



UiTM LAW REVIEW

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THE SOCIAL DYNAMICS OF LAW: AN INQUIRY INTO THE MULTIFORMITY OF LAW IN CONTEMPORARY MALAYSIA

by MOHD DARBI BIN HASHIM*

Introduction

Browsing randomly through the local newspapers over the last four or five months a newspaper reader would invariably stumble upon the news headlines and reports on the various state legislative and quasi-legislative actions as well as law enforcement measures in this country such as follows:

a. The news headlines:

Dept probes six deviant groups in Selangor (The Star 17 July 2002); Chua: Bill on traditional medicine soon (The Star 29 July 2002); Crackdown on cybercafes: Sabah shuts down all outlets (The Star 19 July 2002); Sultan Mizan gives consent to Hudud law – “The Sultan of Terengganu has given his consent to the Syariah Criminal Offences (Hudud and Qisas) Enactment, which was passed by the State Assembly recently ...” (The Star 1 August 2002); Help enforce Hudud law, Hadi urges police (The Star 1 August 2002); GO to cover sexual harassment (New Straits Times 8 August 2002); New laws to prosecute tontos soon (The Star 9 August 2002); Whip for illegals: Seven foreigners to be jailed and caned under amended immigration law (The Star 10 August 2002); 37 films, TV series and ads banned (New Straits Times 23 August 2002); New law to help disabled (New Straits Times 2 September 2002); Ex-Bukit Aman cop to assist in hudud law enforcement (The Star 19 September 2002); Rising cases one reason why the Bankruptcy Act is amended (New Straits Times 25 September 2002); Only women audience for female artiste in Kelantan (The Star 3 October 2002); Rules on medical fees lauded (The Star 12 October 2002); Mental Health Act regulations to be ready soon (The Star 12 October 2002); Guideline for financial planners from next year (The Star 13 October 2002); Ministry bans two publications (The Star 13 October 2002); KMM Men Held: Five more detained for having links to other militant groups (The Star 17 October 2002); Recycle Law – Ong: It’ll be compulsory for certain solid wastes under Act being drafted (The Star 21 October 2002); A-G seeks death for 16 Al-Ma’unah members (The Star 30 October 2002); Authorities bust transvestite beauty pageant (The Star 30 October 2002); New law [Personal Data Protection Act 2003] to punish firms which leak data on clients (The Star 5 November 2002); Kedah to record all sermons in mosque (The Star 6 November 2002); Tougher laws on rape a welcome move (The Star 7 November 2002); Bid to speed up appeals: Talks on Industrial Appeal Court in final

* Associate Professor of Law, Faculty of Administration and Law, Universiti Teknologi MARA, Malaysia, Bar-at-Law (Lincoln’s Inn), MA (Business Law), LLB. (Lond).

stage (The Star 7 November 2002); Easier for bosses to get visas approved (The Star 8 November 2002); Act to regulate youth bodies to be tabled at last (The Star 19 December 2002); Perlis eases law on Polygamy (The Star 3 January 2003); Tough laws for incest (The Star 10 January 2003); New law on food labels, nutrition in June (The Star 12 January 2003); Perlis to table proposal on mandatory curfew for teenagers (The Star 13 January 2003); Stricter licensing rules for L-drivers (The Star 20 January 2003); Ban on posters of women with no tudung (The Star 23 January 2003).

b. The news reports:

“Terengganu may set up its own prisons to hold offenders under its syariah laws if it is not allowed to use Federal owned prison”. (*The Star 11 August 2002*); “The Johor Government is drawing up guidelines to regulate RM2 mini markets in the State”. (*New Straits Times 14 August 2002*); “In their extended war against software piracy, enforcers from the Domestic Trade and Consumer Affairs ministry raided on Wednesday a company suspected of dealing and distributing pirated materials at Desa Setapak here”. (*The Star 27 August 2002*); “Enforcement officers from the Domestic Trade and Consumer Affairs Ministry are empowered to break into premises of suspected companies using pirated and unlicensed computer software”. (*The Star 4 September 2002*); “The PAS led state government has introduced a strict dress code governing the dressing and conduct of both Muslim and non-Muslim tourists as well as tourism department in the state”. (*The Star 13 October 2002*); “The Cabinet has approved a code of conduct for the business community as a guideline for good conduct”. (*The Star 16 October 2002*); “Malaysia may have to introduce a new legislation to protect its rights in matters relating to natural resources which are sold to other countries, said Minister in the Prime Minister’s Department...”. (*The Star 26 October 2002*); “The Youth and Sports Ministry wants to introduce a new Bill that will help youths to forge ahead in the changing globalised world”. (*The Star 31 October 2002*); “The Federal Court granted leave to four Kelantanese yesterday for them to appeal against a jail sentence meted out on them for renouncing Islam”. (*The Star 6 November 2002*); “Six commissions of inquiry have been established to safeguard the rights of non-unionised workers in sectors where the poverty rate is high”. (*The Star 6 November 2002*); “The Domestic Trade and Consumer Affairs Ministry will seek an increase in the maximum claim amount of the Consumer Claim Tribunal ...”. (*The Star 6 November 2002*); “All traditional medicine practitioners will be regulated under the Traditional and Complementary Medicine Act, which is being drafted, Parliamentary Secretary to the Health Ministry ... said yesterday”. (*Sunday Star 10 November 2002*); “State governments have been told to gazette Islamic family law as soon as possible”. (*The Star 15 January 2003*); “A 10 to 20 fold increase in fines and jail term are among new punitive measures being proposed to existing legislations for illegal land clearing”. (*The Star 8 February 2003*).

What immediately strikes a casual reader through such a perusal is that these legislative actions and enforcement measures of the state agencies do not seem to cohere to any distinct and well-defined pattern, trend or direction. Instead they appear

as disparate, fragmented, multifarious, and diverging. There is no one discernible “guiding thread” that runs through the seams of the legal appliqué.

Thus to cite but few instances of the legislative measures cited above, how does one suppose the connection between the laws and regulatory measures that touch upon individual private morality, such as taking part in transvestite beauty pageant and religious conviction, with those, say, that deal with complex intellectual property, business, natural resources and financial issues? How can one make intelligible the link between laws regulating religious matters, such as monitoring sermons in mosques and deviants groups, and those dealing with health, road traffic, land and environmental matters and consumer affairs? Again what is the relationship between the laws promoting the welfare of women, the disabled and youths, and those dealing with religious affairs and implementation of religious edicts; or rules and decisions enforced against religious militant groups and cyber cafés and mini market operators?

The Methodological and Theoretical Issues

Faced with such legal and legislative maze, one is easily roused to make intelligible the situation by looking at each of these legal and quasi-legal measures in isolation and explain their incidence in terms of “interests”. This approach, however, risks slipping into subjectivity and “the vice of teleology”. It is all too easy to move from talk of interests and strategies “to the attribution of purposes to the collective agents and institutions”.¹ The latter can further lead to endless conjecture and speculation as to the nature of those interests, whether they are personal, political, class, bureaucratic, gender, ethnic, religious, etc. Additional difficulties also arise in explaining the ontological status of these interests and how they are related with one another.

Alternatively one can be persuaded to explain these vexed legal phenomena in terms of their serving to ensure justice, peace and order, protection of public morality and decency, preserving the health and physical well-being of the population, promoting the economic life and well-being of the nation and prosperity of the citizens – “the social engineering”, and upholding the ideals of freedom, rights and democracy. But this “law’s usefulness and purposefulness” approach runs, in the first place, into the theoretical quicksand by making the supposition of law as an autonomous and independent entity that could be simply commanded by human volition, either individually or collectively, to act on the social life. This normative and idealist conception of law “which is grounded in a belief in the severability of law from other related social phenomena”² (*ex hypothesi* a separation between law and politics) has lost much of its jurisprudential purchase in the context of modern state societies. Importantly, it negates the crucial role of social agency and thereby smacks of an element of arbitrariness in law’s actions on social life, treating human beings as

1 Alan Hunt, *Exploration in Law and Society* (Routledge New York 1993) at 313.

2 *Ibid* at 304.

passive objects. Legal autonomy also runs counter with the modern idea of democratic government that places high premium on planning, efficient management, accountability and responsibility. Arbitrary actions through laws and edicts by those in power could find their proper place only in the pre-modern epochs where kings, princes, chieftains, warlords and priestly class ruled by absolute will, divine or otherwise.

One might also be inclined to explicate the multiformity of the laws and legal cornucopia above in terms of their ideological underpinnings. This is understandable in view of the contrasting “ideological” espousals of the two major political groupings in the country, Barisan Nasional (BN) – a coalition of ruling political parties - and Parti Islam SeMalaysia (PAS), with the former controlling the Federal Government and eleven other state governments, with the exception of two (Kelantan and Terengganu) which are under the control of the latter. While PAS claims to ground its politics on “Islamic principles” with the ultimate objective of establishing an Islamic state in Malaysia, BN operates on congeries of generally and loosely shared goals – nationalism, multi-racialism, pragmatism, national development and progress. Accordingly, the laws promulgated and legal measures enforced in the states of Kelantan and Terengganu are deemed to be religiously founded while those in other states and at the Federal level would assume a different basis. However, such a classical Marxist “law as an expression of ideology” approach easily breaks down as soon as it attempts to apply itself at explaining the status of technical and competency-related rules and regulations. Thus while the PAS state government would legislate, for instance, laws and rules dealing with foreign direct investments (FDI) flowing into the state, rules pertaining to road traffic matters, or licensing regulations, one is hard put to determine in what way these laws and rules can be ideologically girded together with its Hudud laws, dress codes for tourists or orders banning the sale of liquor. Equally difficult is to see the ideological connection between the diverse legal initiatives and measures introduced by the BN led governments both at the state and Federal levels that deal with matters such as busting transvestite beauty pageant, monitoring sermons in mosques, banning TV series and advertisements, banning publications, expediting visa application process, regulating mini markets and protection of data, regulating traditional medicine, labour relations, and copyright protection. In precise terms, therefore, explicating the myriad of laws and legal measures in Malaysia through the grid of apparent ideological differences between PAS and BN led governments would not take one very far. In too many areas of the law the methodological framework collapses.

Faced with this theoretical impasse one might resign to concede to the Foucauldian (styled after the late French philosopher Michel Foucault) or Bourdieuan (after the French social theorist Pierre Bourdieu) position regarding the matter. This is the position that sees law and power as displaced from any central location in society but instead is dispersed and localized. Accordingly, the apparent disparateness and unconnectedness of legal rules and regulations is the very essence of law’s strength and force, as a manifestation of modern form of state power. In contrast with the Classical era where “power was transparent, epitomized by the command power of

the king ... in modern society power becomes diffused and its location becomes almost mysterious”.³ Since it is no longer perceived as emanating from any centrally controlled site in society, law in modern condition thus hides or camouflages its trails of power that pervade every corner of social and personal life. Dispersed, isolated and localized into the various “capillaries of power” (in departments, agencies, community, organizations and apparatuses), law uncouples itself from power, thereby detaching itself as an instrumental bearer of the latter. In view of law’s current role in society, Foucault goes to the extent of asserting that in the condition of modernity, domination is masked by a range of multiform “tactics” and “strategies”. In his formulation,

domination is organized into a more-or-less coherent and unitary strategic form; that dispersed, heterogeneous, localized procedures of power are adapted, re-enforced and transformed by these *global strategies* ... [H]ence one should not assume a massive and primal condition of domination, a binary structure with “dominators” on one side and “dominated” on the other, but rather a multiform production of relations of domination that are partially susceptible of integration into *overall strategies*.⁴

In a similar vein Bourdieu “sketches a developmental theory of modes of domination that suggests a sequential shift from a premodern reliance on ‘overt violence’ to one organized around ‘symbolic violence’, what he calls ‘the gentle hidden form’”.⁵ A more recent stage of this development further witnesses the progressive withering away of symbolic violence as “objective measures came to be constituted that ... tend to produce the ‘disenchanted’ dispositions their development demanded”.⁶ To further describe the disenchantment of modern laws, Bourdieu deploys the idea of “dissimulation” and “euphemization”. By “dissimulation” is meant the concealment or disguise of some social phenomena under a feigned appearance, while “euphemization” “conjures up some process of substitution in which a more palatable term is used to replace something that is more explicit or more accurate, as in the common euphemization imposed on the language of children for body parts and bodily functions”.⁷ Like Foucault’s “capillary power”, dissimulation and euphemization provide modern laws their normalizing and naturalizing properties. Hence the intractability of linking the multitude of particular legislative and enforcement measures into a coherent framework suggested at the beginning of this essay. However, while this approach is attractive in that it alludes and alerts to law’s role in masking domination and “thus an ideological phenomenon” (especially for Foucault), it runs into the confusion of over stating the plurality of law, rejecting the

3 Ibid at 271.

4 Michel Foucault cited in Alan Hunt, n 1 at 277.

5 Alan Hunt, n 1 at 331.

6 Ibid.

7 Ibid at 332.

unitary conception of state-law, refusing “to grant any significant effectivity to law”⁸ and failing to appreciate the concentration and condensation of power around the state-law coupling. As Hunt points out, in redirecting the study of power that involves a shift of emphasis from state-power to local or capillary power, Foucault’s methodology indeed has displaced law. In Foucault’s own terms, thus

[T]he analysis ... should not concern itself with the regulated and legitimate forms of power in their central locations ... On the contrary, it should be concerned with power at its extremities ... with those points where it becomes capillary ... [O]ne should try to locate power at the extreme points of its exercise, *where it is always less legal in character*.⁹

Against such “expulsion of law from modernity” position, Hunt makes the following observation:

This methodological move presents Foucault with a serious difficulty: how to secure a focus on localized power without at the same time ignoring the indisputable significance of state power and other forms of centralized and institutionalized power? This issue is probably the single most important theoretical and political weakness in Foucault’s whole project, since without attention to the aggregation or condensation of power in centralized sites, the resistance that power engenders is forever doomed to remain localized and fragmented, forever repeating the cycle of single-issue struggles which resist particular manifestations of power without ever being able to mount a wider transformatory politics.¹⁰

Hence instead of providing a satisfactory explanation on law’s mystery in securing “a general and persistent process of social regulation” and pointing toward “an understanding of the conditions of possibility of counterhegemonic strategies that can challenge existing forms of domination”,¹¹ this vision of the trajectory of modern law induces resignation, inertia and paralysis.

This “impenetrability” of the law stems essentially from the conventional way in which law itself is generally understood and experienced as a phenomenon in human existence and its relationship with the state which exercise of power in its terms is formulated.¹² From such a conventional perspective, the state is conceived as a taken-for-granted and ever-present unified reality, both as a unitary political subject as well as forming a unit in a sense of expressing and giving effect to the interest of a dominant group and interest.¹³ The state in this unitary model is thus a Leviathan, an absolute and hegemonic entity. In so far as law is concerned, it is law’s project to

8 Ibid at 272.

9 Michel Foucault cited in Alan Hunt, n 1 at 273.

10 Alan Hunt, n 1 at 273.

11 Ibid at 333.

12 Ibid at 272.

13 Ibid at 309.

police its political boundaries and secure its constitutional unity. This “top down” view of state and, therefore, power, is overly directional in its projection of the trajectory of state in a polity. In so doing it glosses over the reality of the possibility that state position and its exercise of power could to a large measure be undermined and compromised in the fields of social life where new social categories are continually emerging. This is particularly so in the conditions of modernity, where contingency rules the order of social life, such that it is no longer desirable to assume that the state fully dominates and incorporates other sectors of social life. As Hunt expresses the point, directionality and causality are always questions of specific historical and contextual interpretation.

Equally an autonomous and essentialist conception of law dominates the traditional and conventional view of law. What characterizes this view is that law is treated as an entity independent of specific forms of existence that embodies a universal or even general essence. The ramification of such a conception of law is multifarious. One tendency is towards law’s self-referentiality, where law is identified by the very definition of the phenomenon identified as law. Further law takes the form of a system of normative and prescriptive rules or principles. In such a system it is assumed to be sovereign and commanding. It is a system of prohibition and a formal social control. Law’s effectiveness comes through it being the expression of pervasive state power. Law according to this view is cannibalistic; suppressing, checking or incorporating other non-legal form of power, like customs and traditional practices.

However, this view, despite being the dominant perspective of law, is defective. It fails to see that law, as a formal expression of state power, under specific historical condition is itself subject to change and variation both in form and content in the interfacing of state and other categories of social life. While Poulantzas claims that law is more than merely reflecting or encoding existing social relations but is also “a constitutive element of the politico-social field”,¹⁴ I would venture to say that law is capable of acting back on the state from which it emanates, resulting in the latter being “reconstituted”. This “reactive” capacity of law can be evidenced by the “reformatory” transformation of many autocratic states and governments into more open and democratic one.¹⁵

Critics of the conventional view of law have also asserted that the truth of the matter has been that law is never a unitary discourse but has always involved a range of discourses connected to and competing with a range of extra-legal discourses.¹⁶ As

14 Nicos Poulantzas cited in Alan Hunt, n 1 at 293.

15 The report in *The Star* 19 November 2002 which carried the headline *Protesting Iranian students defy warning* is instructive in this regard. According to the report thousands of Iranian students defied warnings of a crack-down by stepping up their protests with vocal demands for greater freedom of speech. In the face of mounting demonstrations and a chorus of criticism of the verdict over the sentencing to death for blasphemy of prominent reformist academic Hashem Aghajari, Iran’s supreme leader Ayatollah Ali Khamenei ordered the hardline-controlled judiciary to revise the ruling. But a student leader said the supreme leader’s intervention did not go far enough in satisfying wider student demands for freedom of speech and freedom in general.

16 Alan Hunt, n 1 at 294.

such it is not desirable, especially in today's condition, to conceive legal ordering as having exclusive dominance but borrows from, incorporates, and makes concessions to other co-existing ordering. Further it is argued that both the conventional views on state and law fail to take into account the intellectual and political attention today that has focused on the significance of civil society and every day life and the resulting "dispersal of political power and the localization of politics".

Foucault's treatment of state and law, though ambivalent, does, however, point in a direction that moves away from the singular and unitary conception of the two categories when he postulates the dispersal and localization of power and disciplinary strategies. However, he fails to explain how such decentralization is possible or caused. Additionally although state power is dispersed and localized he retains a strong top-down sense of directionality in the process. The field of social life in his scheme of things remains a passive object of state power instead of conceiving them in a dialectical relationship such that the state itself could come under pressure from below to make concessions. Equally by excluding law from the realm of social ordering, the point that had been alluded to earlier, Foucault is hard put to explain the legitimacy of the disciplinary and regulatory strategies and tactics he has introduced to displace law. What we are left with is yet another unitary conception of entities. Only this time they are "disciplines", "strategies" and "tactics" instead of law.

The project undertaken by this article is to explore the dynamic behind this apparent dispersal, and hence, the disconnectedness of law. It will be argued that the seeming fragmentation and "irrationality" of law's operation in the every-day social life is no happenstance but an adaptive and necessary form that it assumes under a given socio-political condition. Upon such premise the thesis put forward here is that the multiformity of law expressed through the legislative measures in Malaysia today can primarily be understood as the State's response in its encounter and confrontation with the configuration of new social categories (the market, the individuals and the communities), where on the one hand it seeks to constitute and regulate those categories, and on the other resists, deflects, moderates and accommodates the challenges and demands that these categories have brought to bear upon itself. It is in the constellation of various forces in the wide field of social experience that law shapes its forms.

Methodologically, in order to undertake such a project it becomes necessary to abandon both the conventional unitary and essentialist view of law, and the Leviathan conception of the state. The position in regard to law is that it is not to be understood in itself, through introspection of self-referentiality, and severed from concrete reality of social life. Rather, a "relational approach" will be adopted where law is viewed and grasped in terms of its connectedness, in its location interacting with and interpenetrating other non-legal social processes.¹⁷ Similarly, the dominant top-down view of a state is to be replaced by a "dialectical perspective" such that the field of social life

17 Ibid at 303.

over which the state is presumed to prevail is conceived as dynamic, emergent and contested sphere of existence, such that in its interfacing with the latter the state is itself exposed to the contingencies of modification, transformation and change. Such is the case because within the structure of this sphere of social existence the various social categories, entities or institutions configure. Further, what characterizes or “determines” (to use classical Marxists terminology) the sphere of social existence and its constituent categories is the underlying material-economic relations – that is “the totality of the operations aimed at procuring for society its material means of existence”¹⁸ - within which people find themselves stand with one another. While Hunt, following Foucault, holds the view that social categories are “discovered” and “constituted” by law as its object of regulation (thereby still importing the free-roaming idea of law), it is argued here rather that they are *sui generis* ontological phenomena of dynamic social life contending for their own space of existence which law (and state) is compelled to recognize and come to term with.

Without going into the detailed complexity of the current Malaysian economic structure, it suffices to assert here that in the course of its development toward modernity it has effected a mode of life that sees the configuration of three primary social categories – *the growing market; the emerging individuals and the reactive communities*. How the state interacts with and responds toward these social categories unfolds law’s many and variegated shapes, forms, tactics and strategies such as those illustrated at the beginning of this article.

The Market

The Malaysian economy today can essentially be characterized as industrial-capitalist “market economy”. Even though it possesses some specific local features and has undergone several phases of development, viz., the phase of *laissez faire* (1957-1970), state intervention (1971-1980), liberalization, Malaysia Incorporated and privatization (1981-1996) and economic crises (1997 and onward)¹⁹ its basic characteristics, however, remain, and can be broadly described as follows: (1) Private ownership of property which is put to private use; (2) appropriation of means of production and their placement under independent private industrial enterprises; (3) absolute freedom of exchange in the market place (that is freedom from “irrational” regulations or limitations) founded upon consumer sovereignty for unlimited consumption; (4) propagation of money, as a standardized mode of both exchange and social life; (5) productive specialization, through division of labour, and mechanization to the greatest extent possible with attendant rational technology; (6) free labour – that is, where workers are “economically compelled to sell their labour [which is but just another commodity] on the market without

18 Maurice Godélier cited in Alan Stone, “The Place of Law in the Marxian Structure-Superstructure Archetype” in Kahel Rokumoto (ed) *Sociological Theories of Law* (Dartmouth Publishing Company Limited Aldershot 1994) at 331.

19 Rahimah Abdul Aziz, “Perancangan Pembangunan Sosioekonomi: Dasar, Strategi dan Pelaksanaan” in Abdul Rahman Embung (ed) *Negara Pasaran dan Pemodenan Malaysia* (Penerbitan Universiti Kebangsaan Malaysia Bangi 2000) at 49.

restriction ... under compulsion of the whip of hunger ..." and (7) the commercialization of the economic sphere to include special instruments for property ownership as "share rights in enterprise".²⁰

The specific local features it has acquired in the course of its "compromise" with "capitalism and the greater market economy, how it adopts and digests them, and what kind of entanglements arise from this" take the following forms: (a) The economy is locked in the global market framework; (b) it is heavily dependent on foreign investments to generate industrialization process; (c) the growth emphasis is on service and manufacturing sectors oriented toward export market; (d) there exists strong relationship between public and private sectors; (e) as a departure from the classical *laissez faire* and competitive capitalist form, the state actively intervenes into the economy; (f) there also develops uneven patterns of ownership and control of resources and means of production along ethnic line.

On the socio-cultural plane market economy is generally characterized by expansion of wage-labour and industrial workers which is accompanied by urban migration and urbanization process. To meet the need of increased production and consumption, scientific and technological methods are widely deployed. This is further assisted by improved mass education, mass communication, transportation and infrastructural development. Human relationships here are tending to being impersonal. The normative standard underlying daily life is one based on facts, efficiency, calculability, predictability and cost-effectiveness, which essence can be captured in the Weberian phraseology "the rationalization of society", that deliberate, matter of fact calculation of the most efficient means to accomplish any practical goal. Accordingly, matters of administration and adjudication are heavily regulated by rational, formal and calculable laws and dictated by distant and impersonal bureaucracy. Accompanying this development is the pronounced rise of formal organizations and expansion of the state undertaking the roles by families and communities in pre-modern societies. Market economy also shows the tendency toward monopoly, mergers and concentration of wealth in the few resulting in stratification of social life and inequality.

The emerging free-market economy in Malaysia just described, initially "adopted and digested" by the political elites upon the country achieving independence in 1957, today forms the ideological underpinning of the state's policy and goal toward national development, wealth creation, economic growth and prosperity as envisioned in the project "Vision 2020". Understandably, therefore, the state cannot but to genially respond to this social category with its attendant legal ramifications.

In the first place, the state, being a "power relation expressed in economic relation" of the capitalist mode of production, continues to play its primary traditional role in both containing political disquiet and reproducing the social structure which guarantees "the continuing hegemony of capital".²¹ To this end the state has recourse to law

20 Dragan Milovanovic, *Weberian and Marxian Analysis of Law* (Avebury Aldershot 1989) at 60.

21 David Brown and Michael J. Harrison, *A Sociology of Industrialization: an Introduction* (The Macmillan Press Ltd. London 1978) at 124.

which operates both as a form of coercive domination and ideological domination that “spontaneous” consent could be secured from “the great mass of the population... to the general direction imposed on social life by the dominant fundamental group”.²² In its coercive character law operates “both through specific institutions, which range from the courts themselves to the prison system, probation service, etc. In addition it also operates more generally through the police system that operates with wide-ranging powers, sanctioned by law, but able to act with very considerable degree of autonomy”.²³ Accordingly thus, it is in this connection and context that many of the laws and regulations in Malaysia variously criticized and decried as “undemocratic”, “draconian” and “repressive” could be located and explained – the Internal Security Act, Official Secrets Act, Seditious Act, Printing Press and Publication Act, Police Act and the University and University Colleges Act. This veritable armoury of laws and legal measures stands ready to be invoked whenever the existing economic and political order is threatened or comes under assault. However, it must also be noted that resort by the state to such “authoritarian solution” to defend the existing order is not always automatic. This is because there is at the same time a profound concern on the part of the political rulers and power elites to sustain the legitimacy of the order.²⁴ Hence, even though this contradiction is not an interaction between two equal forces, that smoothly provide a balance for each other, there are nonetheless periods in which there are major shifts toward authoritarianism, as well as periods of movement toward more liberal and less coercive forms.²⁵ The particular result at any point in time is a complex outcome of the constellation of forces and categories in society. This notwithstanding, the fact that the state in Malaysia stands relatively more ready and willing to resort to the harsh laws to thwart any “threat to the law and order” as compared with, say, the state in Britain, Australia, New Zealand or France, would certainly call for deeper understanding of the operative social forces in these countries.

On the other hand, law, in its ideological form that enables “the assent to the existing social order” to be produced and mobilized, serves to convey or transmit “a complex set of attitudes, values and theories about aspects of society”.²⁶ These attitudes, values etc. then reinforce and legitimize the existing socio-economic order. The most pervasive ideological implication of law is to be found through its affirming and giving effect to the “essential legal relations” underlying the social structure. This is “the legal relations that mirror and legally define the fundamental economic relationships in society”.²⁷ In the economy characterized by market industrial-capitalism these would be founded upon ownership of private property, contractual relationships, system of credit, recognition of combination in the form of investment stock company, and trust institution.²⁸ As an illustration, Hunt points out that,

22 Antonio Gramsci cited in Alan Hunt, n 1 at 20.

23 Alan Hunt, n 1 at 21.

24 Ibid at 317.

25 Ibid at 316.

26 Ibid at 317.

27 Alan Stone, “The Place of Law in the Marxian Structure-Superstructure Archetype” in Kahel Rokumoto (ed) *Sociological Theories of Law* (Dartmouth Publishing Company Limited Aldershot 1994) at 334.

28 Ibid at 336 – 340.

the law of property is not only based upon the inequality of property ownership but it reinforces it by allowing and facilitating the owners of property to make use of that property. The complex of legal rules relating to mortgages, trusts, leases, etc. not only allows but also enables property to be used as capital. The law relating to contracts and commercial activity gives to the mechanisms of the market.²⁹

It is not suggested here, however, that judges, in rendering their specific decisions that will best constitute and maintain the mode of production, are always consciously guided by the “dominant ideology” or they are directly influenced by the prevailing group economic interest. To suggest otherwise would fall into the error of determinism as well as denying the dynamic of human agency and action. For people, according to Marx, are endowed with consciousness and the ability to link that consciousness to action.³⁰ Rather it is acknowledged that in their decision-making process judges are generally oblivious to this broader socio-economic reality and even occasionally reach decisions that are adverse to the interests of political rulers or business interests. In fact it is important that judges are perceived to enjoy such flexibility and freedom in performing their functions for that what lends the judicial system the image and aura of independence and neutrality, a conviction so much cherished in the common law system under such doctrines of “judicial independence” and “separation of powers”. How the system then operates to constrain individual judges to “toe the line” and yet providing them flexibility and discretion, is through what is termed the structure of “derivative subrelations”.³¹ This structure forms the “intermediate link” between the economic structure and particulars of legal decision-making. In the legal sphere the derivative subrelations are legal concepts, maxims and doctrines “that fall between essential legal relations and particular rules”. Thus, for example, “property” is an essential legal relation. Under it are such derivative subrelations as easement, lease, and the like. Derivative subrelations of credit include security, bankruptcy, lien, etc. From these derivative subrelations flow particular legal rules and further subrelations”.³² In such a “system of transmission from economic structure to the decisions of individual judges”, therefore, courts, confronted with particular matters, accept as given and unreflectively, the essential legal relation, appraise and rationalize the functions and purposes of the derivative subrelation, and “then seek to render a best decision consistent with the derivative subrelation’s principal function”.³³ Stone thus observes,

So long as the essential legal relations are taken as the starting point, those actors who create the derivative subrelations and the particular legal rules under them will develop a jurisprudence compatible with the structurally defined system although they are neither conspiratorially nor consciously

29 Alan Hunt, “Law, State and Class Struggle” in Kahel Rokumoto (ed) *Sociological Theories of Law* (Dartmouth Publishing Company Limited Aldershot 1994) at 317.

30 George Ritzer, *Contemporary Social Theory and Its Classical Roots: the Basic* (Mc Graw Hill Boston 2003) at 21.

31 Alan Stone, n 27 at 341.

32 Ibid.

33 Ibid at 342.

on behalf of a class or ruling group ... Not only can the system allow creative and flexible decision-making within the framework set by the essential legal relations, but it can also tolerate the mistakes, the inefficiencies, and the conscious or unconscious attempts at subversion that are inevitable when decisions are entrusted to the multitude of variously motivated human agents.³⁴

In its modern interventionist form, the state responds to the market through governmental interventions that aim to make it function better. Accordingly the state sets the ground rules of most economic transactions, directly regulates many significant industries, provides the infrastructure of capital accumulation, manages the tempo of business activity and economic growth and takes measures directly or indirectly to maintain effective demand and itself participates in the market as a massive business actor and employer.³⁵ To overcome the crises tendencies in the market and “to compensate for the dysfunctions of free exchange” and the irrationality of the system the state establishes institutions and introduces measures to deal with such diverse matters as labour-management disputes, collective bargaining as well as arbitrating processes to settle a “just” wage, the character of education, welfare and distribution of income, the allocation of social entitlements for the poor, the nature of family life, protection of the environment, care for the aged, etc.³⁶ An equally important role toward securing economic stability is for the state also to regulate the mutual interests of the possessing classes by providing a mechanism for the resolution of disputes and conflicts that arise between them.³⁷ The legal frameworks of company law and commercial law cater for the interests of shareholders and directors, merchants, middlemen and dealers. Accordingly, on the basis of the growing interventionist stance adopted by the state in Malaysia today we can contextualize some of the legislative measures stated earlier: legislation on sale of natural resources to other countries, setting up commission of inquiry to safeguard rights of non-unionized workers, efforts to speed up the formation of the Industrial Appeal Court, code of conduct for the business community, guidelines for financial planners, measures to increase the maximum claim amount of the Consumer Claim Tribunal, easier visas approval for company bosses, rules making recycle of solid waste compulsory, stricter enforcement of copyright laws, amendment to the Bankruptcy Act, regulations on RM2 mini markets, heavier fines for illegal land clearing and protection against sexual harassment in the work place.

In connection with the above, it is worth noting further that the experience of many developed societies in the West has shown that state interventionism has had a profound effect on the form of legal reasoning that underlines the overall socio-economic system. Such is the case because, according to Gabel, the same regulative or coordinating principle found in the economic sphere will be duplicated in the legal sphere; more precisely, “the theory’s normative logic is actually the system’s

34 Ibid.

35 Karle Klare cited in Dragan Milovanovic, n 20 at 49.

36 Dragan Milovanovic, n 20 at 77.

37 See Alan Hunt, n 29 at 318.

functional logic expressed in ideal terms”.³⁸ Accordingly the form of legal thought “in which reason proceeds according to formal logic, deducing result from rule ... [has changed] to one in which reason has an a priori functional valence – that is, *in which an ideal social theme or ‘end-point’ guides the construction of literally ‘principled’ decisions, inducing in a loose sense ‘rule’ from result* [emphasis added]”.³⁹ Summarizing the situation, Milovanovic remarks:

In the twentieth century capitalism, then, “good faith”, “equity”, “balancing of interests”, “relative liability”, and legal conceptions such as purpose, intent, willfulness and so forth become central in the juridico-linguistic coordinate system and in the legal reasoning. The state of the nineteenth century as the “passive enforcer” has been replaced by the state as an “active enforcer” guided by the notions of the “general welfare”. The form of legal thought, then, is increasingly becoming “substantial rationality” [as opposed to “formal rationality”] in the Weberian sense. Superstructural practices – ideological, juridical, political – become overdetermining factors in establishing constitutional rights.⁴⁰

Turkel, in concluding his analysis of the 1971 Lockheed Loan Guarantee, also observes that “under conditions of monopoly and representative democracy, formal legality is included in a boundary-maintaining discourse that admits of wider, often contradictory, economic and political dimension”.⁴¹

In the specific context of Malaysia, this economic trend towards “reversion to substantive rationality” has caused an acute paradox in the socio-political life of the populace. While it has the benefit of checking the unbridled competition for profit in the market as well as compensating for “the dysfunctions of free market” through such measures of provisions of welfare, social security, health care, education, public utilities, etc., it also undermines the ethos and the normative standards by which the conducts and actions of the political rulers, state and bureaucratic officials, and those entrusted with public funds and confidence, such as corporate directors and managers, are to be judged and measured in the course of discharging their responsibilities. Hence of late there has been mounting demand from the perceiving members of the public for greater transparency, accountability, responsibility and objectivity by those in power and holders of high public offices. Being a society that is still struggling to free itself from the bond of traditional mode of life, where the broad majority of the members are yet to overcome and bring under their conscious control those “irrational” standards and values, shaped by tradition, religion, ethnicity, regionalism, language, culture, belief, morality, shared practices, economic backwardness and deprivation, that bear so much of influence on their decisions in daily life, such a

38 Peter Gabel cited in Dragan Milovanovic, n 20 at 79.

39 Peter Gabel, *ibid* at 78.

40 Dragan Milovanovic, n 20 at 79.

41 *Ibid* at 80.

reversion seems to have occurred a little too early. In other terms, the rationalization process of the society that prepares the members to come to term with modernity, as is the case in most of the western societies is, in Malaysia, denied its full completion or maturation. Whereas the case should be otherwise; for the mode of behaviour and actions that observe strict "adherence to fixed principles" could only flourish through the form of thoughts that is formal and rational. The general fear of many concerned Malaysians is in regard the substantively rational actions through state intervention not being directed toward benefiting the wider public as it was initially conceived, but to serve limited private and sectarian interests. This fear is justifiable in the society where "primitive accumulation of capital" continues to feature in its economy, while patronage system coupled with ethno-religious biases form the main contour of its political landscape. In such a socio-political climate, active state intervention into the economy is open to potential abuse as a pretext for selective allocation of resources and handing out of political largesse, and as well as denying and depriving them to some in the name of "public good", "national development", "national interests" or "national security". The recent spates of "bail-out" moves by the government to salvage few politically-linked companies and cases of abuse of power and misuse of massive public funds by individuals close to the corridor of power, but still wanting in their prosecution before the Court of law, underscore the point.

The government itself is, however, ambivalent in facing this paradox. While, on the one hand, it extols the virtue of transparency, accountability and good governance in the bureaucracy, both private and public,⁴² on the other it has been perceived and accused of condoning corrupt practices, biases, cover-ups, favouritism, nepotism and cronyism in the system. This ambivalence arises because, for reason of prudent economic consideration and judgment, particularly for purposes of attracting foreign direct investments (FDIs) into the country, the political rulers need to project an appearance that they are modern, rational, efficient, objective and professional in managing the affairs of the country. But on account of personal and political expediency, where survival is dictated by the ability to maintain patronage and partake in "money politics"⁴³ to secure loyalties and votes at party elections, these same political elites also find it commodious to bend established rules, regulations and procedures, and compromise declared standards. Furthermore, it is particularly onerous to achieve "objectivity of behaviours" among the political and economic actors in a society such as Malaysia whence the economic activities are deeply divided along ethno-cultural groupings, and the politics is suffused with economic and business interests wherein the political elites themselves have large direct stakes in economic projects and investments instead of simply being

42 See the statement by the Chief Secretary to the Government Tan Sri Samsudin Osman, *New Sunday Times* 8 December 2002 under the headline *Civil servants told not to be biased*.

43 The issue on "money politics" or vote-buying to secure positions in the party hierarchy is perennially a thorny problem for the ruling political parties in Malaysia. For the latest opprobrious remark on the issue see Awang Selamat's Sunday column under the title "Wang Menjalar Lagi?", *Mingguan Malaysia* 25 Mei 2003.

the disinterested “representatives” of the dominant economic class of society. The future resolution of this paradox remains thus to be determined by further development in the underlying economic relations of the society.

The Individuals

A radically new human condition is today also emerging in most societies that are undergoing the process of modernization and industrialization. This is the condition of individualization, “the most powerful current in modern society”.⁴⁴

The choosing, deciding, shaping human being who aspires to be the author of his or her own life, the creator of an individual identity, is the central character of our time. It is the fundamental cause behind changes in the family and the global gender revolution in relation to work and politics. Any attempt to create a new sense of social cohesion has to start from the recognition that individualism, diversity and skepticism are written into Western culture.⁴⁵

Although this phenomenon is currently thought to be the dominant feature of the developed societies of Europe and North America, it is nonetheless fast spreading into all the newly industrialized societies, including our own.⁴⁶ Hence, while in the past and in most societies, only a few would be expected to “lead a life of their own”, it “is now being demanded of more and more people and, in the limiting cases, of all”.⁴⁷ Further, while all through history, individualist behaviour has been equated with conduct that is deviant or even idiotic, it is now, by contrast, enjoying high esteem, celebrated as “radical non-identity”.⁴⁸

What does “individualization” denote? Ontologically, this is the condition that appears out of the disintegrations and ruins “of previously existing social forms – for example, the increasing fragility of such categories as class, social status, gender roles, family, neighbourhood etc.” or “the collapse of state-sanctioned normal biographies, frames of reference, role model” as in the case of the former Eastern bloc.⁴⁹ Accordingly, therefore, the term is distinguishable from individualism, which implies the capacity for subjectivity. Nor does it mean individuation – a term used by depth psychologists to describe the process of becoming an autonomous individual. And it “has nothing to do with the market egoism”.⁵⁰ Instead, it is a concept “which

44 Ulrich Beck and Elisabeth Beck-Gernsheim, *Individualization: Institutionalized Individualism and its Social and Political Consequences* (Sage Publications London 2001) at 22.

45 Ibid.

46 See for instance Francis Loh Kok Wah, “Developmentalism and the Limits of Democratic Discourse”, in Francis Loh Kok Wah and Khoo Boo Teik (eds) *Democracy in Malaysia: Discourse and Practices* (Curzon Press Richmond 2002), where the emergence of the phenomenon in Malaysia is alluded to albeit undeveloped.

47 Ibid at 8.

48 Ibid at 27.

49 Ibid at 2.

50 Ibid 202

describes a structural, sociological transformation of social institutions and the relationship of the individual with society”.⁵¹ It is, therefore, a social condition which is not arrived at by a free decision of individuals⁵² or a matter of private experience. In short individualization is an institution and a compulsion. To borrow Jean-Paul Sartre’s phrase: people are condemned to individualization. For this reason also, therefore, individualization processes are “dependent on complex structural conditions”.

An attempt thus far at a comprehensive articulation of the concept has been made by Ulrich Beck and Elisabeth Beck-Gernshaeim (hereinafter referred to as the Becks) in their 2002 publication.⁵³ Some of the salient points put forward by these two writers will be referred to and in turn inform much of the discussions that follow.

The genealogical thrust of individualization in the condition of modern state can be traced essentially in Marx’s theory of social inequality. Marx, “as one of the most resolute theorists of ‘individualization’” stressed that the unparalleled process of emancipation had been set in motion as a result of the development of industrial capitalism. For him, “emancipation from feudal relations was a precondition for the establishment of capitalist relations of production. But even within capitalism itself people are uprooted in successive waves and wrested loose from tradition, family, neighbourhood, occupation and culture”.⁵⁴ However, as the Becks argue Marx’s theoretical shortcoming lies in his failure to follow up “on this variant of a class society caught up in the process of individualization”. For him “the capitalist process of isolation and ‘uprooting’ had always been cushioned by the collective experience of immiseration and the resulting class struggle”. In other terms, Marx always equated processes of individualization with the formation of classes. In such processes the working class is somehow capable of transforming itself from a “class in itself” into a “class for itself”. And Marx “dismissed as irrelevant the question of how individual proletarians, qua market subject, could ever form stable bonds of solidarity, given that capitalism systematically uprooted their lives”.⁵⁵

In drawing the distinction between modern individualism and bourgeois individualism of the eighteenth and nineteenth centuries, the Becks point out that processes of individualization among the bourgeoisie were derived essentially from the ownership and accumulation of capital. “The bourgeoisie developed its social and political identity in the struggle against the feudal structures of domination and authority”.⁵⁶ Individualization in the present epoch, by contrast, is a product of a highly differentiated labour market and manifests itself in “the acquisition, proffering and application of variety of work skills”.⁵⁷

51 Ibid.
52 Ibid at 4.
53 See n 44.
54 Ibid at 33.
55 Ibid.
56 Ibid at 32.
57 Ibid.

To the extent that society breaks down into separate functional spheres that are neither interchangeable nor graftable onto one another, people are integrated into society only in their partial aspects as taxpayers, car drivers, students, consumers, voters, patients, producers, fathers, mothers, sisters, pedestrians and so on ... Modern society does not integrate them as whole persons into its functional systems; rather, it relies on the fact that individuals are not integrated but only partly and temporarily involved as they wander between functional worlds. The social form of your life is initially an empty space which an ever more differentiated society has opened up.⁵⁸

While such a functional differentiation forms the precondition of individualization, it can, however, flourish and become entrenched as a mode of life only when the "material immiseration" in society has been overcome. Making possible such a condition are "economic prosperity, the construction of a welfare state, the institutionalization of interests represented by trade unions, the legal underpinning of labour contracts, the expansion of education, the growth of the service sector and associated opportunities for mobility and the shortening of the working week".⁵⁹

Methodologically, the concept of individualization is particularly useful in exploring the way people deal with the processes of social transformation in terms of their identity and consciousness, and how their life situations and biographical patterns are in turn changed.⁶⁰ In the context of the main thesis of this article, it will be pointed out that it is precisely this methodological aspect of individualism that provides the impetus for the emergence and development of many and diverse new and novel laws and regulations in the society pertaining to the conditions and private conducts of individual citizens.

The impact of individualization on modern life, involving both rich and poor, is principally that it "liberates people from traditional roles". This is manifested in a number of ways. First, individuals are released from status-based classes. In other terms "social classes have been detraditionalized". In the context of Malaysian social life this change is already happening in family structures, housing conditions, leisure activities, geographical distribution of populations, political parties and club membership, voting patterns etc. Second, women are increasingly freed from their "status fate" of compulsory house-work and support by a husband. Third, the old forms of work routine and discipline are weakening "with the emergence of flexible work hours, pluralized underemployment and the decentralization of work sites."⁶¹

In terms of the individual identity, therefore, this development heralds "the end of fixed, predefined images of man". The old categories of "God, nature and social

58 Ibid at 23.

59 Ibid at 34.

60 Ibid at 203.

61 Ibid at 202-203.

system are being progressively replaced, in greater and lesser steps, by the individual ...".⁶² What was previously "reserved for God or was given in advance by nature, is now transformed into questions and decisions which have their locus in the conduct of private life".⁶³ With the demise of the old traditional bonds and ties,

the individual must become the agent of his or her own identity making and livelihood. The individual, not his or her class, becomes the unit for the reproduction of the social in his or her own lifeworld. Individuals have to develop their own biography and organize it in relation to others.⁶⁴

Life for the modern individual hence loses its self-evident essence and quality. Sources of collective life and their elaborate symbols and rituals "lose their mystique".⁶⁵ "The human being becomes ... a choice among possibilities, *homo optionis*. Life, death, gender, corporeality, identity, religion, marriage, parenthood, social ties – are all becoming decidable down to small print ...".⁶⁶ Underlining human existence in the modern condition is the deep desire to lead "a life of one's own" such that "money means your own money, space means your own space, ... Love, marriage and parenthood are required to bind and hold together the individual's own, centrifugal life".⁶⁷

Explicating the inverse relationship between individualization and detraditionalization processes in the Western societies, the Becks state:

The life of one's own [individualization] is also a detraditionalization. This does not mean that tradition no longer plays any role – often the opposite is the case. But traditions must be chosen and often invented, and they have force only through the decisions and experience of individuals. The sources of collective and group identity and meaning which are characteristic of industrial society (ethnicity, class consciousness, faith in progress), whose lifestyles and notions of security underpinned Western democracies and economics into the 1960s, here lose their mystique and break up, exhausted. Those who live in this post-national, global society are constantly engaged in discarding old classifications and formulating new ones. The hybrid identities and cultures that ensue are precisely the individuality which then determines social integration.⁶⁸

As for the position of culture in the individualization process, it is described thus:

While culture was previously defined by tradition, today it must be defined as an area of freedom which protects each group of individuals and has the

62 Ibid at 8.

63 Ibid at 7.

64 Ibid at 203.

65 Ibid at 26.

66 Ibid at 5.

67 Ibid at 22.

68 Ibid at 25-26.

capacity to produce and defend its own individualization. To be more specific, culture is the field in which we assert that we live together, equal yet different.⁶⁹

However, while the individuals are released from the old modes of life “ordained by religion, tradition or the state”, new standards are, however, emerging that impose new demands, controls and constraints upon individuals.⁷⁰ This is to say that the individual is removed from traditional commitments and support relationships, but exchanges them for the existence in the labour market, welfare state and institutions. Hence,

[t]hrough the job market, the welfare state and institutions, people are tied into a network of regulations, conditions and provisos. From pension rights to insurance protection, from educational grants to tax rates: all these are institutional reference points marking out the horizon within which modern thinking, planning and action must take place.⁷¹

Conceived from this point, therefore, individualization is far removed from the idea of “unfettered logic of action, juggling in a virtually empty space”; neither does the term suggest mere “subjectivity”. “On the contrary, the space in which modern subjects deploy their options is anything but a non-social sphere. The density of regulations informing modern society is well known ... In its overall effect it is a work of art of labyrinthine complexity, which accompanies us literally from the cradle to the grave”.⁷²

What must be noted in this connection, however, is that not only these modern regulations and standards are becoming more pervasive, but they are also being experienced by people in a way significantly different from the past ages.

As the Becks have observed,

[t]he decisive feature of these modern regulations or guidelines is that, far more than earlier, individuals must, in part, supply them for themselves, import them into their biographies through their own actions. This has much to do with the fact that traditional guidelines often contained severe restrictions or even prohibitions on action ... By contracts, the institutional pressures in modern Western society tend rather to be offers of services or incentives to action – take for example, the welfare state, with its unemployment benefit, student grants or mortgage relief. To simplify: one was born into traditional society and its preconditions (such as social estate and religion). For modern social advantages one has to do something, to

69 Ibid at 27.
70 Ibid at 2.
71 Ibid.
72 Ibid.

make an active effort. One has to win, know how to assert oneself in the competition for limited resources – and not only one, but day after day.⁷³

In other words, modern guidelines and regulations “actually compel the self-organization and self-thematization of people’s biographies”.⁷⁴ Further, while the older suffocating controls and guidelines restricted individual’s say in his or her own life to a minimum, by contrast, today’s many sets of guidelines “involve demands that individuals should run their own lives, on pains of economic sanction”.⁷⁵

But individualization is Janus-faced. For this life condemned to activity leads modern individuals to risky and precarious existence. What becomes of their normal and standard biography is the “elective biography”, the “reflexive biography”, the “do-it-yourself biography”. The preordained, unquestioned, often enforced ties of earlier times are replaced by the principle: “until further notice”.⁷⁶ While this happens not necessarily by choice, but institutional or structural, neither will it necessarily succeed. Hence the possibility of the individual’s do-it-yourself biography swiftly turning into a “breakdown biography” is a fate imminent for all.

The do-it-yourself biography is always a ‘risk biography’, indeed a ‘tightrope biography’, a state of permanent (partly overt, partly concealed) endangerment. The façade of prosperity, consumption, glitter can often mask the nearby precipice. The wrong choice of career or just wrong field, compounded by the downward spiral of private misfortune, divorce, illness, the repossessed home – all this is merely called bad luck.⁷⁷

Describing this fleeting and evanescent human experience under the condition of institutionalized individualization, Bauman states:

Nowadays everything seems to conspire against ... lifelong projects, permanent bonds, eternal alliances, immutable identities. I cannot build for the long term on my job, my profession or even my abilities. I can bet on my job being cut, my profession changing out of all recognition, my skills being no longer in demand. Nor can a partnership or family provide a basis in the future. In the age of what Anthony Giddens has called ‘confluent love’, togetherness lasts no longer than the gratification of one of the partners, ties are from the outset only ‘until further notice’, today’s intense attachment makes tomorrow’s frustration only the more violent.⁷⁸

In order to escape this “tyranny of possibilities” it has been pointed out individuals have taken refuge in such kinds of activities as “flight into magic, myth,

73 Ibid at 2-3.

74 Ibid at 24.

75 Ibid.

76 Ibid at 3.

77 Ibid.

78 Ibid.

metaphysics". The overburdened and overspent individual, in the words of Ansgar Weymann, "seeks, finds and produces countless authorities intervening in social and psychic life, which, as his professional representatives, relieve him of the question: "Who am I and what do I want?" and thus reduce his fear of freedom".⁷⁹ With individuals trapped in this tragic situation, they only make a ready "market for the answer factories, psycho-boom, the advice literature – that mixture of the esoteric cult, primal scream, mysticism, yoga and Freud which is supposed to drown out the tyranny of possibilities but in fact reinforces it with its changing fashion".⁸⁰ In the specific context of the Malaysian society we can further add to the list the following: Feng Shui, drugs abuse, "black metal" music, "bomohs" and religious cults.

What then is to be made of people in such state of affairs where they are adrift and lacking clear and secure mooring? In Durkheimian sociological terms, they are but doomed to the pathological condition of anomie – a sense of lost and not knowing what to do that is brought about by "overflowing wishes and desires". Alternatively, the Becks see this individualized society as "characterized by hybrid forms, contradictions, ambivalences (dependent on political, economic and family conditions)". Further, it is also characterized by the "do-it-yourself biography" that can easily transform into a "breakdown biography".⁸¹ Isolation and loneliness may become the major pattern of relationships between people. And while the classical social thinkers Durkheim and Simmel assume that it is still possible to integrate individualized society through values, for the Becks, however, such a possibility is now becoming "more unrealistic the more individuals were released from classical forms of integration in groups, including family and class".⁸²

To return to the main thesis of our argument, therefore, the proliferation of the laws, rules and regulations in Malaysia today is undoubtedly also a response to the developing trend of individualization of society. The range of legal measures to serve this end is becoming amazingly wide, as illustrated earlier, stretching from the parking charges and the tax return to the laws governing the disposals of rubbish.

As individuals become more distinctive and pronounced social actors determining their own life, law is increasingly put under pressure to assume a more expansive constitutive function over them as "legal subjects". Beyond the constitutional and legal rights conferred and duties imposed upon individuals as "citizens" of the state, law is now summoned to recognize wider "social" rights and responsibilities to which individuals are assigned. Hence, apart from the law's recognition of the individual's right, for instance, to vote at general elections or to initiate litigations in courts, it is now impelled towards institutionalizing individual's right to privacy and protection of personal data and information. Likewise, just as individuals as a legal subject, owe the duties to pay taxes and support dependents, they are now subject to the legal

79 Ansgar Weymann cited in Ulrich Beck and Elisabeth Beck-Gernsheim, n 44 at 7.
80 Ulrich Beck and Elisabeth Beck-Gernsheim, n 44 at 7.
81 Ibid.
82 Ibid at 13.

demand against sexual harassment and gender discrimination. The recent amendment to Article 8 of the Federal Constitution that enshrines gender equality in the society is instructive in this regard.

Closely related to the above point is the expanding variety of *legal statuses* and *social relations* into which law would now need to “interpellete” people and groups for both restraining and enabling purposes. Thus traditionally, “defendants” in criminal trial may be held in detention, subjected to bails restrictions and debarred from their normal activities; or “witnesses” are “literally interpellated or summoned in being called before the court”.⁸³ Other interpellated statuses include trustees, beneficiaries, states, agents, owners, mortgagor, mortgagee and host of others. On the social relation side, “child abuse” is interpellated to give cognizance of “a connection between parental violence and sexual abuse” that shifts “attention from a presumed threat from strangers, “child molesters,” to recognition that the contemporary crisis of the family is internal”.⁸⁴ Similarly the interpellation of “incestuous rape” under a proposed amendment to the Penal Code, that carries a jail term between 15 to 30 years plus a minimum of 10 strokes of the rotan, is deemed appropriate to “reflect the greater seriousness of the crime and distinguish it from consensual incest”.⁸⁵ But with individuals today asserting their greater presence and dominance in the social life and pursuing their own life projects that transcend those prescribed by the state and traditional institutions, growing new statuses and social relations are struggling for law’s interpellation. Hence while the statuses of “single parent” and “sex worker” have currently gained wide recognition in the Malaysian society, other new categories are contending for their place as well – for example, “gays”, “lesbians”, “homosexual marriages”, “non-matrimonial spouse” (in place of the pejorative mistress), “non-religious individuals” (instead of the deviant connotative term atheist). However, it must be admitted that law’s interpellative actions perceived to serve regulatory and control ends can be subject to acute contestation. This is because the status or relation to be regulated “comes to be the bearer of major symbolic dimension whose ramifications extend far beyond the immediate object of regulation”. “Thus the struggle around the regulation of abortion is at the same time a wider engagement that extends beyond abortion as [an] object of regulation to encompass symbolic engagements with the ideology of patriarchal control over women’s fertility and over the medicalization of reproduction”.⁸⁶

The far-reaching implications that individualization process has caused on women’s lives, both in the family and in relations to education, work, public life and so on, “which have brought the normal life story of women close to that of men”⁸⁷ too have actuated many legislative measures and initiatives by the state. Hence the inclusion of women in the market and their loosening direct ties to the family, for instance, have forced law to deemphasize, if not to derecognize, women’s traditionally “ascribed’

83 Alan Hunt, n 1 at 225.

84 Ibid at 316.

85 *The Star* 12 January 2003.

86 Alan Hunt, n 1 at 316.

87 Ulrich Beck and Elisabeth Beck-Gernsheim, n 44 at 55.

roles while at the same time to recognize their newly “acquired” roles and positions as “workers”, “professional”, “income earner”, “career person” and so on. Equally, as “female biography” is becoming a widely recognized social reality, or in Durkheimian term “social fact”, law has to help facilitate the opening up of “new scope for action and decision and new chances for women”. Within this context thus could be located the mounting pressure from Malaysian women on the need for tougher laws on rape and incest, the move to extend the General Order to cover sexual harassment at work place, and the women’s group uncompromising opposition against the Perlis state government’s initiative to relax the polygamy procedure as mentioned above. Despite this advancement in “many little steps” that women have achieved for themselves through individualization process, their future, however, remains yet uncertain. This is because as the Becks have cautioned,

just as plainly [the individualization process] brought new uncertainties, conflicts and pressures. For now women had to face risks to which only men had previously been exposed – as well as further risks resulting from the fact that for women individualization process was ‘incomplete’, was trapped in a peculiar *intermediate stage*. Women today are no longer defined as much as they used to be in terms of family life and a male provider, but they still have much more responsibility than do men for family tasks and are still much less protected by a stable position in the labour market. This ‘no longer’ and ‘not yet’ generate numerous ambivalences and contradictions in women’s lives. While old restrictions have receded and many new possibilities have opened up, new types of dependence and compulsion have appeared whose consequences are not yet visible. There is no longer any ‘model’ that defines women’s life prospects – they are both more open and less protected than before.⁸⁸

The deluge of legal measures and legislative actions in Malaysia today that pertain to individual lives and position can also be explicated in terms of the rise in what Foucault has described greater “governmentality”, as the individual population become important target of “calculated administration”. What “governmentality” seeks to secure is “the purposeful administration of social life through the pursuit of social policy”. These is because, especially in the condition of individualized society, the state, as a system of power, could no longer protect itself or operate by laying down negative rules backed by coercive sanctions. Hence, to achieve positive results in society through individuals’ self-activity, decision and choice, in place of the traditional negative prohibitions, an entirely different conception of government is now conceived and preferred. Accordingly, the non-command forms of law are coming into greater prominence in the society that seeks to manage, provide incentives and create opportunities to individuals engaging in activities. To cite again some of the legal measures taken by the state as reported in the newspapers referred to above that point towards this direction, we thus read the news report, “The Youth and Sports Ministry wants to introduce a new Bill that will help youths to forge ahead in the

changing globalised world” and the news headline *New law to help disabled*. On the other hand, the growing irrelevance of the punitive and prohibitory legal measures to governmentality becomes more discernible as evidenced by the position taken by the Penang state government not to follow the Perlis state government in imposing the ludicrous and impractical night-to-dawn curfew on its young people, and as well as the negative response by the Minister in the Prime Minister’s Department, Dr Rais Yatim, on the same issue.⁸⁹

A corollary to the foregoing and to render individual’s life and condition governable, the state through its legislative actions, as Foucault had anticipated, is also generating an ever expanding body of experts and professionals who produce not only new bodies of knowledge of “human sciences”, but as well an array of policies, strategies, programmes and technologies. In coping with the complex social relationships that individuals are involved today the state relies “on the production and deployment of knowledge” through censuses and other forms of gathering of statistical data.⁹⁰ Hence the current government “my-smart card” agenda for Malaysians. Similarly, the state and law are more and more involved in “the designation, identification, or creation of regulatory agents who are charged with a range of functions ranging from the collection and recording of information, inspection, surveillance, reporting, initiation of enforcement action, and host of other activities”.⁹¹ In Malaysia they range from the Police, the Special Branch, Inland Revenue personnel to the RELA (Village Vigilante Corp) members at the village and local levels. What this all means for the modern individual, therefore, is that one’s social action, as alluded to earlier, does not only revolve around the pursuit of the life of one’s own, but also “around and is directed toward the collection, classification, collation, compilation, calculation, and circulation of information”.⁹² While these practices can, on the one hand, be negatively perceived in terms of growing state surveillance and control on the otherwise free subject, on the other, they can also be viewed as the “positive and creative role” of state power to afford greater protection to individuals against risks toward which they are, under the individualization process, now becoming more and more exposed. For instance, video surveillance on the Kuala Lumpur commuter station platforms and in shopping malls is undoubtedly an extension of state surveillance, but it may reduce the incidence of attacks on users.⁹³ In broader terms, and paradoxically, individuals are themselves finding in need of some form of protection against the “uglier aspects” of their own “self-culture” and “self-organization”. This refers to the behaviours and actions of individuals that spring from the “compulsion and the pleasure of leading an insecure life of one’s own and co-ordinating it with the distinctive lives of other people”.⁹⁴ Although currently the signs of this are prevalent in the Western societies, the fact that some of them are fast gaining ground in our society cannot be ignored. As the Becks have outlined, these are,

89 *The Star* 12 January 2003.

90 Alan Hunt, n 1 at 311.

91 *Ibid* at 316.

92 *Ibid*.

93 *Ibid* at 312.

94 Ulrich Beck and Elisabeth Beck-Gernsheim, n 44 at 42.

first, the *new social movements* which keep discovering new issues and forms of expression and thereby display the power of resistance within civil society; then the many kinds of moral and aesthetic *experimentation* that people practice with their own lives and space, in relationships, parenthood, sex, love; the great unfinished experiment with *healthy eating*, in which a new and quite personal relationship is achieved with nature and with people's own bodies; the form of active *empathy* expressed in protest against animal transport or in a commitment to the welfare of the homeless people, asylum seekers or drug addicts; the minor and major *conflicts between men and women* in their everyday life and in the economy, politics and the public arena; the wide-ranging disputes over *urban and regional planning, global identity and the power of reason*; and last but not least, the '*vigilante forces*' that spring up to protect niches of prosperity from anything that appears to threaten them – whether ecological destruction, noise pollution, foreigners, drug addicts or bureaucratic interference.⁹⁵

Thus in this connection the state finds the urgent need to introduce laws and rules seen earlier regulating food labels and nutrition, traditional medical practitioners, traditional medicines, medical fees and health products, and to crackdown on cybercafes.

The new demand imposed on the law under the present condition of growing individualization of the Malaysian society also includes the provision of the framework not only to regulate, but also of equal importance, to enable people coming together into various forms of political and social alliances. Such alliances, particularly temporary alliances, issue-based and pragmatic alliances are necessary for people to cope with the daily problems they face in their precarious biography. Hence, of late Malaysia has seen the steady growth of a range of NGOs (non-governmental organizations) formed around, and advancing, variety of issues and interests, both public and private.⁹⁶ Rationalizing the relevance and rapid growth of NGOs in modern societies Saleha Hassan thus states:

The NGO movement has a significant role in modern societies as it is seldom that individuals are capable of solving current social problems alone. Moreover as the political system of the society becomes more open it is highly likely that individuals will be successful in implementing their common objective by bringing together their voice, expertise and influence. As a model for channeling civil action, NGO operates from the strategy of strength through organization. It is a conduit for action to voice out people's problems and interests in a democratic system.⁹⁷

95 Ibid at 44.

96 Saleha Hassan, "NGO, Masyarakat Sivil dan Demokrasi" in Abdul Rahman Embung (ed) *Negara Pasaran dan Pemodenan Malaysia* (Penerbitan Universiti Kebangsaan Malaysia Bangi 2000) at 225. The original passage reads as follows: Pergerakan NGO mempunyai peranan yang penting dalam masyarakat moden kerana jarang sekali ada individu yang dapat menyelesaikan masalah-masalah kemasyarakatan masa kini secara persendirian. Di samping itu semakin terbuka system politik sesuatu masyarakat maka semakin tinggilah kemungkinan individu-individu berjaya melaksanakan matlamat bersama mereka dengan cara menggabungkan suara, kepakaran dan pengaruh yang ada pada mereka. Sebagai satu model saluran tindakan awam, NGO bertolak daripada strategi kekuatan melalui organisasi. Ia adalah saluran tindakan bagi menyuarakan kemusykilan dan kepentingan rakyat dalam sistem demokrasi.

97 Ibid at 224.

However, the attitude of the government and the political rulers toward this phenomenon has been one of ambivalence.⁹⁸ While on the one hand they see these alliances as a nuisance and hence seek to deploy the law to restrict or even suppress them, particularly those that help “build significant support bases within the emerging opposition”,⁹⁹ on the other, they find such alliances useful fora for airing important public issues, and, therefore, are compelled to provide a legal mechanism to enable their formation and constitution. In addition, the law would also be summoned to manage or diffuse any conflict in the society that these alliances might subsequently generate. Under the condition of individualization law’s role to this end becomes more significant and crucial as these alliances, in pursuing their interests, become a potential target of the society’s reactive protectionist elements attempting “to recuperate the old values of family, neighbourhood, religion and self-identity, which are just not pictures of reality any more”.¹⁰⁰

An entirely new phenomenon that has arisen in individualized society that poses a challenge to the state and law is what has been termed the political “disavowal of politicians” and “double strategy” among the young people. As regard the former, young people are largely today moved by that which (established) politics largely rules out: how can global environmental destruction be resolved? How can the death of hope signified by unemployment, a threat to prosperity’s children, be prevented and overcome? How can one love and live, without the threat of AIDS? As for the latter, while, on the one hand, young people have discovered something for themselves, something to make adults panic – fun, fun sports, fun music, fun consumption, fun life – which politics as currently practised and represented has nothing to do with but instead acts like a dead-certain killjoy, they are on the other, directing their creative energy into “self-organized concern for others which has broken free from large institutions”.¹⁰¹ In the long run, this has been envisaged as potentially having the ultimate effect of “questioning the monopoly of the custodians of the public interest on defining the public interest”¹⁰². Perhaps to counter such a worrying trend in our society today the political rulers are now desperately trying to rekindle the spirit of patriotism among the young people and working on the plan to make it compulsory for them to undergo national service training programme.

The Community

While the rapid processes of industrialization and urbanization have, on the one hand, thrown the Malaysian social life into the current of individualization as just described, they, on the other hand, simultaneously engender what appears as a diametrical social trend toward communitarianism. This is to say that as Malaysians are oriented toward the central concern for control of one’s own money, time, living space and body, and the right to develop one’s own perspective of life, they are at the same time

98 Ibid at 238.

99 John Hilley, *Malaysia: Mahathirism, Hegemony and the New Opposition* (Zed Books London 2001) at 233.

100 Ulrich Beck and Elisabeth Beck-Gernsheim, n 44 at 208.

101 Ibid at 159.

102 Ibid.

confronting the intense pressures in the society that require “the active identification of citizens with their communities as ‘social mortar’ ”.¹⁰³ Yet another paradox facing Malaysians is thus, while people are freed from the traditional ties to pursue the life of one’s own, there is at the same time a social undercurrent to reconstitute the social actors into “communities”.

By way of digression, it must be acknowledged at the outset that “community” is “a slippery concept to capture”, and “attempting to come to a conclusive and definitive understanding of what constitutes a community can be self-defeating tasks”.¹⁰⁴ Without delving into the intricate debates as to the exact meaning of the term community, the debates that stretch back since the era of the classical sociologists, Tonnies, Durkheim, Weber, to that of their modern counterparts, such as Etzioni, Nisbet, Lasch, Bellah and Bell, this article, therefore, adopts the structural and functional understandings of the term. In its structural meaning, community implies (i) *solidarity*, in the sense of feeling of togetherness, a feeling of collectivity and mutual attachments; (ii) *trust*, as opposed to the secrecy and distance that characterized life in the social; and (iii) *autonomy*, in that community involves the recognition of the value of the person as a social being.¹⁰⁵ What is central to the definition is the “types of interconnectedness that individuals feel to one another within the structure of non-obligatory social organizations”. As Bellah *et al* further define the term, a community is “a group of people who are socially independent, who participate together in discussion and decision making, and who share certain practices that both define community and are nurtured by it”.¹⁰⁶

The functional definition of the term, on the other hand, is understood in the context of associations that are required by groups of people living together within a specific geographical area or working together at a particular location or project.¹⁰⁷ This idea of community thus suggests a strong sense of place, proximity and totality.¹⁰⁸ The structural and functional meanings of the term are not, however, to be treated as mutually exclusive. Rather they interpenetrate each other. This is particularly so in the context of the Malaysian social life today where geographical and social mobility renders human relationships mostly transient and momentary.

The significant point to be raised here is that the emergence of strong communitarian impulse has the effect of transforming “communities” into a new social category that poses challenges to the state, that in turn impinge on the laws and the legal system. These challenges come in two forms: firstly, communities, in meeting the members’ goals and aspirations, impose demands on the state and thereby come into direct confrontation with the latter; and secondly, they themselves experience conflicts and strains, internal and external, that are generated by the members that necessitate state intervention.

103 Ibid at 166.

104 <http://newmaine.com/community/page.html>.

105 Gerard Delanty, *Modernity and Postmodernity* (Sage Publication London 2000) at 118.

106 <http://newmaine.com/community/page.html>.

107 Ibid.

108 Gerard Delanty, n 105 at 118.

The most discernible community structure in the present day Malaysian society that is undergoing rapid processes of modernization and urbanization is the extant ethno cultural communities widely dispersed in the rural traditional setting (involving all the three main ethnic groups – Malays, Chinese and Indians) and new villages (involving especially the Chinese). Economically the members of these communities are generally engaged in the marginalized agricultural sector or otherwise running small and medium business enterprises. As a functional entity, these communities interface with the state to negotiate the best bargains in the course of assimilating their localities within the wider process of modernization. Thus, taking priority on their agenda for action would be such matters as the kind of beneficial and profitable development projects or investments that could be brought into the locality; the counter measures that should be taken against the harms (physical, environmental, and cultural) brought by the modernization process; provision of important public amenities (roads, schools, water, electricity; health care) and better deals for local produce in terms of pricing and state assistance in their production and marketing. It is to this end perhaps that the Cabinet had recently proposed amendments be made to the laws on Malay reserve land “including allowing it to be leased to non-Malays and companies for 60 years – in a move to encourage the development of such land”.¹⁰⁹

Unlike the days of the “peasant revolts” in the late 1950s and 1960s, these traditional rural communities appear today as no longer posing serious open challenge to the state. This situation perhaps comes about through the state regulating and controlling the negotiation processes and channels available to the communities’ members. One such regulating strategy is through the setting up of formal and official channels of communication, such as Jawatankuasa Kemajuan dan Keselamatan Kampong (JKKK) (Village Development and Security Committee) and Kemajuan Masyarakat (KEMAS). By channeling the local communal demands and grouses through such agencies the state is able thereby to deflect any potential open confrontation between the centre and the periphery. This step has also proven as politically necessary and expedient to the political rulers as the Malaysian rural setting, particularly the predominantly Malay rural communities, forms the traditional hot-bead of political contestation among the political elites. The contest is chiefly between the leaders of the two major Malay-based political parties, UMNO and PAS, who are dependent on the support of the members of these communities to secure electoral votes. While the former is seen as the bearer of modernization, the latter represents the conservative element that is opposed to the process. Notwithstanding such general perception, however, even though the former would capitalize on modernization and development agenda in canvassing for support, it is also forced to tread with caution and avoid being seen as going overboard with the modernization programmes to the extent that the traditional values and way of life of the communities are thrown to the wind. Otherwise it risks providing opportunities for its opponent to mount attacks and criticisms as being “secular”, “un-Islamic”, “western” or “materialistic” that could sway the sentiments and sympathies of the community members in its favour. Such, however, is the perennial dilemma that Malay political rulers are experiencing and

109 *The Star* 28 November 2002.

will continue to experience for many years to come so long as the existing political process remains and the existence of the rural communities is seen as functionally necessary to such process.

Another variant of structural community that is also emerging in the Malaysian social scene today is the “cultural-moral communities”. These communities emerge through people from the various ethnic, cultural, educational and professional backgrounds seeking to re-constitute and re-assert their collective identity in the new socio-economic environment wrought by modernity. Understandably, this development is a feature in any traditional society that is rapidly transforming into becoming modern with its attendant process of individualization. As many sociologists have opined, when a society expands with the consequent social diversity and weaker social cohesion, it is most likely that the members would face some difficulty in developing individual identity, and experience “a new sense of uncertainty” and “moral ambiguities”¹¹⁰. To this end these cultural-moral communities stake three claims. The first involves the claim against those who belong, or are considered as belonging, to the group; the second involves the claim of the communities against other communities or groups; the third relates to the claim they press against the state or the larger society. The first, involving intra-group relations, is intended to protect the “moral boundary” of the group “from the destabilizing impact of internal dissent”; the second, involving inter-group relations, is intended to preserve the relative strength and influence of the communities vis-à-vis “the others”; while the third is aimed to secure the group from the impact of the external decisions, particularly the political and economic decisions of the state.¹¹¹

As stated in the foregoing discussion on individualization, uprooted from their traditional social set-up and relocated in the urban impersonal, disenchanting and disembedded condition, most Malaysians today are, to differing degrees, experiencing some kind of identity fragmentation and loss, and moral and cultural uncertainties. There is no longer that deep sense of security and certitude as regard one’s positions, expectations and roles as once afforded in their traditional social hierarchy. Rather the new commercial and metropolitan environment generates conflicting values, expectations and goals. While the manner in which they respond to these ambiguities is legion, the most notable one, and that which is relevant to the present discussion, is the “revived interest in the traditional” or a “nostalgia for the ‘sweetness of belonging’ ”.¹¹² This trend is discernible among all the three major races, but most notable among the Malays. As for the latter, the manifestation of the trend rests on two modalities. The first is the re-assertion of the “traditional Malay identity” which at times is also taken to mean “patriotism” and the second the “Islamic identity” which is not clearly distinguishable from “Arabism”. It must be noted, however, that in their concrete realization this separation is difficult to maintain. As

110 John Hilley, n 99 at 57.

111 Will Kymlicka in Steven Seidman and Jeffrey C. Alexander (eds) *The New Social Theory Reader* (Routledge London 2001) at 217.

112 Zygmunt Bauman, *Culture as Praxis* (SAGE Publications London 1999) at xxxix.

for the non-Muslim others, while some are retreating into ethnicity, there are also others who redefine themselves in terms of religious affiliations – Christianity, Hinduism, Sikhism, Buddhism or Bahaism. In the materialization of such cultural-moral communities, therefore, inclusive “moral boundaries”¹¹³ are conceived that close around whosoever is considered to “qualify” for “membership”. In so far as the Malays are concerned, since they are defined under the Federal Constitution as one who practises Malay culture, speaks the Malay language and professes Islam, they are invariably caught into both moral boundaries of “traditional Malay identity” and “Islamic identity”. These boundaries presumably “define the limits of social solidarity” of the members. Moreover, they are presumably “felt in shared sentiments that shape collective experience and expectations”, that in turn shape the perception that determine whether actions are criminal, illegal or deviant”.¹¹⁴ In asserting these boundaries thus, cultural, moral and religious rules, standards, practices, beliefs and norms are imposed upon the communities’ members. In this regard little is reported in the media on the extent of the strict imposition of cultural and moral norms among the members of non-Malays-non-Muslims cultural-moral communities. The least that can be said here is that the overt displays of religious slogans and signets on car stickers are emblematic of the moral and psychological pressure that is brought to bear onto the members to remain within the fold.

To the contrary, for the Malay cultural-moral communities, the maintenance of their moral boundaries is carried out not only officiously, but also to a large measure, officially. As such the groups would seek conformity not only through putting peer pressures or using other informal sanctions upon the members, but have sought the assistance of state power to formally and legally delimit the liberty of, and punish those they consider as members for their “deviant conducts”. Through this strategy, that has been referred to as law “status politics”,¹¹⁵ Malays and Muslims in this country have been made subject to arrest, prosecution and harassment under a miscellany of religio-moralistic rules and regulations such as the *Khatwat* law, the law against apostasy, rules prohibiting consuming liquor in the public,¹¹⁶ regulations forbidding Malays-Muslims attending casinos or buying four digit lottery tickets, rules against eating in public places during fasting month of Ramadhan, rules allowing the arrest of Malays-Muslims for keeping away from a Friday prayer, directives on Malay-Muslim women to wear head-dress, to cite but few examples.

A number of qualifications need, however, to be made in this connection. The state’s legal and official approval to the groups’ restrictive measures on their members has not been without conflicts, tensions and controversies. This is because the terms “Malay” and “Muslim” are catch-all words that rope into the Malay and Muslim cultural-moral boundaries even those Malays and Muslims who do not share the high moral grounds of the communities’ self-declared and self-righteous cultural and moral

113 Kai Erikson cited in Gerald Turkel, *Law and Society* (Allyn and Bacon Boston 1995) at 35.

114 Gerald Turkel, *Law and Society* (Allyn and Bacon Boston 1995) at 35.

115 Ibid at 40.

116 In June 2000, for instance, the Selangor Religious Department (JAIS) detained 53 Muslims at three different premises which served alcohol in Damansara and Pertaling Jaya and had prosecuted 15 of them, all women, including an in house band singer, Azlina Abbas. See *The Malay Mail* 5 June 2003.

custodians. For these Malays, being acquainted and familiar with the modern, more open and liberal cultural outlook of the individualized society, morality ceases to be an overarching structure in social life. Rather, it is a purely private matter. Hence for them such use of “status politics” to secure moral compliance and impose “holier than thou” attitude is but an “individual oppression” and transgression on personal freedom and democratic right. As Zaienal Abidin Omar, the Chairman of Persatuan Karyawan Malaysia commented in connection with the arrest of two of its members for *khalwat* offence by the Selangor Religious Department (Jais),

[R]ather than poking their noses into other people’s private affairs, [religious] departments should prioritise their objectives. Artistes are just like any other members of the society except they have higher profiles. Maybe the religious departments want to ... (ride on the glamour) if they arrest artistes for *khalwat*.¹¹⁷

But it is exactly against such new emerging class of Malays that the moral arrows of the conservative protectionists are targeted. As Gusfield has shown in his studies of the nineteenth century American temperance movement,

[W]hen elites ... experience a decline in their power and moral authority, they seek to assert their authority over emerging classes. They do this by disparaging and, ultimately, criminalizing the habits, manners, and ways of life of the emerging classes.¹¹⁸

In the concrete articulations of the Malay traditional identity, the demarcation line between the constitution of Malay cultural identity and that of Muslim identity somewhat blurs. This is because acts which are “un-Islamic” can also be conceived as “un-Malay”, and vice-versa. What can be safely said perhaps is that the protagonists of the traditional Malay identity would not go along endorsing the attempt to impose those practices and rituals associated with “Islamic fundamentalism” which border on “Arabism”, for instance donning the desert robes and wearing of turbans.

While the state lends its assistance toward or tolerates efforts to assert the Malay-Muslim identities among the communities’ members, there can also be moments where the state withdraws its support from such efforts and check the excesses of the measures adopted. This happens whenever “the preservation of group moral boundary” becomes an obscurantism and embarrassment to the government that seeks to project an image of it as being modern, open and democratic. Illustrative of such an instance was in regard the refusal by several state governments and local authorities in 1997, at the insistence of a few Islamic organizations, to grant permissions for the rock concerts featuring the international pop idol Michael Jackson and the

117 *Sunday Mail* 8 December 2002.

118 Joseph Gusfield cited in Gerald Turkel, n 114 at 40.

popular local singing group KRU. Following the public outcry over the decision, the Federal Government intervened and set aside the ruling. Again in the same year, an acrimonious controversy broke out between the Prime Minister Dr. Mahathir and the former Mufti of Selangor, Datuk Baharum Muhsin, over the issue of female *aurat* (modesty) following the arrest of three Malay girls in Selangor for taking part in the beauty pageant. The Prime Minister severely criticized the rash manner in which the issue was handled by the Selangor State Religious Council and accused some *ulamas* of being obsessed with puny Islamic issues, instead of the more fundamental ones.¹¹⁹ Reiterating this earlier stand perhaps the Prime Minister in 2003 chided those “who try to change the world back to the time 1400 years ago, supposedly to restore the glory of Islam” as actually insulting the religion, and reassured Malaysians, especially the non-Muslims, that the Government had never gone overboard in the implementation of various Islamic values in the country’s administration.¹²⁰ Additionally, the continuing and unyielding Federal Government’s resistance to the Hudud law implementation in the two PAS’s controlled states, Kelantan and Terengganu, the recent Cabinet’s decision to exclude RELA members “in anti-vice raid operations by state religious departments following the misdemeanour of a Rela member who photographed a female detainee easing herself during the raid”,¹²¹ and the directive issued to the Ipoh City Council by the State of Perak’s Menteri Besar (Chief Minister) to stop booking the public for “indecent behaviour” in public parks¹²² could also be extrapolated within this context.

From the theoretical vantage point, it can thus be observed that while the communities seek to secure their internal cohesion and solidarity, they are at the same time creating tensions and conflicts. Their coercive nature to “ensure a grudging compliance with cultural norms” of the members is the source of potential oppositions and dissatisfactions. This point hence dismisses the popular portrayal of “community as intrinsically and normatively harmonious”. More importantly, it cautions to the danger that such a community, particularly the cultural community, can be “important as a conservative cultural defence strategy”, in what has been termed as “authoritarian neo-communitarianism”, in helping to maintain the existing tradition, language, religion and social structure. The extreme examples of such a development are the far right nationalism and neo-facism in Europe and Islamic

119 Sity Daud, “Negara, Pemerintah dan Perkembangan Sistem Politik” in Abdul Rahman Embung (ed) *Negara Pasaran dan Pemodenan Malaysia* (Penerbitan Universiti Kebangsaan Malaysia Bangi 2000) at 195.

120 *The Star* 8 February 2002.

121 *The Star* 31 May 2003.

122 *The Star* 5 June 2003. The controversy that led to the Menteri Besar’s intervention is also instructive of the contingency of the moral enthusiasm among the members of the Malay-Muslim moral-cultural communities spilling over into the boundary of other non-Malay-Muslim communities. Apparently some of those being issued summonses by the Ipoh City Council (which enforcement officers were mostly Muslims) for “indecent behaviour” were non-Muslim Chinese men and women. Signs of disquietude from the Chinese community over such excesses can be discerned from the call by the Perak Malaysian Chinese Association (MCA) to repeal the Ipoh Municipal Council Bylaw on indecent behaviour, and also the apprehension expressed by a Chinese newspaper reader (Tan Soo Inn) in a letter to the editor over the current “moral crusade” in the country. Appealing for greater understanding, tolerance and moderation among his fellow Malaysians, the writer states, “There will be grey areas where different religions will define acceptable behaviour differently. The nature of our nation means we need to live with such ambiguities and not use one community’s values as the main yard-stick to deem what is allowable.” (*The Star* 11 June 2003).

fundamentalism such as the Taliban in Afghanistan. Highlighting the ambiguous existence of cultural communities in modern condition but yet the deleterious consequences that they can bear upon individuals' lives, Bauman has thus declared:

Cultural community is but what it says – a *cultural* community, existing solely courtesy of the shared tradition (or its assumption). It is all about foreclosure of free choice, about the promotion of preference for one cultural choice and staving off all other choices – about strict surveillance and censorship ... Cultural community must therefore be a site of cultural coercion – all the more painful for being *experienced*, lived through, as coercion. It may survive solely at the expense of its members' freedom of choice. It cannot perpetuate itself without close surveillance, disciplining drill and severe penalties for all deviation from its norms. It is, therefore, not so much 'postmodern', as 'anti-modern': ... In a post-modern or late-modern world of free flowing information and a global communicative network, the 'cultural community', so to speak, swims against the stream.¹²³

Perhaps, in the attempt to arrest such authoritarian neo-communitarianism tendency the state in Malaysia has introduced measures, legal and otherwise, such as those quoted above. But it must be admitted that the task is not a simple one in view of the sensitive nature of the situation.

Besides seeking to establish the meaning of their identities and moral rectitude internally among the members, the Malay-Muslim moral-cultural communities also attempt to secure a symbolic group "superior status position" vis-à-vis other non-Malay ethnic communities. And just as in the case of intra-communal moral assertion above, the state support is also sought to realize the communities' objective. Accordingly the Malaysian life witnesses the regulations mandating manufacturers and traders to place a "Halal" label on foodstuff consumable by Muslims; inclusion of "Jawi" inscriptions in road signs over those in the Romanized form; the insistence on the use of Bahasa Melayu as the commercial *lingua franca*; restrictions on building of temples and churches in certain towns and cities in contrast with the liberal constructions of *suraus* and mosques; inundation of Islamic religious programmes on the state run TV channels; directive onto non-Muslim employers to provide ample time for Muslim employees to perform Friday prayers; the requirement in some public universities and polytechnics that non-Malay graduates wear Malay traditional attire for their convocation; a ruling by a school requiring girls joining the school junior cadet corps to wear the *tudung*; prohibition on non-Islamic religious groups proselytizing of Malays; making compulsory Islamic studies subject for Malay students in universities and private colleges; the state promotion of "Malay-Islamic-centric" national culture; the setting up Islamic banks and provisions of "Islamic banking" services in commercial banks; and prohibition on liquor advertisements even in non-halal non-Muslim restaurants. Why such assertion of

symbolic dominance of superior group position becomes necessary to the Malays-Muslims in this country can perhaps be understood in terms of a psycho-cultural reaction to their declining traditional status position brought about by the receding economic power. In short, the loss that Malays-Muslims experience in the economic sphere is presumably redeemed and recompensed instead in their sense of cultural and moral superiority. As Malays-Muslims are still perceived to have the political power at their disposal, such power becomes handy for this end. As Turkel points out;

In societies composed of different social classes, ethnic groups, and religious affiliations, lawmaking can serve as a way for different groups to assert their values and their ways of life against one another. This is especially true when groups are divided not only by such economic differences as income and wealth, but also by differences in religious affiliation, ethnicity, and social ethics ...¹²⁴

Under conditions of legal and social complexity, the institutional and procedural locations for the moralistic use of law by one group against another increase.¹²⁵

It needs to be mentioned, however, that while there is a strong desire among the Malays-Muslims to secure cultural and moral supremacy and dominance over other ethnic groups, they are themselves entrapped in a dilemma of "cultural uncertainties". This is particularly with regard to the cultural forms that are "Malay" and yet pre-Islamic that is most apparent in relation to the "Malay art" forms. As Tan Sooi Beng explains the position,

To the Islamic purists, "traditional" Malay theatre forms are *haram* (forbidden) because they are performed for spiritual occasions including healing. Moreover, spirits are invoked during performances while non-Islamic stories (Hindu-Indian epics like Ramayana and Mahabharata) are used. Also, making of *wayang kulit* figures and their use in performances raise objections from purists who do not wish to see any kind of human representation even in stylized and non-naturalistic. Worse still, idolatory [sic] is promoted on state [sic] by humans and puppets.¹²⁶

It is upon similar reasoning perhaps that the Kelantan State Government has recently sought to discourage and made attempts at banning the *wayang kulit* and the Malay dance drama *makyong* in the state "as it involves men and women performing together and is too focused on Malay, rather than, Islamic elements."¹²⁷

124 Gerald Turkel, n 114 at 40.

125 Ibid at 42.

126 Tan Sooi Beng, "Counterpoints in Performing Arts in Malaysia" in Joel S. Kahn and Francis Loh Kok Wah (eds) *Fragments of Vision: Culture and Politics in Contemporary Malaysia* (Allen & Unwin Pty Ltd Sydney 1992) at 287.

127 John Hilley, n 99 at 184.

While the state is generally supportive of the efforts and actions of the moral-cultural communities, as discussed above, there can also be moments when the state itself is challenged by the communities. Such a challenge can be categorized into two forms, the offensive and the defensive. While the offensive form comes generally from the Malay-Muslim groups, the defensive form comes from the Chinese communities.

Thus on many occasions the state comes under challenge by the Malay-Muslim communities when it is perceived on the one hand, as not doing enough to promote or compromising on the Malay cultural dominance, and on the other, failing in the efforts to run the country according to the pure tenets of Islam. In the case of the former, Malay political rulers would come under severe criticisms when, for instance, the importance of Bahasa Melayu is seen to be undermined through such efforts as the government's move to promote wider use of English language in schools, universities and government departments, the restructuring of Malay studies department in universities, or local authorities' lax attitude in the enforcement of Bahasa Melayu usage on business signboards. The outcome of such confrontations are, however, often unclear. This is because the fiery confrontations are often abated by "closed dialogues" between the political rulers and the communities' spokespersons. However, when such a challenge cannot be checked through this method, the state would not hesitate to invoke the law such as the Internal Security Act and Seditious Act. With regard the criticism against the government's failure to govern the country on Islamic principles, some members of the Malay-Muslim moral-cultural communities have come to believe that the ultimate realization of a true and authentic Muslim identity for Muslims in Malaysia is through nothing short of the establishment of an Islamic State. However, in the present socio-political set up of the state, the fruition of this ideal is an impossibility. In fact the modernization programmes that the state introduces only causes the Muslims to deviate further away from the goal - towards ungodly path of secularism and materialism. In short the state itself is now perceived as the obstacle. This has led to varied efforts and attempts being initiated to overcome this impasse that place the state under severe tests and threats. Those who are reformist minded align themselves with PAS thereby hoping to capture the state power through the ballot boxes and thereafter putting it to the service of Islam. There are also those who generate a counter-cultural movement such that it is represented to Muslims as providing an alternative way of life to that offered by the state. Al Arqam is emblematic of such a movement. It has its own hierarchy of leaderships, internal codes of conducts among members and internal network of economic activities independent of the state. As Al Arqam experience has demonstrated, when the counter-cultural group grows in its size, influence and power so as to challenge the integrity of state, which in political reality has the sole monopoly of power and exercise of violence which it jealously guards, then the state through the full force of its machinery, legal and otherwise, would come down hard on the group. Thus in its dealing with Al Arqam, the state declared the movement illegal, the members deviants, and the leaders a threat to the country's security and, therefore, subjected to detention without trial under the ISA. For the impatient and impetuous others they have not eschewed the violent method of

confrontation with the state to realize their goal. Here the state has proved its willingness to unleash its apparatus of violence to deal with such situations. This could be seen in the 1985 Memali incident, where the police attacked Memali – a village in the Baling district in Kedah, where Ustaz Ibrahim “Libya” led a community of militant PAS supporters – killing 14 villagers (four policemen died) and arresting many more. Again in 2001 the army launched an attack against a group of Muslim-Malays who styled themselves as Al Ma’unah in Sauk, a village in Perak, that was alleged to be preparing a military style take-over of the nation. The mass arrest of the suspected KMM members that began in 2001 was another sequel to the state’s effort in suppressing militant Islamic tendencies in Malaysia.

Just as the Malays-Muslims are showing the revived interest in their traditional roots, there is also a deep sentiment among the Chinese to promote and preserve the Chinese culture. In this regard the state’s “unitary ... approach to nation-building based on one language, one education and one culture”¹²⁸ is seen by the Chinese cultural communities as “hegemonic and inimical to the rights of ethnic minorities”. The most outspoken movement opposed to the state sponsored “cultural hegemony” is the *Dongjiaozong*, an amalgam of two Chinese educationists associations (the United Chinese Schools Committees’ Association – UCSCA- and the United Chinese Schools Teachers’ Association - UCSTA) “which have worked closely together in articulating and mobilizing Chinese opinions in Malaysia on education as well as a wide range of other issues”.¹²⁹ Against the ruling group policies of a single cultural identity these associations push for the “alternative vision of a multi-ethnic nation [based on] a pluralistic (*duoyuan*) approach to all aspects of cultural policy”.¹³⁰ Tracing *Dongjiaozong*’s “chequered history” in the Malaysian socio-political setting, Tan Liok Ee observes thus:

Initially, from 1951 to 1957, *Dongjiaozong* leaders pitched themselves against the British policies which were seen as directed towards Anglo-Malay hegemony. At the same time they also attempted to negotiate with a political elite that was leading calls for early Independence. By 1959, however, these negotiations had broken down and *Dongjiaozong* moved into open opposition against state policies. There was a period of comparative lack of direction between 1962 and 1972 before *Dongjiaozong* reemerged in 1973 under a new group of leaders to again challenge government policies on education and culture. ...¹³¹

The high profile of *Dongjiaozong* leaders was maintained in 1987 when a controversy erupted over the appointment of persons who were not literate in Mandarin to key administrative posts in Chinese primary schools and ex-Chinese secondary schools which had joined the National system.

128 Tan Liok Ee, “Dongjiaozong and the Challenge to Cultural Hegemony” in Joel S. Kahn and Francis Loh Kok Wah (eds) *Fragmented Vision: Culture and Politics in Contemporary Malaysia* (Allen & Unwin Pty Ltd Sydney 1992) at 182.

129 Ibid at 181.

130 Ibid at 182.

131 Ibid.

Protest meetings called by *Dongjiaozong* saw its leaders sitting together on stage with MCA, Gerakan and Democratic Action Party leaders.¹³²

Again after a period of comparative lull since 1987, *Dongjiaozong* resurfaces in 2002, this time to protest the government's move to make compulsory the teaching in the English language of Mathematics and Science subjects taught in the Chinese schools as they are done in the national schools.

Like the instances of the Malay-Muslim oppositions seen earlier, the state is not hesitant to mobilize its coercive machinery to quell the open defiance of the *Dongjiaozong*. Hence, for example, following the 1987 protest that created "the general heat of a political situation charged with an atmosphere of crisis" the presidents of the UCSTA and UCSCA, a vice-president of the UCSTA as well as two other persons closely associated with *Dongjiaozong* activities were detained under the ISA.¹³³ Similarly in the 2002 language controversy, the leaders of *Dongjiaozong* were severely warned and threatened against any attempt to mobilize the Chinese opinion to oppose the Government's policy or to "turn the matter into racial issue".¹³⁴

Another form of communitarianism that has found expression in the Malaysian social life, and involving all the ethnic groups, is the mutual assistance communities that develop among the poor and the deprived sections of the society. It can be hypothesized that in the midst of growing inequality in society mutual help tends to flourish among the poorer sections of society and those marginalized by the system, "as group solidarity and mutual help are one of the few resources they possess in the battle for survival".¹³⁵ Such communities are found both in the urban and the rural areas. In the urban areas they are mostly formed among the squatters, petty traders, hawkers, disabled people, and to a certain extent minority groups (such as the Orang Asli and the natives of Serawak and Sabah, Indonesian and Bangladeshi migrant workers, the Filipino immigrants in Sabah, the Portuguese descendents in Malacca, the Thais in the northern states).¹³⁶ In the rural areas they constitute the small holders (of rubber, palm oil and coconut), farmers (rice, tobacco and vegetable growers and pig and chicken breeders), and fishermen, the rural squatters, estate workers and the Orang Asli and natives. Generally these communities are sustainable over a long period of time, thus challenging the hypothesis that "the poor are less able to maintain support network than the affluent, that poverty or social exclusion is the denial of the possibility of social participation and that the compounding factor in deprivation is the absence of community".¹³⁷

In their effort to alleviate the lots of the members or promote their interests these communities invariably confront the state by either putting up demands or standing

132 Ibid at 196.

133 Ibid.

134 See the reports in *New Straits Times* 10 July 2002.

135 <http://communities.org.uk/greg/chapl.html>.

136 Trade unions and co-operatives are excluded as they are treated as part of the market processes.

137 Note 135

up against the latter's decisions. Instances of the former situation can be seen as when squatters demand that basic amenities (water, electricity and roads) be made available to them, minority groups make representations to be recognized of certain rights, traders and hawkers ask for better facilities and locations to do their business, farmers request for assistance and subsidies in time of low prices for their produce, better accessibility to credit facilities, or effective measures to control industrial pollutants that destroy their crops and husbandry. As for the latter instances, these occur when squatters protest against state authorities' decision to evict them from their land, farmers protest against the state's acquisition of their lands, Orang Asli and natives protest against the destruction of their natural habitat and livelihood through logging activities and loss of their native lands,¹³⁸ and hawkers stand up against the authorities' move to relocate them or impose stringent rules and requirements on their activities.

The state's reaction to such confrontations has been a mixture of both tolerance and accommodation at the one end of the spectrum, and repression and persecution at the other. The political rulers would be more inclined to accommodate the communities' demands if the members are broadly perceived to be loyal ruling parties' supporters, or if the circumstance gives them opportunities to gain political mileage to be voted in the next election. As regard the latter reaction, the state would invoke the relevant regulatory laws and deploy its coercive machinery, such as the Federal Reserve Units, to suppress the opposition and resistance of the communities, as when squatters' houses are razed to the ground, farmers are evicted from their farmland, hawkers' stalls and vehicles damaged and confiscated or immigrants' unauthorized settlements are demolished.

Conclusion

The main project of this article is attempting to make intelligible the multiformity of laws, rules, regulations and other legal measures that perceivably forms the dominant feature of the Malaysian legal system today. While it is a truism that the complexity of the law and the legal system is only reflective of the corresponding complexity of the social condition within which the law and the legal system subsist, it is the complexity of the social condition instead that needs understanding and explication, rather than treating it as given and unproblematic, if the complexity of the law and the legal system is to be fully captured. The gross failing of the conventional conception of law, in which legal formalism and normativism of all hues are emblematic, is to deny any such connection between law and human social life. While other traditions in jurisprudence, such as realism and historical school, acknowledge the strong influence that social life has on law, they, however, stop short of investigating the complex nature of the social dimension and its attendant interplay of forces that provide, in the words of O.W. Holmes, so much of the "life" of the law. This

138 See for instance the report on 14 Orang Asli being arrested for setting up blockade at Genting Kelidang "as they were worried that their source of water would be polluted by the land-clearing activity and their traditional orchards would be destroyed". *The Star* 31 May 2003.

shortcoming is perhaps due to their lack of the necessary conceptual and analytical tool to undertake the task of examining the incommensurable network of concrete human practices and relationships. Confined to normative, non-empirical and non-materialist grid hence, traditional jurisprudence would explain away the heterogeneous nature of the Malaysian law as motivated and informed by either personal, group and class "interests", higher normative standards or ideals, political ideologies. Alternatively the "realist" Foucauldian approach of "bracketing the normative" might be adopted such that law is but a power that "is local, continuous, productive, capillary and exhaustive".¹³⁹ However, these explanations and analyses are at best partial.

To attempt a full understanding of the matter, this article has adopted the relational and dialectical approach to law and state. In this approach, law as an expression of state power, is essentially viewed as interacting with other categories of social life in which the primary ones are most influential. In turn these social categories are materially located in that they arose from the productive economic relations that people are essentially forced to enter for their material existence. The relationship between law and the "economic base" of the society is hence "non-deterministic". Instead it is mediated by the social categories that emanate from the economic base itself which are but its concrete expression. Moreover, the relationship is not unidirectional. But it is dialectical in the sense that both law and the economic structure of the society are mutually influencing. In relation to the complexity and heterogeneity of law and the legal system, therefore, the issue needs to be explored by looking at the nature and condition of the categories that law interfaces. In the context of the contemporary Malaysian social life the primary categories that hold sway on the law and the legal system have been identified to be the market, the individuals and the communities. These represent the dominant categories that the underlying structure of the economy that is rapidly undergoing the process of modernity has generated and into which the people's lives are brought into web of complex relationships. In the interplay between these three categories and the state, on the one hand, and between themselves *inter se*, on the other, law's variegated and heteronymous feature is thus implicated.

The market that is fast expanding and changing in the Malaysian social life is exerting an immense pressure upon the state and the law to keep pace with and accommodate its new demands and imperatives. This has compelled the state to assume an entirely different position from that in the past. While formerly the state was characteristically aristocratic-minimalist, in the present condition it is becoming technocratic-interventionist; from being a neutral umpire in the private sector of life, it is now an active intervener as well as participant and competitor. At the same time the state has to content with the ramifications of such development that brings about negative and inimical impacts on the social life. To this end the law that is resorted to is not only implicated in the complexity of the economic structure and relations upon which it is brought to bear but its form is also transforming from the

139 Nancy Fraser, "Foucault on Modern Power: Empirical Insights and Normative Confusion" in S. Henry (ed) *Social Control* (Dartmouth Publishing Company Limited 1994) at 8.

normative-prohibitive into that of techno-productive. Such transformation in the legal form has posed serious limitation to the traditional jurisprudence in capturing and presenting law as its subject matter, as its quaint ahistorical and asocial methodology is no longer appropriate to deal with the new situation.

The individuals that the dynamic of the economic structure undergirds are also contributive to the current *multiformity* and *heterogeneity* of the law in Malaysia. What is important to be noted here is that the individual under the new economic condition is more than merely a socio-political entity that serves as a bearer of property ownership and wealth accumulation and engages in the process of exchange under the condition of the division of labour. Likewise in so far as law is concerned its role is more than constituting an individual as “citizen” or legal person with corresponding recognized rights and duties. Instead today’s individuals who emerge through the individualization process are an institutionalized entity; each individual is a “structure” *sui generis*.

Being an independent institution, individuals today are left but to assert greater autonomy in the social life. The desire to choose and lead a “life of one’s own” is becoming a right and a clarion call that at the same time demands for fullest activity, participation and creativity on the part of the individual. It is here, paradoxically, that law has its full impact on the individual’s life and where law’s complexity and heteronomy are but a reflection of the condition of such life itself. While law provides and creates multitude of institutions in order to facilitate and enable individuals to be fully engaged in activities it also inevitably renders individuals more dependent and reliant on the state and law. At the same time law is summoned to safeguard individuals from the adverse and negative consequences that arise from the activities of this self-culture, either self-generated or caused by others.

The pursuit for greater individual autonomy seen above has the effect of undermining and weakening the prevailing traditional ties and relationships in the society. In Malaysia, this has led to the resurgence of *communitarianism* and *community formation*. While the old traditional communities are struggling to maintain their existence and coping with the effects of the cannibalizing free-market forces, new ones, particularly those assuming moral-cultural forms, are proliferating to resist the market forces, on the one hand, and stem the rising tide of individualization on the other. In this regard the “local power” of the communities has implicated the law through putting pressures on the state to check the market forces and as well intruding into the private sphere of individuals’ life to limit and restrict their behaviours, conducts and choices. The state’s response to this pressure is ambivalent. While it generally concedes to the demand of the communities, it finds at the same time the necessity to exert control on the power and influence that they have on the social life lest its own position and integrity would be undermined and threatened. In managing the situation hence a complex web of legal rules and regulations is spun.

The foregoing discussion has sought to establish that the social categories of the market, the individuals and the communities have exerted tremendous pressure upon

the state. And to this end law is deeply involved and implicated and thus accounts for the current multiformity and heteronomy in the law and the legislative measures introduced by the state agencies. However, the challenge that still faces the state today is whether, as an institutional legacy of the early modernity, it is appropriately equipped to deal with the new and novel categories and institutions that are emerging under the condition of the present modernity, particularly in regard the individuals. Whereas in the past individuals were “simply the personification of the abstract, impersonal, legal subject, the pure product of social relations”¹⁴⁰ who the state and law constituted and interpellated and upon which the state acted, individuals today are social agencies with productive and transformative capacities and capabilities. This, therefore, demands an entirely new conception of the “individuals” in terms of state’s dealing and relationships with, and treatment of them, that in turn will bear influence on the legal conception of the individuals.

As individuals are progressively moving toward the centre stage of modern social life the extant traditional communities will find their place and role an anachronism, or as the Becks describe them, the zombie categories. Hence communities and comunitarianism will have to find their proper location within the context of the individualized society. Their relevance in this regard is no more than providing the organizational framework for the negotiation process between the individuals on the one side, and the market and the state on the other.

With the rise and spread of individualization in the society today, any attempt to impose an overarching morality and paternalistic value system on the life of individuals would only appear as an intrusion and an impostant. This is irrespective of whether any such attempt comes from the state or the community. What is envisioned instead is a freely and openly negotiated social relation at all levels, both at the “substructure” and “superstructure”, of the society. If anything, morality is a matter for personal realization. This can mean that the traditional value and normative systems that see themselves as encrusted, crystallized and solid would have to make way for a new form that is transient, provisional and local. This condition in turn helps pave the way for people’s greater democratic participation in the political and cultural life, where power is made transparent and vested interests are denied their deceitful normative masks. In a similar way while law can inescapably become entangled in complex roles to deal with the new social condition, its complexity will no longer serve to hide its coercive and hegemonic character.

140 Alan Hunt, n 29 at 328.