SCHOLARSHIP AGREEMENTS IN MALAYSIA: ECONOMIC REALISM VERSUS LEGAL NECESSITY

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SCHOLARSHIP AGREEMENTS IN MALAYSIA: ECONOMIC REALISM *VERSUS* LEGAL NECESSITY

I

At the outset, I must pay my best compliments to the learned Vice-Chancellor and also thank him for the kind words he has spoken about me. I also thank the University for having afforded me the needed facilities for conducting the research in the area of today's topic.

My topic is, to remind you, Scholarship Agreements in Malaysia: Economic Realism *Versus* Legal Necessity. Mr. Chairman, Sir, the views to be presented during the course of this lecture are based purely upon academic considerations and my reading of the Acts as a student of Law.

A country when it becomes free from foreign rule, generally, faces three problems: defence, foreign exchange and economic development. Malaysia enjoys peaceful borders and has a strong foreign exchange position. It, however, needs economic reconstruction and development. It is, therefore, necessary that the old laws, implanted from the English Common Law must be fashioned to new ways suitable to the local environment. But in this age human wants have multiplied and our economic aspirations have soared high. While a full-scale research into the motives, intentions and reasons for entering into and breaking off bonded agreements is properly the task of a sociologist, my limited observation over the years shows that in many cases of non-technical jobs economic factors, particularly where the gap is wide, largely

constitute a reality. In jobs requiring technical qualifications, however, economic factors are sharply mixed up with the questions of technical facilities, job satisfaction and personal reputation.

But there is a third side of the coin also where agreements may be breached by reasons of family tie. Both the spouses may be bonded, one serving in Johore and the other in Sabah. No wonder that the pangs of their separation, their sentiments for their children and their uneconomic separate living may bring about a few resignations to the authorities.

Numerous persons, including infants, become beneficiaries of scholarship schemes and atain the necessary qualifications and training at the expense of the authorities in order to help them in their task of achieving the goals of national planning. Subsequently some of them are tempted to violate their agreements and either fail to enter upon or complete their contract of service. Legal alibis of infancy, lack of consideration, penal nature of the compensatory clauses have been offered as defences for breaches of scholarship agreements.

The law, therefore, must step in to regulate the obligation of the individual to the needs of society. It is in this context that one must study the Contracts (Amendment) Act, 1976 of Malaysia relating to scholarship agreements.

Comparatively speaking, in India there is no specific legislation relating to scholarship agreements. The matter will be governed by the Indian Contract Act which lies where it lay in 1872. Of course, the Foreign Contributions (Regulations) Act, No: 49, 1976, passed during the emergency, requires every citizen of India to inform the Federal Government the quantum of money, the foreign source and the purposes for which the scholarship or stipend has been or is being received. When I left India in 1977, some thought that even this legislation must go.

Our new liberalised custom regulations of 1978 encourage to some extent the inflow of India Brains back into the country. A highly qualified scientist, technologist, doctor or engineer returning to India for permanent settlement after a stay abroad for at least two years is allowed to import free of duty professional instruments upto about ten thousand Malaysian dollars. For a country like India with a teeming population and a traditional shortage of foreign exchange, the above position is a good incentive for the technical hands to return to India. Of course, there is nothing specifically for the lawyers or the law teachers!

II. EARLIER LAW

I shall now briefly state what was the law relating to scholarship agreements before the Malaysian Parliament gave a new dimension to this topic, first in 1967 and later in 1976. Earlier the matter was governed by the Contracts (Malay States) Ordinance, 1950 which was revised in 1974 and became the Contracts Act, 1950. Under the old Malaysian Law, there was no specific provision for scholarship agreements and all parties whether they were Government or Statutory bodies or private individuals stood on the same platform. If the scholar was a minor, he had almost a hey day. For being a minor he is incompetent to enter into a contract.

It was doubtful whether the sureties could be made liable in such a case. A minor could, however, be made liable on a different theory where the education or learning imparted to him was necessaries of life. Where the scholar was of the age of majority, the plaintiff had to prove every bit of damages.

Two landmark cases occurred which severely tested the then existing law to ascertain whether it served the needs of a developing country. In the first case of *Government of Malaysia* v. *Thelma Fernandez* [1967] 1 M.L.J. 194, decided in December 1966, Fernandez received training to become a qualified teacher at the Malayan Teachers' Training College,

Penang for two years. He served the bond for 2½ years, instead of 5 years. He wanted a transfer from Dungun in Trengganu to Banting in Selangor. His request was not accepted by the Education Officer although his colleague in the other school had agreed for a mutual transfer. It was held that the Government could recover all and not merely proportionate expenses from the scholar. For it had now to train another person to be a qualified teacher.

The Court said:

> It is the plaintiffs who have to suffer a great deal more and the damage they are likely to suffer is far greater than the stipulated sum agreed upon, not to mention that they would lose a qualified teacher and the time factor to train another one. The criterion here is the failure to implement the Government's education policy. (P. 196).

Again, one of the clauses in the agreement read:

> "... he/she will if required to do so by the Government ... serve the Government as a teacher in any post consistent with the qualifications obtained by the student to which he/she may be appointed for a period of not less than five from the date of his/her appointment . . ..(P. 195).

The court did not accept the contention of the scholar that the post he held was not commensurate with the education he had received. The Court said:

> If the defendants are alleging that the student should be posted to a secondary instead of a primary school then, in the light of the aforesaid terms of the agreement, . . . their contention does not hold water.

On appeal by the student, the case was compromised in the Federal Court. Soon after this case, the Contracts Ordinance was amended in 1967 and it was provided in exception 3 to section 29 that the exercise of the Govern-

ment's discretion under a scholarship agreement was final and conclusive and could not be questioned in a Court of Law.

The ink of the earlier case had hardly dried up when the Government was faced with another breach in *Government of Malaysia v. Gurcharan Singh and others* [1971] 1 M.L.J. 211. Gurcharan Singh was a minor and had agreed along with the two sureties to serve the Government for a period of five years after receiving a teacher's training at the expenses of the Government. He served the Government for 3 years and 10 months instead of 5 years. His agreement was held void, but he was made liable under section 69 of the then Contracts Ordinance, 1950 because education was one of the necessaries of life for him. The Government had spent over him about 11 thousand dollars and he was held liable only for the proportionate amount of about 2,600 dollars.

These two cases became an eye-opener for the government of Malaysia which realised that the problem of scholarship agreements must be met squarely to carry forward its educational policy. Hence the Contracts (Amendment) Act, 1976.

III. THE CONTRACTS (AMENDMENT) ACT, 1976

Now let us study the winds of change under this new Act. First, I must confess that I have not been able to find out any reported case on this Amendment Act upto December, 1978, although some cases, it appears, may have been decided at the Sessions Court and some may be pending in the High Court. I raise three points for discussion under the Act:

A. Who can bind or bond the scholar?
B. Who can be bound or bonded?
C. What are the consequences of the breach by the scholar?

A. Who can bind?

In two words, the "appropriate authority", or what I may

say, the "scholarship authority". That is the Federal Government, the State Government, the Statutory body like the University, the L.L.N., the Bank Negara and lastly any educational institution which enjoys the blessings of the Minister of Education under the Act. In other words, a private individual or even a company registered under an Act cannot claim the advantages of the Act. They must look and continue to look to the Contracts Act, 1950 for their remedy.

B. Who can be bound?

This question is interesting indeed! Here the main question is: from what source does a person receive the scholarship, loan or any facility for this or her education or learning?

There are four sources of the funds:

1. The Federal Government/State Government/Statutory Body/approved educational institutional grants scholarship/loan or facility. Here these bodies *DIRECTLY* give the money and can bind the scholar.

2. These bodies may receive money from foreign Governments or from any body or person, but may themselves disburse the money so received. In such a case, the scholarship authority, although it pays nothing out of its pocket, can still bind the scholar. The Act is clear on this point.

3. The scholar/student may use his own funds. He cannot be bound under the Amendment Act, 1976.

4. But the fourth case is the most difficult one and the solution is clouded. Take the following illustration:

   A private bank in Malaysia selects 4 bright students on a national competition and grants to each of them a scholarship to study for the LL.B. degree in the University.

Can the appropriate authority tell these students that if they want to avail of the bank scholarship they will have to serve the appropriate authority for a period of five years or else to pay on breach $30,000 dollars each to the appropriate authority. OR to put the same thing in a simple form: If a brother were to give a loan to his talented sister for study, can the appropriate authority bind the talented sister?

No such case has come to my view. But for academic discussion let us have a peep into the Act. Let me read the definition of scholarship agreement:

> "scholarship agreement" means any contract or agreement between an appropriate authority and any person (hereinafter in this Act referred to as a "scholar") with respect to, any scholarship, award, bursary, loan, sponsorship or appointment to a course of study, the provision of leave with or without pay, or any other facility, whether granted directly by the appropriate authority, or by any other person or body, or by any government outside Malaysia, for the purpose of education or learning of any description;

The definition is not very clear and both "yes" and "no" answers are possible. In point of punctuation and grammar, the definition has 11 commas, at least one is superfluous and one is probably misleading. The appropriate authority can bind the scholar on the following grounds;

1. Because of the use of the 9th comma, from whatever source you receive the loan, you can be bound. One may faithfully recollect here the decision of their Lordships of the Judicial Committee of the Privy Council in Irrawaddy Flotilla Co. v. Bagwandass, (1891) I.A. 121, at 127 where their Lordships did not read comma after the word contract in para third of section 1 of the Indian Contract Act, 1872 and held that the succeeding phrase was connected with the immediately preceeding phrase.

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2. It might be shown that the purpose of the Amendment Act is to create in favour of the appropriate authority, a reservoir of talent so that it may in the national interest utilise the best services in the best manner to its best advantage.

3. The Act has expressly abolished the doctrine of consideration for purposes of the scholarship Agreements. This means that it can bind the scholar even if it does not pay the consideration, or money.

4. The word *directly* means *itself,* so that money to a scholar can be given by the appropriate authority itself or by any person or anybody.

The other view could be that the word "directly" suggests that the Act adopts a two-fold classification. That is the authority can bind the scholar only in those cases where it gives either its own money or it disburses the money received from other sources. But this view makes the abolition of the doctrine of consideration purposeless.

This excursion, of course, is an academic exercise and it is hoped that such situations will not arise.

Terms

Under the Act, all scholars whether minor or major, he or she are bound. The Amendment Act, 1976, says that this new Act has to be read or construed as one with the principal Act. This means that a student has the freedom to accept the scholarship. But once he accepts the scholarship, he can't refuse to be bound. The terms must be clear, certain, should not violate the provisions of the Contracts Act, 1950 and should not be such as may be regarded by the courts as opposed to public policy. Suppose:

A scholar who is not a minor agrees under the scholarship agreement that in case he or she marries during the period

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of the training, the scholarship will be forfeited/ terminated.

The question is whether this agreement is in restrint of marriage under section 27 of the Malaysian Contracts Act, 1950. In India we have the same provision and the same language. One of the Indian High Courts has held (See *Rao Rani* v. *Gulab Rani,* A.I.R. 1942 All. 351) that this is NOT in restraint of marriage because the scholar can still marry under the law; the only thing is that he or she loses a benefit. But suppose the provision reads that breach of this clause will mean the breach of the scholarship Agreement and that the scholar will be liable to pay to the appropriate authority thirty thousand dollars. One would suppose that such a heavy amount places a direct restrain on the right of marriage of a scholar and is therefore, void.

Necessary Parties

The necessary, though not the only, parties to the contract or agreement are the appropriate authority and the scholar. The agreement will still be a scholarship agreement, under the Amendment Act, if the appropriate authority chooses to dispense with the surety. Thus an officer selected for further training or a course of study may own a house which he may mortgage to the appropriate authority. Again a scholarship agreement may be of a minor nature and perhaps also the scholar may be financially quite sound.

The Amendment Act, however, gives the definition of surety, suggesting that he may be involved in the scholarship agreement. There is no minimum or maximum number of sureties fixed for a scholarship agreement. Normally, perhaps, at least one surety would be insisted upon by the appropriate authority.

Another dimension of the scholarship agreement unfolds itself when a body, whether or not incorporated, makes a *donation* to a statutory body like the University or an

approved educational institution. The terms of the grant in such cases determine the rights of the parties (donor and donee) *inter se.* The scholarship agreement is entered into between the appropriate authority and the scholar. This may embody a provision that the scholar on successful completion of training shall be bound to serve the "donor" in a capacity consistent with the scholar's qualifications for a stated period, or else shall pay the fixed amount to the authority. Here the "donor" is a third party and under the strict doctrine of consideration, he may not be allowed to enforce the agreement against the scholar, unless the court regards that the consideration indirectly flowed from him. Even this right will be defeated where the donor has abdicated his rights in the grant to the approved educational institution, which will usually be the case.

It must clearly be understood that the abolition of the doctrine of consideration under the new Act is solely for the benefit of the appropriate authority and not for the third party. Where, therefore, the scholar, under the agreement, refuses or fails to complete the contract, the right to file the suit against the defaulter vests in the authority – directly under the contract and validly under the new Act. Under this provision, the authority, while recovering the amount acts as a principal and not as an agent for the third party. There is also the privity between the contracting parties – the appropriate authority and the scholar.

Paradoxically, where the scholar takes up the employment, under the terms of the contract, with the employer (donor) and the latter violates the rules of service, the scholar's right under a recent decision of the Federal Court in *Plantation Agencies Sdn. Bhd.* v. *Haji Ariffin bin Haji Ismail*[27] ([1978] 1 M.L.J. 219) is not against the educational institution but against the employer.

C. Consequences of the Breach of Agreement

(a) The first question is: What is a breach? Suppose the scholar is serving under the scholarship agreement. He falls ill or is involved in a car accident and is hospitallised for a period of six months.

The question is whether this period of six months will be regarded as performance or non-performance. Mr. Chairman, Sir, my submission is that the doctrine of frustration will apply and this period will be calculated as performance so that the actual period of service is cut short by six months. This will apply in all cases whether the scholar is a major or minor. Since the minor's agreement is enforceable under the Amendment Act, his agreement would be contract under section 2(h) of the Principal Act.

The Amendment Act creates a valid agreement in case of the minor, without calling it a contract. This view is fortified by the fact that under the New Act, scholarship agreement means any "contract or agreement".

(b) Damages

where a scholarship agreement has been broken by the scholar he is liable for damages. To what amount of damages?

Two situations are possible:

1. The scholarship agreement may "fix" the amount to be paid by the scholar upon breach.
2. The scholarship agreement may not "fix" the amount. That is the scholarship agreement may be silent on this point.

In the first case, where the amount is fixed, the following is the legal position of the parties:

a. Both the major and the minor scholars are bound.

b. The scholarship authority may file one suit against the scholar and his surety or sureties or the authority may file a suit against one or some of them only. This is because the liabilities of the scholar and the sureties are joint and several.

c. The appropriate authority shall be entitled to the full amount, although it suffered no loss, not even of one cent. It has only to prove in the court that the scholar has broken the contract.

d. If the default is even of *one* day, even by mathematical miscalculation or by the honest interpretation which the scholar places on the situation the appropriate authority is entitled to the full amount and no deduction will be made out of it for the period of performance.

2. Where no amount is fixed under the scholarship agreement, the position of the parties will be as follows:

a. The appropriate authority is entitled to claim the full amount spent by it under the scholarship agreement from the scholar and surety or sureties jointly and severally, eventhough the breach was of ONE DAY.

b. The appropriate authority is entitled to appoint a substitute of comparative qualifications and experience. The scholar is bound to pay to the scholarship authority, (the words are),

> "Cost . . . to engage a person . . . for the period specified in the scholarship agreement".

Suppose a scholar does not complete his service bond with a University. What are the costs which the University may recover?

i. the advertisement expenses. This would be the position under the old law also.

ii. If by a normal procedure, the experts are required to attend a meeting of the selection committee at the seat of the University, then the full amount spent on the meeting, including the cost of air fare paid to the experts and the amount spent on their lodging and boarding. This would be the position under the old law also.

iii. Now suppose there is a dearth of candidates on the subject of the scholar. But one candidate demands $500 per month more than what was being paid to the scholar. The University is entitled to this amount also from the scholar. This would be the position under the old law also.

iv. The next question is: For how long is the scholar bound to pay the difference between his salary and the salary of the new appointee. Suppose he was to serve for five years, but he actually served for 4½ years, the breach being of six months only. The Amendment Act is very strictly framed. It says, to repeat; "The scholar will pay what it will cost . . . the authority to engage a person . . . for the period *specified* in the scholarship agreement. (Italics mine). It is difficult to spell out the exact implications of this provision. Whatever the case may be, the difference between the two salaries has to be paid by the scholar and/or by his surety.

Where the substitute was appointed on a lesser pay, the defaulting scholar does not gain under the Common Law principles. For a wrongdor cannot take advantage of his own wrong.

The Amendment Act is absolutely silent about the liability of the appropriate authority which will be governed by the Contracts Act, 1950. The authorities, however, usually protect themselves by a provision that they may cancel the agreement by one month's notice, which will release the scholar and the sureties from the scholarship agreement.

IV. LIMITATION OF TIME

Under section 6(1)(a) of the Limitation Ordinance No. 4 of 1953[1] for "action founded on a contract or on tort", the limitation period is six years to be calculated from the date on which the cause of action arose. Also for a suit, to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture under clause (d), the period of limitation is the same.

In this context, the provisions of section 6(4) must be seriously examined:

> An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any Ordinance or other written law shall not be brought after the expiration of one year from the date on which the cause of action accrued:
>
> > Provided that for the purpose of this subsection the expression "penalty" shall not include a fine to which a person is liable on conviction for a criminal offence.

The question arises whether the action of the appropriate authority for recovery of the "fixed amount" under section 5(a) of the Contracts (Amendment) Act falls under section 6(1) clause (a) or clause (d) or section 6(4) of the Limitation Ordinance. The matter is not free from difficulty, although the answer weights heavily in favour of penalty. It is pertinent to recollect that the court in the *Gurcharan Singh* case, while referring to the argument of the defendants' lawyer that the amount stipulated was a penalty, said: "The validity of this argument would be apparent in the case of breach one day before the full period expired". Page 217.

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[1] Compare this provision with section 2 of the English Limitation Act, 1939 on which the Malaysian Limitation Ordinance is based. One notices some minor differences between the two provisions.

Under Section 5(a), the appropriate authority is entitled to the whole of the named sum "whether or not actual damage or loss has been caused by such breach".

Be that as it may, the remedy may be negatived altogether under section 32 of the Limitation Ordinance, 1953:

> Nothing in this Ordinance shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

The onus, however, is on the defendant to prove such conduct on the part of the plaintiff as will entitle him to the equitable jurisdiction of the court.

V. TO CONCLUDE

For a smooth and successful working of the Amendment Act, a happy co-operation between the Scholarship Authority and the scholar is necessary to carry us nearer to the goal of Educational Planning. The scholar needs the Scholarship and the scholarship authority needs the scholar. It may be hoped that the Contracts (Amendment) Act, 1976 will achieve the twin purposes of national development and the employment and economic needs of the scholar. The words of a great American Judge of the United States Supreme Court are worth tons of gold. He said: the life of law has not been logic, it has been experience.

My advice to the young students who may have to file scholarship agreements in a rough poetic form is as follows:

> Think deep, before you leap
> Thereafter you shall not weep;
> Fruits of Contract you try to reap
> To your Contract you must keep.