THE INDIAN CONTRACT ACT: ITS WANDERLUST AND WARMER CLIMES

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I.

LIKE ULYSSES of old, the Indian Contract Act, 1872 has had an adventurous, sea-faring career during the last hundred years. The *wanderlust* of this century-old enactment took it across the Bay of Bengal to Burma and Malaysia; it also steamed its way, breaking through sun-lit ripples of the Arabian Sea and the Indian Ocean, to East Africa. The emigrant enactment found a local habitation in Kenya, Tanganyika and Uganda. In the Malay States it found a new name too.

It may be intriguing to follow the adventures of this centenarian in alien lands. This survey of its activities does not deal with the accretions the enactment has achieved through judicial interpretation, but its vicissitudes are mentioned. How far it has been weaned away from the apron-strings of the English common law and what filial relation it still retains are dealt with in some detail.

II.

The law of contractual obligations in India, Pakistan, Bangladesh and Burma is governed by the Indian Contract Act, 1872. In nine states of the Federation of Malaysia, the Act has been adapted for application with no substantial modification, while in the other four states the principles of the English common law continue to be applied.[1] In Tanganyika, under the Indian Acts (Application) Ordinance (Cap. 2), the Act was applied until 1961 when it was replaced by the Law of Contract Ordinance which differed in certain details only from the Indian Act.

The impact of the Indian Contract Act, like that of the *Dharmasastra* of old, has been great and widespread. Unlike the *Dharmasastra* which appears to have been the result of an attempt at consolidating the customs of the people, the Indian Contract Act was a piece of ordinary legislation, deliberately planned and formally passed. It purported to respect certain sentiments of the Indian people; but, by and large, it

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1. Singapore, formerly one of the component parts of Malaysia, follows the English law of contract.

enacted the principles of English common law. Before the passing of the Act, the British-Indian courts decided matters of contract by the law and customs of Hindus when the parties were Hindus, by those of Muslims when the parties were Muslims, and by those of the defendant in cases where one of the parties was a Muslim and the other a Hindu. The Contract Act extends to the whole of India and applies to all persons, regardless of religious affiliations or lack of them.

The preamble of the Act states that "it is expedient to define and amend certain parts of the law relating to contracts. This has led courts and commentators to point out that the Act does not purport to be a complete code dealing with the law of contracts and that it does not deal exhaustively with any particular sub-division of the law relating to the subject. As the Act is not considered exhaustive, it would be possible for the courts to apply, subject to the provisions of the Constitution, the Hindu law of contract to Hindus and the Islamic law of contract to Muslims in cases where no provision can be found in the Act or in any other enactment relating to matters of contract.

The Contracts (Malay States) Ordinance, 1950 which applies to nine states of the Federation of Malaysia, namely, Johore, Kedah, Kelantan, Negri Sembilan, Pahang, Perak, Perils, Selangor and Trengganu, does not contain a similar preamble which could enable one to conclude that the enactment is not exhaustive.[2] According to its preamble, the Contract Ordinance is one intended to unify within the Malay States the law relating to contracts. The expression, "the law relating to contracts" may be interpreted to mean all law relating to contracts. As the purpose is unification of law, the expression may be interpreted to mean all the law relating to contracts which existed in the Malay States at the date of the enactment. Whatever be the interpretation that is given, it is generally assumed that the Ordinance, like its Indian counterpart, is not an exhaustive code; this is mainly because the Ordinance plays the sedulous ape to the Indian enactment and particularly because English judges and commentators have found that if the Ordinance is accepted as a complete code, there would be obvious gaps in the law, according to what they understood by the law of contractual obligations. For instance, they would point out that there is no provision in the Ordinance, just as there is no provision in the Indian Act, to the effect that the parties to a contract should have the intention to create legal relations; though it is doubtful whether such an intention, especially if it is taken to mean contemplation of litigation, is a necessary element in a contract.[3]

2. See H.G. Calvert, "Contract" in L.A. Sheridan (ed.) *Malaya and Singapore* 276 (London, 1961).

3. "The common law does not require any positive intention to create a legal obligation as an element of contract". Samuel Williston, 1 *A Treatise on the Law of Contracts* s. 21. (3rd ed. 1957). Judge Learned Hand observed :

> A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by the mere force of law

We have already noticed that the Contract Act was based on the principles of the English common law. There are, however, some differences between the principles enunciated in the enactment and those found in the common law. A few of them are due to the fact that when the provisions of the Act have, in general, remained unaltered, the principles of the common law have been modified through the years. A few others may be traced to the consideration by the legislators of the differences in social conditions between England and India. To cite one instance : while consideration is regarded as an essential element in a legally binding agreement, there are circumstances where consideration may be dispensed with under the provisions of the Act. A contract under seal is not regarded as valid in India if unsupported by consideration, but a contract in writing and registered is valid without consideration provided it has been made out of natural love and affection.[4] In this provision there is probably a recognition of the well-knit family relationship which still exists in most of the eastern countries including India and Malaysia, though threatening to disintegrate under the impact of western concepts of family life.

It may also be noted that unlike in English law, consideration under the Contract Act may move from the "promisee or any other person."[5] But the courts in India have laid down the rule, following English decisions, that only the promisee can enforce the contract.[6] The provision that past consideration given at the request of the promisor is good consideration appears to be in accord with judicial opinions expressed in England in the seventeenth century.[7] Consideration can be dispensed with in cases where the promise is made to compensate "a person who has already voluntarily done something for the promisor or something the promisor was legally compellable to do".[8]

Another significant departure from English law is seen in the matter of minors' contracts. Section 11 of the Act which provides that "every person is competent to contract who is of the age of majority according to the law to which he is subject", was interpreted by the Indian High Courts in a manner which would make the provision identical with the common law rule that an infant's contract is generally not void, but voidable; but the Judicial Committee gave the section a literal interpretation and held that a minor's contract is void, observing that it was probably intended that the rule of Hindu law on the subject should prevail over the common

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to certain acts of the parties, usually words, which ordinarily accompany and represent a well-known intent". In *Hotchkiss* v. *National City Bank* 200 Fed. 287, 293, quoted by R. Tuck, Intent to Contract and Mutuality of Assent 21 *Can. Bar Rev.* 123 (1943).

4. S. 25(1) of the Indian Contract Act (hereinafter cited as the *Act*); s. 26(a) of the Contracts (Malay States) Ordinance; 1950, (hereinafter referred to as the *Ordinance*).

5. S. 2(d).

6. *Krishna Lal* v. *Pramila Bala*, 114 I.C. 658.

7. See *Lampleigh* v. *Brathwait* (1615) Hob. 105.

8. S. 25(2) of the *Act*; s. 26(b) of the *Ordinance*.

law doctrine.[9] This is one of the many instances in which colonial judges tend to be more English than their counterparts in England.

Under the Act, if a person incapable of entering into a contract is supplied with necessaries, the person who supplies them can be reimbursed from the property of the incapable person,[10] who, however, does not incur any personal liability.

There are certain differences between the Act and the English law in relation to the communication of the acceptance of an offer and the communication of a revocation. Under the Act, the communication of acceptance is complete as against the acceptor only when it comes to the knowledge of the proposer.[11] Similarly the communication of revocation is complete as against the person to whom it is made when it comes to his knowledge.[12] Acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor.[13] This appears to be identical with the Scots law on the subject. Referring to *Dunmore (Countess)* v. *Alexander*,[14] Cheshire and Fifoot[15] comment that to adopt the Scots solution would seem to give the offeree the best of both worlds. They point out that by posting his acceptance, he would be able either to hold the offeror to it or to repent of his bargain and recall it by telegram or telephone. It is true that the acceptor has an advantage over the proposer in that he can revoke his acceptance before it reaches the proposer, while the proposer can revoke his offer only up to the time when the acceptor posts his letter of acceptance. But does the proposer suffer any disadvantage on account of this provision ? In the case of the acceptor, if the offer is allowed to be revoked after his acceptance, he is likely to be disappointed; while in the case of the proposer, what he receives first is the revocation of the acceptance, which is tantamount to his learning that the offer has not been accepted. That it is revocation of the acceptance and not a rejection of the offer that he learns about does not make the slightest difference in his position. If another person happens to have the benefit of both the worlds without my suffering any hardship on that account, am I supposed to object to his good luck ? Contractual relations need not be inhuman relations.

The Act, accepting a policy of *laissez-faire*, is very restrictive of restrictions on the exercise of a lawful profession, trade or business. Section 27 of the Indian Act which appears to have been copied from the draft Civil Code of New York may have been adopted on the assumption that "trade in India is in its infancy".[16] The legislature, therefore, "may

9. *Mohori Bibee* v. *Dhurmadas Ghose*, (1903) 30 I.A. 114.
10. S. 68 of the *Act*; s. 69 of the *Ordinance*.
11. S. 4 of the *Act*; s. 4(2)(b) of the *Ordinance*.
12. S. 4 of the *Act*; s. 4(3)(b) of the *Ordinance*.
13. S. 5 of the *Act*; s. 5(1) of the *Ordinance*.
14. (1830) 9 Sh. (Ct. of Sess.) 190.
15. Cheshire and Fifoot, *The Law of Contract* 44 (6th ed., 1964).
16. Kindersley, J., in *Oaker & Co.* v. *Jackson*, (1876) 1 Mad. 134, at 145.

have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained".[17] It is clear that many of the contractual restrictions on trade which would be considered valid under English law would not be so regarded under the statute except those reasonable restrictions which are specifically exempted.[18]

Section 42[19] of the Act providing for the devolution of joint contractual liabilities on the survivors and the representatives of the deceased when no contrary intention is expressed in the contract, is clearly at variance with the English common law rule by which the liability devolves on the survivors only. There is a similar provision for the devolution of joint rights.[20]

In section 65[21] of the Act there is an equitable provision obliging the person who has received any advantage under a void agreement or a contract which has become void to restore it or to make compensation for it. Here the statute steps in to intervene where the common law inclines to prescribe; 'let the loss lie where it falls'. One would recall in this connection what the Judicial Committee observed about the general nature of the Contract Act. Their Lordships said that they did

> not see any improbability in the Indian Legislature having taken the lead in a legal reform. Such a reform may have been long recognised as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country where the calls for legislative action are so much more numerous.[22]

Section 56[23] of the Act provides for compensation for loss sustained through the non-performance of an act which the party who promised the performance knew to be impossible or unlawful, while the other did not.

In England the rescission or alteration of a contract has to be effected by means of a new agreement which should in general satisfy all the requirements of a contract. In India and the Malay States every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him.[24]

Another provision lays down that a person who is interested in the payment of money which another is bound by law to pay, and who there-

17. *Ibid.*

18. S. 27 of the *Act*; s. 28 of the *Ordinance*. It may be noted that in India two out of the three exceptions contained in the section as enacted in 1872 have been repealed; in the Malay States the *Ordinance* retains all the three exceptions.

19. S. 43 of the *Ordinance*.

20. S. 45 of the Act; s. 46 of the *Ordinance*.

21. S. 66 of the *Ordinance*.

22. *Ramdas* v. *Amarchand & Co.*, (1916) 43 I.A. 164 at 170.

23. S. 57(3) of the *Ordinance*.

24. S. 63 of the *Act*; s. 64 of the *Ordinance*.

fore, pays it, is entiled to be reimbursed by the other.[25] This appears to be much wider in its scope than is contemplated by the common law rule given in the authoritative example by A.L. Smith, L.J. :

> If A is compellable to pay B damages which C is also compellable to pay to B, then A, having been compelled to pay B, can maintain an action against C for money so paid, for the circumstances raise an implied request by C to A to make such payment in his case. In other words, A can call upon C to indemnify him.[26]

The terms of another provision appear to be even wider in its general scope when compared with English law. Under section 70[27] of the Act a person who enjoys the benefit of a non-gratuitous act done lawfully is bound to make compensation for it. While English law would not oblige a person to pay for a benefit which he had no option of refusing, this provision seems to approximate to the rule in many civil law countries where benefits given under similar circumstances have to be compensated for. British Indian judges who incline to approximate the rule to common law principles rather than to civil law concepts assumed that the section ought not to be so read as to justify the officious interference of one man in the affairs or property of another or to impose obligations in respect of services which the persons sought to be charged did not wish to have rendered.[28] When men do not love their neighbours like themselves, but would be prepared to do something to benefit another with an eye for profit, a rule such as this providing for compensation might come in handy to help those whose interests may otherwise be neglected, if no reasonable expectation of gratuity can be entertained in going to their help.

Section 74[29] of the Act makes clear provision for compensation in case of breach of contract where liquidated damages or penalty has been stipulated. The party complaining of the breach is entitled to receive a reasonable compensation not exceeding the amount mentioned as damages or penalty.

These and other variations from the common law seem to have been induced by the desire to amend certain rules of the common law or by the feeling that circumstances in India necessitated such departure. These variations appear to have been considered relevant to societies in East Africa and in parts of the Malay Peninsula.

III.

But recently Kenya and Uganda, after a local repeal of the applied

25. S. 69 of the *Act*; s. 70 of the *Ordinance*.

26. *Bonner* v. *Tottenham etc. Building Society*, (1899) 1 Q.B. 161 at 167.

27. S. 71 of the *Ordinance*.

28. *Nathu* v. *Balwantrao*, (1903) 27 Bom. 390 at 393. See also *Suraj* v. *Hashmi Begum*, (1918) 40 All. 555.

29. S. 75 of the *Ordinance*.

Indian Contract Act, adopted the English law relating to contract. In Tanzania when the (Tanganyika) Law of Contract Ordinance, 1961 replaced the applied Indian Contract Act, it altered the terms of the Indian statute

> in respect of those provisions only which had proved uncertain in meaning, unnecessary for the circumstances of Tanganyika or unduly restrictive in the light of those circumstances, or in conflict with other Tanganyika law.[30]

The Tanganyika Ordinance, like the Indian Act, purports to "define and amend certain parts" of the law relating to contracts. It would therefore be regarded as not an exhaustive code with the result that judges would incline to have recourse to English common law whenever they consider that there is no provision made in the Ordinance in regard to a particular matter.

The changes effected by the Law of Contract Ordinance tended generally to accept the rules of English law in relation to the particular subject. Thus section 23(2) which purports to indicate the circumstances in which consideration given is recoverable under an illegal contract is based on English law. Section 27 adopts the rule of English law according to which agreements in restraint of trade are void except when the restraint is reasonable, in place of the provision in the replaced Indian Act which declares all such agreements void except certain agreements specifically exempted from the operation of the provision. Section 65 has a proviso based on the (English) Law Reform (Frustrated Contracts) Act, 1943, which provides for compensating parties to a contract frustrated through no fault of their own. Similarly a proviso is added to section 70 incorporating a rule of English law. The proviso states that no compensation shall be made in any case in which the person sought to be charged had no opportunity of accepting or rejecting the benefit.

IV.

The adoption of the general law of England relating to contracts by Kenya and Uganda and the adoption of a few rules of English law, in preference to Indian law, in the Tanganyika Ordinance, ought not to prejudice one against the Indian statute, as amended, which the Indian Parliament has not as yet found unsuitable to Indian conditions. The Statement of Objects and Reasons for the Act published in 1867 had emphasised the fact that the draft of the Act prepared under the superintendence of the Indian Law Commissioners consisted of the English Law of Contract, much simplified, and altered in some particulars so as to accommodate it to the circumstances of India. The Commissioners themselves

30. J.S.R. Cole and H.N. Denison, *Tanganyika* 177 (London, 1964).

had indicated:

> It may be said of those proposed modifications of English Law, that while all, or nearly all of them have commended themselves to the approval of enlightened lawyers, not a few are being gradually carried out in England without the aid of the Legislature, through the direction given of late years to the current of judicial decisions.[31]

Thus in 1867 the draft was regarded as being in advance of English law in certain particulars. While keeping the modifications necessitated by the circumstances of the country for which the Act was passed or adopted, it would be worthwhile to clarify controversial points in the provisions or to add to the provisions, if found necessary, as has been done in Tanganyika. But giving up the Act in despair, because of a few ambiguities for which only the draftsman was probably responsible and accepting English law in toto would be not only a retrograde step, but also a step unsuited to the conditions of the countries in which that Act is in force; for however much some westernised persons might desire the contrary, the fact remains that neither India nor Malaysia is England, and the social institutions and conditions of the former are very different from those of the latter. Emerald isles set in the silver seas are not all the same; while Nusantara is washed by sun-lit blue waves, the land lying north of the English Channel is lapped by fog-crested ripples. This difference is fundamental and should not be overlooked in the creation or regulation of social or legal institutions which impinge upon the circumstances of the particular countries concerned.

One may quote in this connection the statement of objectives in regard to the law of contract which was endorsed by the London Conference on the Future of Law in Africa:

> There should be a general law of contract.. .uniformly applicable to persons of all communities, races or creeds, which should follow the general principles of the English law of contract but without some of the refinements and technicalities peculiar to it, and with such modifications or additions as would incorporate those rules of native law and custom which it was desirable to recognise as part of the general law....[32]

This is what has been attempted to be done to a large extent by the Indian Contract Act and the Contract (Malay States) Ordinance and to an even larger extent by the Tanganyika Contract Ordinance of 1961.

Lord Macaulay said in 1833 :

31. Quoted in Sanjiva Rao, *Indian Contract Act* 4 (3rd ed., 1950).
32. A.N. Allott (ed.), *The Future of Law in Africa* 40 (London, 1960).

> ...[W]e do not mean that all the people [of India] should live under the same law : far from it...we know how desirable that object is; but we also know that it is unattainable.[33]

If it is unattainable to the people of India, because of differences in religion, caste or place of birth, could one assume that it would be attained by the peoples of the British Commonwealth where differences not only of religion and caste, but also of nation, and race exist? The English common law, like the Queen of England, may serve as a symbol of unity in the Commonwealth, but it would be unwise to insist on a uniformity in legal rules, when by the force of circumstances, there would be diversity. Macaulay said :

> Our principle is simply this—uniformity where you can have it—diversity where you must have it—but in all cases certainty.[34]

Certainty of law is an illusion roundly spoken of by lawyers, but never believed in.[35] In most instances where a lower court's decision is reversed by an appellate tribunal this certainty tends to be tenuous, if not uncertain. India which entertains a general concept of illusion, of a boundless *maya*, may be inclined to be disillusioned in relation to this illusion. Statutory provisions may make law appear more certain than when reliance is placed for ascertainment of law on judges quoting one another's quotations. Infallibility is an attribute of the gods, not of the lords.

It is said that the life of the law has not been logic, but experience.[36]

> Yet all experience is an arch wherethro'
> Gleams the untravell'd world, whose margin recedes
> For ever and for ever...[37]

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33. Speech in the East India Company Debate, July 10, 1833.

34. *Ibid.*

35. John C.H. Wu has remarked : "...can any American jurist say confidently that there is no uncertainty as to the laws of the United States of America or any other country ? The multitude of sensible dissenting opinions, the existence of the Restatement Institute, the need for the Commission on the Enforcement of Law, the occasional miscarriage of justice even in American courts, ought to make lawyers more thoughtful and less dogmatic about the illusive certainty of law." *The Art of Law* 80 (Shanghai, 1963).

36. O.W. Holmes, *The Common Law* (Mark De Wolfe, ed. 1963).

37. Tennyson, *Ulysses.*