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Review of the Contracts Act 1950: Why and what?
By
Tun Abdul Hamid Mohamad

(I have retired. I do not have the manpower, the facility or the energy to do a thorough research, going through the Act section by section and recommend specific changes to the Act. However, what I am stating here is based on what I have come across in my experience in and around the courts for more than four decades, including after my retirement.)

The fact that the Act has been around for more than half a century without major events arising from it, the fact that it has been used from Malaya, a British Colony, to Malaysia, an independent country, from an agricultural country to an industrialised country and the fact that the same law is also used in other former British Colonies until today, speak a lot about it. It is meant to last.

Furthermore, the law of contract is a basic law in any jurisdiction or jurisprudence. It has evolved over hundreds of years, even borrowing principles from each other. Indeed, the core principles are the similar in any jurisdiction or jurisprudence.

Particularly in a common law system, the beauty of having a long-lasting basic law is the richness of precedents and literature on the subject. That caters for certainty in the law.

The moral of the story is, do not change just for the sake of changing or because it has been there for a long time. The basic structure should not be disturbed. Even the terms that had been used for decades and interpreted and affirmed again and again by the courts should not be changed, unless absolutely necessary. I am not against reviewing. I am against changing for the sake of changing or because it has been there for a long time or because it is not clothed in Arabic dress and therefore un-Islamic.

That there should be a review, I agree. But, for what reasons? I think of two reasons. You may have more, well and good. First, to up-date the provisions to suit the current requirements and developments. Secondly, I think we should cater for the development for Islamic financial and capital market.

Regarding the first, the law of contract in any jurisdiction of jurisprudence had developed over a long period of history. It started with simple barter trading, followed by buy and sell using medium of exchange now known as money where both parties and the goods were present, usually at a market place, offer and acceptance made orally, payment made in the local currency on the spot and the buyer carries home the goods he purchased. Compare it to modern trading, banking and finance. Neither the great Imams nor Sir William Blackstone could have imagined it, let alone try to provide laws for the situation. Usually customs (*urf*) developed first before the law follows suit.

The Malaysian Contracts Act, like those of the other British Colonies, is a codified law. A question might be asked. Even though it is a hypothetical question, this being a seminar, perhaps it could be entertained: Would it be better not to codify it at all and to leave it to Court to develop it? My answer in "NO" and my reasons are as follows: First, it is very difficult for anybody, whether he is a student, a lawyer or a Judge, to ascertain the law on a particular issue at any point of time. He will have to read and digest all the relevant case laws in order to ascertain the currently applicable principle. In the end, he will fall back on the textbooks. I had to spend a lot of time when deciding **Nepline**[i] (a tort case) to determine the common law of England as at 7th April 1956 on duty of care in regard to disclosure of material information. If the law is codified, all you need to do is to look at the relevant section, read it and understand it. Even if one has to interpret it, there may even be an interpretation section. Then you look at the case law. It is much easier.

Secondly, codification ensures certainty in the law. Imagine leaving it to lawyers and judges alone to decide and to develop on case to case basis. The lawyer is paid to represent his client. He will certainly try to influence the Court to state the law in a way that is beneficial to his client. He has a vested interest and he may be a very persuasive lawyer. A weak Judge, especially at lower level, may be persuaded by him. Multiply the scenario and you will see the law going haywire. The same may happen at higher level too, especially where some Judges think that they are or want to be "the Lord Denning" of Malaysia.

In my view, as far as the Contracts Act is concerned, we have done the right thing in codifying it. It should remain so.

Since our law is codified, it means that at the time of the codification, whatever changes and development that had happened until then, had been taken into account. It means that we are spared from having to look further than that date. Even after the codification, there had been amendments to cater for current changes and requirements. If at a point of time, it was found that there was clear inadequacy in the existing provisions, certainly, the legal fraternity, the industry concerned and the Court would have highlighted it. The Attorney General or the relevant Ministry would have moved for the amendments.

All these would narrow the scope for the review. What and where are the current inadequacies? Is there anything that should be provided for the future development and requirement, if it could be envisaged? I think those are the questions we have to ask ourselves. The answers to these questions are things that we have to do.

Do we have to go to Parliament to remedy whatever inadequacy in the law? Can we not just leave it to the Court?

In answering the question, the first thing that we have to bear in mind is that the Malaysian Contracts Act is a written law, an Act of Parliament even though the original principles could have been derived from the principles of common law. So, there is a limit in which the Court could do. At the most, the Court may interpret the provision in the light of current practice, that too if the is no specific definition in the Act or other relevant laws. No Judge is a Parliament. In **Latifah Bte Mat Zin v Rosmawati Bte Sharibun**[ii] (F.C.), I said:

*"The function of the court is to apply the law, not make or to amend law….. Knowing the inadequacy of the law, it is for the Legislature to remedy it, by amendment or by making new law. It is not the court's function to try to remedy it."*[iii]

Fifty two years ago, in **Re: Reginald W Goff, QC**[iv] , an application for *ad hoc* admission to the Malaysian Bar "by a very eminent Queen's counsel" was refused by Thomson CJ. In his judgement, the learned Chief Justice, inter alia, said:

*"Judges are not here to make the law. They are not here to find faults in the law. They are here to administer and declare the law as it has been set out by the legislature. If, therefore, what I have said creates any difficulty it is a matter for the legislative to deal with. After all I am here to enforce the law. I am not here to set a bad example to the public by driving a coach and horses through it."*

It would be a serious breach in the doctrine of separation of powers if, the Court, under the pretext of interpretation, is effectively, legislating. The rule regarding separation of powers and independence of the judiciary should not only apply when the Judiciary is on the receiving end. It should equally apply the other way too.

I observe that quite often, when a Judge bends backward and decides in favour of an individual or a group of individuals, the judgement is applauded as "judicial creativity" and the like, even if it is legally irrational. On the other hand, even without going that far, if the judgment favours the Government or an authority, the whole Judiciary is accused of not being independent and that there is interference by the Executive.

In 40 years of my carrier with the Legal and Judicial Service and the Judiciary, I did not hear any serious complaint about the deficiency or inadequacy of the Contracts Act. Even at the time I retired I did not hear such a complaint. Of course, you may know better since you are directly involved in the running of the Government. So, you are in a better position to advise the Government.

Frankly, I am not in a position to advise you or the Government which provisions should be amended. Perhaps, a good indicator of what new provisions should be included is the law in England. Common law is more flexible. We assume that the Court had been aware of the current needs and are capable of meeting the demands. So, the law gets updated as and when the need arises. Of course, that is as far as up-dating the law to meet current needs arising from the development in the industry and technology.

There is another area that I think we should focus on. This is my favourite topic after retirement and I have spoken and written many times on this.

You know that Malaysia aspires to be a holistic hub for Islamic banking and finance ("Islamic finance"). We should not be shy about that ambition. In many ways, we are already ahead. There is another area that I have been harping on and that is, to position Malaysian Law as the law of choice and Malaysian Courts and arbitrators as the forum for settlement of disputes in Islamic finance cases.

Currently, the position is filled by English law and English Courts. We respect English law and English Courts. They deserve the confidence given to them. In the eyes of the world, I admit that we are still far behind compared to them. But, while Malaysia has what England has (almost at least), Malaysia also has what England does not have. England has a common law system and English as the language of the law and of the Court. We have them too. Our Courts are perhaps the most luxurious in the world. In terms of technology and speed, we are equal to the best in the world. We have summer throughout the year. England doesn't. Our cost of living is much lower. Of more importance to Islamic banking is that we have the will and ability to apply Shari'ah to Shari'ah-based cases. England does not have the ability, let alone the will to do the same. We have a pool of English-speaking Shari'ah scholars to assist counsels in the preparation of their cases. Malaysia is the centre of learning in Islamic finance subjects. We have a law that requires Shari'ah issues be referred to the Shari'ah Advisory Council to ensure certainly and expertise in the opinions. There are no constraints for our Courts to apply the Shari'ah in deciding the cases. I do not think England has all these elements. Now we are working towards the harmonisation of our law with the Shari'ah for application to Islamic finance. No other country does it.

What England has is better perception of the integrity and the level of knowledge of the law of their lawyers and Judges than our lawyers and Judges. First of all, it is perception even though the world, in spite of advance technology and communication, seems to be placing more importance on perception than truth nowadays. Admittedly, English lawyers and Judges may be more learned in some aspects of the law, mainly due to their exposure, I believe we are not very far behind. Indeed some of our lawyers and Judges are more equipped to understand Shari'ah principles, at least. Anyway, that is the challenge to our lawyers and Judges: to enrich their knowledge. I believe that if our lawyers and judges could improve their knowledge, may be partly through specialisation, it would not be long before the perception regarding us would improve. Fifty years ago, which American or European company would want their products to be made in poor and undeveloped Asian countries? The words "Made in USA" or "Made in England" were sacrosanct. Not anymore now. Why? Because the moment those poor and undeveloped countries proved that they could produce the same products of the same quality and at a cheaper price, those big companies rushed to have products made there.

What is important is that we dare to think and to try. Others don't. If you are afraid of failing, don't do anything. Of course if you ask English and England-trained lawyers practising Islamic finance in London, Hong Kong, Singapore and Dubai, they would say it is a "tall order". They have vested interests and many still think that, until today "the sun never sets in the British Empire"! If you think of the unlikelihood of something to happen, forty years ago, who would think that Islamic finance would be what it is today? When Japan exported it first Honda 500 to Malaysia 50 years ago, the people who were then familiar with the British-made Austin, Morris and Hillman cars, joked that Japanese cars were made of Milo and Ovaltin cans. When Japan first exported the Honda Cub motor cycles, the people who were used to the English-made Triumph, Norton, BSA, Royal Enfield and Ariel laughed because they were "made of plastic". Where are those big names now? Your generation don't even know them. The impossible had happened. And the Japanese don't even think or communicate in English.

So, I am urging the Committee that is reviewing the Contacts Act to be receptive to suggestions to make the Act conducive to the development of Islamic finance and positioning Malaysian law as the law of reference and Malaysian Courts and Arbitration Centre as the forum for settlement of disputes.

In this respect, my approach has always been: **Any law that is not un-Islamic is Islamic**. In other words, look at the substance whether it is contrary to *Shari'ah* principles or not. Indeed, in *mu'amalat*, it does not have to be exactly the same as it was during the Madinah days. Things have changed. What was not required then could be required now. What existed then might have to be modified to suit present circumstances. About five years ago, I wanted to buy a cow in Langkawi. The owner insisted that I followed him to the rice field where the cow was grazing for me to receive the rope tied to the cow from him to affect delivery. His Tok Guru must taught him so. Apply that practice or requirement to international trade and finance and see whether it will work! Remember that even Imam Shafie reviewed his rulings after living in Egypt for a few years because of different *urf* (custom). If he were alive today, he might even be teaching the Contracts Act at his *kulliyah mu'amalat*, with some modifications, may be.

For your information, the Law Harmonisation Committee which I chair is now looking at the principle of *wa'ad* which is widely used in Islamic finance. Indeed according to an Islamic banker, remove the *wa'ad,* Islamic finance will collapse[v].

For our purpose, perhaps I can summarise the views of the *fuqaha* (Muslim jurists) on *wa'ad* as follows :

1. Many of the scholars believe that "fulfilling a promise" is a noble quality and its violation is reproachable, but is neither mandatory (*wajib*) nor enforceable through courts of law.

2. A number of *fuqaha* opined that fulfilling a promise is mandatory (*wajib*) and a promisor is under moral and legal obligation to fulfil his promise, which means that a promise can be enforced through courts of law.

3. Some Maliki jurists are of the view that in normal conditions, a promise is not binding, but if the promisor has caused the promise to incur some expenses or undertake some labour or liability on the basis of the promise, it is mandatory on him to fulfil his promise for which he may be compelled by the courts.

Let us take a look at the Maliki view. Do you not see the similarity with "promissory estoppel" that Lord Denning is supposed to have "invented" in the **High Trees'**[vi] case in 1947? Do you think that Lord Denning, sitting in London, happened to think the same way as Imam Malik and his students living in Medina 1,200 years earlier did? Do you not think that Cordova might have played a role in it, even after its fall resulting in professors, Jews and Christians alike, migrating North and ending up teaching at Sorbonne University in France, Oxford University in England and other universities? Do you know that three colleges of Oxford - University College, Balliol College, and Merton College – were established on a system of trusts similar to the *waqfs* used in the founding of Al-Azhar University two centuries earlier? Another coincident? One also wonders whether the statement made by David Moussa

Pidcock in his introduction to the book “Napoleon and Islam” that 97% of Code Napoleon consists of rulings of Imam Malik, bearing in mind Napoleon’s Egyptian campaign, bears some truth in it. The moral of the story is: Do not think that the first law known to mankind is the common law of England!

Once the ruling on *wa’ad* is finalised by Shari’ah Advisory Councils of Bank Negara Malaysia and the Securities Commission Malaysia, we would be proposing that the principle of *wa’ad* be given legal recognition to provide for certainty in its application and effect, at least applicable to Islamic finance contracts. At the moment, we thought that the right place is the Contracts Act 1950. It looks as if the timing is right.

Thank you.

tunabdulhamid@gmail.com

http://www.tunabdulhamid.my

NOTES

[i] Nepline Sdn. Bhd. v Jones Land Wooten [1995] 1 CLJ 865
[ii] [2007] 4 AMR 621; (2007) 5 MLJ 101
[iii] See also Re Geoffrey Robertson (2001) 4 CLJ 317 (C.A.) (Dissenting)
[iv] [1962] 28 MLJ 241
[v] Rafe Haneef
[vi] Central London Property Trust Ltd v High Trees House Ltd (1947) KB 130