BIBLIOGRAPHIC INFORMATION

Title	Law and Politics Under Mahathir: Legitimacy, Challenge and Response
Source	http://phuakl.tripod.com/pssm/conference/day339.doc
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Publication/Conference	4th International Malaysian Studies Conference; 3-5 August 2004, Universiti Kebangsaan Malaysia, Bangi
Edition	NA
Document Type	Article
CPI Primary Subject	Law and Order
CPI Secondary Subject	Judicary; Political Economy ; ;
Geographic Terms	Malaysia;

Abstract

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Law and Politics Under Mahathir: Legitimacy, Challenge and Response

Introduction

Law has taken the center stage in Malaysian politics during twenty-two years of Mahathir's premiership. The use of repressive laws to intimidate and crush political opponents, the regression of the judiciary – as critics charged – to a mere handmaiden of political executive, and the various constitutional amendments which seemed to aggrandize the political executive vis-à-vis other state sections invited much popular disaffection with the government. By and large, at least up to the Anwar trial, there has been widespread distrust – locally and abroad - in the country's legal and political system. The call for *reformasi,* restoration of the independence of the judiciary, respect for human rights and the greater push for participatory democracy seemed to indicate that not only the legal system, but also the whole political system was under trial. Suffice to say that there has been serious challenge to government's legitimacy. This paper attempts at explaining perplexing nexus between law and politics during the Mahathir years amidst swinging pendulum of legitimacy discourse - with human rights discourse on the one side and 'developmentalism' on the other – taking place in constrained but contested legal arena.

Law and the state in economic development

The role of law in economic development has become a contentious subject among law and development theorists.[1] Law and development movement which started in the 1960s assumed that legal reform, based primarily on American law, could play a vital role in development process. Efforts were initiated to transplant the American-style modern law into the developing countries. As these countries were still rigged with escalating expectation for rapid economic development, Trubek observes, gradual transplantation of modern law in the western fashion, with legal institutions playing central role, was not possible. As such, the state was viewed as the main instrument by which "purposive" modern laws could be enacted and enforced, and serve as the "main instrument in overcoming underdevelopment"[2]. Trubek however warns that if authoritarian regimes come to power, legal instrumentalism may become a potent means by which the regimes strengthen their grip on power and legitimize political domination.

Trubek's statist-legal instrumentalist view finds deep resonance in Jayasuriya's treatment of authoritarian legalism as a "technique of rule" in East Asian states.[3] Jayasuriya argues that legal institutions in East Asia are the product of exceptional form of Asian capitalism, which is characterized by strong state intervention in the economy rather than a free market. As such, they follow a trajectory fundamentally different from that traversed by Western European institutions. While competitive liberal capitalism in the West paved way for the emergence of "liberal legalism", strong and interventionist states in East Asia yielded "authoritarian legalism", under which, legal institutions are designed to play a "policy implementing" role rather than to limit the exercise of state power. In this sense, the ideology of legalism facilitates the achievement of accurate government policy objectives as well as "provides an instrument for making certain types of oppositional political activities illegitimate"[4].

Developmental programs in Malaysia since the 1970s have been undertaken as a 'nationalist-capitalist' project whose main function has been not only to contain class and ethnic contradiction, but also to respond to accelerating pressures of globalization.[5] Under the aegis of the New Economic Policy (NEP), a blend of coordinated economy with some degree of openness to foreign investments was put in place. In this regards, a formal system of law has a special role to play. It provides a sense of 'predictability' necessary for capitalist advancement, and at the same time offers leverage for the state to strengthen its power vis-à-vis civil society. The strengthening of the state power, which often means the aggrandizement of the political executive, has been seen essentially necessary in order to ensure political stability in an ethnically divided society, which in turn augured well for economic development.

The primary role of legal and judicial institutions viewed in this particular context has been to facilitate, not to impede, development processes defined and initiated by the state. This idea was well encapsulated in the notion of ‘developmental justice’ which extols the virtues of development for the community rather than individual rights and freedom. The latter is seen as a large obstacle in the nation’s path to developed nation status.[6] Dr. Mahathir in his speech delivered in Montevedio in 1997 affirmed that ‘a requisite for development is a judicial system that understands and supports the aspirations of the people for development and justice’.[7]

Economic development as national interest: legitimizing developmental justice

Malaysia has undergone rapid economic development since the 1970s. In the early 1990’s, i.e. before the economic crisis hit the region by mid 1997, Malaysia’s GDP growth averaged 8.7 percent per annum. This miraculous economic growth helped the nation to improve people’s standard of living, reduce incidence of poverty and ease ethnic tension. Ironically, the quest for economic development and the ‘vision’ for developed nation status had pitted Dr. Mahathir against various sections of civil society. His antagonists included the urban educated middle class who rallied around human rights and environmental groups opposing government’s ‘breakneck development’ approach. To these groups, ‘the benefits and consequences of development as seen by governments and their allied agencies are perceived differently by a wide cross-section of people; they feel more victimized than benefited’.[8] This argument holds if one takes into account the impact of ‘development’ on the displaced people and the environmental cost that the society needs to absorb.

At this juncture, the immediate challenge for the government was to ensure that its development programs, which found expression in state policies and vision such as ‘privatization’, ‘heavy industrialization’, ‘Malaysia Inc.’ and ‘Vision 2020’, did not sit uneasily with the interests of the general public. In a more indirect way, it was a task to reconcile the seemingly irreconcilable interests, i.e. the interests of the bureaucratic and corporate elites with that of the ‘people’. Perhaps, the attempt to construe development as such was best captured by Mahathir’s conception of Malaysia Inc., which means ‘not only full cooperation between the private and the public sectors, but also a joint responsibility for the welfare of all workers, i.e. the citizens of the nation'. In this regards, the private sector, which is expected to function as the new engine of growth, 'cannot be concerned only with the promotion of its commercial and business activities in order to maximize returns to investment', but also to 'consider the human and social needs of the workers, their rights and privileges as shareholders and workers, and their dignity as members of a progressive society'. While the public sector 'will continue to remain primarily responsible for these matters', the private sector 'must constantly be sensitive to this social responsibility'.[9]

Inherent in Mahathir's view of economic development in this sense is the blurring line between 'sectional interest' and 'people's interest' that provides a basis upon which the former is subtly legitimized. The sudden rush by local corporations to expand their investment in insurance industry in the early 1980s and the amendment to Civil Law Act 1956 (Revised 1972) that followed is a case in point. Insurance had been a lucrative and fast-growing industry by the early 1980s with total capitalization rose from RM 68.9 million in 1976 to RM 282.6 million in 1983.[10] This 'invisible trade' however was dominated by foreign companies with interests accounted for RM 106.2 million in that year alone. The Bumiputera and non-Bumiputera interests stood at RM 80.2 million and RM 95.9 million respectively.[11] In 1982, this imbalance led to outflow of premium totaled RM 279 million.[12] In line with the New Economic Policy (NEP) guidelines, the government forced insurance companies to restructure in order to reflect the NEP objective of distributive equity ownership. Large local companies, including those linked to public corporations, joined the run to acquire existing insurance companies.[13]

It was against this backdrop that Dr. Mahathir, in his speech at 7th Malaysian Law Conference on 31 October 1983, slammed the 'trend towards more litigation for bigger awards in Malaysia'. As a developing country, Mahathir reasoned, Malaysia 'cannot afford the kind of awards that make headlines'.[14] He was referring to the surge in the amount of damages claimed by the insured parties that would eventually give rise to an increase in the amount of premiums. In late 1984, the Parliament amended Civil Law Act 1956 (Revised 1972) to limit the amount of claim for damages made under section 7 of the Act (which provides compensation to the family of a person for loss occasioned by his death) to not more than ten thousand ringgit. This amendment meant that the people would get less than what they probably would from the insurance companies in the event of claims for damages. Rather than directly defending the captain of industries, Mahathir explained that the rationale behind the move was to avoid sudden surge in the insurance premiums that 'will be burdensome to the poor'.[15]

Mahathir's priority might have been to protect the fledgling domestic interests in the insurance industry rather than the poor. His welfarist-populist language, however, obscured his ultimate motive and turned what might have been considered as 'sectional interest' into 'people's interest'. From this perspective, it would be fine for the people to accept lower damages as this would spare insurance companies from huge losses and therefore bar the people from paying higher premiums. The insurance industry would flourish, and in turn, benefited the nation as a whole. In the end, what the people and the captain of industries did was to serve their shared 'national interest' and justice in the name of economic development.

Developmental justice under trial: the Bakun dam case

Very often, rapid economic development brings to a head tensions between 'sectional interests' and 'people's interests'. When such tensions erupt, even the most sophisticated welfarist-populist language will be dented. In Malaysia's history, there have been many instances where 'development' brought to the fore contending sectional interests which undermined the very notion of developmental justice. There are sections of Malaysian societies who found themselves trapped in the 'development vs. human rights' conundrum and are apt to believe that development and justice are antithetical to each other, that 'development' benefited only a few and victimized many others.[16] This part seeks to explain this assumption by looking at one of the most controversial development projects in Malaysia – the Bakun dam. It attempts to show how contending interests - that of the displaced communities on the one side, and the political and corporate elites on the other – engaged the court seeking not only to promote their sectional interests, but also to assert their contradicting conceptualizations of development and justice.

Beginning with initial studies in the 1970s, Bakun, in the interior of Sarawak, was identified a possible dam site in 1980. Once completed, it would have power generating capacity of 2,400MW, ten times more than the projected energy needs for the whole Sarawak in 1990. As such, the project would be coupled with a world's first 650 kilometers undersea cable across the South China Sea to carry the access electricity to Peninsular Malaysia. Its spin-off effect would be the attraction of foreign investment to Sarawak and therefore industrial development. This multibillion-ringgit project was abandoned in 1986 due to economic recession. Dr. Mahathir announced just before the UN Conference on Environment and Development at Rio that it was 'proof of Malaysia's commitment to the environment".[17]

With the upturn in the Malaysian economy in the early nineties the government announced its plan to revive the project.[18] In January 1994, a contract to build the dam and the undersea transmission cable worth about RM 15 billion was awarded without an open tender process to Ekran Bhd, a construction company reputed for fast completion of projects, owned by Sarawak-based politically well connected businessman Dato' Ting Pek Khiing.[19] Besides leading the enormous privatized hydroelectric project, Ekran also stood to reap other accompanying benefits. These included an estimated 3 million to 4 million tones of timber, which would be cleared for the dam project, with a total value of about RM1 billion. Ting Pek Khiing also revealed that his company would also invest RM60 million to set up a plant to manufacture high-tension cables for the undersea power transmission project.[20] The lack of transparency in the award of the contract led to accusations that the government practiced favoritism.[21]

The Bakun dam project involved flooding of about 70,000 hectares of tropical rainforest, about the size of Singapore, and displacement of approximately 10,000 indigenous people.[22] The scale of the project, its tremendous environmental, social and economic impact generated protests from local and international pressure groups. The handling of the project, which was riddled with controversies, also fueled the pressures.

This included government's green light in February 1995 for work on the site to start despite the study on its environmental impact was not yet completed.[23] The government also decided to break the Environmental Impact Assessment (EIA) reports into three areas – creation of the reservoir, building of the dam and transmitting the power – in order to speed up the project.[24] Sahabat Alam Malaysia (SAM) president, S.M. Mohamed Idris, slammed the move as 'impossible and illogical' since the three areas are 'part and parcel of the same project'.[25] It raised doubt on the progress of the project should the subsequent EIA reports are rejected. In any manner, the move implied government's determination to go ahead with the project regardless of the outcome of the reports. The market, however, responded well to the nod by the government by pushing Ekran shares up from RM 2.05 to RM 8.90 per share on 20 February 1995, the Monday after a weekend announcement on the approval was made.[26] The feel good sentiment about the project was also boosted by Energy, Telecommunications and Posts Minister Samy Vellu's announcement that the cash-rich Employees' Provident Fund would be the biggest source of funding for the project.[27]

The first EIA report, which was made public in June 1995 after much pressure from the NGOs and the Opposition, indicated that the project would bear disastrous impact on the environment and the life of the affected people. It reported that 'the terrestrial habitats of all species around the dam would be removed and aquatic habitats altered, while removal of vegetation and destruction of vegetation ecotypes was inevitable'.[28] It also added that 'wildlife, fishes and lifestyles of the 5,000 people in the area, mostly farmers, would be affected'. Despite this devastating impact, the project was given a nod, the work continued and the people were relocated, albeit, under strong protests from environmental and human rights groups locally and abroad. It was against this backdrop that three residents of longhouses affected by the construction of the dam filed a suit in the High Court seeking court's declaration that the project was illegal.[29] Their contention included Ekran's non-compliance with the Environmental Quality Act (EQA) of 1974, which provides that certain prescribed activities could only be carried out with the approval of the Director General of Environmental Quality. The prescribed activities included dams and hydroelectric power schemes with dams over 15 meters high and ancillary structures covering a total area in excess of 40 hectares, or reservoirs with a surface area in excess of 400 hectares, or both.[30] The Bakun dam fell within the scope of the prescribed activities as the law envisaged. The law also imposed a duty upon any person who carries out any of the prescribed activities to submit EIA report to the Director General of the Environmental Quality. Guidelines issued by the Director General stated that the report must be made available to the public for their comments.

However, a Minister's Order known as the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 provided that the prescribed activities shall not apply to Sarawak. This order, which was made in March 1995 with retrospective effect from 1 September 1994, was sufficient to cover the initial works on the dam site. Subsequently, the Director General issued a press release stating that the EIA prepared by Ekran was subject to the Sarawak Natural Resources and Environment (Prescribed Activities) Order 1994, and not the regulations made under the EQA by the Federal Government. As the Sarawak Order did not have any provisions on the public's entitlement to a copy of the EIA and for subsequent public comments, the State Natural Resource Board reviewed and approved the EIA report without first making it public. The plaintiffs therefore claimed that they had been deprived of their rights to obtain a copy of the EIA, to be heard and make representation before the EIA is approved.[31] The plaintiffs also claimed that 'their homes and land would be destroyed, their lives uprooted (sic) by the project and that they would suffer far more greatly and directly than other members of the public as their land and forest are not just a source of livelihood but constitute life itself, fundamental to their social, cultural and spiritual survival as native peoples'.[32]

Based on the law and the facts of the case, the court granted plaintiff's application. High Court justice Dato' James Foong in his judgment delivered on 19 June 1996 held, *inter alia*, that 'a valid assessment of an EIA prepared by the project proponent of the prescribed activities cannot be made without some form of public participation'.[33] He added that 'this is essential, for interaction between people and their environment is fundamental to the concept of environmental impact'.[34] As such, 'a right is vested on the plaintiffs to obtain and be supplied with a copy of the EIA coupled with the right to make representation and be heard'.[35] Describing the Minister's Order 'a mortal blow', which 'tantamounts to the removal of the entire rights of the plaintiffs', the court declared that it 'shall not stand idly by to witness such injustice especially when the plaintiffs have turned to (the court) to seek redress'.[36] The court thereby granted a declaration that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 was invalid, and that Ekran, before it could carry out the construction of the dam, had to comply with the Environmental Quality Act of 1974, and with any regulations and guidelines made under the Act.

The activists lauded the court's verdict. Some even commended the landmark decision as a sign of judicial independence and restoration of public faith in the judiciary.[37] Ironically, except for the share prices of those companies that were directly related to the project, the Kuala Lumpur Stock Exchange remained bullish. This might be due to the crux of the judgment, according to the proponents of the project, which impliedly indicated that the project was not illegal. What Ekran had to do was to comply with the EQA, not the Sarawak Order. Once this was done, it could get rid of the legal hurdles. In any manner, the court's verdict would only delay the project, not completely scrap it. Meanwhile, the government abstained from issuing order to stop work on the dam site. Putting the onus on Ekran to decide the next course of action, the then Deputy Prime Minister and Finance Minister Anwar Ibrahim 'reasoned that the government was not prepared to do so 'because of the possibility of future claims (by Ekran if they were to suffer any losses) or heavy financial implications that may burden the Government'. He added that 'such claims could amount to millions of ringgit'.[38] In fact, Ekran continued works on the dam site after receiving 'supports' from state leaders that the decision was one of 'technicality', that the court did not issue 'stop work' order, and that the works were 'preliminary', and thus, not the prescribed ones barred by the law.

Though the market did not seem to respond negatively to the decision, perhaps due to assurances that the project might be given a nod later, the impressions upon investors that government awarded contracts might be overturned overnight by the court did not sound practically feasible for private sector driven economy to grow. Weberian assumption that modern law provides a sense of certainty necessary for capitalist development quickly came into play. It was in this vein that the Court of Appeal on 29 June 1996 allowed Ekran's ex-parte application for an interim order to suspend the High Court's decision. In an inter-parte proceeding that followed, the counsel for Ekran argued, as reported by The New Straits Times, that unlike the residents, Ekran 'would lose substantially if the effect of the declaration was not suspended pending appeal'.[39] Apart from the costs, he also pointed out that it was wrong to delay the project because 'a dislocation would defer the immense benefit from the project accrued to the nation', adding that the Bakun dam 'would make cheap power available to consumers'.[40]

The final mortal blow to the longhouses residents, however, could be found in the Court of Appeal's decision to overturn the High Court's verdict. Allowing the appeal, Justice Gopal Sri Ram held, *inter alia*, that 'the respondents lacked substantive *locus standi*' (i.e standing to bring an action for a declaration in public law), and therefore the relief sought should have been denied. Invoking the language of 'strict legalism', the judge reasoned that (a) the respondents were, in substance, attempting to enforce a penal sanction, which was a matter entirely reserved by the Federal Constitution to the Attorney General of Malaysia; (b) deprivation of respondents' lives, a claim made under article 5(1) of the Federal Constitution, was in accordance with the law, ie the Land Code (Sarawak Cap 81). As such, the respondents had on the totality of the evidence suffered no injury and there was thus no necessity for a remedy; (c) there were persons, apart from the respondents, who were adversely affected by the project. There was no special injury suffered by the respondents over and above the injury common to others; and (d) the judge did not take into account relevant considerations when deciding whether to grant declaratory relief. In particular, he did not have sufficient regard to public interest, i.e. the failure to consider the interests of justice from the point of view of both the appellants and the respondents.[41]

As regard to the question of substantive *locus standi*, the judge opined that a litigant may be disentitled to declaratory relief for ‘substantive reasons’. The following words of Justice Gopal Sri Ram may be illustrative of those reasons:

> The factors that go to a denial of substantive locus standi are so numerous and wide ranging that it is inappropriate to attempt an effectual summary of them. Suffice to say that they range from the nature of the subject matter in respect of which curial intervention is sought to those settled principles on the basis of which a court refuses declaratory or injunctive relief. As regards subject matter, courts have ---- by the exercise of their interpretative jurisdiction ---- recognized that certain issues are, by their very nature, unsuitable for judicial examination. Matters of national security or of public interest, or the determination of relations between Malaysia and other countries as well as the exercise of the treaty making power are illustrations of subject matter which is ill-suited for scrutiny by the courts. Jurisdiction is declined, either because the supreme law has committed such matters solely to either the Executive or the Legislative branch of Government ---- which is termed as 'the political question' by jurists in the United States ---- or because the court is entirely unsuited to deal with such matters. Substantive relief is denied in such cases on the ground that the matters complained of are non-justiciable. Even if a particular issue may be litigated because it is justiciable, a court may be entitled, in the exercise of its discretion, to refuse discretionary relief after taking into account all the circumstances of the case. The grounds upon which declaratory relief may be refused are fairly well settled, and include such matters as public interest.[42]

On the question of public interest, the judge concluded that the trial judge had erred because, in particular,

> ‘he failed to ask himself the vital question: are public and national interest served better by the grant or the refusal of the declarations sought by the respondents? … The affidavit evidence (sic) filed on the respondents' behalf reveals that they were

not against development in the national interest. They were merely concerned that, in respect of the project, there should be compliance of written law. In the present instance, there was such compliance because Ekran, in relation to the project, did observe and act in accordance with the provisions of the Ordinance, which we hold to be the written law that is applicable to the facts of this case. It is also to be noted that the learned judge merely found that the justice of the case would be served by the grant of declaratory relief. But he did not, in the process of making such a finding, carry out any balancing exercise which is essential in cases that concern discretionary relief. He certainly took into account the interests of justice from the respondents' point of view. However, he does not appear to have taken into account the interests of justice from the appellants' point of view as well. This omission fatally flaws the exercise of discretion. Justice is not meant only for the respondents. The appellants are equally entitled to have their share of it'.[43]

No doubt that, the learned judge was trying to assert that both parties must be treated equally before the law, and that the court must strictly concern itself with the letter of the law. This forms the crux of 'rule of law' and 'legalism' – i.e, in particular, equality before the law and rule following. In so doing, the learned judge obscured the fact that, in the present case, there were three small people facing the might of a giant corporation backed by the powerful state and federal government. Strict adherence to the letters of the law, which, in this case, had obviously been amended to legalize the preparatory works by the project proponent, seemed to serve the interest of one party over another. Here lies the limit of 'strict legalism' – rule following tends to serve the interests of those who have domination, or at least bearing, over law making and public policy. Very often, in the context of a 'developmental state', this had been taken to mean, the interests of corporate and political elites who viewed law as an 'instrument' of state-led development rather than a 'limit' to the exercise of state power. Legalism, in this instance, renders the court the guardian of the 'law as it is', not of human rights. Justice, if it ever had any agreed meaning, is served in the name of development as defined and initiated by the state. It is in this sense that legal instrumentalism, backed by the judiciary committed to ‘authoritarian legalism’ as defined by Jayasuriya, serves the interest of the power-that-be.[44]

Political trials in the 1990s: legalization of politics or politicization of the law?

The more compliant judiciary, which emerged after the judiciary crisis in the late 1980s, set the stage for effective use of the court as a “one-sided political arena” to try political opponents.[45] Not only these “political trials” aim at eliminating political opponents, but also serve as a medium by which the political regime articulates its version of “legality”. Once the court decides against the political “offender”, he becomes an ordinary criminal who deserves legal retribution. In this regard, the dominant political elites invoke normal civil and criminal law in order to legitimize domination over their opponents. It is in essence an attempt at transforming latent political conflicts into purely legal battles. Politics is thus legalized in juridical fashion. Though this kind of ‘legalization of politics’ was not new, such an attempt in the face of more compliant judiciary made the fairness of its outcome even more suspect. This trend could be observed in the 1990s where staunched critics of the government and the court were met with normal criminal charges and civil suits, rather than arrest without trial – which is politically more costly - under the Internal Security Act.[46]

The arrest, trial and jail sentence of the former Deputy Prime Minister, Anwar Ibrahim, best illustrate this trend. Anwar was charged with corruption and sodomy, which he and his supporters claimed were trumped up charges brought against him by “conspirators” in high offices in an attempt to defuse his challenge against Dr. Mahathir. Mahathir’s treatment of Anwar had, in turn, triggered intense pressures for political and legal change. The judiciary, as a result of protracted trial and conviction of Anwar, had to bear a serious crisis of confidence. A report by a group of international legal institutions noted that there was a widespread concern about the fairness of the trial and the independence and impartiality of the trial judge.[47] The trial had also raised regional and international concern, which resulted in several leaders of neighboring countries giving ‘unfriendly’ remarks about the ways in which the former Deputy Prime Minister was treated. William Case, in his analysis of the Anwar trial, notes:

> Mahathir leaves a complex legacy…Nor can one gainsay his country's rapid industrial progress. But the obduracy with which he has dealt with opposition forces while pursuing these aims – then tapped the country's judiciary so deeply for legitimacy that he has deadened it –forges an odd trajectory in which the country modernizes its industrial base while its political institutions are demeaned.[48]

The Anwar purge caused mass disaffection with the government. *Reformasi* wave witnessed how law and legal institutions were used to intimidate and crush political opponents. Anwar and his key Anwar supporters were detained under the ISA. During Anwar's trial, one of his counsels, Zainur Zakaria was cited for contempt of court for making an application to the court to have two of public prosecutors excluded from the case. The application was made on the ground that they had attempted to fabricate evidences against Anwar. Mr. Zainur, though he was acting in his professional capacity as defendant's counsel, was found guilty of contempt and sentenced to three months imprisonment.[49] Karpal Singh, the lead defence counsel for Anwar, and a DAP leader, was charged with sedition with respect to statements he made in the court, in the defense of his client.[50] At the height of reformasi, many of those involved in 'illegal assemblies' were charged under normal criminal law for disrupting public order.

It is worth noting that the Anwar trial and the use of repressive laws against him and his supporters occurred in a period during which "racial harmony" and "national security" served minimal, if not almost no, legitimating function. The *Bumiputera*'s economic condition has improved considerably while the *non-Bumiputera's* sense of alienation has also receded as a result of more favorable government attitude toward non-bumiputeras in post-NEP Malaysia. As such, there was less apprehension about recurrence of the 1969 racial riots, or any sort of that scale.[51] It is against this backdrop of changing *Bumiputra-non-Bumiputra* dichotomy that ADIL, an alliance of cross-sectional and cross-ethnic non-governmental organizations, and later keADILan the political party, was set up to pursue the struggle for "reform".

Though the Anwar purge reflects the government's authoritarian way in dealing with political opponents, it is erroneous to conceive that the government maintained itself in power by sole authoritarian means. All detainees held under the ISA for their involvement with *"reformasi"* had so far been released. Many of them were back into active oppositional politics, while some returned to the fold of the ruling party UMNO. At the height of allegations of human rights abuses, the government established Malaysian Human Rights Commission (SUHAKAM), with one of its main function has been "to inquire into complaints regarding infringement of human rights". Though the role of SUHAKAM as an effective human rights 'watch-dog' was very much doubted by its critics, the commission has, since its inception in April 2001, investigated into public complaints over abuses of human rights, including that of the ISA detainees. Their reports and recommendations to the government were also made public, though the government incessantly refused to be bound to act on such recommendations.

At the ideological level, the government actively articulated anti-pluralist politics in order to legitimize its actions. Cynically condemning the critics of his government following the arrest, trial and imprisonment of Anwar Ibrahim, Dr. Mahathir whimsically remarked, "the rights of a political dissident should not outweigh the well being of the rest of the population". In what he sees as "a very distorted perception of right and wrong, the government of a country is considered as having violated human rights because it denies a few people the right of dissent".[52] Such a view, which placed community higher than individuals, is parallel with a kind of anti-pluralist politics inherent in the Asian values discourse.[53] In such a discourse, political pluralism is considered to be a basic threat to political order and stability. Often, curtailment of the right to political dissent is made on the grounds of averting political instability and preserving national security. As such, the notion of 'freedom' and 'human rights', which denotes the essence of pluralist politics, is not fully welcome by the government and pro-establishment sections of the society.

This observation fits neatly into Loh Kok Wah's interpretation of the emerging "new politics of developmentalism" in Malaysia. The new politics, in which ethnicity no longer overwhelms other political discourses, valorized "not only rapid economic growth, rising living standards, and the resultant consumerist habits", but also "political stability which growth and consumerism necessitated … even when authoritarian means are resorted to and cronyism is evident".[54] Moreover, in the midst of "reformasi", there were deliberate attempts by government-controlled media to associate public rallies in support of the reform movement with disruptive elements that could jeopardize development and public peace. In other words, while repression was meted out to political opponents, the government was also concerned with its own legitimacy. In regard to this, "developmental justice" or the politics of "developmentalism" was the government's ideological tool to harness its political legitimacy against the rising demand for greater participatory democracy and respect for fundamental human rights. The mechanism of control is not only confined to authoritarian means, but also delicately tailored ideological appeal.

There was also pressing need on the part of the government to further strengthen its position vis-à-vis the judiciary. In this new politics of ideological contestations, the opposition was also keen to use the court to disseminate values that they seem to espouse. This was clearly shown in the trials of Anwar whereby the defense counsels engaged in direct confrontations with the judges and were more concerned with proving "political conspiracy" rather defending their client, so to speak. Anwar himself delivered fiery speech against his 'perpetrators' when he was given a chance to mitigate for more lenient sentence in one of the trials. The speech was widely reported in the international as well as local alternative media. As such, it is not unconceivable that political opponents, in order to discredit the government, would also find refuge in the legal arena. While the dominant political elites were keen to "legalize the politics", their opponents were equally keen to "politicize the law".

It was at this juncture that the government did not take its "internal cohesion" for granted. Several judges who were seen "cooperative" to the government were elevated to higher positions. They included the chief prosecutor in the Anwar case, Tan Sri Mokhtar Abdullah, who was made in February 2001 a judge of the Federal Court, the nation's highest court. The judges who presided over the Anwar case, Justice Augustine Paul and Justice Ariffin Jaka, were also elevated in July 2003 to the Appeal Court. The promotion of these judges, who bypassed more senior judges in the judiciary, was a matter of much controversy. It was alleged that their promotion was a reward for their ruling against Anwar, the allegation which the Chief Justice strongly denied.[55] The Malaysian Bar criticized the appointments since it was done without proper consultation with the legal fraternity. Its attempt to hold an Extraordinary General Meeting, which was attended by about 1400 lawyers, to pass resolution against the appointments was futile, due to very high requirement of quorum.[56] Apparently, the prerogative of the Prime Minister to have his "advice" heeded to by the *Yang di-Pertuan Agong* in such appointments was benefited so as to avoid the judiciary from reverting to its pre-1988 activist line of judicial reasoning.

Conclusion

Decades after the 1980s witnessed, on the one hand, the decline of judiciary's role to keep the government in check; "stronger" political executive; and articulation of anti-pluralist political discourse at the expense of individual freedom and fundamental human rights. It was in this vein that the interplay between law and politics during the Mahathir years witnessed the discourse of developmentalism – under the name of developmental justice - spilled over into the legal domain. This was observable in controversial cases that pitted the corporate and political elites, who stood to gain enormous benefit from 'development', against the people, who seemed to be the victims of the same. On the other hand, legalization of politics provides space as well as constraints for political opposition to mount challenge against the government through the legal arena. The limited success of the Opposition in politicizing the law indicates that the court, in this sense, has not been successfully turned into a one-sided political arena. The prospect for wider space for political competition, however, remains ambivalent as present developments show that the more the opposition utilizes the space, the more the government squeezes it.

[1] For detail account on this subject, see Carty (1992).
[2] Trubek (1972: 36).
[3] Jayasuriya (1996).
[4] *Ibid.*, p. 368-9.
[5] Khoo (2000: 214).
[6] Soyinka (1999)
[7] Mahathir (1997)
[8] Vinod et. al. (1997: 8)
[9] Mahathir (1983a)
[10] *Business Times Singapore*, 11 November 1983.
[11] *Ibid*.
[12] *Business Times Singapore*, 21 August 1984.
[13] *Business Times Singapore*, 1 November 1984.
[14] Mahathir (1983b).
[15] Mahathir (1984).
[16] Tan (1997) offers illustrative case studies of 'development projects' that 'victimize' the people. Among the projects are Kerpan prawn farming, Nenasi aquaculture, Batang Ai dam, Bright Sparkler firework factory, Asian Rare Earth yttrium plant and Durian Tunggal dam.
[17] *New Straits Times*, 13 June 1990 quoted in Kua (2001: 56).
[18] 'Bakun hydro-electric project to be revived', *Business Times*, 8 March 1990.
[19] 'Ekran is tapped to construct Malaysian dam', *Asian Wall Street Journal*, 31 January 1994.
[20] 'Ekran to benefit from timber cleared from the dam', *Business Times*, 31 January 1994.
[21] *Asian Wall Street Journal*, 31 January 1994. The article mentions that private negotiation first took place between Dato' Ting and powerful Chief Minister of Sarawak, Tan Sri Abdul Taib Mahmud. Dr. Mahathir then approved the award without competitive bidding.
[22] Kua (2001: 55). First EIA report released in June 1995 mentioned only 5000 people.
[23] 'Environment group protests Malaysia dam approval, *Reuters News*, 18 February 1995.
[24] *Reuters News*, 18 February 1995.
[25] *Ibid.*
[26] 'Malaysia: Ekran up 2.05 Rgt to 8.90 Rgt on news it has won initial approval to start work on Bakun dam – traders', *Dow Jones International News*, 20 February 1995.
[27] 'EPF to be biggest source of funds for Ekran dam project', *Business Times Singapore*, 22 February 1995.
[28] 'Environmentalists demand work to be stopped on hazardous Malaysian dam', *AFP*, 25 June 1995.
[29] *Kajeng Tubek & Ors v. Ekran Bhd. & Ors* [1996] 2MLJ 388.
[30] See item 13(b) of 'Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987' numbered as PU(A) 362/87 ('PU(A) 362').
[31] [1996] 2MLJ, p.p. 388-9.
[32] *Ibid.*
[33] *Ibid.*, p.p 412.
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] 'Dam ruling restores faith in law', *South China Morning Post*, 24 June 1996.
[38] 'Ekran must decide for itself – Anwar', *Business Times*, 25 June 1996.
[39] 'Dam project's delay will defer benefit, says counsel', *The New Straits Times*, 12 July 1996.
[40] *Ibid.*
[41] *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23.
[42] *Ibid.*, p.p. 41.
[43] *Ibid.*, p.p. 46.

[44] See Jayasuriya (1996).

[45] The objective of political trial is “the destruction, or at least, the disgrace or disrepute, of a political opponent” (Shklar 1964: 49).

[46] See for example *Attorney General, Malaysia v. Manjeet Singh Dhillon* [1991] 1 M.L.J. 167*; MBf Capital & Anor v. Tommy Thomas & Anor* [1991] 1 M.L.J. 139; *Lim Guan Eng v. Public Prosecutor* [1998] 3 M.L.J. 14; *Dato' Param Cumaraswamy v. MBf Capital Bhd* [1997] 3 M.L.J. 300; *INSAS Bhd. & Anor v. Param Cumaraswamy* [2000] 4 M.L.J 727; *Re Zainur Zakaria* [1999] M.L.J. 577.

[47] International Bar Association (2000: 46).

[48] Case (2003: 130).

[49] *Bernama,* 30 September 1998.

[50] His statement reads, “It could be well that someone out there wants to get rid of him…even to the extent of murder” and “I suspect that people in high places are responsible for this situation”. See, IBA (2000: 42). The Court in January 2002, however, acquitted him of the charge. See *The Lawyer*, 22 January 2002.

[51] Hari Singh (2002: 533).

[52] Mahathir (1999).

[53] Jayasuriya (2001: 101)

[54] Loh Kok Wah (2003: 278).

[55] *New Straits Times*, 26 July 2003.

[56] *INFOLINE,* October 2003.