



UiTM LAW REVIEW

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UNIVERSITI TEKNOLOGI MARA (UiTM)

An Introduction

Universiti Teknologi MARA (formerly known as MARA Institute of Technology) is Malaysia's largest institution of higher learning. It had its beginnings in 1956 as Dewan Latihan RIDA, a training centre under the supervision of the Rural Industrial Development Authority (RIDA).

Nine years later Majlis Amanah Rakyat (MARA) Act, 1965 provided for a change of name from Dewan Latihan RIDA to Maktab MARA (MARA College). The Act also defined a new role for the MARA College -- to train Bumiputras (literally it means "the sons of the soil" - ie the indigenous people) to be professionals and semi-professionals in order to enable them to become equal partners with other ethnic groups (ie the former migrants, especially the Chinese and Indians) in the commercial and industrial enterprises of the nation.

In 1967 Maktab MARA was renamed Institut Teknologi MARA (ITM) (or MARA Institute of Technology). In August 1999, the Institute was upgraded to university status and named Universiti Teknologi MARA (UiTM).

As part of the government's affirmative action policies, UiTM provides education and training in a wide range of sciences, technology, business management and professional courses to 56,408 full-time students in 2000. Another 3,156 have enrolled for off-campus courses. In addition, there are 7,725 students in distance-learning and flexible-learning programmes.

The main campus stands on a 150-hectare piece of land on a picturesque hilly area of Shah Alam, the state capital of Selangor Darul Ehsan, about 24 kilometres from the city of Kuala Lumpur.

The Universiti has also established branch campuses in the various states of the Federation: Sabah (1973), Sarawak (1973), Perlis (1974), Terengganu (1975), Johor (1984), Melaka (1984), Pahang (1985), Perak (1985), Kelantan (1985), Penang (1996), Kedah (1997) and Negeri Sembilan (1999).

The Universiti currently offers 184 programmes conducted by 18 Faculties. These programmes range from post-graduate to pre-diploma or certificate levels. More than half of these are undergraduate and post-graduate programmes, while diploma programmes account for an additional 39%. Some of the post-graduate programmes are undertaken in the form of twinning programmes, through collaboration with universities based overseas.

The following 18 Faculties currently run programmes in the University:

Accountancy; Administration and Law; Applied Science; Architecture Planning & Surveying; Art & Design; Business & Management; Civil Engineering; Education; Electrical Engineering; Hotel & Tourism Management; Information Technology & Quantitative Science; Mass Communication; Mechanical Engineering; Office Management & Technology; Performing Arts; Science; Sport Science & Recreation.

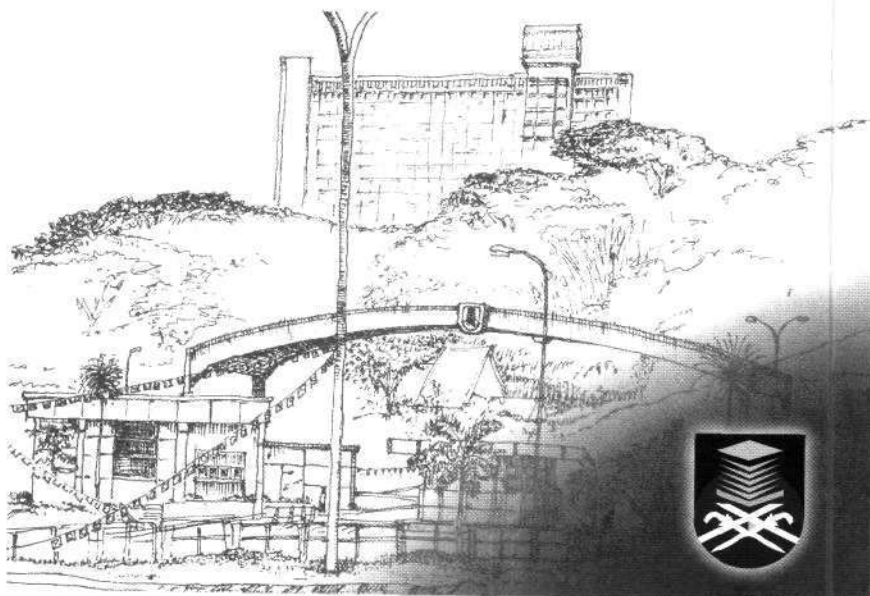
In addition to faculties there are 17 'academic centres' to cater various academic, business, technological and religious needs of the campus community. They are Extension Education Centre (PPL); Language Centre; Centre for Preparatory Education; Resource Centre for Teaching and Learning; Total Quality in UiTM (CTQE); Department of Academic Quality Assurance & Evaluation; Computer Aided Design Engineering Manufacturing (CADEM); Malaysian Centre for Transport Studies (MACTRANS); Text Preparation Bureau; Bureau of Research & Consultancy; Malaysian Entrepreneurship Development Centre (MEDEC); Islamic Education Centre; Centre for Integrated Islamic Services; Business & Technology Transfer Centre.

THE FACULTY OF ADMINISTRATION AND LAW, UiTM

The Faculty of Administration and Law (formerly known as the School of Administration and Law) was founded in 1968. It began as a centre offering British external programmes, the LLB (London - External) and the Chartered Institute of Secretaries (now Institute of Chartered Secretaries and Administrators). The only internal programme offered then was the Diploma in Public Administration and Local Government (DPALG). In 1978 the LLB (London - External) programme was terminated and replaced by the current internal LLB programme. The LLB is a three-year academic degree course based on the structure of the undergraduate law programmes normally offered in the British universities. Unlike most of the British LLB programmes, however, the LLB at the Faculty is conducted on a semester system. In 1982 the Faculty introduced a one-year LLB (Hons) programme towards which graduates of the LLB could advance their studies. The LLB (Hons) is a professional and practice-oriented programme that provides training to students for their career in the legal practice as Advocates and Solicitors. The delivery of the curriculum for this course adopts the method and strategy of simulated or experiential learning. Because of the unique experience it provides to students in their legal training this course has acquired wide recognition and acceptance among the Malaysian public.

The Faculty of Administration and Law enjoys strong connections with the legal profession, particularly the Malaysian Bar, and the industry. It takes pride in continually developing pioneering options in its degree programmes, both at the academic and professional levels. In 1995 the Faculty introduced the degree of Bachelor in Corporate Administration (Hons) to train young and bright Malaysians to hold office as Company Secretaries. In the pipe-line are some new courses - Bachelor of Law and Management (Hons), Bachelor of Administrative Science (Hons), Masters of Law and Executive Masters in Administrative Science.

The Faculty currently comprises some 70 academic staff from both the disciplines of law and administration. It has about 600 students reading for the LLB and LLB (Hons) and 500 students reading for the Diploma in Public Administration and Bachelor in Corporate Administration (Hons). The Faculty admits about 200 students each year.



Main Entrance to Shah Alam Campus

EDITORIAL NOTES

This law journal had a long period of gestation in the Faculty. There were several attempts in the past, by individuals or the faculty collectively, to bring about its parturition. It is no easy task to initiate an academic journal, regardless of the discipline it represents. It demands a high degree of commitment in time, energy and attention. It calls for an intense love of labour for scholarship among a critical mass of the faculty members, either in the editorial board or as article contributors. But, at long last, this journal has arrived.

Many factors led to this successful launch. The recent elevation of this institution to university status created its own impetus. Our strong law programme and its capable teachers demanded, and will benefit from, this specialist forum for academic debate and analysis. There is support within the legal profession and among our many distinguished alumni for such a journal, too. We are delighted by the synergy and collaborative goodwill the notion of a journal has evoked. So, we were able to marshal much expertise and experience to bring out this inaugural issue of the Journal.

Academic faculty at UiTM are part of the worldwide network of academia. We must participate in discussions and debates over issues that are not only of direct academic and professional concern but also of importance to the general public. A journal such as this facilitates reflective and disciplined participation. In doing so, it helps the Faculty, and the University, to undertake its noble role in serving the general community.

A learned journal is one of the major measures by which the weight and prestige of an institution are judged. It reflects the institution's maturity and ability to manage and conduct its specialist discipline. It reflects a confidence among its faculty to offer themselves to be evaluated in the open market place of ideas, and it serves notice of the faculty's readiness to serve the community at large. This Journal, in no small measure, marks the coming of age of the Faculty.

The Journal functions also as a meeting point for law teachers and practitioners who share a common interest in various areas of law. It provides them a source of information on the current and topical issues in their specialised areas. It creates a forum for the exchange of ideas and for engaging in discourse over sometimes intricate and often vexed legal issues. Much is gained by the legal fraternity, as well as the legal system, through such engagements and encounters.

Law teachers, as members of the broader academic community, are aware that it is no longer tenable for them to function solely within their traditional ivory towers, isolated from the reality of the world outside. For career and professional advancement, and for taking their rightful role in the community, no academic can confine

herself to her classroom or departmental audience. She must reach for a wider audience. The recognition (or lack of it) that she gains from her peers, both within and without the discipline, will speak for her standing and credibility in the community, both scholarly and otherwise. This Journal will serve as one channel for the Faculty members to reach that wider audience.

There are relatively few academic legal journals in this country. Most existing legal publications cater for the professional needs of legal practitioners. One ramification of this is that there are few discourses on theoretical and abstract legal issues. Yet these issues are important for the fuller appreciation and development of the law and the legal system, by the legislature, the reform bodies and the courts. This Journal will try to answer this need and stimulate discussions on issues that are of interest and relevance to the academic and broader communities.

The labour and skill required for this Journal to thrive will challenge the staff of the institution and the supporters of this initiative among the profession and the wider community. We hope the Journal sails well in fair winds.

Our wish is that Malaysia's legal profession, its legal academic circle and the many students and practitioners of law in this country and elsewhere will benefit from this forum for analysis and reform. We hope this Journal makes an important contribution to debate on vital legal matters in our society. We hope, too, that our quest for self-expression and critical reflection among the members of the legal academia will be assisted by this Journal. It is with great pleasure and some satisfaction at the completion of this worthy task that we complete this inaugural Editorial.

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THE ONTOLOGICAL QUESTION IN THE INSTRUMENTALIST CONCEPTION OF LAW

by MOHD DARBI BIN HASHIM*

The Star, a local newspaper, on 2 October 1993 carried the following report:

Addressing the US-Asean Business Council dinner here on Thursday night, Dr. Mahathir said Malaysia's [development] strategy combined economic, social, legal, labour and educational tools.

The particular point in question which the report has raised and which will be taken up for discussion in this article is the evident realization at the highest level by the country's powers-that-be regarding law's efficacy as a tool or instrument for development and economic policy. In Malaysia such a view toward law is rather unconventional, because the general attitude among legal practitioners and lay public alike is that law is no more than a means of social control for the preservation of the social order and a framework for "conflict amelioration".

At the scholarly level such legal fields of studies as "law and development" and "the political economy of law" remain unexplored and unexamined. Although such fields have been widely deliberated upon and researched by legal academics in African and Latin American countries, they have received cursory attention in local legal discourse. Similarly they are marginalized in the legal education curricula and in universities and colleges, which are heavily inundated with "bread-and-butter" subjects oriented toward professional practice.

What further makes Mahathir's view unconventional is its removal of law from its apparent isolation and locating it in the socio-economic agenda of the society. Such a conception of law goes against the grain of the common law legal tradition. Its characteristic feature is to treat law as an isolated phenomenon, divorced from the social experience out of which it emerges in the first place. As such, law is

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This article was prepared in 1993. Because of unavoidable circumstances, it failed to find a place on printed pages. Despite the long passage of time, the writer believes that the theoretical problematic it raises remains current. On Tuesday 5 January 1999, *The Star* newspaper carried the following report: "Beijing: China's law makers will deliberate 89 new or revised laws over the next four years as the nation rushes to create a legal system that can cope with its swift economic reforms. On the agenda with the standing committee of the National People's Congress (NPC) is legislation as diverse as contract and air pollution control ..."

viewed as a self-sufficient category which is capable of being understood and explained within its own internal logic and dynamic. Hence law's interconnectedness with other factors in society – politics, economy, religion, culture and education – is overlooked and law's status as a social construct ignored. Instead law's doctrinal aspects are markedly and repeatedly emphasised (by judges, lawyers, academicians and students) thus leaving its ideological, legitimating, hegemonic, mystifying and repressive aspects and functions unarticulated and unquestioned.

Despite the apparent social orientation in this conception of law it nevertheless represents a characteristically instrumentalist¹ or purposive view of the phenomenon. This is the view which essentially and narrowly conceives law as a precision tool of state and government. Hence law is believed to possess a transformative capacity on social order and institutions. It can be deployed "to restructure or plan economic enterprise on a massive scale, to promote peaceful revolution in social relations... and to shape attitude and beliefs."² In the context of a development programme which relies heavily on private entrepreneurial initiatives and capital, law's task becomes one of providing and creating an hospitable climate in which to stimulate and facilitate private investments. This is accomplished through such steps as the provision of easy tax law, an educated work force, research institutes, "law and order", well-developed infrastructure, the drawing of clear demarcation lines between administrative power and individual rights, and the suppression of corruption and the collection of taxes.

Within an economic development model with emphasis on egalitarian distribution of resources and wealth, on the other hand, law's instrumentality is seen in doing whatever is necessary to remove institutional barriers to development in society, restructuring inequitable relationships, finding solutions for equitable shareouts of incomes and providing mechanisms for greater participation in decision making by wage earners and peasants.

It is, however, not the aim of this article to compare the merits of the two economic models. Neither is its objective to identify which of the two models best describes the development path on which Malaysia is presently embarking. Nor to assess the efficacy of law's instrumentality in "social engineering" task. What it seeks to venture instead is to examine the ontological premise upon which the instrumentalist conception of law stands.

Implicit in the instrumentalist conception of law is the theoretical standpoint regarding law's separatedness from the society it regulates, its apparent autonomy within social life, such that it "becomes possible to conceive law as standing apart

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1. The term "instrumentalist" is used here in a sense different from that referring to a strand in Marxist thinking of law where it is viewed as an instrument of the ruling class in society to suppress the working class.
 2. R Cotterrell, *The Sociology of Law: An Introduction* (Butterworths London 1984) 48.

and in some way acting upon society instead of being an aspect of it". Law from such a perspective thus has become (or can be) somehow freed from its social and cultural roots. A corollary idea which develops from such a theoretical standpoint is that law can be deliberately and consciously used as a tool to change patterns of social life in a massive scale; a mechanism of purposeful government.

Such a conception of law that endows upon it an existence set apart from all other individual and social forces, however, raises serious theoretical problems. This is because, as a social phenomenon, it is inconceivable that law will ever gain an existence independent of the society in which it exists. An early rejection of any notion of law's autonomy can be found in the "determinist" approach to law of the Marxist tradition. This theory posits a relationship between the economic sphere and the "superstructure" in society. The economy consists of relations of production (which are regarded as the most basic of social relations) together with the productive forces - that is, the means of production (material, labour, machine, etc) labour resources and conditions of production including the level of technological development. Upon this economic "base" a superstructure arises, ultimately "determined" by the economic structure. The superstructure consists of the legal, political, ethical, ideological and philosophical spheres of social life. The following well-known excerpt from Marx's writing is often used to base the claim.

In the social production of their life men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their productive forces. The sum total of these relations of production constitute the economic structure of society, the real foundation on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual life process in general. It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness.³

The extreme determinist reading of this statement would suggest that the agenda, form and content of law are directly derived from the economic relations of production.⁴ The metaphor of "reflection" is used to characterise the point. As Collins points out,

The key [to Marxist analysis of law] was found in the base and superstructure idea. It was said that law was a reflection of the economic base; the forms and contents of law correspond to the dominant mode of production.⁵

3 Karl Marx cited in Y Ghai, R Luckman and R Snyder (eds), *The Political Economy of Law, A Third World Reader* (Oxford University Press Delhi 1987) 40.

4 KS Newman, *Law & Economic Organisation* (Cambridge University Press 1983) 17.

5 H Collins, *Marxism and Law* (Oxford University press 1982) 23.

Again as others have stated,

The Marxist view of the state and law that became fashionable thus regarded both as mere reflections of the economy through repression but without autonomy of their own, either from the economy or the ruling class.⁶

Law in the determinist matrix thus appears as ancillary to economic relations, indeed derivative of them. "It is conceived as lacking in autonomy and, therefore, for example, in any social engineering potential... law follows and never leads."⁷ *Ex hypothesi* it is untenable to speak of law capable of transforming the social condition within which it stands.

Some Marxists, however, have rejected such a mode of analysis of law as being either "reductionist", "economistic" or "mechanistic". But such criticisms do not go to refute law's autonomy from its social foundation in the manner suggested by the instrumentalist conception. The hub of the criticism instead highlights the failure of such a deterministic explanation of law to account for human agency, consciousness and volition for independent action and choice in law's social drama. Certainly, it is pointed out, people cannot be assumed to conform "to the mysterious constraints imposed by the material base without seriously refuting the contrary view that men are free to determine their own goals and act accordingly."⁸ Further, it is argued, a more elaborate analysis of base and superstructure is called for than appears in the "deceptively simple passage" from Marx which had been cited. And this is most proper "for, to put it at its most obvious, why did Marx and Engels write so voluminously if ideas were incapable of changing the world?"⁹ And Engels admits as much: "Why do we fight for the political dictatorship of the proletariat if political power is economically impotent?"¹⁰

Diverging from the determinist or reductionist reading of Marx, this strand in Marxist tradition advances the view that rather than determinism being a unidirectional phenomenon, it posits a dialectical relationship such that law (and other superstructural constructs) can influence the economic base, and that "law moulds social development" too. Thus, for instance,

a modern statute designed to penalize and deter the pollution of rivers is the product of considerable argument and debates motivated by groups who want to alter the practices of manufacturing industries. Such a law alters the relations of production to the extent that factories will have to make alternative production arrangements to avoid polluting activities. In what sense can this deliberate attempt to change a

6 Y Ghai, above n 3 at 178.

7 Lloyd and Freeman, (eds), *Lloyd's Introduction to Jurisprudence* (Stevens & Sons Ltd 1985) 959.

8 H Collins, above n 5 at 25

9 Lloyd and Freeman, above n 7 at 960.

10 *Ibid* at 960 - 961.

minor aspect of the relations of production be described as a reflection of that material base?¹¹

Further, it is asserted, superstructural institutions (law, politics, ideology and other phenomena) exist in reciprocal interaction. "Each has a certain influence on the others, but retains a degree of independence."¹²

Support for the foregoing interpretation of Marx's statement could be found, it is argued, in Engels' letter to Bloch, where it was said,

According to the materialist conception of history, the ultimately determining factor in history is the production and reproduction of real life... If someone twists this into saying that the economic factor is the only determining one, he transforms that proposition into a meaningless abstract phrase. The economic situation is the basis, but the various elements of the superstructure... such as constitutions... juridical forms... political, legal, philosophical theories... also exercise their influence... There is an interaction of all these elements in which... the economic movement is finally bound to assert itself.¹³

Whichever reading of Marx and Engels represents the "authentic" Marxian analysis of law and legal phenomenon, it is obvious that the Marxian paradigm, as it was originally articulated, posits a strong relation between law and economy.¹⁴ Neither strand in Marxism recognizes law as having acquired an independent and separate realm of existence in the way it has been comprehended by instrumentalism.

The assertion of law's lack of autonomy had also been raised outside the Marxist circle. We shall begin by taking up the views of William Graham Sumner, an American sociologist.

In his classic work *Folkways*¹⁵ Sumner enjoins that law grows, or should grow out of the "mores". It shades into them. Folkways and mores change gradually as the conditions of life change, but there is little scope for changing them fundamentally through any conscious act of legislation.

Acts of legislation come out of the mores... Legislation... has to seek standing ground on the existing mores, and it soon becomes apparent that legislation, to be strong, must be consistent with the mores.¹⁶

11 H Collins, above n 5 at 25.

12 KS Newman, above n 3 at 18.

13 Friedrich Engels cited, *ibid.*

14 *Ibid.*

15 W G Sumner, *Folkways and Mores* (Schocken Books New York 1979).

16 *Ibid* at 55.

Social life, for Sumner, thus has a dynamic of its own. Law, philosophy, religion, and morality (the “superstructure” in Marxist terminology) have no independent existence except as various projections of the dynamic. “They are deeply rooted in the process of social development yet virtually powerless to alter them.”¹⁷

Despite the unequivocal insistence on law’s inseparable link with social life, Sumner, unlike the above-mentioned Marxist position, does not discount law’s potentiality, particularly through legislation, to break away and act independently of the social base. However, he does caution that such a course can lead law onto a dangerous and risky path.

Legislation can and does diverge from the mores and to the extent that this occurs it threatens to become divorced from the sources of its authority and potentially ineffective.¹⁸

In essence, thus, while the instrumentalist perspective posits law “at the centre of things”, in Sumner’s “massive picture of human history” law is clearly peripheral, a dependent variable, a sideshow in the main drama of social development. Its social significance is not a given, but depends on social conditions which vary in different stages of social development in different societies and which law itself has little power to shape. “Accordingly whenever law seeks to change society the very idea itself is a derivative of the subterranean social forces.”¹⁹

On the European continent, among the most piquant criticisms of the notion of law “as merely technical regulation” came from the German conservative statesman and jurist, Frederick Karl von Savigny. Savigny insisted that “a legal system was part of the culture of a people”, and found an especial abhorrence in the codification of law (a trend which was fast emerging in Europe in nineteenth century, particularly in France). To Savigny such a move was disastrous, primarily because “it sought to fix in immutable principal legal ideas which, as an expression of culture, should be allowed to develop spontaneously.”²⁰ Whenever legal innovation through legislation ignored “the social root of law” and sought to fix legal doctrine in a comprehensive conceptual system, it only lead to “atrophying” the natural processes of change in social rules.

The basis of Savigny’s opposition to legislative activities lies in his belief that law is an expression, one of the most important expressions together with language, of the “spirit of the people” (Volkgeist). Central to this idea is the notion that law is much more than an ensemble of rules and judicial precedents. It is a reflection and

17 R Cotterrell, above n 2 at 21.

18 Ibid.

19 Ibid at 22.

20 Ibid at 23.

expression of a whole cultural outlook of the collective life. As Cotterrell commented,

The spirit of a nation or people is the encapsulation of its whole history, the collective experience of the social group extending back through the ages of its existence... For Savigny, law is incomprehensible as a social phenomenon except in the perspective of the history of the society in which it exists.²¹

However, like Sumner, Savigny did not totally dismiss the possibility of law being subject to conscious and rational creation and development through legislative activities. This can happen, and perhaps is necessary, in progressive societies where division of functions becomes more clear cut among its members and development of classes and sub-groups, becomes more pronounced "such that the *volkgeist* becomes progressively less identifiable and capable of finding spontaneous expression through law".²² But even in such circumstances, Savigny argued, conscious legislative process should be confined only to removing doubts and uncertainties in evolving law and enacting settled customary law. At no time should it deny "the evolutionary nature of law by setting out fixed, final and comprehensive principle".²³ With such caution, Savigny hoped to be able to restore law within the life of society.

Eugene Ehrlich, an eminent and prolific Austrian law professor also made an early critique of the autonomy of law. For Ehrlich, law is derived from social facts and depends not on state authority. In his view, law differs little from other forms of social compulsion, and the state is merely one among many associations, though admittedly it possesses certain characteristic means of compulsion. The real source of law is thus not statutes or judicial decisions reported in case reports but the activities of social life. There is what he terms a "living law" underlying the formal rules of the legal system and the task of judge and jurist is to integrate the two types of law. It is this living law, which furnishes the rules actually followed in social life and which generally, operates to prevent disputes. When disputes arise, it settles them without recourse to the legal institutions of the state, for the "centre of legal gravity lies... in society itself".²⁴ For Ehrlich, thus, legislation – the state-law – plays only a marginal role as a "formulative factor in law". However, like the two preceding views, there appears in Ehrlich's argument a tacit recognition of law's autonomous status in society. This can be drawn from his formulation of the dichotomy between the living law and formal law. As the former is rooted in the social life of society, the latter, by implication, must be external to it. But for Ehrlich, despite the autonomy of the formal law, its connection with the social life is not

21 *ibid.*

22 *Ibid.*

23 *Ibid.*

24 Lloyd and Freeman, above n 2 at 562.

lost, as legislators and jurists have the task of adjusting the formal law to match the living law.

Notwithstanding the foregoing sociological and juridical invocations regarding law's rootedness in social life, there prevails a cognition that law is an autonomous phenomenon, a reality *sui generis* (to borrow Durkheim's terminology), at the free disposal of lawyers, judges, legislators and state planners alike. Such cognitive experience predominates both the "common sense" perception as well as legal postulations and discourses. Cotterrell, for instance, points out,

[I]n the lawyers' view and in the wider public view [law] has come to be seen as separate from the society it regulates. It has become possible to talk about law acting upon society, rather than law as an aspect of society. It appears autonomous within society.²⁵

Despite the occasional avowal on the connection between law and the socio-economic basis, its "determining" aspect, its capacity to act upon and mould society, free from its cultural and normative constraints, remains prodigiously emphasised. Hartwell thus states, "legal institutions have some autonomy of their own which, in varying degrees, makes them exogenous variables in any process of economic change."²⁶ Horwitz also puts the argument that there was a radical break with pre-capitalist society and its law after 1790, and that in the period 1790-1880 the American courts "engineered the facilitation and legitimization of industrial capitalism."²⁷

At the forefront of the intellectual validation of the autonomy of law and legal doctrines, and hence their important derivative, the instrumentality of law, is the normative legal theory, particularly its positivistic variant based on the writings of the English legal reformer, Jeremy Bentham, and his more professionally orthodox follower, John Austin. Legal positivism posits that laws are the command of the sovereign – the supreme legal authority of an independent political society – typically expressed through legislation and supported by state sanction. Judges are the mouthpieces of the sovereign, their powers of law creation existing only by delegation from sovereign authority.²⁸ Notwithstanding the later refinement and elaboration of this normative theory, its general thrust remains clear: "all law derives directly or indirectly from the state, that is, from the supreme political authority of a politically organized society."²⁹ Under legal positivism law thus becomes "a distinct realm of knowledge and practice" – "purified" of ethical, social, political, scientific and historical considerations.

25 R Cotterrell, above n 2 at 48.

26 Lloyd and Freeman, above n 7 at 963.

27 Ibid.

28 R Cotterrell, above n 2 at 28.

29 Ibid.

Within the sociological tradition the most elaborate refutation against any attempt to explain law as a direct outcome of economic forces was raised by Max Weber, a prominent German sociologist, in the course of his "debate with the ghost of Marx". Weber preferred to account a larger variety of forces (economic, organizational, political and ideological) acting to shape and constrain law.³⁰ In his words, "economic situations do not automatically give birth to new legal forms; they merely provide the opportunity for the spread of a legal technique if it is invented."³¹ Further he adds, "the development of the legal structure of organization has by no means been predominantly determined by economic factors."³² And elsewhere he states "law evolves at least in part from the momentum of its own internal logic."³³ Recognizing law's autonomous existence, Weber proceeds to provide a definition of law, which is unmistakably positivistic.

An order will be called... law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about compliance or avenge violation.³⁴

Despite the claim on law's autonomy in their systems, both positivism and the Weberian sociology of law do not provide an explanation to the basic question; "how is law's autonomy possible?" In my view, this is the failure of the two theories. In other words, the independent status of law is never explicated in both legal theories. Law's externality is taken for granted, a given. Law is a self-evident entity which acquires an autonomous reality simply on the basis of its definition. The reality of law is explained in the very process of fixing the meaning of legal ideas.³⁵ As such the ontological status of law in both of the theories remains problematic.

How then is the dichotomy between law's rootedness in social conditions, on the one hand, and its apparent autonomy from it, on the other, to be explained? For this inquiry, it is suggested that recourse be had to "the exchange theory of law", which theory represents so far as the most theoretically informed attempt to explain this legal phenomenon. The central precept of this legal theory is that law is autonomous only "in form" while in essence and content it is very much embedded in social relations, particularly in society's relations of production. So an adequate theory of law cannot begin by examining abstract concepts and ideas such as "equality", "right" and "duties" because to adopt this approach would only conceal the dynamics which give rise to the very concepts themselves. Pashukanis, elaborating on the definition of law, noted that "law as a form, does not exist in the

30 KS Newman, above n 3 at 26

31 M Rheinstein, *Max Weber on Law in Economy and Society* (A Clarion Book 1954) 131.

32 D Milovanovic, *Weberian and Marxian Analysis of Law* (Avebury 1989) 3.

33 KS Newman, above n 3 at 26.

34 Max Weber cited in D Milovanovic, above n 32 at 22.

35 R Cotterrell cited in Lloyd and Freeman, above n 7 at 667.

heads of the theorists or learned jurists. It has a parallel, real history which unfolds not as a set of ideas, but as a specific set of relations which men enter into not by conscious choice, but because the relations of production compel them to do so."³⁶ The process through which law transforms into a "supra-historical force" is, according to exchange theory, the distinct feature of the commodity relations in capitalist society.

In capitalism, social relations appear as the relations of free and equal individuals; they are not directly relations of power or force as in pre-capitalist societies, such as slave or feudal societies, where they took the form of some sort of social hierarchy. The government of such a society could consist of commands passed through the hierarchy.³⁷ In a society where such relations of power were lacking "solidaristic groups" instead emerged which took decisions, regarding social order according to some kind of basic collective process. By their nature, such groups would take into consideration the different status of the groups such as elders, women, etc. What is important here is that in either of these (pre-capitalist) models, the legal and political order of the society remained embedded in its social and economic structure. It is under capitalism that a legal order (as well as the political) emerges which appears as autonomous and supra historical.³⁸ How is this explained?

Exchange theory proceeds from the assertion that one of the most important characteristics of capitalism is that creative human processes are seen in terms of commodities. Everything can be bought and sold and so is understood in terms of its commodity value. Social relations themselves become, paradoxically, relations between things.³⁹ Balbus thus commented: "in [the] capitalist mode of production the exchange of commodities is paralleled by the exchange of citizens."⁴⁰

What this implies is that under capitalist social relations individuals relate to one another as property owners, that is, in terms of the commodities they hold or around which their dealings are organized. Thus they are brought together as "employers", "consumers", "neighbours" because they buy and sell objects. Such a feature of social life is of paramount ideological importance to the system, since capitalism depends on the freedom of market transactions. These transactions include, most fundamentally, those embodied in the relations of production in which human labour-power itself is seen as a commodity (which is a rather unique commodity) to be exchanged in the market. Hence the reason why in a capitalist system the capitalist can retain all the profits (surplus value) from another man's labour is

36 Evgeny B Pashukanis cited in D Milovanovic, above n 32 at 24.

37 Sol Picciotto, "The Theory of the State, Class Struggle and the Rule of Law", in B Fine, R Kinsey, J Lea, S Picciotto and J Young (eds), *Capitalism and the Rule of Law* (Hutchinson of London 1979) 166.

38 Ibid.

39 R Cotterrell, above n 2 at 123.

40 ID Balbus, "Commodity Form and Legal Form: an Essay on the Relative Autonomy of the Law", in CE Reasons and RM Rich (eds), *The Sociology of Law. A Conflict Perspective* (Butterworths Toronto 1978) 77.

precisely because he has bought, in a freely negotiated contract, the worker's labour power and "so holds it and its fruits as his own".

Such production relations eventually assert themselves in juridical concepts and ideas. "Production relations", Marx points out, "are bound to be expressed as political and legal relations."⁴¹ Hence in a capitalist society the legal form is but "the direct analogy and necessary fulfillment of commodity forms". To borrow the term from Balbus, a "homology" is created between the legal form and commodity form.⁴² At the heart of law is found the concept of the universal legal "subject", which in the commodity exchange transaction "figures for the first time in all the fullness of its definitions."⁴³ The rights and duties of individual legal subjects are equal before the law and "whatever the real economic and social differences between individuals, capitalist law tends towards the idea that all are equal in its eyes". The special determinant of legal status based on property, race, gender or other qualifications tend gradually to disappear with the development of the law. The application of the law may greatly discriminate between classes and groups, but on its face – in legal doctrines and legal ideology – capitalist law tends to treat all as equal, so disregarding the status of real or substantive inequality which it maintains.⁴⁴ In other words, under capitalism legal relations take place in forms which conceal "the qualitatively different interests and social origins of individuals".⁴⁵ However, the universal legal subject is recognized by law as free and equal only insofar as he can be seen as a property owner. He owns, at the very least, his faculties and his power to work which under capitalism is a commodity. This commodity, if no other, he can avail to the market. Thus under capitalism legal relations are fundamentally the relations of commodity owners in the market.⁴⁶ Law is born with the market, reaches its highest and most abstract form in capitalism, where all social relations are dominated by commodity form. People's actual relationships are hence not immediately social but, due to the domination of commodity production, they are mediated by the exchange of commodities. They appear as fetishised form. More specifically, relations existing in the society are given "idealized expression" in the form of concepts, ideas, etc. Balbus points out that it is precisely such fetishism under capitalism that allows for formalist conceptualization of law as "autonomous" reality to be explained according to its own "internal dynamics", where it is conceived as an independent subject, on whose creativity the survival of the society instead depends. The ramification this has for individuals is that there develops in their consciousness an affirmation that they owe their existence to the law, rather than the reverse, "inverting" the real causal relationship between themselves and their product. Consequently, they are

41 Karl Marx cited in D Milovanovic, above n 32 at 23.

42 ID Balbus, above n 40 at 77.

43 Evgeny B Pashukanis cited in P Fitzpatrick, *Law and State in Papua New Guinea* (Academic Press 1980) 25.

44 R Cotterrell, above n 2 at 12.

45 ID Balbus, above n 40 at 78.

46 R Cotterrell, above n 2 at 124.

precluded from the possibility of evaluating the legal form, an entity that is conceived as an independent source of one's existence and values.⁴⁷ "It is in this sense," points out Milovanovic, "that lawyers uphold the status quo by merely accepting, uncritically the logical expressions emanating from existing relations of production".⁴⁸

The foregoing views, which have been expressed by modern critical writers, are reminiscent of what Marx had stated very much earlier. Production relations, he points out,

are bound to acquire an independent existence over against the individuals. All relations can be expressed in language only in the form of concepts. That these general ideas and concepts are looked upon as mysterious forces is the necessary result of the fact that the real relations of which they are the expression, have acquired independent existence... these general ideas are further elaborated and given a special significance by politicians and lawyers, who, as a result of the division of labor, are dependent on the cult of these concepts, and who see in them, and not in the relations of production, the true basis of all property relations.⁴⁹

Elsewhere Marx also argues that in consciousness - in jurisprudence, politics, etc., - relations become concepts; since they do not go beyond these relations, the concepts of the relations also become fixed concepts in their mind.⁵⁰ Thus in Balbus' words, "commodity fetishism and legal fetishism are... two inseparably related aspects of an inverted, 'topsy-turvy' existence under a capitalist mode of production in which humans are first reduced to abstractions, and then dominated by their own creation".⁵¹

So far the discussion in this article centres on law's apparent autonomy in social life, and recourse is made to the exchange theory of law for the explanation of the phenomenon. What remains sequentially to be explained is the process through which law is capable of being conceived as an independent instrument or tool of social control, "an efficacious instrument of economic policy". In other words, the point to be clarified is; how is law, which is an idealized expression of the existing relations in society, capable of acting back on to the society?

Cotterrell proffers that this phenomenon can be understood as an aspect of the apparent autonomy of modern state from the society in which it exists.⁵² State in this context is taken to mean the specifically political elements of organization of society. In modern societies these elements tend to become increasingly concentrated

47 ID Balbus, above n 40 at 84.

48 D Milovanovic, above n 32 at 24.

49 Karl Marx cited in D Milovanovic, above n 32 at 23, 24

50 Ibid.

51 ID Balbus, above n 40 at 84-85.

52 R Cotterrell, above n 2 at 150.

and centralized in specific institution (eg government bureaucracies) and processes. The modern state thus represents a distinct concentration of political power. It holds the monopoly of the means of violence and coercion and rule making.⁵³ This particularly important historical development in human history occurred gradually in Western societies, especially in Europe. The nineteenth century social thinkers came to conceive of the separation of "state" and "civil society", that is, broadly speaking, the separation between on the one hand a "public" realm of government, politics and collective interest, and on the other, a "private" realm of individual interests and social relationships reflecting those interests, the private transactions based on the concept of private property and rights. A clear conception of the process was captured by Engels:

The state is... by no means a power imposed on society from without; just as little is it 'the reality of the moral ideas'... Rather it is a product of society at a particular stage of development: it is the admission that this society has involved itself in insoluble self-contradiction and is cleft into irreconcilable antagonisms which it is powerless to exorcise. But in order that these antagonisms, classes with conflicting economic interests shall not consume themselves and society in fruitless struggle, a power, apparently standing above society, has become necessary to moderate the conflict and keep it within the bounds of 'order'; and this power, arisen out of society but placing itself above it and increasingly alienating itself from it, is the state.⁵⁴

As to the "reification" of the state, Marx described it in the following terms:

[A state is a power] which has won an existence independent of the individuals... a social power ... [which] appears to the individuals ... not as their own united power, but as an alien force existing outside of them, of the origin and goal of which they are ignorant, which they thus cannot control, and which on the contrary passes through a peculiar series of phases and stages independent of the will and the action of men, may even being the prime governor of these.⁵⁵

From the foregoing elaboration a point can be reiterated. With the separation of public and private spheres of life, or the "politics" and the "economy", becoming more pronounced, while the reach of the state extended to control an ever widening sector of social life, law not only appeared as inevitably standing apart from society but was in a position to "act" independently upon it as an external force. Such a conception becomes significant under capitalism for the protection of the capitalist mode of production and more so under present day monopoly capitalism, where the state actively intervenes in the economic sphere to overcome crisis tendencies.⁵⁶ As Klare declares,

53 JA Hall and GJ Ikenberry, *The State* (Open University Press 1989) 2.

54 Friedrich Engels cited in Y Ghai, above n 3 at 192.

55 Karl Marx cited in ID Balbus, above n 40 at 84.

56 D Milovanovic, above n 32 at 49.

The state sets the ground rules of most economic transactions, directly regulates many significant industries, regulates the class struggle through labor laws, through its actions determines the size of 'social wage', provides the infrastructure of capital accumulation, manages the tempo of business activity and economic growth, takes measures directly to maintain effective demand, and itself participates in the market as a massive business actor and employer.⁵⁷

In reference to the Third World economies which are preoccupied with the fulfillment of "development" goals, such a task for the state and law does not only become necessary but their *raison d'être*. "Nowhere," states Ghai *et al.*, "has the instrumentalist conception of law been more widely used in the Third World than in the establishment of a multitude of public enterprises based on the idea that the balance between executive control and management autonomy is best achieved through law".⁵⁸ Further points on the issue have also been highlighted by the economist, Harry G. Johnson, in his writing of "economic policies toward less developed countries". He concludes:

To establish a modern society capable of self-sustaining growth at a reasonable rate requires, in broad cultural terms, the attainment of political stability and a reasonable impartiality of governmental administration, to provide a political institutional framework within which individuals and enterprises (whether working for their own gain or within the public sector) can plan innovations with maximum certainty about the future environment. It requires the establishment of a legal system defining rights of property, person and contract sufficiently clearly, and a judiciary system permitting settlement of disputes sufficiently predictably and inexpensively, to provide a legal institutional framework within which production and accumulation can be undertaken with a minimum degree of non-economic risk. And it requires the establishment of a social system permitting mobility of all kinds (both allowing opportunity and recognizing accomplishment), and characterized by the depersonalization of economic and social relationships, to provide maximum opportunities and incentives for individual advancement on the basis of productive economic contribution.⁵⁹

Adding to the economic imperatives for law's instrumentality is the modernization theory adopted by many of the Third World countries. The theory has a penchant for authoritarianism. The emphasis, therefore, is toward a strong state, order and stability. To this end, law is often viewed as having a central role to play.

[M]odernization theory has tended to conform more to the dictates of order and stability (that is, repression) than to liberal democracy... Modern law and modern legal education have rarely been seen to stand apart from this. On the contrary, law is often seen as rightly associated with the preservation of order ... any order ...

57 Karle Klare cited, *ibid.*

58 Y Ghai, above n 3 at 431.

59 Harry G. Johnson cited in P Fitzpatrick, above n 43 at 41-42.

Gardner instances how legal education with 'progressive', instrumentalist emphasis produced efficient operatives for military dictatorship in Latin America ...⁶⁰

In the light of the preceding discussion, a point can perhaps be made that the view expressed by Malaysia's Prime Minister, Dr. Mahathir, on the necessity to utilise law in a development strategy, quoted at the beginning of this article, could well be understood from the perspective of law thus examined, that is, the conception of law as an autonomous entity in a state-regulated Third World capitalist economy. For it is in such a perspective that law becomes possible to be viewed principally as state-action and an instrument of government, freed from moral and cultural constraints, purified of normative values, consciously and rationally formulated and applied; and most importantly, it gathers an ontological status apparently external and apart from the society in which it exists.

Conclusion

In the present age of bureaucratised mass societies, where codification and legislation have become the principal sources of legitimate social regulation and control, it appears inevitable that the instrumentalist conception of the law will dominate legal discourses and all attempts to comprehend legal phenomena. This means that an adequate concept of law in the present epoch of human socio-economic development must necessarily acknowledge law's "transcendent facticity", its autonomous status within the society in which it stands. Moreover, it is this characteristic of law which today essentially distinguishes it from other forms of social regulation – customs, mores, usages, etc.

However, caution must be exercised in such a conceptualization of the law in order that it does not become unacceptably reified. For otherwise it paves the way for the tyranny of the legal form which only serves to conceal, mask and mystify many of law's "dysfunctional" traits in a human collective life – as instrument of power and repression, as a tool of mass ideological conditioning, in legitimisation of order and domination which deepens individuals' alienation and their dependency on the state power, and in perpetuating the hallowed and symbolic rights, of freedom and liberty for citizens. As observed by the nineteenth-century novelist Anatole France, in his eloquent but cynical remark: "The majestic equality of the law... forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread." What this, in turn, calls for is a constant awareness, especially on the part of legal scholars and jurists, of law's anchorage in the "material conditions of life", wherein resides the brute fact of human historical process through incessant struggles and from which law draws much of its force and essence.

60 P Fitzpatrick, *ibid* at 49.