REVIEW OF CIVIL LAW ACT 1956 (Act 67)
COMMENTS
By
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My focus is only on section 3 of the Civil Law Act 1956 (the Act).

Section 3 provides:

"Application of U.K. common law, rules of equity and certain statutes

3. *(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall—*

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

(2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

(3) Without prejudice to the generality of paragraphs (1)(b) and (c) and notwithstanding paragraph (1)(c)—

(i) it is hereby declared that proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division of the High Court by way of habeas corpus or for an order of mandamus, an order of prohibition, an order of certiorari or for an injunction restraining any person who acts in an office in which he is not entitled to act, shall be available in Sabah to the same extent and for the like objects and purposes as they are available in England;

(ii) the Acts of Parliament of the United Kingdom applied to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of Sarawak [Cap. 2]

and specified in the Second Schedule of this Act shall, to the extent specified in the second column of the said Schedule, continue in force in Sarawak with such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of Sarawak and, in particular, subject to the modifications set out in the third column of the said Schedule."

The effects of the provisions in respect of Peninsular are as follows:

(i) The court shall apply the common law of England and the rules of equity;

(ii) As administered in England on the 7 April 1956;

(iii) In so far as provisions have not been made (at that point of time) by any written law in force in Malaysia;

(iv) Provided that the said common law and rules of equity shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit;

(v) And subject to such qualifications as local circumstances render necessary.

The effects of the provisions in respect of Sabah are as follows:

(i) Points (i) to (v) above apply to Sabah with two differences:

(a) The cut-off date is 1 December 1951.

(b) Besides the common law of England and the rules of equity, statutes of general application are also applicable.

(iii) Proceedings by way of habeas corpus or for an order of mandamus, an order of prohibition, an order of certiorari or for an injunction shall be available in Sabah in the same way as they are available in England;

The effects of the provisions in respect of Sarawak are as follows:

(i) Points (i) to (v) above apply to Sarawak with two differences:

(a) The cut-off date is 12 December 1949.

(b) Besides the common law of England and the rules of equity, statutes of general application are also applicable.

(ii) There is a special provision regarding the the Acts of Parliament of the United Kingdom applicable to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of Sarawak [Cap. 2].

General observation

It should be remembered that the Act was made in 1956 i.e. one year before the Malaya achieved her independence. Looking at the Act, we do not know the real reasons for it. I will not speculate.

However, I think, at that time, there was a case for having a general provision for the Court to apply the common law of England and the rules of equity subject to necessary conditions. The legal and judicial system established by the British was the English system. Common law and rules of equity form an important part of the law applicable by the Courts. Malaya then did not even have her Parliament yet. Written laws, as existed then, were perhaps inadequate. The written laws which had been made were common law-based. In areas where no written law had been made, the Courts applied the common law of England and the rules of equity. Indeed, in my view, with or without the provisions, the lawyers would resort to and the Courts would apply the same, without any guidance. Where else would they look to? They were all trained as common law lawyers, at that time, all in England. In the circumstances, it was natural for the applicability of the common law of England and the rules of equity be spelled out clearly by law.

Without going in the details, do we still need such a provision? In my view, yes. First, we may still need to refer to the common law of England, particularly in the law of tort. In the same way we may still need to refer to the rules of equity, particularly in the law of trust. Secondly, such a provision removes any doubt regarding the Court's jurisdiction to apply such laws. Bear in mind the provision of Article 121 of the Federal Constitution which, inter alia, states that the Courts shall have jurisdictions "as may be provided by federal law." Thirdly, it provides the guidance to the Court in applying such rules leading to greater consistency.

What should the provision contain?

1. The reference to the common law and the rules of equity should not be confined to that of England but also to that of the Commonwealth countries.

2. Even with conditions stipulated, the provision should not be mandatory on the Court. The word "shall" should be substituted with the word "may". That would give a discretion to the Court to make a decision to apply the said principles or not.

3. There should be no cut-off dates. Common law and the rules of equity grow through judgments of courts to cope with the time. There is no basis whatsoever to impose the cut-off date around 1950's (or whatever) unless we want live by an archaic law which may no longer be suitable even in England. Beides, it is difficult to determine the common law or rules of equity on a matter on the cut-off date. A case decided after the cut-off date may draw the principle from earlier judgments. There is not a judgment that does not refer to earlier precedents. **Hedley Byrne & Co. Ltd. v. Heller & Partners** [1964] AC (HL) 465 ia a good example. I had that problem when deciding **Nepline Sdn Bhd.** That is why judges hardly take the trouble to determine the common law

or the rules of equity as at the cut-off date. Judgments of English courts are cited and applied as if section 3 of the Civil Law Act 1956 does not exist.

4. The provision that such common law and the rules of equity should only be applicable in so far as provisions have not been made (at that point of time) by any written law in force in Malaysia should remain, subject to improved drafting, if any. This is obvious. Once the Malaysian Parliament enacts a law on the subject, it is that law that should be applied. No lawyer should be heard to argue and no Judge should be heard to say that common law rights or equitable remedy continue to run parallel with the written law enacted by Parliament. The introduction of the principle of equitable estoppel to contracts made under the Control of Rent Act 1966 (which has now been repealed) had cause great injustice to house owners affected and had caused the houses to to deteriorate.

5. The proviso that "*the said common law and rules of equity shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary"* should remain subject to improved drafting, if any.

6. With regard to Sabah and Sarawak, the provisions regarding the application of statutes of general application should be removed. Even if there were some justifications six decades ago, they do not exist anymore now. If it is not necessary to apply English statutes in Peninsular Malaysia, why should it be necessary for Sabah and Sarawak? Besides it may lead to disparity in the laws of Peninsular Malaysia and the the two States. Everything should be done to standardise the law applicable to the whole country.

7. There should be a new addition. The principles of Islamic law should be included too. I realise that due to ignorance and prejudice the mention of "Islamic law" would straight away raise a controversy. However, we must remember that, first, we are not dealing with the introduction of the Islamic criminal law or laws relating to *ibadah*. We are dealing with civil law and the scope is very limited. Consider this example. There is no equivalent of *caveat emptore* in Islamic law. Islamic Islamic law insists fairness and honesty on both parties in their dealings. The common law on disclosure of material information (e.g. as in **Hedley Byrne**) does not go so far as the Islamic law principle that "a seller must disclose the defects of the good he is selling". Please see discussion in **Nepline Sdn Bhd** enclosed. Indeed in that case the court went further than the common law of England and indeed drew an inspiration from the Islamic law position, without saying so. (I know because I decided the case.) The Court of Appeal confimed the judgment, perhaps without even knowing where the idea came from. Unfortunately, there is no written judgment of the Court of Appeal. I have not come across any criticism of the judgment. I hope there will not be any even after this "disclosure"!) The point I making is that there might be some principles of Islamic law which could be applicable. Due to ignorance and prejudice, many people do not realise the similarities between Islamic law and common law.

8. With regard to Sabah, section 3(3)(i) regarding habeas corpus, mandamus, prohibition, certiorari or injunction should be repealed. Habeas corpus is a criminal procedure. The laws on the subject applicable to Peninsular Malaysia should be extended to Sabah (and Sarawak) where necessary to provide for standardisation.

9. My comment in paragraph 8 should equally apply to Sarawak in respect of section 3(3)(ii).

For further reference, please read:

1. Nepline Sdn Bhd v Jones Lang Wooten [1995] 1 CLJ 865

2.Pemakaian common3)(1) law England, kaedah-kaedah ekuiti dan penghakiman-penghakiman luar negara di Malaysia.

3. Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon (2006) 2 CLJ 1

4. Seminar Perundangan dan Kehakiman Malaysia: Ulasan Kertas Kerja.

All are available on my website: http://www.tunabdulhamid.my):

The above arguments may be applied to section 5 of the Act.

Thank you.

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