

## Between Legalization of Politics and Politicization of Law: Politics, Law and Economic Development in Malaysia

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### ABSTRAK

*Sepanjang dua puluh tahun negara dipimpin oleh Dato' Sri (kini Tun) Dr. Mahathir Mohamad, undang-undang menduduki tempat utama dalam politik Malaysia. Penggunaan undang-undang yang menindas untuk menakutkan dan menekan pihak lawan politik, penundukan badan kehakiman – sebagaimana didakwa oleh pengkritik – kepada menjadi hanya sebagai 'intang' kepada eksekutif politik, dan pelbagai pindaan perlembagaan yang seolah-olah memperbesarkan kedudukan eksekutif politik itu vis-à-vis bahagian-bahagian lain telah menimbulkan perasaan kurang senang terhadap kerajaan. Mainan (interplay) antara undang-undang dan politik di Malaysia, sekurang-kurangnya sehingga berakhirnya era kepimpinan Mahathir memperlihatkan, pada satu segi, pengurangan peranan badan kehakiman dalam mengawal perjalanan kerajaan, kedudukan eksekutif politik yang semakin kukuh, dan pengungkapan wacana politik anti-pluralist sehingga menjejaskan kebebasan politik dan hak asasi manusia. Pada segi yang lain, kebangkitan politik baru menghasilkan hubungan atau ikatan kumpulan-kumpulan sosial yang bersifat rentas-etnik dan rentas-bahagian, selain kemunculan developmentalism sebagai satu gerak kuasa pengesahan yang baru. Mainan antara undang-undang dan politik ini juga menyaksikan contestations yang berlaku antara wacana mengenai developmentalism – di bawah nama keadilan pembangunan – dan hak asasi telah melimpah ke dalam domain perundangan. Tuntutan supaya diadakan pembaharuan, kembalikan kebebasan badan kehakiman, hormat hak asasi manusia dan supaya adanya lebih banyak participatory democracy menunjukkan bukan sahaja sistem perundangan, tetapi keseluruhan sistem politik telah terbicara. Makalah ini cuba menerangkan keadaan yang membingungkan antara politik, undang-undang dan pembangunan ekonomi di Malaysia yang terdapat di tengah-tengah wacana yang berubah-ubah berkaitan dengan kesahan, iaitu antara wacana mengenai hak asasi pada satu pihak dan developmentalism pada pihak yang lain. Keadaan ini berlaku dalam arena undang-undang yang constrained tetapi tetap contested.*

## ABSTRACT

*Law has taken the center stage in Malaysian politics during the long twenty-two years of Dato' Sri (now Tun) Dr. Mahathir Mohamad'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 seemingly aggrandized the political executive vis-à-vis other state sections invited much popular disaffection with the government. The interplay between law and politics in Malaysia, at least up to the end of Mahathir years 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. On the other hand, the rise of new politics brought forth cross-ethnic and cross-sectional alliances of social groups challenging government's political legitimacy, as well as the emergence of developmentalism as a new legitimating force. This interplay between law and politics also witnessed the contestations between the discourse of developmentalism – under the name of developmental justice – and that of human rights spilled over into the legal domain. The call for reform, restoration of the independence of judiciary, respect for human rights and greater participatory democracy seemed to indicate that not only the legal system, but also the whole political system has been under trial. This paper attempts to explain perplexing nexus between politics, law and economic development in Malaysia 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.*

## INTRODUCTION

Law has taken the center stage in Malaysian politics during the long twenty-two years of Dato' Sri (now Tun) Dr. Mahathir Mohamad'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 seemingly aggrandized the political executive vis-à-vis other state sections invited much popular disaffection with the government. By and large, at least up to the former Deputy Prime Minister Datuk Seri Anwar Ibrahim's trial for charges of corruption and sodomy, there has been widespread distrust – locally and abroad – in the country's legal and political system. The call for reform, restoration of the independence of judiciary, respect for human rights and greater participatory democracy seemed to indicate that not only the legal system, but also the whole political system has been under trial. Suffice to say that there has been serious challenge to

government's political legitimacy. This paper attempts to explain perplexing nexus between politics, law and economic development in Malaysia 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 been a contentious subject among law and development theorists (Franck 1972; Trubek 1972; Greenberg 1980; Carty 1992). Law and development movement that started in the 1960s assumed that legal reform, based primarily on American law, could play a vital role in bringing about economic development. Efforts were thus initiated to transplant the American-style modern law into the developing countries. As these countries were still rigged with escalating expectations for rapid economic development, Trubek (1972: 36) observes that gradual transplantation of modern law in the western fashion, with legal institutions playing central role in legal development, was not possible. As such, the state was viewed as the main instrument by which purposive modern laws could be enacted and enforced, and served as the main instrument in overcoming underdevelopment. Trubek, however, warns that legal instrumentalism may be used by authoritarian regimes to strengthen their grip on power and legitimize political domination.

Trubek's view of state-centered legal instrumentalism finds deep resonance in Jayasuriya's treatment of authoritarian legalism as a technique of rule in some East Asian states. Jayasuriya (1996) argues that legal institutions in these states 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, law and legal institutions are designed as policy implementing instruments rather than a limit to the exercise of state power. In this sense, the ideology of legalism facilitates achievement of accurate government policy objectives while at the same time 'provides an instrument for making certain types of oppositional political activities illegitimate' (1996: 369).

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 contradictions, but also to respond to accelerating pressures of globalization (Khuo 2000). Under the aegis of the New Economic Policy (NEP), which aims at restructuring the society through elimination of economic imbalances among major ethnic groups and alleviation of poverty, a

blend of openness to foreign investments with institutionalized affirmative actions programs was put in place.<sup>1</sup> The government promoted foreign direct investment and private sector-led industrial development, but at the same time imposed restrictions on foreign corporate ownership under the NEP. A 30-per cent rule was introduced under the Investment Coordination Act 1975, which provides for compulsory distribution of equity in manufacturing projects to *Bumiputeras* (son of the soil).<sup>2</sup>

In promoting good investment climate, 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 the civil society. Free Trade Zone legislations, which provided generous tax break to foreign investors, were enacted alongside strict labor laws that curtailed a host of labor rights. Security laws were also occasionally invoked to discipline workers, environmental activists, peasants, students and opposition leaders. This has been to ensure that the working of legal framework is predictable, industrial harmony is maintained, wages are kept low and politics is stable. All these are important ingredients of Malaysia's comparative advantage in the age of globalization, where capital flows into low cost production hubs that offer cheap labor, legal predictability and political stability. It was in this context that Malaysia showcased rapid economic growth in the 1970s through the 1990s, which to a large extent was a result of quasi liberal economic policies that coexist with illiberal politics.

Pistor and Wellons (1999) in their study of the relationships between law and economic development in 10 Asian countries show that there has been increased liberalization in Malaysian economy from the mid 1980s. These included relaxation of foreign equity ownership in manufacturing firms; revision of bankruptcy law to assist credit; law reform to make financial sector more efficient and competitive; reduction in the licensing control for manufacturing companies; amendment to the company laws to strengthen shareholders' rights; market-based procedures for commodity trading; and new legislations for offshore insurance, banking and trust. However, there has been no sign of major reduction in executive's power over the economy. Privatization policy is an example. The government 'continues to take the initiative in identifying the project and the recipient, and relied primarily on directive and persuasion to guide the process' (Pistor & Wellons 1999: 91). Further, rule making in the executive expanded and the judiciary exercised self-restraint in cases involving abuses of executive powers.

The strengthening of state power, which often means the aggrandizement of the political executive, has been cited as essentially necessary to ensure political stability in an ethnically divided society, which in turn, augured well for economic development. The primary role of law and legal institutions viewed in this context of *dirigiste* developmental state 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' that extols the virtues of development for the community rather than individual rights and freedom. While the former is represented as a matter of national interest, the latter is seen as a large obstacle in the nation's path to developed nation status (Soyinka 1999). Dr. Mahathir in his speech delivered in Montevideo 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' (Mahathir 1997).

#### ECONOMIC DEVELOPMENT AS NATIONAL INTEREST: LEGITIMIZING DEVELOPMENTAL JUSTICE

Malaysia has undergone rapid economic development since the 1970s. In the early 1990s, that is before the economic crisis hit the region by mid 1997, Malaysia's GDP growth averaged 8.7 per cent per annum. This miraculous economic growth helped the nation improve people's standard of living, reduce incidence of poverty and ease ethnic tensions. Ironically, the quest for economic development and the vision for developed nation status pitted the government against various sections of civil society. The antagonists included the urban educated middle class who rallied around human rights and environmental groups opposing government's breakneck approach to economic development, which adversely affected the people and environment. 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' (Raina et al. 1997: 8). This argument holds if one takes into account the impact of development projects on displaced people and the consequent environmental cost that the society needs to absorb. The question is whether development in its crudest sense is legitimate if it exposes certain segments of society to direct sufferings and losses, let alone bringing any benefit to them.

At this juncture, the immediate challenge for the government has been to present to the people that its developmental programs, which found expression in state policies and vision such as 'privatization', 'heavy industrialization', 'Malaysia Inc.' and 'Vision 2020', do not sit uneasily with the interests of the general public. In a more indirect way, it is a task to reconcile the seemingly irreconcilable interests between the interests of political and corporate elites, who stand to reap the benefit of development through patronage dispensing function of the former, with that of the affected 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, that is, the citizens of the nation'. In this regards, the private sector, which was 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' (Mahathir 1983a).

Hidden in Mahathir's view of public and private sector's joint social responsibility is the blurring line between public interest and sectional interests, which provides a basis upon which the latter is subtly represented as national interest and politically legitimized. The sudden rush by local corporations to expand their investment in insurance industry in the early 1980s and subsequent amendment to Civil Law Act 1956 (Revised 1972) is a case in point. Insurance had been a lucrative and fast growing industry by the early 1980s with total capitalization rose from RM68.9 million in 1976 to RM282.6 million in 1983 (*Business Times Singapore*, November 11, 1983). However, foreign companies dominated this invisible trade with interests accounted for RM106.2 million in that year. The *Bumiputera's* and *non-Bumiputera's* interests stood at RM80.2 million and RM95.9 million respectively. In 1982, this imbalance led to outflow of premium totaled about RM279 million from the country (*Business Times Singapore*, August 21, 1984). In line with the New Economic Policy (NEP) guidelines, the government forced insurance companies to restructure in order to reflect the NEP's objective of distributing at least 30 per cent equity to *Bumiputera* interests.

It was against this backdrop that Mahathir in his speech at 7<sup>th</sup> Malaysian Law Conference on October 31, 1983 slammed the 'trend towards more litigation for bigger awards in Malaysia'. As a developing country, he reasoned, Malaysia 'cannot afford the kind of awards that make headlines' (Mahathir 1983b). He was referring to the surge in the amount of damages claimed by the insured parties. 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 for compensation to the family of a person for loss occasioned by his death) to not more than ten thousand ringgit. This amendment means the people would get less than they normally did from the insurance companies in the event of claims for damages. Rather than directly defending the captain of insurance 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' (Mahathir 1984).

Mahathir's priority could have been to protect the fledgling domestic interests in the insurance industry rather than the poor. His essentially nationalist-capitalist project glossed with welfarist-populist language, however, turned what might have been considered as sectional interest into all enveloping public interest. Viewed in this particular context, it was fine for the people to accept lower damages as this would spare insurance companies from huge losses and therefore

bar the former from paying higher premiums. The insurance industry would flourish, and in turn, yield enormous economic benefits to the people and the nation. In the end, the people and the captain of industries are doing justice to their shared national interest, which is predicated upon rapid growth and unimpeded economic development. Justice is thus done in the name of national economic development, which constitutes conceptual justification of developmental justice. Coupled with popular conviction for the primacy of economic development, the notion of developmental justice also entails people's tolerance for government heavy handedness and violation of basic human rights. Tan (1997: 223) in his case studies of breakneck development projects in Malaysia notes, the people 'seem to have accepted the official rationalization that economic prosperity necessarily entails the sacrifice of some civil liberties'. He added, 'as long as the government delivers the goods in terms of material comforts and well-being, some amount of coercion and repression is taken in stride'.

#### DEVELOPMENTAL JUSTICE ON TRIAL: THE BAKUN DAM CASE

Very often, rapid economic development brings to a head tensions between sectional interests and public interest, hence unleashes internal contradictions of developmental justice. When such tensions erupt, even the most sophisticated welfarist-populist language will be dented. In Malaysia, there have been instances where economic development brought to the fore contending sectional interests, which undermined the very notion of developmental justice. There are sections of Malaysian societies who find themselves trapped in the "development vs. human rights" conundrum and are apt to believe that economic development and social justice are antithetical to each other, that economic development benefits only a few and victimizes many others. This part seeks to explain such a conundrum by dissecting 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 opposing 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, the dam would have power generating capacity of 2,400 MW, approximately 10 times more than the projected energy need for the whole Sarawak in 1990. As such, the project would be coupled with a world's first 650 kilometer undersea cable across the South China Sea to transmit the access electricity to Peninsular Malaysia. Its spin off effect would be the attraction of foreign investment to Sarawak and therefore industrial development in the state. This multi billion ringgit project, however, was abandoned in 1986 due to economic recession.

With the upturn in the Malaysian economy in the early 1990s, however, the government revived the project. In January 1994, a contract to build the dam and the undersea transmission cable worth about RM15 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 (*Asian Wall Street Journal*, January 31, 1994). 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 also revealed that his company would invest RM60 million to set up a plant to manufacture high tension cables for the undersea power transmission project (*Business Times*, January 31, 1994). The lack of transparency in the contract award to a politically connected businessman led to accusations that the government practiced favoritism (*Asian Wall Street Journal*, January 31, 1994).<sup>3</sup>

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 (Kua 2001: 55). The scale of the project, its tremendous environmental, social and economic impacts 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. 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. Malaysia's Friends of Nature Society (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' (*Reuters News*, February 18, 1995). The separate EIA reports put the project at risk should subsequent reports are rejected. In any manner, the move implied the government's determination to go ahead with the project regardless of the outcome of the subsequent reports.

The market, however, gave a bullish response to the government's nod. Ekran's shares rose from RM2.05 per share to RM8.90 on February 20, 1995, the Monday after a weekend announcement of the approval was made by the company (*Dow Jones International News*, February 20, 1995). The feel good sentiment was also boosted by the then 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 (*Business Times Singapore*, February 22, 1995).

The first EIA report that was made public in June 1995, after much pressure from the NGOs and the Opposition, indicated that the project would have 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'. The report added that 'wildlife, fishes and lifestyles of the 5,000 people in the area, mostly farmers, would be affected' (AFP, June 25, 1995). 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 longhouses residents who are affected by the construction of the dam filed a suit in the High Court seeking court's declaration that the project was illegal (High Court of Malaya, *Kajeng Tubek & Ors v. Ekran Bhd. & Ors*). This included non-compliance with the Environmental Quality Act (EQA) of 1974, which provides that certain prescribed activities can only be carried out with the approval of the Director General of Environmental Quality. Under item 13(b) of Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987, the prescribed activities include 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. The Bakun dam fell well within the scope of the prescribed activities. 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. Further, 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 (*Business Times*, April 7, 1995). As the Sarawak Order did not contain 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. 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' (High Court of Malaya, *Kajeng Tubek & Ors v. Ekran Bhd. & Ors*, 389).

Based on the law and the facts of the case, the court granted plaintiff's application. High Court judge, Dato' James Foong, in his judgment delivered on June 19, 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'. He added that 'this is essential, for interaction between people and their environment is fundamental to the concept of environmental impact'. 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'. Depicting the Minister's Order as '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' (High Court of Malaya, *Kajeng Tubek & Ors v. Ekran Bhd. & Ors*, 412). 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 EQA, and with any regulations and guidelines made under the Act.

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. United Nations special rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, said that the decision in such a case where "the judge sat between three small people and the might of the federal and state governments and a large public corporation.... will certainly help restore public confidence in the judiciary" (*South China Morning Post*, June 24, 1996). 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 project proponents, which impliedly indicated that the project was not illegal. What Ekran had to do was to comply with the EQA, not the Sarawak Order and then get rid of the legal hurdles. In any manner, the court's verdict could only delay the project, not completely scrapped it. Meanwhile, the government abstained from issuing order to stop work on the site. Putting the onus on Ekran to decide the next course of action, the then Deputy Prime Minister and Finance Minister, Anwar Ibrahim said that 'it is the responsibility of Ekran' to decide whether to stop or continue work. The government, according to Anwar, was not prepared to issue the order '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' (*Business Times*, June 25, 1996). In fact, Ekran continued work 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 court's verdict did not bear any serious repercussions on the economy, 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 flourish. 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 June 29, 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, Ekran's counsel argued that unlike the residents, 'Ekran would lose substantially if the effect of the declaration was not suspended pending appeal'. He added that 'dislocation would defer the immense benefit from the project accrued to the nation', because the project 'would make cheap power available to consumers' (*The New Straits Times*, July 12, 1996).

The final mortal blow to the longhouses residents, however, was dealt by the Court of Appeal's decision that overturned the earlier High Court's verdict. Allowing the appeal by Ekran, Court of Appeal Judge, Dato' Gopal Sri Ram, held inter alia that the 'respondents lacked substantive locus standi' (that is 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, i.e. the Land Code (Sarawak Cap 81). As such, the respondents had on totality of the evidence suffered no injury and there was thus no necessity for a remedy; (c) because 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 injury common to others; and (d) the trial 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 (Malaysian Court of Appeal, *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajeng Tubek & Ors and other appeals*).

As regards to the question of substantive locus standi, the learned judge opined that a litigant might be disentitled to declaratory relief for 'substantive reasons'. The following words of Justice Gopal 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 (sic), 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 (Malaysian Court of Appeal, *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajeng Tubek & Ors and other appeals*, 41).

The court’s restraint approach to substantive matters, or more accurately political questions, leaves the space for political executive’s superiority vis-à-vis displaced communities wide open, hence facilitates human rights violation. The court’s approval of legal deprivation of lives further reveals the ugly face of legalism. Though rule following, a cardinal aspect of legalism, is to be regarded as a moral act by itself, being strictly legal, or above politics in a legal framework that supports development above human rights, as was the case in the Bakun dam litigation, causes the court to be devoid of human rights defender role. Sheer rule following in such developmental state’s legal framework frustrates the morality of legalism.

On the issue of public interest, the judge concluded that the trial judge had erred because,

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 (Malaysian Court of Appeal, *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajeng Tubek & Ors and other appeals*, 41).

No doubt, 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 – that is, in particular, equality before the law and the virtue of rule following. In so doing, the learned judge misconstrued 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 developmental state, this had been taken to mean, the interests of corporate and political elites who viewed law as an instrument for state-led economic development rather than a limit to the exercise of state power. Legalism, in this instance, renders the court the guardian of law as it is, rather than 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 statist-legal instrumentalism, which entails the state's use of law and legal instruments to achieve its policy objectives, backed by the judiciary committed to strict legalism, serves the interests of the ruling groups.

#### POLITICAL TRIALS: LEGALIZATION OF POLITICS?

The more compliant judiciary, which emerged after the judiciary crisis in the late 1980s, set the stage for the use of court as a 'one-sided political arena', to try and disgrace political opponents.<sup>4</sup> These political trials also aimed at articulating and disseminating political regime's version of legality. It is in this sense that law unleashes its coercive and ideological forces. In Marxist tradition, as noted by Alan Hunt, law is not simply to be regarded as 'part of the coercive armory of the state; but also must be understood as making a major contribution to ... ideological domination' (1976: 178). As a coercive instrument, law operates through state institutions such as the police, court and prison to coerce the offenders. Ideologically, the coercion of the offender reinforces values, attitudes and behavior associated with the ruling class. These two elements of legal domination – coercive and ideological – are thus not simply alternatives but are closely bound together, and as such contribute to the effectiveness of law as a mechanism of legitimate domination. Legal domination, in this sense, is regarded as a useful tool by which political regime legitimizes domination over political opponents and makes some forms of political activities illegal.

Apart from arrest without trial under preventive detention law such as the Internal Security Act 1960, the Malaysian government also often subjects political opponents to normal criminal and civil law as a means of legal domination. This requires the prosecutors, in criminal cases, to prove the accused person's guilt not only under the scrutiny of the court, but also of the public. The advantage of

this political trial is aptly described by Simon Barraclough in his study of the dynamics of coercion in Malaysia:

Opponents of the regime are periodically subjected to a variety of legal sanctions, which can be described as coercive. The use of the courts avoids, to some extent, the odium of arbitrary action under the *Internal Security Act* as well as reinforcing the notion of the rule of law. Opponents of the regime can be portrayed as acting illegally, and the Government's substantial legal and financial resources can be pitted against the limited resources of opponents. Even if a prosecution is unsuccessful (as has often be the case), an opponent will have been subjected to lengthy, costly and emotionally taxing legal proceeding (1985: 808-809).

The routine use of normal civil and criminal laws, rather than emergency and anti-subversion laws, against political opponents, whose political activities has often been associated with actions prejudicial to national security, denotes two emerging trends. First, a blurring of line between exception and normalcy is unfolding. Carl Schmitt suggests exception as something which is 'codified in existing legal order, can at best be characterized as a state of peril, a danger to the existence of the state, or the like', which 'cannot be circumscribed factually and made to conform to performed law' (1985: 6). Jayasuriya defines exception as the 'capacity of the sovereign to make decisions in terms of its political will rather than be constrained by normative law' (2001: 93). The recurrent application of normal civil and criminal procedures in Malaysia to cases of exception occluded the line between the two. Under this circumstance, Jayasuriya assumes that 'civil and criminal law had been infused with the very vague political standards that previously defined state of exception' (2001: 95). Harding's reference to normality perhaps best captures the occlusion between normal and exceptional legal procedures in Malaysia. He notes,

Malaysia has been under emergency law for most of its existence ... and legal "normality" had applied only for a brief period. Thus normality had to be redefined; what has become normal is the existence of emergency laws in parallel with the operation of the ordinary constitutional legal system. This means that the rule of law has become simply one option rather than the entire basis of the constitutional order (1996: 159).

Second, the use of normal criminal and civil law against political opponents, to certain extent, signifies government's attempt to reduce apparent political battles into pure legal conflicts, mired by legal technicalities abstracted from its substance. This can be termed as legalization of politics, which entails an attempt at turning the struggle for political power away from political arena to legal arena representing that as purely legal rather than political. This is an act of depoliticizing the politics. Charging 'political offenders' with ordinary crimes such as corruption, sedition and causing violence, is often a preferred means. Once a political offender enters the courtroom, the law operates by abstracting the case from its political context, and thus reduced apparent political issues to being purely technical and legal. Further, partial understanding of rule of law as

everyone is equal and subject to the same law legitimizes coercion meted out to subordinate groups. Political trials thus allow apparent political conflicts to be ignored while political opponents can be safely branded as common criminals.

Though political trials are not new in Malaysia, such an attempt in the face of a more compliant judiciary made the fairness of their outcome even more suspect. This trend could be observed in the 1990s onwards where staunch critics of the government and the court were subjected to criminal charges and civil suits, rather than arrest without trial – which is politically more costly – under the Internal Security Act. Opposition leaders and government critics have been subjected to contempt proceedings (Supreme Court of Malaysia, *Attorney General, Malaysia v. Manjeet Singh Dhillon*; High Court of Malaya, *Re Zainur Zakaria*), defamation suits (High Court of Malaya, *MBf Capital & Anor v. Tommy Thomas & Anor*; Court of Appeal, Malaysia, *Dato' Param Cumaraswamy v. MBf Capital Bhd*) sedition charges (Court of Appeal, Malaysia, *Lim Guan Eng v. Public Prosecutor*; High Court of Malaya, *PP v. Karpal Singh*), corrupt practice charges (High Court of Malaya, *PP v. Dato' Seri Anwar Ibrahim*), sodomy charges (High Court of Malaya, *PP v. Dato' Seri Anwar Ibrahim*) and official secrets charges (High Court of Malaya, *Mohamad Ezam Mohd Noor v. PP*).

#### THE ANWAR TRIAL: LEGALIZATION OF POLITICS VS. POLITICIZATION OF LAW

The criminal trial of former Deputy Prime Minister, Anwar Ibrahim, best illustrates the most recent trend of political trial in Malaysia. Anwar faced charges of corruption and sodomy, which he and his supporters claimed were trumped up, brought against him by conspirators in high offices, in an attempt to prevent him from challenging former Prime Minister Dato' Seri Dr. Mahathir Mohamad. Anwar's associates, including his defense counsels, were also not spared of legal coercion. During one of his trials, defense counsel, Zainur Zakaria, was cited for contempt of court for making application to the court to exclude two public prosecutors from the case. The application was made on the ground that they had earlier attempted to fabricate evidences against Anwar. Zainur, though he was acting in his professional capacity as defendant's counsel, was found guilty of contempt and sentenced to three months imprisonment (*Bernama*, 30 September 1998). Karpal Singh, the lead defense counsel for Anwar, and an opposition Democratic Action Party (DAP) leader, was charged with sedition with respect to statements he made in the court, in the defense of his client.<sup>5</sup> At the height of *reformasi*, which was marked by street protests against the sacking and arrest of Anwar, many were charged under normal criminal law for disrupting public order.

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 notes that there were widespread concerns about the fairness of the trial and the independence and impartiality of the trial judge (International Bar Association 2000: 46). The clouds over political motives behind the trial also tarnished Mahathir's credibility. William Case, in his analysis of the 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 old trajectory in which the country modernizes its industrial base while its political institutions are demeaned (2003: 130).

Amidst allegations of political conspiracy behind the Anwar trial, the government maintained that Anwar was a common criminal and the trial was nothing but a normal legal process. Anwar otherwise claimed that he was a victim of political conspiracy, his trial was politically motivated, and he above all was innocent. It was in this context that both the prosecution and defense teams sought to prove their respective claims. The prosecution team incessantly opposed to evidences of political conspiracy being adduced and sought to confine the trial to strictly legal matters. The defense counsels were instead adamant that political conspiracy was their client's only defense and exclusion of such evidences would frustrate justice that the court ought to dispense. The trial judge, however, ruled such evidences as irrelevant.

The trial also received extensive local and international media coverage, which provides an avenue for legal and political contestations unfolded in the court-room to spill over into the public domain. The government, through mainstream electronic and print media, portrayed Anwar's crime as not only a breach of the country's law, but also an act unbecoming of a former deputy premier and a Muslim activist.<sup>6</sup> As such, apart from representing the trial as a normal legal process, the media apparently launched a delicately tailored smear campaign against Anwar. The trial made headlines with detailed account of the charges and lurid explanations of the sex offence as described by prosecution witnesses. During the trial, a photo of semen-stained mattress purportedly used by Anwar and his "sex partners" were reproduced by the local media. The purpose of such offensive media coverage was not only to smear Anwar's image, but also to vindicate government's action against him. The then Education Minister and UMNO Vice-President, Datuk Seri Mohd. Najib Razak, told reporters that 'once the evidence that has been accumulated against him unfolds in court, more and more people will come to believe in what the government has been doing and saying thus far' (*New Straits Times*, 31 September 1998).

The alternative print media, however, was to Anwar's aid. *Harakah*, the media organ of the opposition Islamic party PAS, emerged as an alternative news source for the trial. The bi-weekly publication carried Anwar's and opposition leaders' statements on the trial, and even provided a special column for Anwar to publish his pieces. Alternative web-based news sources also played their



role. The *Free Anwar Campaign* website for example posted a host of British Broadcasting news coverage of the trial (See <http://www.freeanwar.net/news/>) to counter the local mainstream media's attack on Anwar. Among the news headlines read 'Anwar Sex Claims Were False', 'Anwar's Only Crime Was Courage', 'Diplomat Tried To Frame Anwar' and 'No Evidence Brother Sodomized'.

Though the court convicted Anwar of both offences, and sentenced him to a total of 15 years imprisonment, the events unfolded during the trial did cast doubt on the genuineness of the decision. One of the prosecution's witnesses, a government doctor, told the court that he found no medical evidence that Anwar had sodomized his adopted brother, Sukma Darmawan Sasmitaat Madja. Prosecution's star witness in sodomy trial, Azizan Abu Bakar, who accused Anwar of sodomizing him, had in cross-examination denied that the alleged sodomy did ever take place. The defense team also managed to produce alibi to help prove Anwar's innocence, despite prosecution's move to amend four times the dates of the alleged crime. In Anwar's corruption trial, the defense team revealed the existence of a tape containing conversation between prosecution's star witness, Umi Hafilda Ali, and a Sarawakian politician, Datuk Sng Chee Hwa, in which the former mentioned about political conspiracy against Anwar. Defense counsel, Gurbachan Singh, in his submission concluded that 'whether we like it or not, this case smacks of politics'. He further added, 'the only crime (Anwar) may have committed is because he was courageous enough...to stand up against powerful politicians' (*BBC Online*, 31 March 1999).

It is in this context of contentious court battles and extensive media reports on the trial that contestations between legalization of politics and politicization of law came to light. While the government attempted to portray the trial as a normal legal process, hence depoliticized its apparent political elements, Anwar used the same to prove collusions between political and legal elites in spelling an end to his political career, hence politicizing the law. The former seeks to extract politics out of the legal context, while the latter strives to infuse law with the political framework within which it operates.

#### LEGITIMACY CRISIS: RESPONSE AND CONSOLIDATION

It is worth noting that the Anwar trial and the use of laws and legal institutions against him and his supporters occurred in a period marked by shifting legitimacy discourse. At least, up to the Anwar trial, the hitherto legitimate bases for legal coercion – 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 receded as a result of more favorable government's attitude toward them in post-NEP Malaysia. As such, there was less apprehension about recurrence of the 1969 racial riots, or any sort of that scale (Hari Singh 2002). It was against this

backdrop the Anwar purge reflects the government's authoritarian way in dealing with political opponents. However, it is erroneous to conceive that the government maintained itself in power by authoritarian means alone. All detainees held under the ISA for their involvement with *reformasi* had been released. Many of them are back to active oppositional politics, while some return to the fold of 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 has been 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 by such recommendations.

At the ideological level, the government actively articulated anti-pluralist politics, which placed community rights higher than the individuals'. Cynically condemning his critics after the arrest, trial and imprisonment of Anwar, 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 saw as 'a very distorted perception of right and wrong', Dr. Mahathir moaned about inclinations to label the government 'as having violated human rights because it denies a few people the right of dissent' (Mahathir 1999). Such a view is parallel with anti-pluralist politics inherent in the Asian values discourse (Jayasuriya 2001). In such a discourse, political pluralism that tolerates dissents is viewed as a threat to political order and stability. Often, curtailment of the right to political dissent is made on the ground 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 valorizes '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' (2003: 278). 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. While repressions were meted out to political opponents, the government actively sought to justify its actions by resorting to the politics of 'developmentalism' as a new basis of political legitimacy. The mechanism of control is not only confined to authoritarian means, but also delicately tailored ideological appeal.

There had also been pressing need on the part of the political executive 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 Anwar trial where the defense counsels engaged in direct confrontations with the judges to prove the existence of political conspiracy against their client. Anwar himself delivered fiery speeches, which were widely reported in local alternative and international media, against his perpetrators whenever he was given opportunities to mitigate for more lenient sentences. As such, it is not unconceivable that political opponents, in order to discredit the government, would also find refuge in the legal arena.

It was at this juncture that the government did not take its internal cohesion for granted and strove to consolidate its position. Several judges who were seen cooperative to the government were elevated to higher positions. They included the chief prosecutor in the Anwar trial, 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 Anwar's corruption and sodomy trials, Augustine Paul and Dato' 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 the promotion was a reward for their ruling against Anwar, the allegation which the Chief Justice, Tan Sri Ahmad Fairuz Sheikh Abdul Halim, strongly denied (*The New Straits Times*, July 26, 2003). The Malaysian Bar criticized the appointments since it was done without proper consultation with the legal fraternity (*Infoline*, August 2003). Its attempt to hold an Extraordinary General Meeting in October 2003 to pass resolution against the appointments was futile due to very high requirement of quorum. 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.

Though the political executive has seemingly consolidated its position vis-à-vis the judiciary, this does not suggest that the judges are all sold out to the former. Left to their own, that is, without interferences from the political executive, the judges were likely to deliver judgments based solely on sound interpretation of law and facts rather than fear of retribution. This was demonstrated in the Federal Court decision on September 2, 2004 which overturned Anwar's sodomy conviction. The court found that the complainant and the alleged sodomy victim, Azizan Abu Bakar, was uncertain about the dates of the crime, his evidence was uncorroborated and his statements were contradictory to one another. As such, the nation's highest court could not agree that Azizan was a 'wholly reliable, credible and truthful witness' thus refused to convict Anwar solely on his evidence (Federal Court of Malaysia, *Dato' Seri Anwar Ibrahim v. Public Prosecutor and Another Appeal*). The new

Prime Minister, Datuk Seri Abdullah Ahmad Badawi, repeatedly denied that he had interfered with the decision or had any deal with Anwar. One of Anwar's counsels also opined in an interview that the judges were left alone to decide based on their own conscience.

## CONCLUSION

The interplay between law and politics in Malaysia, at least up to the end of Mahathir years 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. The rise of new politics brought forth cross-ethnic and cross-sectional alliances of social groups challenging government's political legitimacy, as well as the emergence of developmentalism as a new legitimating force. It was in this vein that the interplay between law and politics witnessed the contestations between the discourse of developmentalism – under the name of developmental justice – and that of human rights spilled over into the legal domain. This was observable in controversial court cases that pitted the corporate and political elites, who stood to gain enormous benefit from state-led development, against the people, who seemed to be the victims of the same.

Political trials revealed contradictions in the government's effort to depoliticize apparent political conflicts through the use of court and normal legal processes. On the one hand, these trials severely reduced the scope for free political competition and tilted the balance in favor of the ruling elites. On the other, the court battles provided an avenue for political opposition to lay bare injustices perpetrated by the power-that-be and articulate opposing values and mores. Legalization of politics in this sense provides space as well as constraints for political opposition to mount challenge against the government through the legal arena. The limited and yet significant breakthrough by the opposition in politicizing the law indicates that the court has not been successfully turned into a one-sided political arena, hence challenging any attempt to make law as a sheer technique of rule. The prospect for wider space for political competition, however, remains ambivalent as present developments show that the more the opposition forces utilize the space, the more the government squeezes it.

## NOTES

1. Major ethnic groups in Peninsular Malaysia are Malays, Chinese and Indians. In the east Malaysian states of Sabah and Sarawak, the major ethnic groups include *pribumis* (indigenous) Iban, Kadazan and Murut. The Malays and *pribumis* of Sabah and Sarawak enjoy *Bumiputera* status under the Malaysian Constitution which entitles

them to special privileges in the economy, education, public service and land matters. Given wide gap of economic achievements between the *Bumiputeras* and non-*Bumiputeras* in the post-colonial Malaysia, the government in 1970 introduced 20-year affirmative action programs under the New Economic Policy (NEP). The policy, among others, aimed at increasing the *Bumiputera's* equity ownership from less than 2 per cent in 1970 to 30 per cent by 1990. The non-*Bumiputera's* equity ownership was projected to stand at 40 per cent, while the rest was for foreign interests. When the policy ended in 1990, *Bumiputera's* equity ownership was slightly below 20 per cent, while the non-*Bumiputeras'* exceeding the 40 per cent target.

2. By virtue of this Act, manufacturing projects with shareholders' funds of RM2.5 million and above (USD 1 = RM3.8) (initially with paid-up capital of RM250,000 and above), and employ 75 or more full time paid employees, have their foreign equity ownership restricted, depending on the level of their export. If the projects export more than 80 percent of its product, 100 percent foreign equity ownership is allowed. If it is lesser than that, the equity has to be allocated to the locals. If foreign investors hold 70 percent or more of the equity, the *Bumiputera* will hold the rest. If less than 70 percent of the equity is held by foreigners, the *Bumiputera* will hold 30 percent, and the rest is for the non-*Bumiputera*. After the 1997 economic crisis, this "30 per cent rule", was first relaxed in respect of all applications for manufacturing licenses made during the period between 31<sup>st</sup> July 1998 and 31<sup>st</sup> December 2003. The rule has now been totally abandoned.
3. The article mentions that private negotiation first took place between Dato' Ting and the powerful Chief Minister of Sarawak, Tan Sri Abdul Taib Mahmud. Dr. Mahathir then approved the award without competitive bidding.
4. By the late 1980s, Malaysian judiciary resorted to the so called fierce judicial activism which resulted in unfavorable decisions being made against the government in a number of high profile cases. These included the reinstatement of work permits of two foreign journalists who had made critical remarks about Malaysian politics and economy and the release of an opposition leader who had been detained without trial under the Internal Security Act. This had caused a row between the executive and the judiciary. In 1988, an appeal against High Court's verdict to dissolve the ruling United Malays National Organization (UMNO) party was pending at the Federal Court. The party was dissolved as a result of irregularities in the lead-up to party polls, which witnessed Dr. Mahathir being re-elected as party president with a tiny 43-vote majority. In the meantime, Dr. Mahathir formed UMNO Baru (New UMNO) and made himself its president. The appeal, if allowed, would revive the old UMNO and call for a re-election. This would certainly put Dr. Mahathir's position at stake yet again. In an unprecedented move, the Prime Minister made representation to the *Yang di-Pertuan Agong* (the King) to remove the then Chief Justice, Tun Salleh Abbas, from his office. Salleh, who had earlier involved in a spat with Dr. Mahathir over court decisions in certain high profile cases, was seen as an unfriendly judge by the latter. The King set up a tribunal which found Salleh guilty of charges of judicial impropriety and misconduct. He was later removed from office and replaced by a more compliant judge, Hamid Omar, who was also the Chairman of the tribunal that found Salleh guilty of the charges. This episode set the stage for more compliant judiciary to emerge in the 1990s onwards.

5. Mr. Karpal's statement reads, 'It could be well that someone out there wants to get rid of him (Anwar)...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 Mr. Karpal of the sedition charge (*The Lawyer*, 22 January 2002).
6. In 1971, Anwar and his associates found Muslim Youth Movement of Malaysia (ABIM), an Islamic movement known for its commitment to fundamental Islamic faith. He was ABIM president until he joined the ruling United Malays National Organization (UMNO) party in 1982.

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