

## **The Wars of Jurisprudence: Clash between Contractual Justice and Freedom of Contract**

*Faiz Abdullah*

*Kuala Lumpur: The Other Press, 2017. 456 pages.*

The present book is based on the author's doctoral research (duly modified) on contract law in Malaysia. It is primarily concerned with the dialectical tension between contractual justice and freedom of contract and the resultant "plethora of battles" (hence the plural 'wars' in the title) fought on the "doctrinal/theoretical fronts over a jurisprudential landscape." The book engages the notion of contractual justice in the context of Malaysian contract law, its role in the adjudication of contract cases, and its realization vis-à-vis the freedom of contract and the legislative grounds Malaysian courts have in such situations.

The author, Faiz Abdullah, Dean of the Selangor Business School of UNISEL (Universiti Selangor, Malaysia), has divided the book into six chapters (including introduction and conclusion) along with a preface, a long list of cases discussed/mentioned in the book, a bibliography, and an index. The chapters grapple with the sacrifice of contractual justice (understood as 'fairness') at the altar of the freedom of contract in the adjudication of contract-related cases in Malaysian courts (introductory chapter), the various aspects of consent theories (express and implied consent, silent consent, hypothetical consent, etc.) (chapter 2), concepts of justice and freedom and their dialectical tension in Malaysia (chapter 3), the notion of unconscionability in contracts (chapter 4), economic duress (chapter 5), and a conclusion including a summary and proposing reforms in contract law. The contents of the book are reflective of the exhaustive treatment of the subject and the comprehensiveness of the discussion.

In the introductory chapter, after mentioning the facts of four different contract cases (one of which was adjudicated in Malaysia), the author highlights the conservative and narrow approach of Malaysian courts regarding contractual justice: "Malaysian courts tend to emphasize the importance of form and procedure over substance" (4). While the primary objective of adjudication is attaining justice, this is compromised through overemphasis on the formal and procedural validity of contracts. In other words, the literal application of statutes regarding contract law results in the violation of the spirit of justice, yielding harsh results for the relatively weak contract-

ing party. To ameliorate this situation, the doctrine of contractual freedom needs to be revisited and re-examined, thereby introducing proper reforms in contract laws, in keeping with the “changing commercial and economic realities as well as changing legal and juristic thinking in other common law jurisdictions” (11).

The fundamental role played by consent (voluntary choice) in contract law comprises the discussion of the second chapter. The author highlights what constitutes free consent and what renders it invalid: “consent, apart from impacting other factors such as duress and unconscionability, occupies the substratum on which the other factors depend when considering contractual validity” (57). He also introduces the subtle difference between “ignorance of law” and “ignorance of terms (of a contract)”. While the former is no defence, the latter can affect the validity of a contract. The author laments economic, financial and social disparity between the contracting parties in case of the sanctioning of standard-form contracts on the grounds of duty-to-read rule.

In the next chapter, dealing with the interplay of justice and freedom in the context of contract law, the author contends that in this interplay the prevalence of justice over freedom benefits the weaker party and vice versa (65). The author here grapples with different conceptions of justice in order to arrive at a definition of contractual justice. The author prefers Aristotle’s *Nicomachean Ethics* to Plato’s *Republic*; John Rawls’ *Theory of Justice* also finds mention in this regard. In defining justice, Abdullah emphasizes ‘fairness’ in modulating the relation to freedom, reflecting a balanced approach towards both the relatively stronger and weaker parties in a given contract.

The fourth chapter of the book discusses the doctrine of unconscionability in contracts, particularly its bearing on the tug of war between freedom and justice in the settlement of contract cases. Replete with illustrative cases as well as examples of historical developments, unconscionability is discussed in terms of such factors as the potential danger found in a contract, unequal bargaining position, price imbalance, absence of meaningful choice and terms, statutory unconscionability, and procedural/substantive unconscionability. The doctrine of ‘just price’ and *laesio enormis* rules also find mention in this chapter. According to these principles, disproportionate and inequitable contracts can be construed as immoral. It is in the light of these rules that ‘economic injustice’ serves “as an umbrella doctrine for contractual avoidance comprising all the vitiating factors in consensual requirements arising from economic circumstances” (225).

The doctrine of economic duress in relation to contract law forms the topic of the next chapter, as analyzed with reference to leading cases and the relation between duress and unconscionability. Discussion of coercion, duress, and economic duress is confined to contract law and not extended to criminal law, tort law, or law of trusts and equity. The author regards the current provisions in Malaysian contract law to address economic duress inadequate and proposes some amendments in this direction. The author's recommendations are directed against sacrificing contractual justice at the altar of contractual freedom, such that the powerful are not left unchecked to drag the weak or powerless people into unjust contracts. The concluding chapter sums up the discussions of the previous chapters and makes some recommendations for reform in contract law.

In sum, the book is a valuable addition to the legal literature, especially literature on contract law. It is an insightful resource for understanding the dialectical tension between justice and freedom in contract cases. It provides an informative survey of the various developments in the history of contract law, especially in the context of Malaysia. It makes practical, reasonable and fruitful recommendations for reform in contract law so that power/influence is not exploited in the name of freedom to impede the realization of justice. It can serve as a useful resource for students/scholars doing research on justice; indeed, its scope extends beyond legal studies, for it includes significant theoretical discussions on the concepts of justice and freedom. Recommended to students and scholars of law, political science, sociology, and philosophy.

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