complaint handling that ensure effectiveness in dispute resolution processes which can be transplanted to the Malaysian system.

## 6 PROSPECTS OF OMBUDSMAN FRAMEWORK IN THE MALAYSIAN HIGHER EDUCATION SECTOR

The previous section examined the cross-jurisdictional operation of Ombudsman in the Higher Education sector. It is now important to discuss the feasibility and effectiveness of implementing a similar approach in the Malaysian Higher Education Institutions. Malaysia being a previous colony of England retains some similarities in its system of government and other forms of practices with the United Kingdom (Goh, 2008). This includes the structure of its higher education system.

However, the education system has its own peculiarities and uniqueness. The idea of Ombudsman in Malaysian HEIs is not totally alien. In fact, few universities in the country have introduced the Ombudsman office into their internal dispute resolution processes. There is however much more to do to ensure the process is properly backed up with a legal framework and well-structured as seen in other jurisdictions. With over sixty universities (public and private including university colleges) and other Institutions in the country like accredited training centres and international branch campuses, ("Education Malaysia Global Services," n.d.) only three Universities are officially operating the Ombudsman framework. The University Sains Malaysia (USM)((USM), n.d.), International Islamic University Malaysia (IIUM)("Office of Ombudsman and Integrity, International Islamic University Malaysia, IIUM," n.d.) and Monash University Malaysia. ("Monash University Malaysia, University Student Ombudsman Policy," n.d.) University of Nottingham Malaysia Campus also have a well-structured complaint handling process with different stages. Just like other Universities in the University home country (United

Kingdom), students who are unsatisfied with the internal processes of complaint handling in their universities have the option of proceeding to the Office of Independent Adjudicator (OIA) charged with the responsibility of reviewing complaint handling processes in Higher Education Institutions in England and Wales (University of Nottingham, n.d.).

To avoid numerous and cumbersome litigation and/or students resorting to social media, there must be an accessible, independent, and well-structured complaint-handling process in the Malaysia HEIs. There is a need for a clear policy on complaint handling in Malaysia higher education system which would mandate each university in establishing an Ombudsman (Omoola, 2018).

## 7 REVIEW PROCESSES

The legal system of every democratic country has hierarchy of courts. The merit of hierarchy of court in a judicial system is not only to establish the bindingness of previous decisions on the lower courts, the system allows for the opportunity to check any form of inadequacies in the decisions made by the lower courts and also gives the appellant another chance to seek justice. (Gardner, 1935) The complaint handling process in any sector especially the educational system should also allow for the review of decisions. Therefore, if all Universities and colleges in Malaysia establish Internal Ombudsman offices today, it seems necessary that a review process by a separate body independent of each university and a further judicial review process as seen in England and Wales.

In discussing the function of courts in the process of handling grievances of students in the United States, Rabban opines that the court at the beginning upheld the arbitrary decisions of universities regardless of the status of the university. This gave universities an autocratic power which was unchecked by the court. (Rabban, 1973) The case of *Dixon v. Alabama State Board of Education* (*Dixon v. Alabama State Board of Education*, n.d.) was

the turning point on judicial review on matters between students and University authority. In this case, some black students were expelled for refusing to leave a lunch grill after being refused service and order to vacate the premises. This was termed as demonstration and the students were expelled from the university without given them the chance to defend themselves. The board of Education and the trial court upheld this expulsion. The decision was reversed on the ground that there was no notice to the students as to the ground of their expulsion and there was no fair hearing. This case was a landmark in shielding students from arbitral dismissal from universities. Since 1961 when the case of *Dixon* was decided, students have been protected by courts on their constitutional rights and from vague university regulations.

## 8 LESSONS FOR MALAYSIA HIGHER EDUCATION

Dispute handling in higher education institutions is as important as other sectors. Different dispute resolution mechanisms have been adopted in the financial sector, family matters and a host of others. Adopting similar ways in the educational sector, particularly higher education is feasible and provide lots of prospect for sustainability of HEIs. Seven lessons can be learnt from the cross-jurisdictional study of dispute resolution in higher education and are discussed below.

1. **Legal framework:** For any program or policy to be effectively carried out or achieved in a country, there is always the need for a legal backing. The force of law makes individuals and institutions more accountable. Passing a law by the Malaysian Parliament on dispute resolution in Malaysia HEIs will not only mandate all Universities and Colleges to establish proper complaint handling system but also provide a standard process of handling complaints. As discussed above the European Union and UK law, Higher Education Act, 2004 in its part clearly established a designated operator for the review of student complaint and

further states the process of the review (Higher Education Act, 2004). This 2004 legislation made it mandatory on all higher education institutions in England and Wales to not just have distinct internal dispute resolution processes but also subscribe to the Office of Independent Adjudicator established by the law. The Federal Student Aid Ombudsman and the Office of the Civil Rights are also creations of the law under the United States Department of Education.

2. **Internal Ombudsman Office:** A complaint well addressed by a competent and independent Officer may reduce the need of an external independent adjudicator. A great lesson learnt from the study of other jurisdiction is that each higher education institution has a well-structured internal complaint handling mechanism which affords students to freely lodge their complaints without the fear of victimization. In fact, the office of independent adjudicator in the United Kingdom would not entertain a complaint that has not gone through internal process.
3. **A unique Independent Adjudicator:** The UK Higher Education Act, 2004 charges the secretary of state to appoint a body cooperate as an independent adjudicator for student complaints review.(Higher Education Act, 2004) The idea of a body cooperate for an establishment like this, is to ensure that the office is free from the influence of the university and that of the government.
4. **Complaint Handling offices as an offshoot of the Education Ministry:** not all countries have an independent body cooperate for higher education institutions as created in the UK laws. The Ministry of Education in Malaysia can also adopt a method similar to the United States. A department can be created under the Ministry of Education to review student

complaints unsettled through each University internal complaint handling process. Measures must however be put in place to ensure there the department is independent and free from any form of influence.

5. **Clear and distinct Stages of Resolving disputes:** The discussion in this paper makes it clear that a single complaint handling process may not be effective. Students who are unsatisfied with the complaint handling processes should have the opportunity for appeal to an independent body. Three stages of complaint handling as applicable in the UK is recommended for Malaysia.
6. **Option of Judicial review:** One of the purposes of creating an effective complaint handling mechanism in HEIs is to avoid numerous court cases against the educational institutions. Going to court may however be the last resort. A student who has attempted the internal procedure of the school and the independent adjudicator and still unsatisfied may be forced to seek redress in the court. *Cardao-Pito v. Office of Independent Adjudication for Higher Education*(EWHC, 2012) is a renowned case in this regard.
7. **Periodic reports of the External Independent Adjudicator:** to ensure transparency in the activity of the independent adjudicator, there is the need to provide annual report on cases brought to the office, the process of handing each case and the outcome thereof. This report could be quarterly, twice a year or annually. An example is the OIA annual report.

## 9 CONCLUSION

Best practices in Higher Education dispute resolution around the world particularly in the United States, United Kingdom and Australia were examined in this. It was found that to achieve an effective process of resolving disputes in universities and colleges, there must be an independent internal structure (a

university Ombudsman) which is easily accessible to students and then a review process outside the operation of the school. This external independent body which is the Office of Independent Adjudicator (OIA) in United Kingdom is approached only after the internal process is exhausted. This is clearly stated in the Higher Education Act of the United Kingdom. This process is quite different from what is obtainable in the United States. Although almost all Universities in the United States have internal processes of handling complaint, there is no clear provision for the establishment of a separate body like OIA in the United States. There is however other institutions with similar functions under the Department of Education (ED) in the United States. Office of Civil Rights (OCR)(Education, n.d.-b) and Federal Student Aid Ombudsman("Federal Student Aid," n.d.) are the prominent examples of these institutions. The former addresses issues of civil rights in higher education while the latter is restricted to complaints arising from student loan. The processes of handling complaint in both the United Kingdom and the United States are similar especially in the internal processes and the Judicial Review stages. These can be transplanted into the Malaysia system to improve the current complaint handling processes in Malaysia HEIs.

## 10 ACKNOWLEDGEMENT

This study was carried out under the Fundamental Research Grant Scheme ID No.: FRGS19-175-0784, titled "ESTABLISHING A REGULATORY FRAMEWORK FOR ONLINE OMBUDSMAN IN MALAYSIAN HIGHER EDUCATION SECTOR" awarded by Kementerian Pendidikan Malaysia - the Ministry of Education (MOE), Malaysia. The authors acknowledge MOE and the International Islamic University Malaysia for their immense financial supports.

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