PUBLIC POLICY UNDER THE CONTRACTS ACT 1950

Introduction

The Malaysian courts have, in a number of case considered the question of whether certain agreements were void as being opposed to public policy. In one of the earliest cases reported, *Engku Leh v. Che Wok*,[1] a guarantee, the effect of which was to stifle a criminal prosecution, was held to be void by the Court of Appeal as being contrary to public policy. In *Yap Chee Meng* v. *Aji-no-moto (Malaysia) Berhad*,[2] Harun J. in the High Court refused to set aside a settlement negotiated by a solicitor on behalf of his client on the ground of public policy. His Lordship was of the view that this would open 'the floodgates of litigation'. More recently, the Federal Court in *Malaysia National Insurance Sdn. Bhd.* v. *Abdul Aziz bin Mohamed Daus*[3] held that even though the assured did not have a valid driving licence at the time of the accident, this fact did not invalidate the insurance policy as being against public policy. Raja Azlan Shah F.J. delivering the judgement of the court held that in motor manslaughter cases, public policy does not prevent the enforcement of an indemnity. His Lordship pointed out that:

> The reason behind it seems to be that the act to be indemnified is one intended by law that people should insure against. The logical test is whether the person seeking indemnity is guilty of a deliberate, intended and unlawful violence or threats of violence. Road traffic cases, e.g. manslaughter on the road by gross negligent driving and the like are not wilful and culpable crimes which make them contrary to public policy to allow a person to be indemnified. In the circumstances, having carefully reviewed the question of public policy, I do not think it applies in this case.[4]

[1] [1948–1949] M.L.J. Supp. 8.

[2] [1978] 2 M.L.J. 249.

[3] [1979] 2 M.L.J. 29.

[4] At page 33.

It was also held by the High Court in the case of *Ho Kok Cheong Sdn. Bhd. & Anor,* v. *Lim Tay Tiong & Ors.*[5] that non-compliance with the 'Guildelines for the Regulation of Acquisition of Assets, Mergers and Take-overs' issued by the Government was not an act opposed to public policy. Wan Hamzah J. observed:

> The guidelines reflect the Government's political policy, but Government's political policy is not public policy.[6]

An agreement entered into by certain members of a political party and their party where it was provided that

> in the event of our resigning or for any other reason ceasing to be a member of a party, we would pay $15,000 (for a state assemblyman) and $20,000 (for a Member of Parliament) as liquidated damages,

was held by the Court in Penang not to be against public policy. In this case, an attempt was made by a major opposition party, the Democratic Action Party (DAP), to sue for compensation on this agreement certain of its former members who had defected to other political parties after being sucessful in the elections. The Court, held that the DAP contract did not belong to any established categories of public policy and therefore held the agreement not to be void against public policy.[7] Another recent case dealing with contracts made by members of a political party and the party is *Sinyium anak Mutit* v. *Datuk Ong Kee Hui.*[8] The facts of the case are as follows: the plaintiff, a member of the Sarawak United Peoples Party (SUPP), sued the defendant, the President of the Party in his personal capacity and as an officer to the Party by virtue of section 9 of the Societies Act, 1966. The plaintiff claimed, *inter alia,* for money received by SUPP on his behalf and $42,750 as special damages. The plaintiff became a member of SUPP in 1967 and in 1969 was nominated as a Parliamentary candidate on a SUPP ticket. The plaintiff had to sign a document undertaking that on being elected as a Member of Parliament he

[5] [1979]2 M.L.J. 224.

[6] At page 226.

[7] Unreported, but see *Asiaweek,* August 21 1981.

[8] [1982] 1 M.L.J. 36

would donate all the allowances paid to him as a Member to the Party. The Party would then pay him a monthly allowance of $300. He also signed a letter resigning as a Member of Parliament. It was agreed between the plaintiff and the Party that this letter of resignation would be tendered to the Speaker of Parliament in the event the plaintiff resigned as a member of the Party. The plaintiff also signed a promisory note for the sum of $15,000 which was for expenses incurred by the Party for the plaintiff's election campaign.

The plaintiff resigned as a member of the Party and the defendant forwarded the letter of resignation signed by the plaintiff to the Speaker.

The High Court in Borneo at Kuching held that the agreement under which the Party could tender the letter of resignation of the plaintiff to the Speaker when the plaintiff resigned as a member of Parliament was against public policy. The Court held that:

> . . . such a contract is against public policy and liberty of a Member of the Dewan Rakyat. It is against public policy for a Member of Parliament or State Legislative Assembly to be made obliged by any political party or any other body of which he is a member to resign from either the Dewan Rakyat or Council Negeri (State Legislative Assembly) when the Member resigns from the Party. To recognise such an arrangement would amount to a degradation of the Honourable House which is the fountain of democracy in our country.[9]

The High Court also held that the plaintiff was bound to repay the Party the $15,000 which he had agreed to reimburse for the expenses incurred in the election campaign. The Court held:

> The submission of the letter of resignation earlier signed by the Plaintiff to the Speaker, Dewan Rakyat, was therefore a wrongful act on the part of the Defendant and therefore the Plaintiff is entitled to damages. The Plaintiff had lost a sum $41,325.80 which he would have received until the dissolution of the Dewan Rakyat. The Plaintiff however is obliged

[9] per Dato' Haji Wan Mohamed J.

> to pay back the $15,000.00 which he had partly honoured before his resignation.[10]

Perhaps, the most important case on public policy in Malaysia is the decision of the Federal Court in *Theresa Chong* v. *Kim Khoon & Co.*[11] This is the only reported case where the scope of public policy under the Contracts Act 1950 was considered in detail by any Malaysian Court. The Court in this case observed that the Courts in Malaysia are bound by the traditional heads of public policy as understood by the Common law and therefore could not invent any new heads even if a situation arises which necessitates the invention.

The purpose of this article is to make a detailed study of the scope of public policy under the Contracts Act and to consider whether the restrictive view adopted by the Federal Court in *Theresa Chong*'s case is desirable.

The Contracts Act provides that all agreements which are immoral or opposed to public policy are void. Section 24 provides as follows:-

> The consideration or object of an agreement is lawful . . . . unless the Court regards it as immoral or opposed to public policy.

The section further provides that in such cases, the agreement is unlawful and void.

There is no definition of the scope of public policy under the Contracts Act. The Malaysian Courts have therefore resorted to the common law in deciding whether an agreement is opposed to public policy and therefore void under section 24 of the Act.

2. What is Public Policy?

The important question which then arises is, what does public policy really mean? A number of judges and learned writers have attempted to define this concept, whilst,

> some judges have thought it to be indefinable, the others have given descriptions not exactly reconcilable, and others again have made inconsistent statements in the self-same decision. This uncertainty is no surprise because the topic is so elusive.[12]

[10] *Ibid.*

[11] [1976]2 M.L.J. 253.

[12] Winfield, *Public Policy in the English Common Law*, 42 HLR 76, 92.

Whatever the definition, in each case the effect of the doctrine under the common law and the Contracts Act has been to nullify agreements which, whilst satisfying legal requirements have certain other adverse effects on the community at large. In other words, it is the doctrine applied by the courts to set aside normal legal relationships which under certain circumstances would frustrate the public interest. One can, however, take the broader view that 'every legal doctrine is the expression of public policy'.[13] But for the purpose of this article, the narrower view would be adhered to.

This then brings us to the next question as to how one determines whether any public interest is adversely affected. Surely, there would only be a few circumstances whereby a certain relationship entered into between two individuals would affect the public adversely. In most cases, it would only be sectional. Would this be sufficient to invalidate an agreement on the grounds of public policy? Furthermore,

> many questions of public policy are profoundly uninteresting to the whole community. What does it matter to the ordinary citizen whether matrimonial agencies flourish or not . . . or whether a profiteer is a little too unblushing in his methods of procuring a title . . . . .?[14]

This then leads to a paradoxical situation: should the sectional or communal interest prevail? The courts in such cases will have to attempt to strike a compromise between the communal interest and the sectional interest: if the sectional interest affects the community, it should be struck down. However, the caution of Jessel M.R. must always be borne in mind:

> Public policy must be, to a certain extent a matter of individual opinion, because what one man, or one Judge, and perhaps I ought to say one woman also in this case, might think against public policy, another might think altogether excellent public policy. Consequently, it is impossible to say

[13] 67 HLR 1295. See also Wright, *Public Policy, Legal Essays and Addresses*, (1939) page 68.

[14] Winfield, supra at page 92.

what the opinion of a man or a Judge might be as to what public policy is.[15]

Therefore whenever the courts invoke the doctrine of public policy to limit or restrict the freedom to contract, they should always make an attempt to reconcile two principles: the freedom to contract and the protection of the community. As pointed out by Jessel M.R.,

> It must not be forgetten that you are not to extend arbitrarily those rules which say a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom to contract.[16]

It is submitted that the courts in every case should apply this precaution when invoking the doctrine of public policy.[17] At the same time, they should not hesitate to apply the doctrine in cases where the facts sufficiently disclose that the agreement will affect the public adversely. Some judges have, in certain cases, been overcautious in applying the doctrine on the ground that public policy is'a very unruly horse'[18] and therefore dangerous to ride. However, no matter how 'unruly the horse may be, it is not possible for the courts to refuse to ride'[19] if the circumstances of the case warrant the riding.

[15] *Besant v. Wood* (1878) 12 Ch. D. 620.

[16] per Sir George Jessel M.R. in *Printing & Numerical Registering Company v. Sampson* (1875) L.R. 19 Eq. 462, 465.

[17] See also view of the American courts: "The right of private contracts is no small part of the liberty of the citizen, and that the usual and most important function of the court of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from the obligations on the pretext of public policy unless it clearly appears that they contravene public right or the general welfare' –*Baltimore and Ohio S.W.R. Co. v. Voight*, 20 S. Ct 385.

[18] per Burrough J. in *Richardson v. Mellish*, (1924) 2 Bing 229, 252.

[19] *Corbin on Contract*, section 6A.

Another aspect of the doctrine of public policy which gives rise to a fair deal of uncertaintly is its exact ambit: what are the different circumstances under which the courts will hold any agreement to be contrary to public policy? Linked with this aspect is the other related problem which has also given rise to some dispute: whether any new heads of public policy may be created by the courts or whether they must be content with the already existing heads.

3. Scope of Public Policy

Though in the early development of the doctrine there was much doubt as to its scope, by the eighteenth century, the scope of public policy was well-defined into a number of different heads: contracts to commit a crime, tort or a fraud on the third party; contracts that are sexually immoral; contracts which are prejudicial to the administration of justice; contracts that tend to lead to corruption in public life; contracts that are intended to defraud the revenue; contracts to oust the jurisdiction of the courts and contracts that are in restraint of trade.[20] The judges therefore only declared a contract as being void against public policy if the contract in question fell within any of these established heads. In cases where the contract did not clearly fall within the established heads, the rules within the heads were extended to cover the contract in question.

At the same time, there were sufficient warnings being given by some judges and learned writers that no judge should extend these heads so widely as to distort the original heads and thereby attempt to 'invent' a new head. It was argued that the heads of public policy have long been closed and that the courts should not usurp the function of the legislature by introducing any new heads.[21] The advocates of this view also argue that like any other branch of the common law, the doctrine of public policy is also subject to the established doctrine of precedent.

In fact the whole argument is very succintly summed up by Cheshire and Fifoot:

[20] Cheshire and Fifoot, *Law of Contract*, 9th ed. 338. See also Pollock's classification, *Pollock on Contract*, 13th ed. 297.

[21] See generally Wright, *supra*.

> Although the rules extablished by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand this particular branch of the law. The heads of public policy thus comprise and are limited to, the nine types of contract.[22]

Against this narrow view that no new head of public policy be created is the contrary view that the heads of public policy are never closed. It is argued by the supporters of the latter view that the courts have an inherent power, if justice so demands to invent a new head. The support for this latter view appears to be as equally strong as that for the narrower view. In an excellent article in the Harvard Law Review, Winfield points out that

> this variability of public policy is a stone in the edifice of the doctrine, and not a missile to be flung at it. Public policy would be almost useless without it.[23]

Dennis Lloyd (as he then was) in turn supports this view by arguing that

> it seems doubtful, whether the doctrine of public policy can be rigidly confined to a fixed number of heads. For not only is it impossible to define specifically the particular categories into which public policy may be divided, but this restriction is hardly to be maintained in a developing system of law . . . This rigid approach must inevitably be rejected if the law is to remain free to develop and it hardly assists the controversy to suggest that it is hard at the present day to think of a new tort being discovered. In the infinite permutations of human affairs new situations will inevitably arise and the law must

[22]Cheshire and Fifoot, *Law of Contract*, 8th ed. at page 322, but compare 9th ed. at page 331–332. For the nine heads see text above. Footnotes in the passage omitted. See similar view of Pollock at page 295 and also the view of Halsbury L.C. in *Jameson* v. *Driefontein Consolidated Mines Ltd.* (1902) A.C. 484, 491.

[23]Winfield, supra 95.

> remain free to adapt itself from time to time to novel and unforeseen conditions.[24]

It is the writer's view that the Courts should strike a compromise between the need for flexibility and the need for certainty. In fact, it is submitted that the narrow view is unreal: though it is argued by the supporters of the narrow view that no new heads of public policy may be invented, they, as would be seen latter, recognise that the rules governing the different heads may be changed or extended with time and circumstances. In practice, what this really amounts to is that under the disguise of an extension of an old head, a new head is in fact invented. As Pollock points out,

> in judicial decisions it is occasionally hard to mark the line between extension of an old principle and the creation of a new rule.[25]

In such case, the existing rule is modified to create a new rule.

This, it is submitted, is the reason why the courts are able to apply the doctrine of public policy in cases where they have felt the need to invoke the doctrine. This may also account for the fact that inspite of major changes in the economic and social conditions of the twentieth century, the courts have been able to invoke the doctrine of public policy on the ground that the case could not fall within any of the extablished heads of public policy. And as shall be seen later, the courts have always applied the doctrine whenever the case warranted its application.[26]

[24] Denis Lloyd, *Law and Public Policy*, 1955 C.L.P. 41,47. See also view of American courts in the case of *Henningsen* v. *Bloomfield Motors*, 32 N.J. 358, 121 A. 2d 69 (S.C.N.J. 1960): "Public Policy is a term not easily defined. Its significance varies as the habits and needs of a people may vary. It is not static and the field of application is an ever increasing one. A contract or a particular provision therein, valid in one era, may be totally opposed to the public policy of another.'

[25] *Supra* page 296.

[26] See application of the doctrine of public policy in cases of restraint of trade dealings with solus agreements, *Esso Petroleum Co. Ltd*, v. *Harpers Garage (Stourport) Ltd.*, [1968]A.C. 269. See also the English case of *Horwood* v. *Millar* [1917]1 K.B. 305; *Nagle* v. *Feilden* [1966]2 Q.B. 633; *Initial Services Ltd.* v. *Putterill* [1968]1 Q.B. 396, and the Australian case of *Trustees, Church Property* v. *Ebbeck* (1960) 34 A.L.J.R. 413. See also the American case of *Henningsen* v. *Bloomfield Motors* 75 A.L.R. 2dl.

4. Public Policy is not Static

It was generally accepted by all that the rules encompassed within the doctrine of public policy were not static :it was subject to change with time and other circumstances. As pointed out by Cheshire and Fitfoot,

> judicial views will inevitably differ upon whether a particular contract is immoral or subversive of the common good, there is no necessary continuity in the general policy of the law, for what is anathema to one generation seems harmless to another, and the public good affects so many walks of life that the cause of action that can be said to arise *ex turpi causa* must in the nature of things vary greatly in their degree of harm to the community.[27]

Other warnings of caution have also been emphasised by some other judges. Lord Thankerton in *Fender* v. *St. John Midmay*[27] observed that the duty of the judge is

> to expound, and not to expand such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy.[28]

In a leading article on the doctrinc of public policy, Winfield points out that

> public policy is necessarily variable. It may be variable not only from one century to another, not only from one generation to another, but even in the same generation. Further, it may vary not merely with respect to the particular topics which may be included in it, but also with respect to the rules relating to any one particular topic.[29]

[27] *Cheshire and Fifoot*, 8th Ed. at page 319. 27(a) [1938]A.C. 1.

[28] At page 23. See also Lord Roche in the same case where he said, "Now to evolve new heads of public policy or to subtract from existing and recognised heads of public policy if permissible to the Courts at all, which is debatable, would in my judgment certainly only be permissible upon some occasion as to which the legislature was for some reason unable to speak and where there was substantial agreement within the judiciary and where circumstances had fundamentally changed.' – at page 54.

[29] 42 Harvard Law Review 93–94. See also views of Lord Wright where he argues that judges generally do not have the power to create new heads, but, have very wide

Again Lord Wright points out,

> What public policy requires in the circumstances of one time may not be required in the circumstances of another age. The rule remains the same, but its application is conditioned by the facts.[30]

A survey of the recent cases also reveals that the Courts in England, Australia and United States have declared certain agreements to be void even though they did not fall within the traditional heads.

In the English case of *Horwood* v. *Millar*[31] a mortgagor assigned to the plaintiff, a money lender, all his salary, wages, or other moneys which was due to him under his employment, during the continuance of the security. He also agreed, *that he will not terminate his services with the defendants, that he will* not borrow, sell or pledge his furniture, chattels or other effects. There were also other harsh terms relating to the disposal of his property. Ths issue before the Court of Appeal was whether the agreement was contrary to public policy. It will be observed that the agreement could not fall within any of the established heads although the head relating to restraint of trade may be applicable. But it is the writer's view that the agreement in question was not a contract of employment but a contract between a lender and borrower. The Court of Appeal held the agreement to be void as being contrary to public policy. Scrutton L.J. said:

> I can conceive nothing more dangerous to the interest of the public than that a system of money-lending like this to small

powers to change the rules applicable under a particular head depending on the circumstances of the case. After a discussion of the *Nordenfelt Case*, he then arrives at the following conclusion: 'This case when read in the light of authorities over two centuries before it, is a good illustration of the way in which a doctrine of public policy changes with the times. It has to change when the time changes, at least when it is a flexible rule adjusted to the conditions of the day, like covenants in restraint of trade, the reasonableness of which is judged by a different test in days of rapid and easy communication as compared with old days when circles of trade and commerce were restricted to small local areas.' – Legal Essays at page 93. See also case of *Bowman* v. *Secular Society Ltd.* (1917) A.C. 406, where the rules of public policy were also changed with time.

[30] See Note 13, but at page 94.

[31] [1917]1 K.B. 305.

> people in offices where they have great temptations, and great opportunities to be dishonest if money pressure is put on them, should be allowed to exist for a single minute ...[32]

In *Nagle* v. *Feilden*[33] it was pointed out by the Court of Appeal that any unjustifiable discrimination against a person's right to work at his trade may be against public policy. Lord Denning observed:

> The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enable them to reject this application arbitrarily or capriciously, not reasonably, that rule is there. It is against public policy. The courts will not give effect to it.[34]

There are suggestions in the same decision that the scope of public policy may be extended on grounds of discrimination, 'colour of hair', or on other grounds.[35]

Again in *Initial Services Ltd.* v. *Putterill*,[36] the defendant who had resigned as a sales manager of the plaintiff launderers, divulged certain information pertaining to the company's affairs to the press. The newspapers published this information and the plaintiffs issued a writ against the defendant claiming an injunction and damages, on the grounds that the defendant had breached an implied term of his contract of service. The defendant argued that the information he revealed related to certain agreements entered into by the plaintiff which contravened the Restrictive Trade Practices Act. 1956. The main issue therefore was whether an employee was prohibited from disclosing some information relating to his employer's malpractices. As Salmon L.J. said,

[32] At page 318.

[33] [1966]2 Q.B. 633.

[34] At pages 644–5.

[35] See judgment of Salmon L.J. at page 655.

[36] [1968]1 Q.B. 396.

> It is clear that it raises questions of great important of far-reaching consequences about which there is very little relevant authority.[37]

His Lordship further observed:

> I do not think that the law would lend assistance to anyone who is proposing to commit and to continue to commit a clear breach of statutory duty imposed upon him in the public interest.[38]

In the Australian case of *Trustees, Church Property* v. *Ebbeck*,[39] the court held a condition in a will relating to religion as being opposed to public policy as it had a tendency to give rise to discord between the husband and wife. Dixon C.J. delivering the majority decision of the High Court of Australia said:

> The case is not covered in any one of its aspects by precise authority out the condition when all its aspects are brought under consideration appears to me to be one which upon well settled principles is obnoxious to the policy of the law and void.[40]

In the American case of *Henningsen* v. *Bloomfield Motors*,[41] the Supreme Court of New Jersey held an exemption clause in a contract of sale of a car to be against public policy. The purchaser of the car and his wife brought an action against the manufacturer and dealer for personal injuries suffered in an accident caused by a defect in the car's mechanism. The defendant sought to rely on an exemption for breach of warranty to cover only replacement of defective parts. The court in rejecting the defence held as follows:

> Courts keep in mind the principle that the best interests of society demand that persons should not be unnecessarily restricted in the freedom to contract. But they do not hesitate to declare as void against public policy contractual

[37] At page 409

[38] per Salmon L.J. at page 410.

[39] (1960) 34 A.L.J.R. 413.

[40] At page 415.

[41] 75 A.L.R. 2d 1.

> provisions which clearly tend to the injury of the public in some way . . . . In the framework of the case . . . . we are of the opinion that the Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligation arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.[42]

Therefore the English Courts will hold an agreement to be void as being opposed to public policy even if the agreement does not fall squarely within the established heads: they have either invented a new head, or under the pretext of expounding the heads have expanded it. In fact, it may be said that the question as to whether new heads may be invented or not is academic, for whether an agreement is declared to be void as being against public policy depends on the attitude of the courts. If the court is of the view that an agreement should not be upheld, they will declare it to be so, either by holding that they are expanding or expounding the heads of public policy. As Winfield points out:

> It is doubtful whether there is any real conflict on the point, for even the adverse views would regard such new cases as mere applications of a general principle, and if that general principle be the vast one of the good of the community, they concede to us all we want.[43]

5. Public Policy under Malaysian Law

The leading Malaysian case on the scope of public policy under the Contracts Act is the decision of the Federal Court in *Theresa Chong* v. *Kin Khoon & Co.*[44] In this case the question arose whether as agrement entered into with a person to act as a remisier who was not registered with the Stock Exchange was void as being contrary to public policy. The Federal Court held that

[42] At page 31–32.

[43] Winfield, supra page 94.

[44] [1976]2 M.L.J. 253. See generally, Sinnadurai, *The Law of Contract in Malaysia and Singapore*, 1979, OUP, Chapter 8.

> the present contract does not fit into any of the traditional pigeon holes . . . the contract between the plaintiff and the defendant was not illegal.[45]

In so arriving at its decision the Federal Court accepted the argument that,

> Not being registered as a remisier is not contrary to public policy because the byelaws of the Stock Exchange are the bye-laws of a private body wich have no force of law. They are binding on the plaintiffs but not on the defendant. If the plaintiffs were dealing with an unregistered remisier they were committing a breach of bye-law 97 of the Stock Exchange Rules which provides for a penalty. But their dealing with such a remisier did not make the contract illegal as being opposed to public policy.[46]

The decision of the Federal Court is important as it establishes the rule that the heads of public policy are closed in Malaysia. As the implication of this decision is far-reaching, the decision merits a closer analysis. Gill C.J. who delivered the decision of the Federal Court accepted the narrower view of the scope of public policy: that 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. Gill C.J. was greatly influenced by the views of *Cheshire and Fifoot*[47] and *Pollock and Mulla.*[48] His Lordship did not consider the view of other writers and judges who have advocated the broader view. His Lordship relied on the earlier views of *Cheshire and Fifoot* expressed in the eighth edition of their *Law of Contract,*[49] which has been quoted above. However, in the later edition of the same text, the editors have changed their stand and have now accepted a broader view :

> Since public policy reflects the mores and fundamental assumptions of the community, the content of the rules

[45] Ibid at page 256.

[46] Ibid.

[47] 8th ed. of *Law of Contract.*

[48] Indian Contract Act. 8th Ed.

[49] But see 9th ed. of the same text at page 331–2. This highlights the danger of courts relying on old editions of text books.

> should vary from country to country from era to era. There is high authority for the view that in matters of public policy the courts should adopt a broader approach than they usually do to the use of precedents. Such flexibility may manifest itself in two ways: by the closing down of existing heads of public policy and by the opening of new heads. There is no doubt that an existing head of public policy may be declared redundant.[50]

It is submitted that the value of the Federal Court's decision is drastically reduced as it based its views on older and outdated texts.

It should also be observed that the Federal Court did not also consider the attitude of the Indian courts in the interpretation of the scope of public policy under the Indian Contract Act 1972.

There are two leading Indian decisions on this point. In the Bombay case of *Shrinivas Das Lakshminarajan* v. *Ram Chandra Ramrattandas,*[51] the Bombay High Court held as follows:

> It is no doubt open to the Court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the Court regards as public policy. This is laid down in Section 23 of the Indian Contract Act and in India therefore it cannot be affirmed as a matter of law as was affirmed by Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines Ltd.*, that no Court can invent a new head of public policy, but the dictum of Lord Davey in the same case that 'public policy is always an unsafe and treacherous ground for legal decision' may be accepted as a sound cautionary maxim in considering the reasons assigned by the learned Judge for his decision.[52]

It would appear from the passage quoted above that the Indian courts have rejected the narrow view and have empowered themselves the right to create new heads of public

[50] At page 331–2. See 10th Edition at p.318.

[51] A.I.R. 1920 Bom. 251.

[52] At page 251–2. A similar view was expressed in *Bhagwant Genuji Girme* v. *Gangabisam Ramgopal*, ILR 1941 Bom. 71, and in *Gopi Tibadi* v. *Gokbei Panda*, ILR 1953 Cuttack 558.

policy. This, however, does not appear to be the accurate appraisal of the Indian law. In 1959, the Indian Supreme Court, the highest court in India, took the opportunity to re-examine the scope of public policy in India in the case of *Gherula Parakh* v. *Mahadevadas Maiya & Others.*[53]

Justice Subha Rao summed up the position as follows:

> The doctrine of public policy may be summarised thus: Public policy or the policy of the law is an illusive concept; it has been described as 'untrustworthy guide', 'variable quality', 'uncertain one', 'unruly horse' etc.; the primary duty of the court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the court may relieve them of their duty on a rule founded on what is called public policy; for want of better words Lord Atkin describes that something done contrary to public policy as a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies ; this doctrine of public policy is only a branch of the common law, it is governed by precedents; the principles have been crystallised under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.[54]

It would appear from this summary that the Supreme Court is taking a neutral view. It appears to strike a compromise between the narrow and the broad view. On the one hand they have said that the doctrine of public policy 'is only a branch of the common law, it is governed by precedents,' and that the principles having been crytallised under different heads and it is not possible for public policy to be extended. Yet on the other hand, they admit that 'the heads are not closed and . . .

[53] AIR 1959 S.C. 781.

[54] At page 795.

theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world'. It would appear that even though the Supreme Court approved the view of the Bombay High Court, yet they have limited the power to invent new heads virtually to a nugatory; after all as they point out it is only 'theoretically' possible to invent a new head. In the instant case itself, the Supreme Court refused to invent a new head by pronouncing wagers to be opposed to public policy. In fact, after considering the English position regarding wagers in detail, they came to the conclusion that

> It may be stated without any contradiction that the common law of England in respect of wagers was followed in India,[55]

and since wagers were not contrary to public in England, it should be similar in India too.

The Indian cases do not elucidate this uncertainty either. In *Gulabchand v.Kudilal,*[56] though the issue of public policy was argued before the Supreme Court, the Court decided that it was not necessary to make any ruling on the ground of public policy as the agreement was otherwise void. In the lower court[57] the agreement was held to be void under section 23 of the Contract Act. Similarly, the Madras High Court in *Lily White* v. *Munuswami*[58] held an exemption clause to be void as against public policy. Though the headnotes of the report makes reference to Section 23, there is no reference to Section 23 in the judgement. However, the Andhra Pradesh High Court in *Ratanchand* v. *Askar*[59] took a bold step and said that the heads of public policy are not closed :

> In a modern progressive society with fast changing social values and concepts it becomes more and more imperative to evolve new heads of public policy, whenever necessary to meet the demands of new situations. Law cannot afford to remain static. It has, of necessity to keep pace with the pro-

[55] At page 796.

[56] AIR 1966 S.C. 1734.

[57] AIR 1959 M.P. 151.

[58] AIR 1966 Mad 13.

[59] AIR1976 A.P. 112.

gress of society and judges are under an obligation to evolve new techniques or adapt old techniques to meet the new conditions and concepts.[60]

C. Reddy J. stated that if the agreement in question fell within 'a new head of public policy we are ready to sponsor it'. The attitude of C. Reddy J. is commendable and it is hoped that at some not too distant date the Supreme Court will 'unblinker the unruly horse'.

6. Conclusion

It is the writer's view that the courts in Malaysia should be slow in following the decisions or attitudes of other countries with regard to the scope of public policy in Malaysia. Some of the problems prevailing in Malaysia are peculiar to the nation and it would not be in our best interests to rule out the possibility of inventing a new head in solving some of these problems. The social and economic conditions prevailing in any community necessarily lead to a different sense of values. As is often said, what is good for a particular community, may not necessarily, be so in another. The very concept of public policy must necessarily imply that the interest of a particular community alone is being considered: any analogy to the interest of any other community would be sterile. It is therefore submitted that the Malaysian courts should exercise caution in following the decisions of other countries.[61] They should consider the interest of the public in the Malaysian context according to their own values and norms.

It is further submitted that it must have been the intention of the drafters of the Contracts Act to bestow on the Malaysian courts a much wider power to declare agreements to be void on the grounds of public policy than that of their English counterparts. When the Act was introduced both in India and in the Malay States, there was already the controversy in England as to whether the heads of public policy may be extended. At this time too, certain heads of public policy were fully established.

[60] At page 117.

[61] See Lord Thankerton in *Fender's Case*, 'There can be no justification for expanding the principles of public policy in this country by reference to the public policy of another country.'

If the drafters of the Contracts Act had merely desired to give the Malaysian and the Indian judges a restricted power to declare agreements to be void on the grounds of public policy, they could have best achieved this intention by enumerating the different heads under which the judges could declare agreements to be contrary to publicy policy. The fact that they did not take this course indicates that they intended the judges to have a much wider power in allowing them to expand the different heads according to the needs of the community. This intention of the drafters is further evidenced by the fact that they had specifically enacted certain provisions in the Contract Act declaring certain agreements which under the common law were against public policy to be void. For example, section 28 of the Contracts Act declares agreements in restraint of trade to be void, whilst section 27 declares agreements in restraint of marriage to be void. Both such agreements are generally void under English law on the ground that they are opposed to public policy. If, therefore, the scope of section 24(e) was intended to be similar to the English equivalent, why was it then necessary to make provisions in the Act to declare these two types of agreements to be void? Would it not be superfluous? It must therefore mean that the drafters intended section 24 to cover any situation which the Court feels to be contrary to the public policy of the Malaysian community: They did not intend it to have an identical meaning to the English law. It is therefore submitted that the Malaysian courts should recognise this difference. They would otherwise find their hands so tied that, in certain cases, they would not be able to deal with any new situation which may arise in Malaysia and which has not been covered by any of the English heads.[62]

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[62] See Canadian experience in the case of *Re Noble and Wolfe*, (1949) 4 D.L.R. 375, (1951) 1 D.L.R. 321, where the validity of a 'racial covenant' was challenged on the ground of public policy. The Supreme Court of Canada refused to follow an earlier Canadian decision of *Re Drumond Wren* (1945) 4 D.L.R. 674, on the ground that in the earlier case the court had invented 'an entirely novel head of public policy' which was an arbitary extension of the rules of public policy. This the Supreme Court considered was an error. For further discussion on the case see *Lloyd, Public Policy: A Comparative Study in English and French Law*, (1953) 143 seq., and also (1952) 30 Can. B.R. 863 seq.