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Liberties, Rights and Remedies: Conceptual Framework, Relationship and the Position in Other Jurisdictions and Malaysia

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Abstract: This article aims to analyse the conceptual framework of liberties, rights and remedies. Subsequently, the article will study the relationship between them in order to find out the best model that describe the relationships. To support the finding, the study will refer to other jurisdictions such as Canada, India and South Africa to affirm that the best model has been adopted in these countries. At the end, the study will look into the position in Malaysia, and hope to shed some light for further study to be carried out in the future.

Keywords: Liberties, rights, remedies, model, relationship.

1. Introduction

It is known that where there are liberties or rights, there will be a remedy. Liberties or rights without remedies are meaningless. Thus, both the "liberties and remedies" as well as "rights and remedies" should be integrated. Both the rights and liberties often used interchangeably. It is difficult to distinguish, but the two are co-exist harmoniously. Therefore, speaking of rights one can refer to liberties as well. Although, there are four models describe about the relationship between rights/liberties and the remedies, but based on study the third model (rights and remedies are integrated) consider as the best model to describe the relationship. More so, the studies on other jurisdictions have supported this finding. Nevertheless, the third model is not adopted in Malaysian legal system as the liberties and remedies are separated under the Federal Constitution 1957. Therefore, the study may shed some light for future research to be carried out to study whether the current system is workable in Malaysian legal system.

2. Liberties, Rights and Remedies

There are various definitions given by Scholars to the terms "liberty". This can be seen when writers such as Charles Fried has defined liberty as an expression of what is valuable about us as human beings. He said that liberty is a natural law idea which is moral imperative based on what is fundamental about our human nature. He further mentioned that what makes us moral human beings, is our individual capacities to think, reason, choose and value [1]. Theodore E. Simonton has explained succinctly that liberty is condition of human life in which freedom to act as one wills is restricted only moderately and in roughly balanced proportions by positive law without arbitrariness and by mores without superstition [2]. Charles E. Shattuck refer to the definition of "liberty" as defined by Blackstone to be the liberty of a member of society and no other than natural liberty so far restrained by human laws, as is necessary and expedient for the general advantage of the public [3]. In conclusion, the definition put forward by the three scholars above have one thing in common, namely that liberty is something natural, but can be reasonable restricted by law.

Definition of rights has been defined by various scholars. Among these are that a right is an advantage, benefit or interest conferred upon a person by law, including the common law, statute or the Constitution of the land. When the law recognizes a right, it imposes a duty on some other person or persons to do something or omit to do something in relation to the right of the person on whom the right has been conferred by law [4]. There is also a scholar defined right as refers to a legal entity derives from a rule of law and it can normally enforce before a court of law through remedies, that is, class of action intended to make good the infringements of the right concerned [5]. Some suggest that a right takes its form from the relationship between *persona* and *res* and this is the reason why one always talks about right to something [6]. Research on the above definitions, find that there is an equation presented by the three writers on the right to which the rights is closely related to the law and it is derived from the law.

In discussing the relationship between "liberty" and "rights", several articles will be studied. According to Charles E. Shattuck, the word "liberty" used in its broadest and most

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general sense, means and includes all those great rights, remedies, and guarantees which a human being has in a given state of society or under a given government. Thomas C. Grey, said that the American liberals believe that both civil liberties and civil rights are harmonious aspects of a basic commitment to human rights [7]. Carl J. Friedrich has stated that natural rights have gradually turned into civil liberties [8]. Furthermore, Eduardo García Ynez emphasised that the juridical meaning of liberty is not power, nor a capacity derived from nature, but right [9]. According to W.F. Bowker, some writers said that rights, freedoms and liberties are synonymous. However, it must be conceded that the terms are often used interchangeably and in some cases it may be difficult to characterize a claim as one or the other [10]. Based on the writings of the above, it can be concluded that the rights and liberties have a close relationship. Both the rights and liberties often used interchangeably. It is difficult to distinguish, but the two are co-exist harmoniously.

On the other hand, a remedy is represented as a cure for something nasty. To remedy is to cure or make better. The only precondition to the use of the word is a state of affairs which needs making better. Provided that the facts disclose a relationship between phenomena which can be perceived as analogous to that between illness and medicine, anything that alleviates, eliminates, or prevents can be referred to as a remedy [11]. In a legal context it describes the state's response when wrongdoing occurs, the word 'remedy' in a civil litigation setting can mean several distinct things, each of which is such a response. It is more than remedying a mischief. An observer today is likely to say that it refers to what the Plaintiff can obtain by way of redress (e.g., damages, specific performance, injunction, rescission, accounting) [12]. After this, researchers will discuss the relationship between liberties and remedies.

To discuss the relationship between liberties and remedies, reference should be made to the relationship between rights and remedies as many studies were carried out on it. Given the rights and liberties are closely and harmoniously existing, then this allows researchers to draw an analogy. It is complicated to discuss the relationship between rights and remedies due to multiple views on the subject matter which further confounded by the nature and antecedent circumstances. There are four models that can explain the relationship between rights and remedies. First, remedies precede rights in which the entitlement to a remedy that defines the existence of rights. Second, remedies derived from rights because a right is viewed as a legal prerequisite to a remedy [13]. Third, remedies form an integral part of the rights where there is a legal right, there is also a legal remedy [14]. Fourth, the distinction between rights and remedies are drawn is for the purpose of clearness and compactness [15]. Although, there are different views about the relationship between rights and remedies, but there is no denying that both rights and remedies are inextricably linked and cannot be separated since there is no right unless there is a remedy and vice versa. By and large, the third model is the best to describe the relationship between rights and remedies. Lastly, without an avenue to seek redress for violation of their rights, the disadvantaged have only paper rights, without remedy, a situation fundamentally at odds with our sense of justice [16]. Therefore, rights and remedies were interrelated and cannot be separated. By making an analogy, the third model is said to be the best model to describe the relationship between liberties and remedies as well.

3. The Position in other Jurisdictions

The third model is the best model to explain the relationship between the rights and remedies. Both the rights and remedies should be integrated and inseparable, because the existence of both together can ensure the rights of an individual to be enforced effectively. Thus, the Constitution or the supreme law in most jurisdictions had guaranteed the rights as well as the method of enforcement in their Constitution or supreme laws. Therefore, few jurisdictions, such as Canada, India and South Africa will be studied to confirm the application of the third model in their jurisdiction. The study looked into these countries in view of the common legal system, which is mainly based on English Common Law as inherited from British colonisation.

3.1. Canada

In Canada, the most famous advocates of a bill of rights was Pierre Elliott Trudeau, he was elected to Parliament in 1965 and became Minister of Justice in the Liberal Government of Canada. Later, he became Prime Minister in 1968. His government has remained in office with only one brief interruption from 1968 until his retirement in 1984, his government has tried to achieve provincial consent to an amendment of the Constitution which would include a new bill of rights. Finally, that long quest culminated in November 1981 when an agreement was signed by nine out of the ten provinces (Province of Quebec dissenting), and followed by the enactment of the Constitution Act, 1982, where Part I of the Constitution Act, 1982, is the Canadian Charter of Rights and Freedoms [17].

The Canadian Charter of Rights and Freedoms, which was entrenched in the Canada's Constitution, came into force on 17 April 1982. It is provided in Part I of the Constitution Act, 1982. The Charter binds both the legislative body and the Federal Government of Canada, as well as those Provincial Governments that signed the charter. The Charter was incorporated in the legal order of the Provincial Governments for all those matters related to their jurisdiction. The Canadian Charter is composed of 34 sections [18]. Furthermore, Canadian Charter of Rights and Freedoms enumerates the rights and freedoms of Canadians. Among those rights is the democratic rights, mobility rights, legal rights, equality rights, minority language education rights, the rights of indigenous peoples and others. Meanwhile, the examples of freedom described as freedom of religion, freedom of media, freedom of speech, freedom of peaceful assembly and freedom of association.

Thus, to enable Canadians to fully enjoy the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms, the Court must be able to award remedies to victims if their rights and freedoms were unreasonably infringed [19]. This has been recognized by the Supreme Court of Canada in the case of *Nelles v Ontario [1989] 2 S.C.R 170*, when the Supreme Court said that to create right without a remedy is antithetical to one of the purposes of the Charter, which surely is to allow the Courts to fashion remedies when is an infringement of human rights under the Constitution.

Hence, what was stated by the Supreme Court of Canada has indicated that the provision of remedies for enforcement of fundamental rights were provided under the Canadian Charter of Rights and Freedoms. Under the Charter, remedies to enforce rights were provided under section 24 (1) Canadian Charter of Rights and Freedoms. Section 24 (1) stated that: "*Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".* Section 24 (1) Canadian Charter of Rights and Freedoms is applicable in cases of violation of fundamental rights under the Canadian Charter. It is not a remedy for the violation against the Constitution in general. This is due to the fact that any breach of Constitutional provisions can only be challenged through the supremacy clause of the Constitution. Section 24 (1) empowers the Court to grant remedies in situations deemed appropriate and just. Justice Bayda in the case of *Kodellas v Saskatchewan (Human Rights Commission) [1989] 5 W.W.R. 1* has made a thorough analysis in respect of the word 'appropriate' and 'just' in section 24 (1). Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself – a remedy "to fit the offence" as it were. The quality of justness, on the other hand, has a broader scope of operation. It must fill the more extensive set of criteria than the quality of appropriateness. To be just a remedy must be fair to all who are affected by it.

This means that section 24 (1) itself is the source of power of the Court to provide remedies in situations which deemed as appropriate and fair. In other word, section 24 (1) of the Constitution provides for the right to a remedy, therefore, any legislation enacted should not limit the powers of the Court of competent to grant constitutional remedies. Similarly, section 24 (1) should be interpreted as allowing the court to modify a new remedy in the event of violations of rights under the Canadian Charter. Section 24 (1) of the Canadian Charter of Rights and Freedoms has provided remedies to any person that their rights have been infringed or denied in the Charter. The court may modify the remedy in appropriate cases. This was stated by Justice L'Heureux-Dubé in the case of *R v O'Connor [1995] 4 S.C.R. 411.*

However, the powers of the court in granting remedies under section 24 (1) provided the Court a difficult and complicated duty. Although the Court was given such a hard duty, but the rights and freedoms of Canadians are fully enjoyed because Canadians can get the appropriate and just remedy in the courts when their rights and freedoms have been infringed. In addition, the Canadian Charter of Rights and Freedoms is entrenched in Part I of the Constitution Act, 1982 and it is part of the Canadian Constitution. Therefore, the Canadian Charter of Rights and Freedoms is the supreme law of the land. So it is guaranteed on the principle of the supremacy of the Constitution. This study has shown that the third model has been practiced in Canada, where the rights and remedies considered as an important and inseparable.

3.2. India

On 26 November 1949 the people of India, through the Constituent Assembly has accepted the Indian Constitution. Dr. Ambedkar, a chairman of the Drafting Committee of the Constituent Assembly was principally responsible in shaping the Constitution which he endeavours to embody the political, social and economic ideas and aspiration of the people of India to the Constitution of India. In addition, Dr. Ambedkar strongly defended the inclusion of fundamental rights in the Constitution as a supporting pillar of India's democracy. At the same time, he very highly appreciated the right to Constitution remedies as a fundamental right itself, because he considered this aspect of the fundamental right as the 'heart and soul to the Constitution'. Moreover, he also defended the inclusion of various writs such as writ of *habeas corpus*, mandamus and others prevailing in the British jurisprudence into the Constitution of India. He explained that the inclusion of the writs is to grant urgent relief to the aggrieved party without bringing any proceedings or suit [20]. Eventually, what has been maintained by Dr. Ambedkar has become a reality when the provisions regarding fundamental rights were enshrined in part III of the Constitution of India 1950 [21]. While, the provision of the remedies for enforcement of fundamental rights have also been included under the Constitution of India 1950, in which it has been provided under articles 32 and 226 of the Indian Constitution 1950 [22].

There are differences between article 32 and 226 of the Indian Constitution. The remedy under article 32 was issued by the Supreme Court of India, while the remedy under article 226 was issued by the High Court of India. In addition, the High Court has jurisdiction to issue writs not only for the purpose of enforcing fundamental rights, but also to enforce any legal rights because of the words 'for any other purposes' in article 226 [23]. Though under article 32, the Supreme Court of India can only issue the writs for the purpose of enforcing fundamental rights. Accordingly, there is no question, other than in relation to fundamental rights can be determined in proceedings under article 32 of the Constitution of India [24]. Any person when their fundamental rights have been infringed can choose whether to initiate proceedings in the High Court or the Supreme Court of India, as both the Court has jurisdiction to hear the application for the issuance of the writs. Furthermore, a person can apply directly to the Supreme Court under article 32 without first making an application to the High Court [25]. Under articles 32 and 226 of the Indian Constitution 1950, the language used is very wide. The power of the Supreme Court and High Courts including to issue to any person directions, orders and writs, including writs in the nature of *habeas corpus*, mandamus, quo warranto, prohibition and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purposes. In view of the express provisions of the Indian Constitution, there is no necessity for the Court to look into the writ procedures that stress on technicality in English Common Law.

Likewise, an application under article 32 cannot be thrown out simply on the ground that the appropriate directions or writs has not been prayed for. Therefore, if an order in the nature of mandamus applied for in a special form, there is nothing that can prevent the Court from giving it in another form. Article 32 gives the Supreme Court very wide discretion in the matter of framing the writs to suit the exigencies of a particular case. In other words, article 32 not merely empowers the Supreme Court to issue a writ of *habeas corpus*, mandamus, prohibition, quo warranto and certiorari as they are known in England, but also enables the

Supreme Court to devise directions, orders or writs analogous to the above, or to improve upon the above writs so as to avoid their technical deficiencies or to adapt them to Indian circumstances. Besides, no legislation would be required to support the invention of directions or the modification of the writs as may be required for the effective enforcement of the fundamental rights [26]. Apart from providing a remedy in the form of prerogative writs, article 32 of the Constitution of India also allows the Court to devise new remedies for the purpose of enforcing rights and it has the power to issue any remedies in accordance to the circumstances of the case. Looking at the provisions of this Constitution, the Supreme Court can also provide remedy including compensation in appropriate cases. (see the case of *Khatri (II) v State of Bihar (1981) 1 SCC 627*).

Thus, it is clear that article 32 and 226 of the Indian Constitution 1950 empowers the Supreme Court and the High Court a very wide power to grant remedies when rights under part III of the Indian Constitution are infringed. The principle of awarding the remedies under article 32 is also applicable to article 226 of the Constitution of India. Finally, the Supreme Court of India has decided that the power of judicial review vested in the High Courts under article 226 and in the Supreme Court under article 32, is an integral and essential feature of the Constitution, and part of its unamenable basic structure [27]. This study has shown that the third model have been practiced in India, both the rights and remedies for enforcement of fundamental rights are enshrined in the Constitution of India 1950.

3.3 South Africa

The South Africa's original Constitution (South Africa Act of 1909) was enacted by the British Parliament. In 1961, when South Africa withdrew from the British Commonwealth, the Act was replaced by the Republic of South Africa Constitution Act No. 32 of 1961. This act was subsequently modified by the Republic of South Africa Constitution Act No. 110 of 1983. Although the latter was amended a number of times, its essential provisions remained operative until the passage of the new Constitution in 1994. From 1948 until April 1994, South Africa was ruled by the Nationalist Party and this Party devised the policy and the term 'apartheid' [28]. According to Adrien Katherine Wing, the system of 'apartheid' systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90 percent of the land mass of South Africa. They were denied for employment in high ranking positions and denied admission to leading schools and universities. Meanwhile, civic amenities including transport systems, public parks, libraries and many were also closed to black people. Instead, separate and inferior facilities were provided [29].

The Constitutions adopted in 1910, 1961 and 1983 took little account of the multi-ethnic and multicultural nature of South African society. Lastly, over a period of four years beginning in 1990, the former South African government and liberation movements successfully negotiated a two-phase transition to democracy. The first stage was the drafting of the Interim Constitution by 26 parties, many of whom had little apparent legitimacy and no mandate. The Interim Constitution came into force on 27 April, 1994 and has established the system for governing the country under a government of national unity as well as setting out the process for elected representatives to draft a final Constitution after the first democratic elections. Meanwhile, the second phase was the drafting of the final Constitution by the Constitutional Assembly [30]. During the drafting of the final Constitution, a democratically elected Constitutional Assembly met to draw up a draft Constitution. Within the framework of the Constitutional Assembly, an Independent Panel of Constitutional Experts and a Constitutional Committee were established to facilitate both the process of negotiations and the process of drafting sections of the Constitution. The Constitutional Committee was designed as the negotiating and coordinating structure of the Constitutional Assembly. On 8 May, 1996 the Constitutional Assembly adopted the new Constitution. The document was then duly referred to the Constitutional Court for certification, the Court invited political parties and any other body or person wishing to any of its provisions, to submit a written objection. In the event, objections were submitted on behalf of five political parties and eighty-four private individuals and groups. In addition, a right of audience was granted to the political parties as well as twenty-seven other bodies. On 6 September, 1996 the Court delivered its judgment in Certification of the Constitution of the Republic of South Africa, 1996. The Court recognised that the new Constitution represented a monumental achievement, particularly given the circumstances of South Africa, and concluded that the document complied with the overwhelming majority of the Constitutional Principles requirement. However, a number of provisions were identified for reconsideration by the Constitutional Assembly before it could certified by the Constitutional Court. Having addressed these concerns, the Final Constitution received presidential assent on 18 December, 1996 [31].

In the new Constitution of the Republic of South Africa, 1996 the bill of rights is enshrined in Chapter 2 of the Constitution. The provision of remedies for enforcement of fundamental rights is provided under section 38 of the Constitution of the Republic of South Africa, 1996 [32]. Under section 38 of the Constitution of the Republic of South Africa 1996, the remedy of a declaration is clearly stated in the Constitution, no other remedies are specified, but the Constitution has given the power to the court to provide appropriate relief when fundamental rights are violated [33]. The question of what the appropriate relief to be given by the Court to litigants when their fundamental rights were violated have been answered by the High Court of Gauteng North, Pretoria, in the case of *Von Abo v The Government of the Republic of South Africa and Others 2010 (7) BCLR 712*, in which the High Court has referred to the case of *Fose v Minister of Safety and Security 1997 (7) BCLR 851* to get the meaning of 'appropriate relief'. The court in the case of *Fose* has stated that 'appropriate relief' means an effective remedy, because without an effective remedy in the event of a breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld. Thus, the Court is obliged to forge new tools and shape innovative remedies to provide effective remedies when rights enshrined in the Constitution are violated.

Finally, the remedies to enforce rights under section 38 of the Constitution of the Republic of South Africa given the Court a broad power to provide remedies when rights are infringed.

The results showed that the South African state has chosen the third model in their justice system of which rights and remedies are considered interdependent. The rights and remedies provided for in the Constitution is secured with the principle of the supremacy of the Constitution under section 2 of the Constitution, which states that the Constitution is the supreme law of the Republic of South Africa and the laws that conflict or inconsistent with the Constitution is invalid.

4. The Position in Malaysia

In Malaysia, the position is totally different if compared to other jurisdictions. The third model is not practiced in our country. It is because the fundamental liberties were entrenched under Part II of the Federal Constitution 1957 (article 5-13), but the provision of remedies for enforcement of those liberties in Part II is provided under an ordinary Act of Parliament, namely the Courts of Judicature Act 1964 [34]. The relevant provision is section 25(1) of the Courts of Judicature Act 1964 of which refers to 'additional powers' of the High Court which set out in the Schedule to the Courts of Judicature Act. The related paragraph in the schedule is paragraph I which empowers a High Court to issue remedies for the enforcement of fundamental liberties as conferred by Part II of the Federal Constitution.

It is noted that the scheduled powers in paragraph I is *in pari materia* with article 226(1) of the Indian Constitution [35]. The only dissimilarity is that the power under article 226(1) is conferred by the Indian Constitution, but the source of such powers is an ordinary law in Malaysia. It is interesting to note that during the drafting of the Federal Constitution 1957 as proposed by the Reid Commission, the provision of constitutional remedies was provided in article 4 of the said draft Constitution. However, the Working Party had subsequently revised the said draft Constitution, resulting in what is known as the White Paper. In the White Paper, the Working Party had omitted the provision of Constitutional remedies from the draft Constitution as proposed by the Reid Commission on the grounds that the remedies can best be provided by the ordinary law and is impracticable to provide within the limits of the Constitution. Therefore, the present Federal Constitution 1957 is a draft that submitted by the White Paper. It is important to trace the history of the Constitution making in Malaysia to study the reasons behind the removal of the said constitutional remedies from the draft Constitution as proposed by the Reid Commission.

4.1 A Brief History of Constitutional Making

The progress towards self-government began after the Alliance, consisting of the three political parties, namely the United Malays National Organisation (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC) won 51 of the 52 seats in the first federal elections which were held in July 1955 for seats on the new Federal Legislative Council [36]. From its inception the Alliance emphasised its desire for the attainment of independence at the earliest possible date, and in January, 1956, a conference was held in London, attended by representatives of Their Highnesses the Rulers and the Alliance, as a result of which the basic principles upon which independence could be achieved were resolved. It was also agreed at that conference that an independent Constitutional Commission should be appointed to make recommendations for a form of Constitution for a fully self-governing and independent Federation of Malaya within the Commonwealth [37].

The London conference agreed that the chairman of the commission and another member would be British. The remaining members were to come from Canada, India, Pakistan and Australia. Lord Reid, an experienced Appeal Court judge, was elected to be the chairman of the Commission. Sir Ivor Jennings, a constitutional lawyer and academic at Cambridge, was elected as the second member, at the request of the Alliance party chief Tunku Abdul Rahman who had known Jennings personally while studying in Cambridge. India offered the services of Justice B. Malik and Pakistan nominated Justice Abdul Hamid. Australia's nominee Sir William McKell, a legislator and former Cabinet Minister, was a personal choice of the Australian Prime Minister Robert Menzies. The candidate from Canada withdrew at the last minute for health reasons and was not replaced [38]. The Reid Commission met in Malaya in 1956. It solicited memoranda from organizations and individuals and received 131 such memoranda. It held 81 hearings in support of the memoranda throughout the peninsula. It visited each State and Settlement conferring with officials, British and Malay, and met informally with other official and private persons. The Commission went to Rome to prepare its report [39]. The Reid Commission submitted its report (which contained a draft Constitution) to Her Britannic Majestic and Their Highnesses the Rulers on 21 February 1957 [40].

In the Reid Commission report, the recommendations regarding the issue of fundamental liberties were set out in Chapter XII in which the Reid Commission had suggested that fundamental liberties should be guaranteed in the Constitution and the Court should have the power and duty of enforcing these liberties [41]. In the meantime, the Fundamental liberties were guaranteed in article 5 (Liberty), Article 6 (Prohibition of slavery and forced labor), article 7 (Protection against retrospective criminal laws and repeated trials), article 8 (Equality), article 9 (freedom of movement), article 10 (freedom of speech, assembly and association), article 11 (freedom of religion), article 12 (rights in respect of education) and article 13 (right to property) of the draft Constitution. Meanwhile, the constitutional remedies were provided in article 4 of the said draft Constitution.

The Reid Commission favoured fundamental liberties and constitutional remedies guaranteed by the Constitution. Nevertheless, one of the Commission members, Mr. Justice Abdul Hamid of Pakistan disagreed with the majority view and appended a note of dissent in Chapter XII of the Reid Commission report [42]. With regards to the constitutional remedies, Mr. Justice Abdul Hamid agreed that every constitution need and generally has a provision which protects it from violation by the executive and the legislature, and provision for this purpose has been made in article 4 of the draft Constitution. However, Mr. Justice Abdul Hamid objection was only on Article 4(1)(b)(iii) which was the incorporation of natural justice rules, which he regarding them as ill-defined, open-textured and capable of leading to chaos. Mr. Justice Abdul Hamid suggested that the words "*or that the procedure by which act or decision was done or taken was contrary to the principles of natural justice"* in the article 4(1)(b)(iii) should be deleted [43]. Nowhere in the

note of dissent suggest omitting the whole provision of article 4.

The Reid Commission has submitted its report in February 1957. Following a period of public debate, the Government of Malaya appointed a Working Party, consisting of four Alliance members, four Rulers, and two British officials, to consider the draft Constitution, which was appended to the Commission's report [44]. Finally, the draft Constitution prepared by the Reid Commission was subsequently revised, resulting in what is known as the White Paper [45]. The official name of the White Paper is, Constitutional Proposals for the Federation of Malaya. It is important as it stands as the foundation for some of the existing constitutional provisions. Although the paper declared itself as part of the Reid Commission report, it introduced some measures that altered the notion of democracy laid down by the Reid Commission [46]. It made significant amendments both in substance and form to the Reid Commission proposals. Many constitutional lawyers showed insufficient understanding of the far-reaching legal, political and substantive changes inserted into the Reid proposals by the Working Party [47].

The most important changes were on the subject of the constitutional remedies which was proposed in the Reid Commission report. The Working Party agreed that the Federal Constitution should define and guarantee certain fundamental liberties, and proposed to accept the principles recommended by the Reid Commission for inclusion in Part II of the Federal Constitution with some changes in drafting. Nonetheless, the Article proposed by the Reid Commission on the subject of the enforcement of the rule of law was, however, found unsatisfactory and has been omitted on the ground that it is impracticable to provide within the limits of the Constitution for all possible contingencies. It is considered that sufficient remedies can best be provided by the ordinary law [48]. The White Paper outlining the revised proposal does not elaborate or further explain for these changes except with the brief reason. Based on this review the fundamental liberties proposed by the Reid Commission was retained in Part II of the Federal Constitution, but the provision of the constitutional remedies has been removed entirely from the draft Constitution of the Federation of Malaya. The present Federal Constitution 1957 is a draft that submitted by the White Paper.

It is pertinent to note that before the draft Constitution annexed in the White Paper adopted as the Constitution of the Federation of Malaya in 1957, the final draft was submitted to the Federal Legislative Council in July 1957 for further consideration, particularly of the provisions that seemed to be potentially controversial [49]. During the debate in the Federal Legislative Council, the principal topics for debate concerning the Constitution were focused on the issue of social contract, with respect to citizenship, language and special privileges. In addition, the issue of fundamental liberties and enforcement provisions also featured conspicuously in the debates [50]. With regard to fundamental liberties, the debate actually concerned the power of judicial review of the political rights provided under article 10. However, issues regarding enforcement provisions were related to the removal of the constitutional remedies from the draft Constitution. For the purposes of this paper, the main focus is on the debate of the issue on removal of constitutional remedies from the draft Constitution. In the the Federal Legislative Council, concerns have been voiced by Mr. K.L. Devaser an unofficial member, who was a lawyer at the time. Mr. K.L. Devaser did not understand why the Working Committee considers it desirable to amend article 4 of the draft Constitution, which was the basis of the rule of law. According to Mr. K.L. Devaser, article 4 of the draft Constitution encompass remedies in the Constitution, but it has been completely removed by the Working Committee. In the draft of the new constitution after the revision of the Working Committee, there was no reference in any provision of the draft Constitution that we have a constitutional remedy. Hence, Mr. K.L. Devaser urged the Chief Minister to reconsider in order to provide the constitutional remedies in the Federal Constitution [51].

With regards to Mr. K.L. Devaser question, no explanation was given by the Chief Minister and the Attorney General on 11 July 1957, or on 14 August 1957 when the House reconvenes. However, on 15 August 1957, the Chief Minister Tunku Abdul Rahman had explained that the removal of article 3 and 4 of the draft Constitution was not with any bad intention. According to the Chief Minister, the legal adviser in Malaya and the United Kingdom have advised that articles 3 and 4 shall be omitted, because it was not suited after taking into account all the circumstances that may arise if it was maintained. Articles 3 and 4 would have unduly fettered the power of Parliament to make appropriate provision in order to safeguard and protect the rights of individuals and the public. The Chief Minister said that various attempts were made to improve the wording of article 3 and 4, but it was still too vague for any use. Thus, it was decided that it would be better to omit the articles altogether. In addition, legal counsel did not consider that the retention of article 3 and 4 is something that was important to preserve the fundamental liberties and freedoms, as the true guardian of human rights and freedoms must remain with the people entrusted to their representatives in Parliament [52]. In the same session on 15 August 1957, Mr K. L. Devaser reiterated that article 4 of the draft Constitution provided a constitutional remedy, where one can take action if rights were infringed. Meanwhile, Mr. K. L. Devaser was referring to Note of Dissent by Mr. Justice Abdul Hamid, and said that Mr. Justice Abdul Hamid agreed with article 4 (1)(a) and article 4 (1)(b)(i) and (ii), the only objection of Mr. Justice Abdul Hamid is the term 'natural justice' must be defined in article 4 (1)(b)(iii), if it was to be incorporated into the Constitution. In addition, Mr. Justice Abdul Hamid had stated in the Note of Dissent arguing that every constitution generally has provisions that protect the rights of any citizen from infringed by the executive and the legislature. According to Mr. K. L. Devaser, every written constitution has a provision stating constitutional rights and remedies, where this has been provided for in the Constitution of the United States, India and many other countries in the Commonwealth. Again Mr. K. L. Devaser sought clarification why article 4 was deleted [53].

At the same session, the Attorney General Mr. A. V. Brodie had explained in detail the reasons of removal of article 4 in the draft Constitution. According to the Attorney General, the importance of article 4 has been enlarged. This is because it was not true if the removal of article 4 will result in no power to enforce the liberties in the Constitution. According to the Attorney General, if the actions of the Government had caused injury to a person, a person can still get compensation through Common Law. Furthermore, the Attorney General

had explained that this article 4 appears to be unsatisfactory as it was unique and did not appeared in that form in any other Constitution. In addition, this draft appears to be unsatisfactory, it takes thing too far and did not mention the proper limit. The attempt was made to improve on it, but the result is still the same. However, if the proper limitation was imposed it will cause the matter to be meaningless. Accordingly, in these circumstances, the Committee believes that it was better that to scrap it altogether [54]. Further, Mr. A. V. Brodie has provided examples of his objections to article 4. The first is concerned with article 4 (1)(a), where a clause gives the right to any person whether interested or not to seek a declaration in court. No restrictions were imposed to limit the standing to an interested person only. The second is with respect to article 4 (1)(b), in which the clause did not limit the right to seek remedies only to the Constitution rights, but includes other legal rights. Moreover, the clause is said to empowers the Court to give any order that it considers appropriate in the circumstances of the case. Thus, the Court may issue any kind of order includes damages or compensation, it could make no order at all or may formulating rules as like judge made law. According to the Attorney General, now if the judges made bad law, it can be corrected by the Parliament. Under this provision, when the judges made bad law, they could not be corrected by anyone [55]. Although Mr. K. L. Devaser argued at length, but his arguments were not accepted in the Federal Legislative Council. Finally, the draft Constitution was approved and a new constitution has emerged along with new state on August 31, 1957.

5. Conclusion

From the above, it is clear that the third model is best to describe the relationship between liberties and remedy. The third model is selected by the researcher as the study carried out in the various jurisdictions have shown that it is working well in their legal system. In Malaysia, the third model is not adopted in our legal system as the liberties and remedies are separated. Instead, liberties are enshrined under the Federal Constitution, but the provision of remedies is provided under an ordinary legislation. This research has only taken the first step in understanding the relationship between liberties, rights and remedies as well as highlighting the position in Malaysia. No research prior to this study has been carried out in this area. Therefore, the researcher hope that this study does offer a stepping stone from which future studies can be carried out for there is much room, and a need, for future research to be conducted on this area.

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