

A Mission with a Clear Vision: Eliminating the Problems of Public Policy in the Malaysian Contracts Act 1950

(Penyelesaian Masalah Polisi Awam dalam Akta Kontrak 1950 di Malaysia)

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ABSTRACT

Public policy in the Malaysian Contracts Act 1950 have caused much debate among the judges in Malaysia. The underlying problem is due to the fact that the provision in the Act itself has failed to lay down a proper legal framework as to what agreements are against public policy. As a short term solution to curb these uncertainties in the law, the judges in Malaysia have adopted different trends in adjudication and this in turn contributed to inconsistencies in the law, a phenomena not commonly practiced in the common law system. This article seeks to propound that Malaysia should establish a proper legal framework to regulate contracts which are against public policy. As Malaysia is advancing towards as a holistic hub in Islamic banking and finance, perhaps adopting the maqasid al-shari'ah as a framework of regulation can be a useful starting point, bearing in mind that transposing case laws from other jurisdictions may not be the long term solution.

Keywords: Public policy; Contracts Act 1950; maqasid al-Shari'ah, Malaysia

ABSTRAK

Polisi awam dalam Akta Kontrak 1950 telah menimbulkan banyak perdebatan perundangan dalam kalangan hakim di Malaysia. Perdebatan ini berlaku disebabkan oleh kegagalan Akta tersebut dalam menyediakan satu kerangka undang-undang yang menentukan jenis perjanjian yang bertentangan dengan polisi awam. Oleh itu, hakim-hakim di Malaysia telah menggunakan pendekatan yang berbeza dalam menyelesaikan masalah ketidaktentuan dalam Akta ini. Walau bagaimanapun, pendekatan tersebut telah menjadikan undang-undang tidak konsisten sehingga gagal mencerminkan amalan common law. Kertas kerja ini berhasrat untuk memberikan cadangan iaitu, negara Malaysia perlu menghasilkan satu rangka undang-undang yang sesuai untuk mengawal kontrak-kontrak yang bertentangan dengan polisi awam. Penggunaan maqasid al-Shari'ah sebagai kerangka undang-undang merupakan satu titik permulaan yang amat positif kerana negara kita berhasrat untuk menuju ke arah sebagai pusat perkembangan yang holistik dalam sektor perbankan Islam dan takaful. Perlulah disedari bahawa penggunaan undang-undang negara lain bukan satu bentuk penyelesaian yang sesuai untuk jangka masa panjang.

Kata kunci: Polisi awam; Akta Kontrak 1950; maqasid al-Shari'ah; Malaysia

INTRODUCTION¹

Since the application of the Contracts Act 1950 in Malaysia, no major event on the amendment of the Act has come to light. It can be observed that the phrase 'public policy' occurs only on one occasion in the Malaysian Contracts Act 1950. No definition has been provided to accompany the phrase, which has accordingly authorises the judges in Malaysia to act at their discretion to decide on the framework of policy which are in the interest of the public. Section 24 of the Act provides:

Section 24. What considerations and objects are lawful, and what are not.

The consideration or object of an agreement is lawful, unless-

....

(e) the court regards it as immoral, or opposed to public policy.

In... the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Based on section 24(e) of the Contracts Act, it can be perceived that an authoritative remark was made. The discretion is left to the court, but not the legislative body, to decide what amounts to immoral, or agreements which are opposed to public policy. Indistinguishable reflection

was made by Wee Chong Jin CJ in *Cheng Swee Tiang v Public Prosecutor*:²

... the development of the law has generally been judicial; Parliamentary intervention is likely to be at best occasional and delayed; and the Law Commission do not appear to have taken cognizance of the problem...

This means that the judges in Malaysia are at their discretion to decide on the framework of policies which are in the interest of the public. In this context, transposing case laws from other jurisdictions is a phenomenon in Malaysia in this particular area. It can be perceived that the judges in Malaysia adopted two trends on adjudicating matters pertaining to agreements that are opposed to public policy. In some instances, the case laws suggested that they adopted the 'narrow view' on public policy while in other cases, they chose to depart from the former.

The 'narrow view' on public policy is said to be based on the traditional classification under the common law, namely:

- (a) illegal by common law or legislation,
- (b) injurious to good government, either in the field of domestic or foreign affairs,
- (c) interfere with the proper working of the machinery of justice,
- (d) injurious to family life, or
- (e) economically against the public interest.

Based on the common law classification, if the object or the consideration of an agreement falls under any one of the stipulated rules, the agreement is said to be void on the grounds of illegality. In a similar fashion if the object or consideration of the agreement does not fall under any one of the head as stipulated under the common law classification on public policy, the agreement is said to be enforceable and not unlawful. Such agreement is lawful because it is not against the interest of the public. It does not contradict the welfare of the society and is not unenforceable. Under such circumstances courts are not allowed to invent any new heads of public policy. In the interest of the certainty the courts will in general refuse to apply the doctrine of public policy to contracts of a kind to which the doctrine has never been applied.³ Courts are obliged to follow the classification under the five heads. Hence this is commonly regarded as the 'narrow view' on public policy as if any consideration or object of the agreement falls outside these five rules. It does not make the agreement unlawful. Such adoption of 'narrow view' on public policy is evident in *Theresa Chong v Kin Khoon & Co*,⁴ where the Malaysian court held that they are bound by the traditional heads of the common law and that they would not invent any new heads of public policy. Gill CJ quoted:

... The present contract does not fit into any of the traditional pigeon holes...the contract between the plaintiff and the defendant was [hence] not illegal...

The decision of the Federal Court is important in that it represents the narrow judicial viewpoint in respect of the concept of public policy. The heads of public policy are closed and that the Malaysian courts do not have the power, even under section 24 of the Contracts Act, to invent new heads. The wisdom of the Malaysian courts in adopting such a narrow view is hence questionable.⁵ Although adopting the common law view on public policy into the local context provides consistency and certainty in the law, it must be noted that such approach of incorporation of foreign jurisdictions' principles into Malaysia may not be entirely suitable. A policy administered in foreign countries may vary with those administered in Malaysia.

The judges in Malaysia must be critical when incorporating case laws from other jurisdictions. Departure from common law counterparts is necessary and obligatory when those principles are not suitable to the local context. Hence when the Contracts Act 1950 provides discretion to the judges to decide on what agreements are opposed to public policy, judges should then formulate a policy that is suitable and appropriate to the Malaysian context or the framework of 'Malaysian style' public interest matters. Cross references to other counterpart jurisdictions are no longer relevant. The richness of Malaysia begins with its people, and a policy should be modelled and moulded into a manner in character with the local context. Since public policy reflects the morals and fundamentals assumptions of the community, the content of the rules should vary from country to country from era to era. This is in line with the aspect of '*fiqh waqi'iyah*,' the understanding of the need in the community and how the law can be adaptable to the community. The laws relating to public policy must change with the passages of time and it cannot remain immutable.⁶ There is a view that in matters of public policy the courts should adopt a broader approach than they usually do to the use of precedents.⁷

On the other hand, where judges who seek to depart from the common law classification on public policy, this is regarded as adopting the 'wider view' on public policy. Such circumstances witnessed the judges extending the scope of public policy to a larger circle. This means that an agreement does not necessarily become lawful even if it does not fall under any one of the head of classifications under the common law classification on public policy. This type of approach on public policy brings benefits as it ensures that the party's autonomy to a contract is not without restrictions. For instance, agreements such as in contravention of foreign law, bribery, defrauding public authorities, touting, defrauding creditors and non-compliance of Guidelines are held to be against public policy and unenforceable under section 24(e) of the Contracts Act 1950.⁸ It can be deduced that when judges have chosen to depart from so-called established common law 'heads' of public policy, at least it has shown that the Malaysian courts have finally utilised the power to

‘invent’ new heads when the circumstances of a particular case warrants it. However one problem arises, *viz.* when judges are permitted to adopt the approach of ‘wider view’ on public policy, this may contribute to inconsistencies in the law. Particularly in Malaysia, with no proper guidelines being established in the Contracts Act 1950 on public policy matters, no control mechanisms are imposed on judicial discretions and this is when judicial creativity is at its worst in common law system. The courts will play the role in formulating or re-designing the existing principles on public policy which may be out-of-date to accommodate the onward movement of the society. Accordingly, with opinions commonly varying from one judge to another, the legal principles differ from one case law to another. Judges often have distinct schools of thought in law. One may be a naturalist but the formulated legal principles may not be accepted by the positivist, who has his own opinion. In a similar fashion, juristic opinions raised by legal realists are often enough counter-argued by formalists. Accordingly, this may then further affect the consistency and certainty of legal principles. With such grave inconsistencies on the view of public policy among the judges in Malaysia, perhaps there is urgency or the need to establish a proper framework on ‘what amounts to agreements that is against public policy.’⁹

SHARI’AH AS A GUIDING PRINCIPLE TO REGULATE PUBLIC POLICY IN COMMERCIAL MATTERS

Contemporaneously, Malaysia is a nation that is advancing progressively in all aspects. English law and English courts’ of justice have always been given the utmost respect. Malaysia has inherited the common law system in the legal fraternity from the British, which brings positive outlook as it caters certainty in the law. However, Malaysia has never intended to live under the silhouette of British counterparts in an endless manner. Malaysia has aspired to be a holistic hub for Islamic banking and finance.¹⁰ This has been strongly advocated by Abdul Hamid Mohammad on the aspect of reviewing the Malaysian Contracts Act 1950 so as to bring it in accord with the growth of Islamic finance in commercial law. His Lordship opines:¹¹

... 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 had 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 [here] 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 unlike hood of something to happen, 40 years ago, who would think that Islamic finance would be what it is today? When Japan exported its 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 cans. When Japan first exported the Honda club motorcycles, 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 does not even know them. The impossible had happened. And the Japanese don’t even think or communicate in English...

The essence underlying the speech is that we must dare to be different, innovative rather than following everything exactly as practice in the foreign countries. As aforesaid, do not make changes to the Contracts Act 1950 for the sake of changing. Even the basic structure and principles which had been reaffirmed repeatedly should remain. Therefore a useful starting point to bring the Malaysian Contracts Act 1950 so as to be in accord with the Islamic principles begins with matters pertaining to public policy. In the realm of contract law, Malaysia has never possessed a proper framework on public policy to regulate business and trade. It has always been left to the discretion on the judges, and even the Act authorises such judicial creativity.¹² Such circumstances created grave unpredictability based on the case laws and hence yielded injustice. In some instances the narrow view on public policy as classified under the common law was adopted into the local context. On some occasion, the creativity of judges have been deployed where judges opted to extend the scope of public policy beyond the common law classification. Perhaps such inconsistent behaviour by the Bench in adjudicating cases is not acceptable particularly in the Malaysian common law system. A man is not allowed to blow hot and cold – to affirm one and to deny at another. Such a principle has its basis in common sense and common justice. Whether it is called estoppel or by any other name, this principle is, indeed, in modern times, most usefully adopted by the courts of law.¹³

In Malaysia, the review on the Contracts Act 1950 can be centred on the public policy. With the ambition of revolutionising Malaysia to become a hub for Islamic banking and finance,¹⁴ perhaps establishing a proper framework on public policy with reference to the Shari’ah principles will be a useful starting point. With the scope of public policy in the law of contract being wide and being discretionary at the hands of judges, feasibly a proper structure and guiding principles based on Islam or Shari’ah principles can be used as a reference to avoid uncertainties in the law. Malaysia should have a distinct set of classification on public policy from the common law jurisdiction. Malaysia should not acquire the framework similar to the English counterparts. Public policy matters in the local context may not possess identical characteristics as those in other counterparts. The revelation from Allah SWT and the teachings of Prophet

SAW are not confined to the belief and moral systems, but includes the law that is suitable to be implemented to mankind.¹⁵ Therefore, embracing such approach as the framework and boundary on public policy will not create disharmony, but serving an overall better protection. It promotes a more realistic and reference as the guiding principles are well laid down in the Holy Book of al-Qur'an and the Sunnah of Prophet SAW. Espousing Islam as the structure on public policy means that anything which contradicted to the *maqasid al-Shari'ah* are indeed against the interest of the public. This poses the reason why Malaysia should adopt the principle enunciated in Islam as the guiding concept or as a source of reference on public policy in the realm of the law of contract.

ISLAM: ITS COMPLETENESS AND SUITABILITY AS FRAMEWORK IN LAW OF CONTRACT

Islam was revealed more than one thousand and four hundred years ago. It consists of a full system of life that is compatible for human being of all ages.¹⁶ *Al-Rabbaniyyah*, *al-Waqi'iyah*, are among the characteristics of Shari'ah and Its' Completeness need no arguments as it is further reaffirmed in the *surah al-Anam* verse 38:

... And there is no creature on [or within] the earth or bird that flies with its wings except [that they are] communities like you. We have not neglected in the Register a thing. Then unto their Lord they will be gathered...

Islam was revealed to serve the purpose of revolutionising us from the *jahiliyah* society to a moralised and progressive one. It has changed us from an uncivilised society to a civilised and morale one, liberated us from prejudice, oppression and bias to equality among all races and gender regardless of religion. All it does is to ensure the society is safe and sound. It protects the public from threats, and anyone who transgress the permissible boundary will be punished. The intention to protect the welfare of the society can be seen in many injunctions.¹⁷ In *surah al-Baqarah* verse 178-179 provides on *al-qisas* (law of equality in punishment) where even one life is killed, it will save others as punishment will deter others from committing future possible crimes. It is spelt as:

... *Surah al-Baqarah* verse 178: O you who have believed, prescribed for you is legal retribution for those murdered – the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment...

... *Surah al-Baqarah* verse 179: Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable – a duty upon the righteous...

Surah al-Nisa' verse 10 of the al-Qur'an then prohibits eating up property of orphans which again placed its emphasis on equality even to the extent of the poor, protecting the public from oppression and bullies. In *surah al-Maidah* verse 8 it provides let not enmity and hatred make you avoid justice. This means that in the machinery of justice, the act of judging should be accompanied with the name of law and justice, but not as the judge wishes to. In the interest of public, fairness and justice is important. Similarly in *surah al-Nisa'* verse 58 declares that you are to judge with justice; in *surah al-Mumtahinah* verse 60: 8 also encourage to establish justice even to those not in the same faith; and *surah al-Hadid*, 57: 25 declares "We sent Our Messengers and revealed the Book through them so as to establish justice among people." This verse is further emphasised in the Sunnah of Prophet SAW which in fact when Usamah bin Zayd requested Prophet SAW to withdraw *hadd* punishment on a convicted person, narrated by Muslim in Hadith the Prophet SAW said:

... Why earlier nations was destroyed is because, when the people who has position among them committed a crime, they will be released without any punishment, but if the poor committed a crime then they will be punished. I swear in the name of Allah, if Fatimah binti Muhammad (daughter of Prophet SAW) has stolen anything and convicted for the crime, I will chop her hand...

Hence it is observed that in Islam the primary objective of Shari'ah is the realisation of benefit to the people, concerning affairs both in this world and the hereafter.¹⁸ The justice it seeks to establish transcends into different race and religion. No bias can be evident from the injunctions. Thus there are no problems on opting not to embrace Islam as the guiding principles regulating the public policy in Malaysia. The Holy Book of al-Qur'an has laid down all the general principles, and as the society progress, these general principles is further clarified and detailed by certain prescribed methods to accommodate the need in that particular era. Among them are the *ijma'* (consensus of opinions) and *qiyas* to deduce the rulings in the al-Qur'an and Sunnah. In addition to that there existed the secondary sources, which although not all these have gained its respective consensus from all different Schools of Islamic law (*mazhab*), yet they shared the ultimate common idea of fulfilling the intent of the original provided text. Among these secondary sources are: *istihsan* (juristic preference), *maslahah mursalah* (consideration of public interest), *sadd al dhara'i* (blocking the means to evil), *'urf* (custom), *istishab* (presumption of continuity), and *amal ahl al-Madinah* (the practice of Madinah people). Details of narration need not to be done to each source aforesaid, nonetheless, it can be observed that all these methods of interpretation serve the purpose of protecting the public from harm, mischief and destruction.

Presently in the context of Malaysia, the absence of a proper framework on public policy in the contract

law may give rise to the option of embracing Islam as the guiding principle. Indeed Islam does not only touch on religious matters. In the realm of commercial law, perhaps the quote by Abdul Hamid J sums up such state of affairs where the al-Qur'an is an exhaustive piece of document:¹⁹

... [The waqfs]... do you not see the similarity with 'promissory estoppel' that Lord Denning is supposed to have 'invented' in the Central London Property Trust Ltd v High Tress House Ltd [1947] KB 130? 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 coincidence 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 that 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!...

Based on the above thoughts, there is no reason why Islam and Shari'ah principles cannot be adopted to establish the framework of public policy in commercial law in Malaysia. It permeates through all aspects of human being to protect the society from threats. Hence whenever an agreement contradicts to the objectives of Shari'ah, it is regarded as unlawful because it opposed to public policy in the context of Malaysia. As a general outline, Shari'ah aims to protect five different categories: protection of *al-Din* (religion), *al-Nafs* (soul), *al-'Ird* (mind), *al-'Aql* (intellect) and *al-Mal* (property).

ESTABLISHING MAQASID AL-SHARI'AH AS A STRUCTURE FOR PUBLIC POLICY

Ibn Qayyim al-Jawziyyah explains that the Shari'ah aims at safeguarding people's interest and preventing harm from them in this world and the next. Such protection is necessary and if al-Qur'an is not aimed at bringing benefit, then it will be disastrous for all mankind.²⁰ Allah SWT will not gain and does not need to gain anything from these injunctions.²¹ This is further reaffirmed in the following verses:

... *Surah al-Yunus* verse 57: O mankind, there has to come to you instruction from your Lord and healing for what is in the breasts and guidance and mercy for the believers...

... *Surah al-Naml* verse 40: Said one who had knowledge from the Scripture, 'I will bring it to you before your glance returns to you.' And when [Solomon] saw it placed before him, he said, 'This is from the favour of my Lord to test me whether I will be grateful or ungrateful. And whoever is grateful-his gratitude is

only for [the benefit of] himself. And whoever is ungrateful-then indeed, my Lord is Free of need and Generous...

Similarly al-Shatibi characterised *maslahah* as being the only principal objective of Shari'ah which is broad enough to comprise all measures that are beneficial to the people.²² In other words, based on the views advocated by the scholars it can be deduced that Shari'ah was revealed with certain objectives. It aims at providing benefit in its entirety to mankind and preventing harm (*jalb al-masalih wa dar al-mafasid*). In the context of Malaysia, there is no reason not to opt for Islam as the guiding principle on the public policy in commercial law. This can serve the purpose of certainty and Islam is not something being new to the people of the entire nation. Islam never shows bias and inequality among the people of Malaysia. Hence establishing Shari'ah as the structure of public policy is no doubt an excellent choice rather than leaving it entirely to the discretion of judges.

Shari'ah aims to protect five fundamental values (*al-daruriyyah al-khamsah*) to human life, *inter alia* protection of *al-Din*, protection of life (*al-nafs*), protection of dignity and lineage (*al-'ird*), protection of intellect (*al-'aql*), and protection of property (*al-mal*). The protection of all these values are guided by the principles which had been laid down in al-Qur'an and been further reaffirmed in the Sunnah of Prophet SAW. All the jurists need in the local context is to adjudicate based on these principles, adopting liberal method of interpretation, and elucidate the words to fulfil the original intent of the text. This will serve a more consistency in judgment and in the law. Malaysia will have a proper framework in regulating public policy in commercial law rather than leaving it to the creativity of judges which had been proven on numerous occasion of grave uncertainty. Quoting several examples will suffice.

Addressing the need on the protection of life, it has been regarded in Islam that life is essential and valuable to everyone. There is no difference between the life of rich and of the poor. Hence protecting life of everyone is equally important and obligatory.²³ This had been reaffirmed in *surah al-Isra* verse 33:

... And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly – We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law]...

In addition to that, Prophet SAW narrated:

... 'When two Muslims met with their sword (in fight with each other), both of them will be in the hell of fire, (the companion asked him), this (punishment should be) for the one who try to kill his challenger, what about the one who try to defend himself?' Prophet replied: "He was also trying to kill his opponent"...

Hence it is observed that the life of people is very important. Based on this principle it serves as a guideline that if an object or consideration of an agreement aims at taking the life of someone, thus such agreement is

unlawful and unenforceable. Such illegality may even extend to many branches of unlawful conduct such as abduction, kidnapping, human trafficking and etc. Similarly an agreement on restraint of trade or marriage is illegal because it will affect the livelihood of people. Hence such agreement is unenforceable as it injures the life of people. In a similar fashion as emphasised in criminal law, the conduct of taking one's life without lawful excuse does not justify or excuse him from criminal liability. Hence such agreement which contradicts Shari'ah principle is unenforceable and as such is against the interest of public. Such agreement threatens the safety of the people and affects the welfare of public overall. In the like manner, restraint to legal proceedings falls under this category. Prohibiting someone to take legal action against the accused may injure the life of people. A victim cannot take legal action to recover his loss or injury and this may then contribute to severing the life of the victim. For an example in the realm of the law of tort, restricting the victim from taking legal action against medical negligence cases may cause losses to the family member of the victims. The destruction does not stop at that instance. If the legal proceedings is forbidden to be taken against the tortfeasor, the free man may in future commit the similar act of injuring the life of other people. Comparing to the classification done by the common law on public policy, it has emerged that Shari'ah principles have covered beyond the scope of the agreement which is illegal to legislation, injurious to family life and interfering the machinery of justice. Therefore it is evident that, adopting Shari'ah principles as the guideline on public policy could bring benefit to mankind. The general principles laid down will cover any agreement which is against the welfare and interest of the public and not only those listed under the common law classification.

With regard to the protection of dignity or lineage, Islam had put great emphasis on the individual's right to privacy.²⁴ Jeopardising the dignity of others is not acceptable and will be punished. This is to ensure that the relationship between human will be in harmony and in the interest of public, it is better to have a safe and sound society than a society fills with anger and hatred. *Surah al-Nur* verse 4 and verse 23 illustrated such stern reminder.

... *Surah al-Nur* verse 4: And those who accuse chaste women and then do not produce four witnesses – lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient...

... *Surah al-Nur* verse 23: Indeed, those who [falsely] accuse chaste, unaware and believing women are cursed in this world and the Hereafter; and they will have a great punishment...

Hence it can be deduced that if an object of an agreement includes unlawful marriage such as the gay and lesbian marriage, or agreeing to have unlawful sexual relation (example adultery), such agreement is

definitely unlawful and unenforceable. It contradicts the Shari'ah principle which aims to protect the dignity and lineage of human and such agreement is against the interest of the public. On a similar remark, manipulation of women to become sexual or commercial objects is prohibited and such agreement is illegal. In the interest of public, Islam prohibits such conduct for the safety of the public. Consequently it reduces social problems regardless of the generation. A stable country requires an unshakeable foundation. The rise and fall of a nation lies on the unity and health of its people. Thus when the public is not healthy regardless of mental, physical or otherwise and this is often accompanied by havoc and hatred, it is impossible for a nation to develop progressively and to advance forward. Comparing to the common law classification on public policy, Shari'ah principle has again make a more authoritative status to protect the interest and welfare of the public at a larger scope. It covers not only agreement which is injurious to good governance, it also extends beyond any wild imagination of human being which they might have such as those aforesaid.

Protection of intellect is the third value which seeks to be protected by Shari'ah. Intellect is a great gift from Allah SWT to mankind. Substance which will affect the intellectual of mankind such as gambling, consumption of drugs and liquor are among those which are strictly prohibited in Islam. Severe punishment will be imposed for those who transgress the limit. *Surah al-Maidah* verse 90 provides that:

... O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful...

Similarly in the Sunnah of Prophet narrated by Muslim:

... Anas bin Malik reported that Allah's Apostle SAW gave a beating with palm branches and shoes, and that Abu Bakr gave forty lashes. When Umar (became the Commander of the Faithful) and the people went near to pastures and towns, he said (to the Companions of the Holy Prophet). What is your opinion about lashing for drinking? Thereupon al-Rahman bin Auf said: My opinion is that you fix it as the mildest punishment. Then Umar inflicted eighty stripes...

Such prohibition serves the interest of public welfare. If the consumption of liquor were to be allowed, street fights, drug-rape, drunk driving will loom largely in a society and this will distort the harmony and safety of the people. Similarly selling drugs, vaping, smoking which affects the intellect or the health of people are prohibited because it will increase social problems. Hence if the consideration of agreements includes such prohibitions, then it should be categorised as against the public policy. Such agreement cannot be enforced and is unlawful.

Lastly, Shari'ah seeks to protect the property of mankind. Acquiring property is one of the necessities of

mankind and no one should transgress the property of others without lawful contract or legitimate reasons.²⁵ Al-Qur'an has provided all the commandments forbidding human being from doing such prohibited conduct. Among them are:

... *Surah al-Baqarah* verse 188: And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful]...

... *Surah al-Nisa* verse 10: Indeed, those who devour the property of orphans unjustly are only consuming into their bellies fire. And they will be burned in a Blaze...

... *Surah al-Nisa* verse 161: And [for] their taking of usury while they had been forbidden from it, and their consuming of the people's wealth unjustly. And we have prepared for the disbelievers among them a painful punishment...

... *Surah al-Maidah* verse 38: [As for] the thief, the male and the female, amputate their hands in recompense for what they committed as a deterrent [punishment] from Allah. And Allah is Exalted in Might and Wise...

Hence when an agreement containing fraud, coercion, undue influence or misrepresentation, such agreement is illegal and unenforceable as it is against the interest of public. One should not use an unlawful manner to acquire the property of another. Similarly, agreement of bribing, breaking the trust on property, stealing, taking usury (*riba*) and other similar means are prohibited. Such agreements are unlawful as it brings harm to the welfare of the public. Integrity of the nation will be jeopardised and the people will not practice good faith in business dealings. Corruption to obtain tender, bribery to obtain compulsory license will loom large in the society. Such situation then is against the interest of the public and thus cannot be permitted. In comparing with the common law classification on public policy, this falls under the category of agreements which are economically against the interest of public. Unfortunately in many countries, the policy of taking usury in an agreement is not prohibited as strictly as those under Shari'ah principle. Such agreement in Islamic context cannot be enforced because Islam emphasises on earning through handwork. Allah has cursed the one who charges *riba*, the one who pays it, the one who witness it, and the one who records the transaction (Muslim). Again in a similar manner it appears that Islam has covered a wider context to safeguard the interest of public. Any agreement which runs counter to any of these principles is not enforceable. It appears that *maqasid* al-Shari'ah as revealed in the Holy Book of al-Qur'an and Sunnah of Prophet SAW, provides a better overall safeguards which includes a larger circle compared to the common law classification on public policy. It is hence reasonable for Malaysia for opting Shari'ah principles as the framework of public policy in regulating the law of contract. Adopting a different complete structure such as the suggestion above not only caters for certainty in the Malaysian law, it will further

protects the public in commercial law in a larger context, covering beyond the edge of the ability of human to commit an insidious undertaking.

As a concluding remark, although the common law classification on public policy has laid down certain principles, yet it is not an exhaustive one. No piece of document has achieved such status except the Holy Book of al-Qur'an. Al-Qur'an has laid down all the general principles in it so as to be applicable in any era and in any succeeding generation. Allah SWT has bestowed mankind the greatest gift that sets us apart from other creatures, *viz.* intellect. Such precious gift allowed human to use these injunctions as revealed one thousand and four hundred years ago to protect the interest of people and welfare of the public. The task which falls upon human is to apply such guiding principles in their respective era. Perhaps adopting such framework of public policy in the law of contract brings benefit rather than harm, ensure certainties in the law and elevates justice to people. Hence any agreement which runs counter to the *maqasid* al-Shari'ah is not allowed (*haram*) for the purpose of safeguarding the interest of people. It must be borne in mind that Shari'ah does not brings more harm than benefit, or else it will then be disastrous.

CONCLUSION

As it stands, Malaysia still does not have a proper framework on what object or consideration of an agreement which are opposed to public policy. Based on the case laws, it is evident that the incorporation of principles from foreign jurisdiction frequently occurs and this has posed serious questions on the sense national pride and the status of Malaysian law. However it is to be borne in mind that Malaysia is manifesting oneself towards a holistic hub for Islamic banking and finance, and hence embracing Shari'ah principle as the guideline in regulating public policy in commercial law will be a meaningful starting point. Such approach will ensure consistencies in the law, and it further reduces the discretion of the judges to a reasonable boundary. Malaysia will therefore, not only be proud of being in possession of a proper and established structure on regulating public policy in the law of contract, yet it proved that Malaysia is no longer living under the penumbra of external influence.

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NOTES

- ¹ Kho Feng Ming, Sakina Shaik Ahmad Yusoff, Public Policy in Contracts: The Legal Inconsistencies in Malaysia, (KLiCELS 7-070), paper presented at The 7th Kuala Lumpur International Communication, Education, Language & Social Science Conference, The Role of Social Sciences in the Harmonisation of Diverse Communities, 22nd-23rd July 2017, Hotel Bangi-Putrajaya, Bangi, Selangor, Malaysia.
- ² [1964] MLJ 291.
- ³ Peel, Edwin (Ed), *Treitel: the Law of Contract*, 14th edition, Sweet and Maxwell, London, 2015, p 550; and *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462.
- ⁴ [1976] 2 MLJ 253.
- ⁵ Sinnadurai, Visu, *Law of Contract*, 4th edition. LexisNexis, Petaling Jaya, 2011, p. 656.
- ⁶ *Nagle v Feilden and Others* [1966] 1 All ER 689 at 696.
- ⁷ Kho Feng Ming, Sakina Shaik Ahmad Yusoff, Public Policy in Contracts: The Legal Inconsistencies in Malaysia, (KLiCELS 7-070), paper presented at The 7th Kuala Lumpur International Communication, Education, Language & Social Science Conference, The Role of Social Sciences in the Harmonisation of Diverse Communities, 22nd-23rd July 2017, Hotel Bangi-Putrajaya, Bangi, Selangor, Malaysia, p. 352.
- ⁸ The cases demonstrating the wider view approach on public policy in Malaysia can be seen in the cases as followed: *Koid Hong Keat v Rhina Bhar* [1989] 3 MLJ 238 (agreement amounted to touting under the Legal Profession Act 1976 (Act 166)); *Fusing Construction Sdn Bhd v EON Finance Bhd* [2000] 3 MLJ 95 (a transaction which was intended to deceive Bank Negara Malaysia); *Lim Yoke Kian v Castle Development Sdn Bhd* [2000] 4 MLJ 443 (a scheme whereby the shareholders agreed to defer the winding up of the company so as to minimise the payment of income tax); *Thong Foo Ching v Shigenori Ono* [1998] 4 MLJ 585 (an agreement to circumvent the provisions of the Stamp Act 1949 (Act 378) and the Real Property Gains Tax Act 1976); *PT International Nickel Indonesia v General Trading Corp (M) Sdn Bhd* [1978] 1 MLJ 1 (a contract between a briber and recipient of a bribe is an illegal contract); and *David Hey v New Kok Ann Realty Sdn Bhd* [1985] 1 MLJ 167 (non-compliance of guideline).
- ⁹ Kho Feng Ming, Sakina Shaik Ahmad Yusoff, Public Policy in Contracts: The Legal Inconsistencies in Malaysia, (KLiCELS 7-070), paper presented at The 7th Kuala Lumpur International Communication, Education, Language & Social Science Conference, The Role of Social Sciences in the Harmonisation of Diverse Communities, 22nd-23rd July 2017, Hotel Bangi-Putrajaya, Bangi, Selangor, Malaysia, pp. 355-356.
- ¹⁰ Abdul Hamid Mohamad, 'Review of the Contracts Act 1950: Why and What,' (2014) 1 *Current Law Review* 1, p. 4; and Farid Sufian Shuaib, 'Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods,' (2009) 13 *JUUM* 158.
- ¹¹ Abdul Hamid Mohamad, 'Review of the Contracts Act 1950: Why and What,' (2014) 1 *Current Law Review* 1, p. 5.
- ¹² *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291.
- ¹³ ICC Second Preliminary Award of January 14, 1970; and *Cave v Mills* (1862) 7 Hurlstone & Norman 913, (1862) 158 ER 740.
- ¹⁴ Ruzian Markom, Norilawati Ismail, 'The Development of Islamic Banking Laws in Malaysia: An Overview,' (2009) 13 *JUUM* 191.
- ¹⁵ Mohammad Akram Laldin, *Introduction to Shariah & Islamic Jurisprudence*, CERT Publications, Kuala Lumpur, 2006, p. 1.
- ¹⁶ Mohammad Akram Laldin, *Introduction to Shariah & Islamic Jurisprudence*, p. 1.
- ¹⁷ Kho Feng Ming, *Incorporating "Reasonableness" Into Fundamental Liberties of the Federal Constitution*, Seminar Hak Asasi Manusia Kebangsaan 2016: Teori, Realiti dan Penghayatan Semula, Faculty of Law, Universiti Kebangsaan Malaysia, Bangi, 2016, p. 125.

- ¹⁸ Mohammad Akram Laldin, *Introduction to Shariah & Islamic Jurisprudence*, p. 14.
- ¹⁹ Abdul Hamid Mohamad, 'Review of the Contracts Act 1950: Why and What,' (2014) 1 *Current Law Review* 1, p. 7.
- ²⁰ Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin*, Maktabah al-Kilani, Cairo, 1969, p. 216.
- ²¹ Mohammad Akram Laldin, *Introduction to Shariah & Islamic Jurisprudence*, p. 14.
- ²² Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (Usul al-Fiqh)*, Islamic Research Institute Press, Islamabad, 2000, p. 121.
- ²³ Mohammad Akram Laldin, *Introduction to Shariah & Islamic Jurisprudence*, p. 14.
- ²⁴ Mohammad Akram Laldin, *Introduction to Shariah & Islamic Jurisprudence*, p. 23.
- ²⁵ Mohammad Akram Laldin, *Introduction to Shariah & Islamic Jurisprudence*, p. 28.

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