Saudi Journal of Humanities and Social Sciences (SJHSS) **ISSN 2415-6256 (Print)**
Scholars Middle East Publishers **ISSN 2415-6248 (Online)**
Dubai, United Arab Emirates
Website: http://scholarsmepub.com/

The Remedies for Enforcement of Fundamental Rights in Malaysia and India

Dr. Gan Chee Keong*
Sessions Court Judge (SCJ), Kuala Lumpur Courts Complex, 50480 Kuala Lumpur, Malaysia

***Corresponding author**
Dr. Gan Chee Keong

Article History
Received: 21.02.2018
Accepted: 07.03.2018
Published: 30.03.2018

DOI:
10.21276/sjhss.2018.3.3.3

Abstract: This paper deals with a comparative study of remedies for enforcement of fundamental rights in Malaysia and India. The provision of remedies for enforcement of fundamental rights plays an important role in preserving and defending the fundamental rights in the Constitution. Hence, the said provision is better catered for under the Constitution than under an ordinary legislation to ensure strength in upholding fundamental rights. In Malaysia, the provision of remedies for enforcement of fundamental rights provided under an ordinary legislation. Conversely, Indian Constitution has provided such remedies under Article 32 and 226. The Indian Courts have given a wide construction to Article 32 and 226 of which the provisions give powers to the Supreme Court as well as High Courts to issue any order, including any order in the nature of the common law prerogative writs, for the purpose of enforcement of fundamental rights guaranteed by the Constitution. In addition, the Indian 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. On this paper the writer makes a comparative study on the remedies for enforcement of fundamental rights between Malaysia and India to find out more information regarding the position of the law given in both the countries. At the end of the paper, the writer will make recommendations for the purpose of improving the law concerns.

Keywords: Remedies, Enforcement, Fundamental Rights, Constitution, Judicial Attitudes.

INTRODUCTION

The fundamental rights are defined as basic human freedoms by which every citizen has the right to enjoy for a proper and harmonious development of personality. These rights are apply to all citizens, irrespective of race, place of birth, religion, gender and etc. It is listed in Part II of the Federal Constitution 1957 (Malaysia) under the heading "Fundamental Liberties", and Part III of the Constitution of India 1950 under the heading "Fundamental Rights". The incorporation of the fundamental rights in the Constitution is deemed to be a distinguishing feature of a democratic State. These rights are prohibitions against the State. The State cannot make a law which takes away or abridges any of the rights of the citizens guaranteed in the Constitution. The Paragraph I of the Schedule of the Courts of Judicature Act 1964 (Malaysia), Article 32 and Article 226 of the Constitution of India 1950 had conferred on judiciary the power to grant most effective remedies in the nature of writs like '*Habeas Corpus'*, '*Mandamus*', '*Prohibition*', '*Quo warranto*', and '*Certiorari*' whenever these rights are violated. It is pertinent to note that the scheduled powers in Paragraph I (Malaysia) is *in pari materia* with Article 226 of the Constitution of India 1950. The only dissimilarity is that the power under Article 226 is conferred by the Indian Constitution, but the source of such powers is an ordinary legislation in Malaysia. The writer now proceed to discuss the position of the law given in both the countries.

The provision of remedies for enforcement of fundamental rights in malaysia

In Malaysia, the provision of remedies for enforcement of fundamental rights is provided under Paragraph I of the Schedule of the Courts of Judicature Act 1964 (Act 91) [1]. The Paragraph I empowers the High Court the powers:

"Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."

In other words, the power of the courts to issue remedies for the enforcement of fundamental rights is conferred under Paragraph I of the Schedule in the Courts of Judicature Act. It is noted that the scheduled power in Paragraph I is *in pari materia* with Article 226

of the Constitution of India 1950 [2]. The only difference is that the powers under Article 226 are conferred by the Constitution, but in Malaysia, the source of such power is an ordinary legislation. The Indian Courts have given a wide construction to Article 226 of which the provision give powers to the High Courts to issue any order, including any order in the nature of the common law prerogative writs, not only for the purpose of enforcement of fundamental rights guaranteed by the constitution, but for '*any other purpose*'. Although there are similarity of language between Article 226 of the Constitution of India 1950 and Paragraph I of the Schedule in the Courts of Judicature Act 1964, but the approach taken by the Malaysian Courts in terms of giving remedies in public law is quite different, reason being the remedies for enforcement of fundamental rights is provided under the ordinary legislation.

Under the ordinary legislation, the Paragraph I of the Schedule to the Courts of Judicature Act 1964 is not noticed by many judges and was not applied since it was introduced in 1964. The situation continued until 1997, when for the first time the Supreme Court in the case of *R Ramachandran v The Industrial Court of Malaysia & Anor [1997] 1 M.L.J 145* has applied the powers under Paragraph I in providing the relief. For the period of 33 years since the Court of Judicature Act was introduced in 1964 until the decision of *Ramachandran* in 1997, the provision of remedies for enforcement of fundamental rights under Paragraph I was only cited by the Court in seven cases, but the Court missed an opportunity to apply the law concerned. During this period, the English common law has been applied extensively as the prerogative writ was inherited from the British, thus English common law rule has been strictly adhered to. Further, the English common law was widely apply in the era of Pre-*Ramachandran* is also influenced by our education system because most of the judges and lawyers have legal training in England. Thus, not surprising to find that their approach influenced by the philosophy and approach taken by the English judges and lawyers.

In short, the era of the Pre-*Ramachandran* display the judicial attitudes that influenced by English common law in awarding public law remedies. In 1997, the case of *Ramachandran* has change the scene, the Supreme Court for the first time had apply the powers under Paragraph I of the Schedule to the Courts of Judicature Act 1964 to extend the powers of judicial review primarily concerned with the powers to mould the relief in accordance with the demands of justice in the circumstances of a particular case. After the case of *Ramachandran*, our Courts have begun to show a change in attitude as they have begun to apply its powers under Paragraph I in public law.

The, Malaysian judges have depicted different judicial attitudes in hearing the relief under Paragraph I of the Schedule to the Courts of Judicature Act 1964. On one hand, some judges follow the English common law of which they took a rigid, narrow and strict adherence to the technicalities of the English law. On the other hand, some judges took a more liberal, broad and less rigid approach toward interpretation of the provision under Paragraph I. Be it as it may, the tendency of applying values of English common law is much higher due to the fact that Malaysian judges had use in-depth the English common law since independence. In addition to that, provision of Paragraph I is simply an ordinary legislation and not a supreme law, therefore the method of interpretation cause it bound by the restrictive rules as in English law. This situation continues to give room to the English common law to evolve rapidly in Malaysian public law.

The provision of remedies for enforcement of fundamental rights in india

On 26 November 1949, the people of India, through the Constituent Assembly have 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 [3]. 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.

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 Constitution of India 1950 [4]. There are differences between Article 32 and 226 of the Constitution of India 1950. Article 32 stated that: -

'32. Remedies for enforcement of rights conferred by this Part –

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.'

While Article 226 of the Constitution of India 1950 provided that: -

'226(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders, writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purposes.'

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 [5]. 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 1950 [6]. 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 [7]. Under Articles 32 and 226 of the Constitution of India 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.

It is pertinent to note that the powers of the Court are not restricted to the five writs specifically mentioned in Article 32 and 226. This is because the power of the Court is '*inclusive*' and the Court has power to issue writs '*in the nature of*' the specified five writs. This means that the Court has flexibility in the matter of issuing writs [8]. The word *'in the nature of'* in Article 32 and 226, means that the Court is free to devise writs according to the circumstances of each particular case. In other words, the Court has the power to mould the reliefs to fit into the factual matrix of each particular case. This is stated in the case of *Chiranjit Lal Chowdhuri v Union of India A.I.R. 1951 S.C. 41*, the Supreme Court held that Article 32 empower Courts with wide discretion in the matter of framing their writs to suit the exigencies of particular cases. In *K. Sanyal v District Magistrate, Darjeeling A.I.R. 1973 S.C. 2684*, Justice Bhagwati states that though the right to move the Supreme Court under Article 32 is itself a fundamental right, but there is no obligation on the Supreme Court to give any particular kind of remedy to the petitioner. In the case of *M.C. Mehta v Union of India A.I.R. 1987 S.C. 1086*, the Supreme Court stated that the Court is free to devise any procedure appropriate for the particular purpose of the proceeding under Article 32.

The Supreme Court and the High Court also have powers to devise directions, orders or writs so as to avoid their technical deficiencies, if any, or to adapt them to Indian circumstances. For instance, in the case of *Rashid Ahmed v Municipal Board, Kairana A.I.R. (37) 1950 S.C. 163*, the Supreme Court observed that although the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting prerogative writ, but this is not an absolute ground for refusing a writ or order under Article 32, because the powers given to the Supreme Court under this article are much wider and not confined to prerogative writs only. In *T. C. Basappa v T. Nagappa A.I.R. 1954 S.C. 440*, the Supreme Court ruled that the Court may make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner, without having to look back to the early history or the procedural technicalities of these writs in English law.

The Supreme Court and High Court may make any order under Articles 32 and 226 to enforce fundamental rights in an effective manner. Thus, the wide powers allow the Court to grant declaratory order together with ancillary relief, such as injunction order when it is the most appropriate relief to be given to the aggrieved party. For example, in *K.K. Kochunni v State of Madras A.I.R. 1959 S.C. 725*, the Supreme Court held that if the impugned Act had abridged the petitioners' right under Article 19 (1) (f) without justification, a declaration order together with the consequential relief by way of injunction was appropriate relief to restrain the respondents from asserting any rights under the enactment that has been declared null and void. Besides, the Court may award damages or compensation when a person's rights are infringed, and there is no other suitable remedy available to give relief and redress in the specific

situation for the injury caused to the aggrieved party. This was done by Justice S. Saghir Ahmad in the case of *Common Cause, a Registered Society v Union of India A.I.R. 1999 S.C. 2979*.

In addition to having the power to issue any orders, the Courts also have the power to give any directions, including laying down general guidelines having the effect of law to fill the vacuum till such time the legislature steps in to fill in the gap by making the necessary law. This can be seen in the case of *Lakshmi Kant Pandey v Union of India A.I.R. 1984 S.C. 469*, the Supreme Court sets guidelines for the adoption of minor children by foreigners. In *K. Veeraswami v Union of India (1991) 3 S.C.C. 655*, where guidelines for the purpose of maintaining the independence of the Judiciary were laid down by Supreme Court. In *Supreme Court Advocates-on-Record Association v Union of India (1993) 4 S.C.C. 441*, the Supreme Court laid down guidelines and norms for the appointment and transfer of High Court Judges. In *Common Cause v Union of India A.I.R. 1996 S.C. 929*, the Supreme Court issued directions for revamping the system of blood banks in India. In *Visakha v State of Rajasthan (1997) 6 S.C.C. 241*, the Supreme Court laid down guidelines to discourage sexual harassment of women in work places. In *Dinesh Trivedi, M.P. v Union of India (1997) 4 S.C.C. 306*, the Supreme Court recommends the setting up of a high-level committee to monitor the investigation in the Vohra Committee Report. In *Vineet Narain v Union of India A.I.R. 1998 S.C. 889*, the Supreme Court has laid down directions to ensure the independence of the Vigilance Commission and to reduce corruption among government servants. In *Union of India v Association for Democratic Reforms (2002) 5 S.C.C. 294*, the Supreme Court issued certain directions to the Election Commission. In *D. K. Joshi v. State of U.P. (2000) 5 S.C.C. 80*, the Supreme Court issued directions to the Government of U.P. to take necessary steps to stop carrying on medical profession in the entire state by unqualified/unregistered medical practitioners by identifying such persons under a time-bound programme.

Under Article 32, there are salient feature not provided in Article 226, namely the word '*appropriate proceedings*' has given power to the Supreme Court to follow *any* procedure, provided that is appropriate for the enforcement of fundamental rights, and the Court is not bound to follow the technicalities of adversarial litigation [9]. While under Article 226, there is a special feature that is not provided in Article 32, the word '*any other purpose*' in Article 226 not only applies for the enforcement of fundamental rights, but for also to enforce other legal rights [10]. By and large, Articles 32 and 226 are an exceptional constitutional remedy, for having a very wide power to enforce fundamental rights under Part III of the Constitution of India 1950. Thus, it is clear that Article 32 and 226 of the Constitution of India 1950 empowers the Supreme Court and the High Court a very wide power to grant remedies when rights under part III of the Constitution are infringed. The principle of awarding the remedies under Article 32 is also applicable to article 226. Finally, the Supreme Court of India has decided that the power of judicial review vested in the High Courts (Article 226) and Supreme Court (Article 32), is an integral and essential feature of the Constitution, and form part of its unamenable basic structure [11].

DISCUSSION

The above study illustrates that Article 32 and 226 of the Constitution of India 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 writer believes that method of interpretation gives the Courts such a wide power. This is because the method of interpretation of the Constitution is different from the interpretation of an ordinary legislation. The Constitution being an important document when compared with ordinary legislation should not be construed in a narrow and pedantic sense. The Constitution should be interpreted broadly, liberally, and purposively so as to enable it to continue to play "a creative and dynamic role in the expression and the achievement of the ideals and aspirations of a nation, in the articulation of the values bonding its people, and in disciplining its government" [12]. In Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor (1992) 2 C.L.J. 1125, the Federal Court of Malaysia stated that:

"Secondly, as the Judicial Committee of the Privy Council held in Minister of Home Affairs v. Fisher at p.329, a constitution should be construed with less rigidity and more generosity than other statutes and as sui juris, calling for principles of interpretation of its own, suitable to its character but no forgetting that respect must be paid to the language which has been used in this context."

Hence, the position of Article 32 and 226 enable the Indian Courts to tailor and mould the reliefs in accordance with the demands of justice in the circumstances of a specific case and may even order the administration to take affirmative action in a given situation. It is because a broad and liberal approach in the interpretation of a written Constitution give the courts more rooms for applying judicial creativity and enjoy large remedial powers, with the judicial creativity the judges are as if holding a scalpel instead of an axe, a tool that may fashion a suitable remedy to fit the factual matrix of a particular case. Everything on this can only be done with the application of a broad and liberal approach in interpreting the Constitution.

On other hand, in interpreting the provisions of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words. If the meaning of the words in the statute is clear, certain or unambiguous, the courts will interpret them literally, by giving them their plain and natural meaning. The duty of the courts is to apply the law laid down in statute to the particular facts of the case before them [13]. In the literal rule, the courts cannot modify the language of the Act if such meaning is clear and unambiguous; effect should be given to the provisions of a statute whatever may be the consequence. In other words, the Court has given a limited interpretation to the words expressed in the statute. Hence, the interpretation of this method is actually a narrow, rigid and strict approach.

The writer is of the opinion that if the provision of remedies for enforcement of the fundamental rights under Paragraph I enshrined in the Federal Constitution 1957, it can change the judicial attitude of some judges that are bound by the English common law as the Constitution is the supreme law and paramount to other laws. This is because the enhanced legal status of the Paragraph I will certainly affect the judicial attitude because the Constitutional status of Paragraph I will send a clear message to the Courts that the restrictive, narrow and archaic values of the English common law which at times characterized their approach to the Paragraph I is under ordinary legislation should be departed. This proven workable in Canada when the enhancement of legal status of the Canadian Charter of Rights and Freedoms had a great impact on the judicial behaviour, both in their words and in their deeds, Canadian judges have begun to carve out a bold new constitutional jurisprudence [14].

CONCLUSION & RECOMMENDATIONS

Above all clearly shows that the provision of remedies for enforcement of fundamental rights in Paragraph I should be provided in the Federal Constitution 1957 to further safeguard the enforcement of fundamental rights. Hence, it is recommended that the Federal Constitution should be amended to include the provision of Paragraph I. However, it is further recommended that the said Paragraph I should be modified to take into consideration several factors such as public safety, doctrine of separation of powers and limit the powers of Paragraph I before provided under the Federal Constitution 1957. All the factors need to be considered in order to ensure successful implementation of the enforcement of the rights of the people in this country.

It is pertinent to note that the factor of public safety is not specified in Paragraph I. Moreover, none of the provisions of the Federal Constitution which states the suspension of the right to seek relief in court for the purpose of enforcing the fundamental rights during an emergency or the national security is threaten or there is imminent danger thereof by war, external aggression or internal disturbance. Therefore, the factor of public safety should be specified in the Paragraph I. It is because the provision under Paragraph I allow the public to seek relief in court to enforce their fundamental rights when their rights are violated by the public authorities. In the absence of any restrictions imposed for the sake of public safety, if the public still has the right to move the Court for the enforcement for the fundamental rights even in a state of chaos, it is feared that it will impedes, disrupts or interferes while the government is performing their duties in the process of maintaining and restoring peace in the country to safeguard national security. Therefore, we should strike a right balance between rights and public safety.

Besides, the provision in Paragraph I empowers the Court to give any directions or orders to the public authorities. It is feared that too wide of powers will cause the Court to interfere with legislative and administrative action. The Court is the weakest institution if compared to the executive and the legislature. The most powerful institution is the executive and the legislature. The executive branch has the power to execute the law and the legislature has an influence on the budget. The Court can truly be said to have neither force nor will, but merely judgment. Thus, the Court has to establish a good and harmonious relationship with two other organs of government, as if there was a controversy between the Court and the executive or legislature, the former is always bound to lose. In order to maintain a harmonious relationship, each branch of government should confine itself to its assigned responsibility under their respective jurisdiction, without encroaching jurisdiction of other branches as stated under the doctrine of separation of powers. In the event, this doctrine is strictly adhered, certainly an independent of the judiciary can be maintained. The Court must therefore be vigilant against any form of violation and jealously guard its independence. In Malaysia, the doctrine of separation of powers not expressly provided for in the Federal Constitution 1957. Nevertheless, the idea of doctrine of separation of powers is still the foundation of the entire Constitutional structure of Malaysia, as set out in Article 39, 44 and 121 of the Federal Constitution. There is a need to include the doctrine of separation of powers in the provision of Paragraph I, so that the doctrine has the effect of law and can be observed as well as complied with by all organs of government in order to establish a harmonious relationship between them.

Finally, the provision in Paragraph I should be limited to the enforcement of fundamental rights in Part II of the Federal Constitution 1957. At present, the provision in Paragraph I empowers the High Court's not only to enforce the fundamental rights in Part II of the Federal Constitution 1957, but for any other purposes.

In other words, the provision in Paragraph I not only permits the High Court to hear petitions for the enforcement of fundamental rights, but also the enforcement of any legal rights. The power of the High Court is wide enough to reach any act of injustice, wherever it is found. This gives very wide powers to the High Court including invalidate any law enacted by the Parliament, or any actions taken by the Executive, if the laws or actions have violated fundamental rights or any legal rights. Therefore, it is proposed that the words '*for any purpose*' under Paragraph I shall be removed to limit the powers of the High Court for the enforcement of fundamental rights only. By removing the words '*for any purpose*', the extensive powers of the High Court may be controlled and alleviated. In addition, removal of the words '*for any purpose*' in Paragraph I does not affect the broad powers of the High Court in cases relating to the enforcement of fundamental rights in Part II of the Federal Constitution 1957. Hence, it is recommended that the provision of Paragraph I should be modified taking into consideration of several factors such as public safety, doctrine of separation of powers and limit the power of Paragraph I before provided under the Federal Constitution 1957.

REFERENCES

1. Anantaraman, P. V. (2006). The Extended Powers of Judicial Review in Malaysian Industrial Relations: A Review. *Malayan Law Journal*, *4*.
2. Thye CC. The role of article 8 of the federal constitution in the judicial review of public law in Malaysia. Malayan Law Journal. 2002;3.
3. Vibhute, K. I. (1993). Dr. Ambedkar and Empowerment, Constitutional Vicissitudes.
4. Datta, R., Chaturvedi, R., Rudra, A., & Jaideep, C. N. (2013). End of life issues in the intensive care units. *Medical Journal Armed Forces India*, *69*(1), 48-53.
5. Shah, J. M. (2013). First report on illegal mining of iron and manganese ores in the state of odisha.
6. Mohapatra, G. C. (2017). *The stone age cultures of Orissa*(Doctoral dissertation).
7. Thaper, V. Romesh (1950). *State of Madras, AIR, SC*, *124*.
8. Van Eeden, E. P. (2009). *A guide to the Consumer Protection Act*. LexisNexis.
9. Basu, D. D. (1984). *Shorter constitution of India*. Prentice-Hall of India.
10. Basu, D. (1952). Cases on the Constitution of India Ed. 3rd (1950-51).
11. Chowdhury, R. (2010). The Road Less Travelled: Article 21A and the Fundamental Right to Primary Education in India. *Indian Journal of Constitutional Law*, *4*, 24-46.
12. Ijaiya, H. O. (2017). *Judicial Approach to Interpretation of Constitution: A Study of Nigeria, Australia, Canada and India*. Malthouse Press.
13. Hamzah, A., & Bulan, R. (2003). *An introduction to the Malaysian legal system*. Oxford Fajar Sdn. Bhd..
14. Morton, F. L. (1987). The political impact of the Canadian Charter of Rights and Freedoms. *Canadian Journal of Political Science/Revue canadienne de science politique*, *20*(1), 31-55.