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Tie Fatt Hee
University of Malaysia

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Abstract

This article begins with a definition of the terms modernity, modernisation, and postmodernism. It discusses some of the characteristics prevalent in each stage of evolution and the legal system that exists. It investigates the relationship between these forces of change and the legal system that emerges.

A review of the influence of modernity, modernisation and postmodernism in the Asian context is carried out. It acts as a framework that assists a better understanding of the character and operation of the law. It also provides a benchmark against which specific law reform proposals and the direction, that the law takes, can be addressed. The South-East Asian financial crisis has revealed the need to improve the level of transparency, accountability and regulation among companies in the region. The shift towards the postmodernist era is characterised by a number of challenges. Finally, the article considers the effect of these changes on company law legislation and reform in the context of Malaysia.

Keywords

company law, Asia, Malaysia, modernity, modernisation, postmodernism

THE INFLUENCE OF MODERNITY, MODERNISATION AND POSTMODERNISM ON COMPANY LAW REFORM IN MALAYSIA

*Tie Fatt Hee**

Introduction

Reform in company law is a dynamic process as evident from the number of contemporary issues that have emerged, such as the demands for higher level of transparency, corporate disclosure, increased shareholder activism and the consequences of the internationalisation of finance and business enterprises. This article begins with a definition of the terms modernity, modernisation, and postmodernism. It discusses some of the characteristics prevalent in each stage of evolution and the legal system that exists. It investigates the relationship between these forces of change and the legal system that emerges.

A review of the influence of modernity, modernisation and postmodernism in the Asian context is carried out. It acts as a framework that assists a better understanding of the character and operation of the law. It also provides a benchmark against which specific law reform proposals and the direction, that the law takes, can be addressed.¹ The South-East Asian financial crisis has revealed the need to improve the level of transparency, accountability and regulation among companies in the region. The shift towards the postmodernist era is characterised by a number of challenges. Finally, the article considers the effect of these changes on company law legislation and reform in the context of Malaysia.

* LLB (London), LLP (Mal), LLM (Mal), SJD (Bond). Lecturer, University of Malaysia. This article forms the basis of Chapter 2 of the author's book, *Corporate Governance and Corporate Law Reform in Malaysia* (2003) and is reproduced by permission.

1 S Bottomley, N Gunningham, and S Parker, *Law in Context* (1991).

The Definition of Modernity, Modernism, Modernisation, and Postmodernism

The word "modernity" sometimes refers to a state of well-being. It is defined as "the quality of being modern".² Jurisprudential thinking, to a certain extent, has been influenced by developments in modernity.

On the other hand, the term "modernism" is often associated with progress achieved in the area of the arts. It has been described as "a comprehensive term for an international tendency, arising in the poetry, fiction, drama, music, painting, architecture, and other arts of the West in the last years of the nineteenth century and subsequently affecting the character of twentieth century art".³ Nevertheless, it depicts a period of reform. A new set of modern characteristics and tendencies has appeared in "modernism". These changes impact on the law. They predicate a new legal structure and a new set of problems. This was succinctly reported by Minda, who while writing about postmodern legal developments, described this period of modernism as one that is exemplified as a "search for a universal method to resolve law's many problems".⁴

The term "modernisation", from the perspective of civilisation, illustrates the process of social change where the less developed societies acquired characteristics, which are common in the developed societies.⁵ It describes the developments in modern societies effected by the process of industrialisation and mechanisation.⁶ Conversely, postmodernism signifies a new era. It is the period of progress marked by innovation in technology and methods of economic production. Facets of mass forms of communication, commodification of intellectual products, and symbolic forms depict the era.⁷ The period is synonymous with the "postmodern phenomenon of pastiche, fragmentation and mediasation".⁸ Postmodernism is also a period where the "search for new legal theories and metanarratives to solve law's problems has been exhausted".⁹

2 A Delbridge and JRL Bernard (eds), *The Macquarie Concise Dictionary* (2nd Edn 1988).

3 A Bullock, O Stallybrass, and S Tombley (eds), *The Fontana Dictionary of Modern Thought* (2nd Edn 1988) 539.

4 G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995) 6.

5 DL Sills (ed), *International Encyclopedia of the Social Sciences* (1968) vol 9.

6 *Supra* 2 at 540.

7 D Bell, *The Coming of Post-Industrial Society* (1973).

8 JM Balkin, "What is a Postmodern Constitutionalism?" (1966) 90 *Michigan Law Review* 525.

9 JF Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984). Cited in G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995) at 9.

The evolution of the different phases of development and society's progress from modernity, modernism, modernisation, to postmodernism have a significant influence on society in general, and the law, in particular. The pertinent issue is to examine how the forces, that define each of the cultural ages above, affect the practices that occurred within that age itself.

The Characteristics of Modernity, Modernism, Modernisation, and Postmodernism

The Emergence of Modernity

In the pre-modern era, the traditional form of life was governed by a set of community-validated patterns of behaviour, thought and feeling.¹⁰ The individual assumed a relatively fixed role in customary society and the traditional culture was conceived to be a functional requirement of social life.¹¹ There was a close customary social attachment to the values and morals of society. Communal solidarity and customary law governed the relationship among its members. There was a deep and lasting communal bond based on common beliefs and ideals.¹² As stated by Unger “their law, their religion, and their art ... express the view that the ideal and actuality are at root inseparable”.¹³ The element of unity implied that the traditional form of law was simple but effective in regulating the way of life.

However, the transition to the period of modernity transformed these established features. It gave rise to numerous problems. According to Unger, modernity led to the law of communal solidarity being substituted by the “law of the jungle”.¹⁴ Forms of “interest association” replaced communal solidarity.¹⁵ It consisted of a bureaucratic legal system that involved a set of royal discretionary commands and the law of a sacred, suprapositive order.¹⁶ Nevertheless, it was at this phase that the rule of law emerged and developed to solve the problems of modern society. At this time, human behaviour was influenced by the new cultural aura of modernity with characteristics of “liberalism” and “individualism”.¹⁷ The traditional form of authority, rationality and objectivity was replaced by the cardinal institution of capitalism. Individual freedom and self-interest was promoted and it became the

10 AG Nasser, ‘Legal Theory in Late Modernity’ (1991) 42 *Mercer Law Review*.

11 *Ibid.*

12 RM Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (1976).

13 *Ibid* at 143.

14 *Ibid* at 144.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

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primary focus of society. As a result, the theory and practice of capitalism led to a “re-conceptualisation of the individual”.¹⁸

The state of moral values surrounding the new species of *homo oeconomicus*, driven by self-interest, has been succinctly described by Nasser as follows¹⁹:

“The corrosion of the traditional bases of moral rationality and objectivity by the acids of modernity creates for the abstract individual a historically unprecedented set of moral problems. The detached individual must now justify her most basic moral convictions. That is, the individual must identify and legitimate new sources of authority. It is part of the historic mission of modern law to provide, for a pluralist society lacking the cultural and philosophical resources necessary to sustain common beliefs and commitments, the functional equivalent of a coherent and effective moral discourse.”

The emergence of modernity, during the Enlightenment Age around 1500, was marked by the era of European exploration and global colonisation.²⁰ Autonomy was the main theme in modernity.²¹ It was driven by the legal and political norms established by nation states and the state of socio-economic development. A set of processes and histories that involved the intellectual, cultural, political and social aspects gave rise to modernity.²² The evolution of modernity may be divided into three phases as suggested by Marshall Berman, namely²³:

- (i) The first phase, from the beginning of the sixteenth century till the end of the eighteenth, where individuals are beginning to experience aspects of “modern life”;
- (ii) The second phase, that commenced from the French Revolution in the 1790s, with upheavals in personal, social and political life. The sense of living in both the material and spiritual world gave rise to the ideas of modernisation and modernism.
- (iii) The final phase of the twentieth century, where the process of modernisation expands on a global scale.

The transition from an agricultural to an industrialised society was characterised by massive economic, technological, political, social and cultural changes.²⁴ Externally, modernity was marked by a radical transformation from the pre-

18 Ibid.

19 *Supra* 10 at 915.

20 C Lemer, *Postmodernism Is Not What You Think* (1997).

21 D Patterson, ‘Postmodernism/Feminism/Law’ (1992) 77 *Cornell Law Review*

22 B Hall and Gieben (eds), *Formations of Modernity* (1992).

23 M Berman, *All That Is Solid Melts Into Air: The Experience of Modernity* (1982) at 16.

24 BS Turner (ed), *Theories of Modernity and Postmodernity* (1987).

modern to the modern. On the other hand, it faced constant change within itself.²⁵ It led to the development of a capitalistic economy that was driven by technological determinism and profit maximisation. Economic policies were formulated to optimise the use of financial resources. There was a consensus of establishing a common framework to regulate the market economy based on principles of democracy.²⁶ This period, which was associated with a new avant-garde intellectual and artistic movement in the area of the arts, literature, architecture, science and philosophy, was often referred to as “modernism”.²⁷ The legal system was influenced by these changes.

Associated with these changes was the vivid description of modernity by Marx. He succeeded at providing a clear and significant insight into the evolution of capitalism and its peculiar features. His “experience with modernity as a whole when only a small part of the world was truly modern” allows a more accurate analysis of the phenomenon.²⁸ The creation of the capitalist and proletariat classes had an impact on the mode of production and consumption. It led to the concentration of capital in a small group of individuals, who were concerned with the nature of global production.²⁹ Bell indicated that there were three structural changes at that time, namely: the separation of ownership from management, an increase in white-collar jobs, and the development of a new banking system.³⁰

On the other hand, there were some weaknesses in modernity that represents “rationalism, technocentrism, the standardisation of knowledge and production, a belief in linear progress and in universal truths”.³¹ The other side of modernity found itself in a state of anguish and anxiety. Marx described this pathetic condition in the following manner³²:

“Constant revolutionising of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch from all earlier ones. All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air.”

An example of the negative consequence and the failure of modernity is its inability to address the issue of equitable distribution of economic benefits. The

25 F Halliday, ‘The Potentials of Enlightenment’ (1999) 25 *Review of International Studies* 105.

26 Masakazu Yarnazaki, ‘Asia, a Civilization in the Making’ (1996) 75 *Foreign Affairs* 4.

27 *Supra* 14.

28 *Supra* 23.

29 *Supra* 15.

30 *Supra* 7.

31 EM Wood, ‘Modernity, Postmodernity, or Capitalism’ in RW McChesney; EM Wood, and LB Foster, *Capitalism and the Information Age: The Political Economy of the Global Communications Revolution* (1998), 9.

32 K Marx and F Engels, *The Communist Manifesto* (1992).

capitalistic system has, in actual fact, led to further inequality on a global level. The benefits derived from industrialisation and the growth of a capitalistic market were restricted to only a small group of countries.³³ There was a growing economic gap between the North and South. There were also periods of colonial plunder and war.³⁴ The other features include a growing influence of Western imperialism, the dominance of capitalism in Northern Europe, the bureaucratisation of economic, political, and military practices, and the growing monetarisation of values.³⁵ The concept of modernity had some limitations as it was based on the assumption that “everything is destined to be speeded up, dissolved, displaced, transformed and reshaped”.³⁶

Modernity is associated with the concept of a new form of social life that arose as a result of a material and cultural evolution. Features of capitalism spread throughout the world. The economic, technological and cultural changes led to the isolation, estrangement and demise of certain aspects of tradition. Unfortunately, modernity is marked by a state of instability as the modern state is in a state of constant change and innovation. It is arguable that this state of instability has a significant impact on the law. Complex regulation governing companies are introduced to meet the demand of constant change. The argument that “the general trend of corporate law... has been ever-increasing legislation”³⁷ is relevant and applicable.

Modernism

Modernism represents the culture and the theories of modernity.³⁸ Its philosophy and thought which is synonymous with the spirit of enlightenment emphasised on progress, civility, rationality and human emancipation rather than the pre-modern idea of custom, ritual, and authority.³⁹ The adoption of new methods of mass production, made possible through technological advances, fulfil the purpose of the statement that “the promise of modernism is the forward march from darkness to enlightenment”.⁴⁰

The enlightenment philosophers attempted to develop universal morality and law and enrich daily life.⁴¹ However, these objectives have yet to be attained. In fact,

33 *Supra* 12.

34 *Ibid.*

35 BS Turner (ed), *Theories of Modernity and Postmodernity* (1987).

36 *Supra* 23.

37 J Farrar, ‘Fuzzy Law, the Modernization of Corporate Laws, and the Privatization of Takeover Regulation’ in JH Farrar (ed), *Takeovers: Institutional Investors and the Modernization of Corporate Laws* (1993).

38 *Supra* 12.

39 *Supra* 12.

40 *Ibid.*

41 *Ibid.*

the failure of the reformist movement in Western industrialised nations at the end of the twentieth century has led to the growth of the phenomenon known as cultural self-doubt. Legal institutions are also affected by the state of chaos and social disruption in modern society.⁴² The situation became complex, as the features of legal modernism are different from those of artistic modernism. According to Minda, the term legal modernism is used “to describe the intellectual position of jurisprudential writers who believed a lone author could discover “right Answers” for even the most difficult and controversial problems in the law”.⁴³

The Experience of Modernisation

Modernisation led to the emergence of individualistic, competitive and pluralist forms of socio-economic and political organisations.⁴⁴ Goodrich has described the consequences of modernisation and modernity in the following terms.⁴⁵

“The experience of modernisation and modernity as fundamentally irrational processes engenders a sense of powerlessness and of incomprehension which, while it dates back as far as the industrial revolution itself, appeals with particular force to the growing apocalyptic sense associated with the close of the century. The sense of irrationality is directed towards the political structures and institutions of modern state bureaucracies which seem largely irrelevant to the lives, needs and desires of modernist existence while at the same time appearing impervious to fundamental change.”

One of the effects of modernisation is the growth of excessive bureaucratic regulation. The initial form of legislation, that was simple, was radically transformed into a set of elaborate and detailed forms of regulation. Administrative regulation, policies and bureaucracy increasingly exert a dominant influence on corporate legislation.

Postmodernism and Technological Development

Postmodernism represents an era that contains a set of cultural products inherited from the era of postmodernity.⁴⁶ It is a period of crisis and fragmentation with deconstruction and instability. From the economic perspective, it is a new phase that is marked by multinational and multi-conglomerate consumer capitalism. As the second phase of capitalism, the post-industrialism and post-Fordism phase is characterised by multinational information, consumerism and

42 P Goodrich, ‘Law and Modernity’ (1986) 49 *Modern Law Review* 5.

43 *Supra* 4 at 15.

44 *Supra* 8.

45 *Supra* 42 at 548.

46 *Supra* 8.

new technology.⁴⁷ Conversely, postmodernism also marks the transition from the phase of Fordism to that of a more flexible form of production.⁴⁸

The postmodernism phase of economic development is driven by modern technologies. In the information age, the information technologies have brought in concepts such as "time-space compression", "just-in-time" production, and mobile capital into the capitalistic market.⁴⁹ These new forms of production are vital to allow companies to meet the demand of global competition. The former Fordist mode of "mass production with its assembly line techniques, large factories turning out standardised goods, the creation of the mass worker and the role of the state in the formation of mass markets" has been replaced with new technology.⁵⁰ The postmodernism era tends to focus on the use of new technology and electronic means of production. Intellectual technology tend to play a vital role in decision-making.⁵¹

On the other hand, the postmodernism stage of development is characterised by anxiety and the threat of moral breakdown. The legacy of confrontation, collision and remonstrance left behind by modernity continued into postmodernism.⁵² Corporate management has been afflicted with widespread reports of unhealthy practices such as corruption, conflict of interest and unethical decision-making. Attempts have been made to solve these problems such as by the use of the traditional methods of conflict resolution. However, the problem remains and key buzz words such as "transparency", "accountability", and "best practices in corporate governance" became periodic slogans of corporate regulation.

The dilemma of resorting to traditional means to solve ethical problems was highlighted in a movie, *Wall Street*, where Denzin pointed out that⁵³:

"On the surface, the movie appears to be a hard-hitting, realistic treatment of a corrupt market structure, built on ethical considerations in late postmodern multinational capitalism. However, contrary to appearances, the film resolves its ethical dilemmas in a traditional capitalist fashion ... By failing to seriously interrogate the inner market structures that produce unethical commodity trading, and which fuel the desire for money and fame, the text leaves unexamined the ethical contradictions that lie at the heart of late market capitalism."

47 F Jameson, *Postmodernism or the Cultural Logic of Late Capitalism* (1991).

48 D Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (1989).

49 *Supra* 31.

50 *Supra* 22.

51 D Bell, *The Coming of Post-Industrial Society: A New Venture in Social Forecasting* (1973).

52 P Murphy, 'Postmodern Perspectives and Justice' (1991). Thesis Eleven cited in D Patterson (ed) *Postmodernism and Law* (1994).

53 NK Denzin, 'Reading 'Wall Street': Postmodern contradictions in the American Social Structure' in Turner (ed), *Theories of Modernity and Postmodernity* (1990), 32.

It is unlikely that these “inner” problems can be overcome since there is little serious consideration given to address moral issues. Denzin indicated that it is an illusion to state that these problems have been resolved.

“By keeping alive the myth of the repentant son who returns to the values of family and individualism, this film and others like it, creates for the members of the popular culture a sublimating fantasy structure which represses the ‘real’ destructive forces of a world economy gone wild and out of control.⁵⁴”

The likelihood of finding a solution appears to be diminished as economic power, in contemporary society, tends to be concentrated in an elite group of individuals.⁵⁵ Perhaps, the comment made by Nasser that “capitalism spells the beginning of the end of the world” may be accurate as the disintegration of the homo oeconomicus way of life continues today.⁵⁶ This can be deduced from the deconstruction of the distinction between politics and law. A similar situation occurred with respect to the alleged independence of the judiciary from political control during late modernity.⁵⁷ This is apparent in some countries. The past philosophy of modernity, that expressed loss of faith in ideals and fear of the future,⁵⁸ is found in postmodernism.

The legal system is affected by a climate of uncertainty associated with change. Reforms in company law are carried out to cope and accommodate these changes. Berman described the continuous process of accommodation to various experiences of the modern society as follows⁵⁹:

“On the one hand, to be modern is to experience personal and social life as a maelstrom, to find one's world in perpetual disintegration and renewal, trouble and anguish, ambiguity and contradiction; to be part of a universe in which all that is solid melts into air. “

It is submitted that this situation is also encountered in company law. Contemporary company law has been reportedly to be in a stage of indeterminacy and uncertainty.⁶⁰ The situation seems to be more serious in certain countries that have a Western capitalist form of social democracy. These postmodern liberal

54 Ibid at 3.

55 B Harrison, *Lean and Mean: The Changing Landscape of Corporate Power in the Age of Flexibility* (1994). Cited by Peter Meiksins, ‘Work, New Technology and Capitalism’ in RW McChesney, EM Wood, and JB Foster, *Capitalism and the Information Age: The Political Economy of the Global Communication Revolution* (ed) (1998).

56 *Supra* 10.

57 Ibid.

58 *Supra* 35.

59 *Supra* 16 at 15.

60 N Andrews, ‘Bad Company? The Corporate Form in an Uncertain Law’ (1998) 9 *Australian Law Journal* p 39.

societies appear to have undermined the rule of law.⁶¹ The legal system's shift from a central concern with the rational application of rules to a standard and discretionary-approach has been highlighted by Bottomley and others.⁶² In addition, Unger indicated that post-liberalism has led to a rapid expansion of "open-ended standards and general clauses in legislation, administration and adjudication".⁶³ Some of these examples are: the responsibility entrusted to the courts to "police unconscionable contracts, to avoid unjust enrichment, and to control economic concentration so as to maintain competitive markets".⁶⁴

It is ironic that disillusionment and struggles exist at the same time when success has been achieved in the postmodern era. Although the twentieth century has been described as being "born in hope", it was marked by:

"...mankind's most bloody and hateful century, a century of hallucinating politics and of monstrous killings ... never before in history was killing so globally pervasive, never before did it consume so many lives, never before was human annihilation pursued with such concentration of sustained effort on behalf of such arrogantly irrational goals".⁶⁵ Tension and uncertainty tends to be associated with the crisis and upheavals of postmodernism.

Modernisation and Globalisation

Modernisation is associated with opening up of the domestic market to foreign access. It denotes a willingness to accept openness as a source of many economic benefits. Countries that have clear economic priorities succeed in reshaping their economic development. There is a sound legal framework besides strong macroeconomic stability. Policy makers who are able to focus on the fundamentals of economic development such as foreign investment, good governance and sustained economic growth will succeed in the modernisation process. In a different perspective, these countries are able to achieve economic growth from international economic integration.

Conversely, economies that grew fast may also be exposed to a certain backlash if rapid liberalisation is not supported by a strong governance framework. Modernisation and globalisation, which are associated with economic growth and investment flow, have certain risks where the legal structure is weak. Discontent has been expressed on the international financial system following the aftermath of the global economic turmoil that afflicted Asia, Russia and Latin America. Financial globalisation in these economies have increased their government's

61 *Supra* 12.

62 *Supra* 1.

63 *Supra* 12 at 194.

64 *Ibid*.

65 Z Brzezinski, *Out of Control* (1993), at 3 cited in Mahhubani K, *Can Asians Think?* (1998) at 26.

vulnerability to the international financial markets. The financial crisis showed that conflict management is an issue that has to be addressed appropriately.

Modernism, Postmodernism and Company Law

The three principles of modernity that are applicable to company law, as analysed by Farrar,⁶⁶ are also relevant in the context of postmodernism. These principles are: the principle of incompatibility, the principle of flexibility, and the presumption in favour of freedom of contract.⁶⁷ These principles developed due to advances in information science, economics and corporate legislation in North America.⁶⁸

The first principle above stipulated that, as society becomes more complex, there is a tendency among courts and legislators to adopt vague and loose concepts such as the duty of care, fiduciary duties, and fairness, to deal with the increasing complexity of legal structures.⁶⁹

The second principle concerns flexibility or user-friendliness. A flexible pattern of legislation which caters to the needs of the business community allows greater efficiency and lowers the transaction costs. Traditionally, the public law approach acts as the basis for corporate law where the state grants the incorporation as a privilege.

Subsequently, in the nineteenth century, the freedom of contract and utility approach was adopted. The freedom of contract approach was restricted to the law of contract. However, the law and economics movement have adopted and applied the concept into corporate law. Thus, Farrar suggested that “there is a need for rational justification of mandatory laws which interfere with the freedom of contract”.⁷⁰ The 1844 *English Act* that was supplemented by the *Limited Liability Act* 1855 and the *Companies Act* of 1862 were examples of the liberal regime that required minimal statutory requirements and registration.⁷¹ A paradox is reached when the criteria laid down in modernity is examined as “traditional corporate law was more modern than much more recent corporate legislation in the sense that it was simpler and more flexible, and facilitated freedom of contract subject to minimal restraints”.⁷²

In the postmodernism era, advances in technology have led to a re-engineering of the way in which companies operate. The legal structures have become

66 *Supra* 37.

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 *Supra* 37 at 4.

71 *Ibid.*

72 *Supra* 37 at 4.

increasingly complex. There is a movement to make the law become simpler for the lay person to comprehend. In the modern day context, the principle of incompatibility tends to have become more relevant particularly with excessive and burdensome legislation. Nevertheless, there is a tendency for governments to allow the private sector to participate more actively in the legislative process especially in electronic commerce where a new set of specific legislation is required.

Summary

As the basis of the *Rechtsstaat*,⁷³ modern law contains the following characteristics:

- (a) a technical instrument of rational government for modern states;
- (b) comprehensive enough to cover all contingencies;
- (c) unified and systematic; and
- (d) principled as a consistent expression of social life.⁷⁴

However, the contradictions within legal modernity set up a form of tension as the law became fragmented in discretionary and particularised regulation.⁷⁵ Cotterell suggested that modern law has become overloaded and unprincipled. He has raised the issue of whether law is effective in “remaking the world”.⁷⁶ On the other hand, law has also evolved into a form of “postmodern law”.

According to Bauman, postmodernism represents a state of the mind.⁷⁷ Postmodernism's denial of rationality and objective reality goes against liberalism. Its assertion that “all knowledge is subjective, conventional or dictated by authority” radically undermines the idea of objective ascertainability of the law.⁷⁸ Liberal legality was rejected by the deconstructionism of Derrida.⁷⁹ The notion of knowledge as being “permanently and irreparably flawed” represents a significant thesis of the postmodernists.⁸⁰ Contemporary law, in the postmodern world, is

73 R Cotterell, *The Sociology of Law: An Introduction* (2nd Ed 1992).

74 *Ibid* at 306.

75 *Supra* 73 at 307.

76 *Ibid*.

77 Z Baurnan, *Intimations of Postmodernity* (1992) cited in R Cotterell, *The Sociology of Law: An Introduction* (2nd Edn 1992).

78 S Ratnapala and GA Moens, *Jurisprudence of Liberty* (1996).

79 *Ibid*.

80 *Supra* 78 at 88.

marked by greater symbolic and rhetorical power in a world that has lost faith in moral absolutes.⁸¹

Modernity, Modernism, Modernisation, and Postmodernism in the Asian Context

The traditional Asian societies were in a state marked by “impoverishment, technological backwardness, disorganization, political instability, overpopulation and traditionalism”.⁸² These features of a traditional society were common prior to the influence of modernity. These traditional legal and cultural systems adopted a dual pattern with a central legal order and a set of customary law juxtaposed on the structure of society. The desire to modernise and industrialise resulted in the diffusion of some of the characteristics of Western industrialism and technology into these societies.⁸³ A radical economic transformation occurred as these economies sought to emulate the Western ideology of modernity. Modernisation deconstructed the traditional legal system and led to the growth of bureaucratic law. The primary purpose of social and economic reforms, aimed at modernisation, was to prevent these economies from being “left behind or stranded on the periphery of economic and technological change”.⁸⁴ These policies succeeded in radically transforming the stagnant region into a modern economy.

Although modernisation in Asia means the adoption of economic policies to become modern and be transformed into the image of the West, the Asian mode of modernity has its own peculiar hybrid. The diverse history, culture and economic background of Asia enable it to differ from the Western notion of modernity and concept of individualism in certain ways.

Firstly, state paternalism and patronage exert a significant influence on the Asian model of modernity. The needs and goals of the state are given utmost priority and at times, the spirit of entrepreneurship may be sacrificed. The state planned and implemented economic development programmes. Political patronage was predominant. The process of decision-making was based on reciprocity rather than economic and technical tendencies. Asian modernity, in contrast to the West, is heavily dependent on the state as it assumed the role of the key agent of development with specific government policies that promotes economic growth.⁸⁵ Although the overall political and economic conditions had serious shortcomings, the state managed to establish a capitalist enclave.⁸⁶ The policy and philosophy that underlie national development plans that are designed by the government

81 *Supra* 78.

82 *Supra* 65.

83 *Supra* 9.

84 *Ibid.*

85 *Ibid.*

86 S Radelet and J Sachs, ‘Asia’s Re-Emergence’ (1997) 76 *Foreign Affairs* 6.

implied that there is a system of central control. It reflects the goals and aspirations of government leaders. An example is the five-year National Development Plan in Malaysia.

Occasionally, the state may adopt part of the policy and philosophy of its Asian neighbours in its national development programmes. An example is that of Malaysia. In 1981, the government pursued a "Look East" policy where a selective emulation of the Korean and Japanese models of management and behaviour was adopted. Its main intention was to create a group of new Malay entrepreneurs.⁸⁷ The policy was based on the assumption that the economic success of both Japan and South Korea, which was based on determination and hard work, could be followed in Malaysia. Modernisation in Asia was supported by the spirit of nationalism with an earnest desire to break from the past struggle with colonialism and imperialism.

Secondly, Confucian values and practices such as loyalty, frugality, and respect for authority tend to act as a catalyst for the dynamism of the East Asian economies of Hong Kong, Taiwan, South Korea and Singapore. Traditional networks, linkages and groupings often dominated business practices. Certain aspects of the traditional identity appear to be preserved in spite of the influence of imperialism during Western colonisation. It was during the colonial era that conceptions of modernity emerged in some of the countries in East Asia. Efforts to shake off previous Western domination during the post-colonial years were ironically substituted by adopting the strategies of modernisation employed by the former colonial masters.⁸⁸ The dilemma faced by most of the Asian economies was whether to continue to preserve traditional identities as a form of resistance against colonialism or to abandon these identities and strive towards becoming a modern state.⁸⁹

Thirdly, the economic success in Asia appears to be based on the unique manner by which businesses are structured. Networks of businesses formed linkages to provide support and patronage. The *chaebol* in South Korea and the *keiretsu* in Japan are examples of such networks. The family-controlled company is another significant feature. The overseas Chinese community owns most of these companies. However, in recent years, governmental policies have reduced this form of shareholding. These types of business stressed informal relationships. Networking along ethnic and linguistic lines was a norm with an aversion to litigation and debt.⁹⁰ An example is that of the situation in Hong Kong. A publication, known as *The Second Report of the Corporate Governance Working*

87 CK Young (ed), *The Southeast Asian Economic Miracle* (1995).

88 LM Raymond Lee, *The Tao of Representation: Postmodernity, Asia, and the West* (1999).

89 Ibid.

90 C Jordan, 'Family Resemblances: The Family Controlled Company in Asia and its Implications for Law Reform' (1997) 8 *Australian Journal of Corporate Law* 89.

Group (1997), published by the Hong Kong Society of Accountants reported that “almost 90% of all Hong Kong listed companies have one shareholder or one family group of shareholders owning 25% or more of their entire issued capital; 77% show one shareholder or family group owning 35% of the entire issued capital and more than half have one shareholder or family group owning 50% or more”.⁹¹

Fourthly, modernisation in Asia was supported by a large inflow of multinational capital and investment. According to Yamazaki, “the integration of the Asian region into the world economic system was due to the global tide of modernization and industrialization” with an influx of capital and technology from Japan and the West.⁹² The element of “timing” played a critical role in the economic success of these countries. Hsin Huang indicated that “the East Asian NICs (Newly Industrialised Countries) undertook the critical transition in industrialisation strategies in the middle to late 1960s when the world economy was extremely conducive to trade and exports”.⁹³

Finally, the economic achievements were fostered by the pressure to perform in a competitive global environment.⁹⁴ Yamazaki further added that “what few have seen clearly, however, is that the force behind the convergence observable in the region today is modernity, which was born in the West but has radically transformed both East and West in this century”.⁹⁵

Modernisation and the Process of Economic Development in Asia

According to the World Bank Policy Research Report, *The East Asian Miracle: Economic Growth and Public Policy*,⁹⁶ eight countries in East Asia recorded a high level of growth between 1960 to 1990. Some of the reasons that accounted for the significant success achieved by these countries were: a high level of domestic financial savings, rapid growth of human capital, good macroeconomic management, stable macroeconomic performance, state intervention and the integrity of the banking system.⁹⁷ It was further supported by a conducive legal

91 Ibid at 90.

92 Masakazu Yamazaki, ‘Asia, a Civilization in the Making’ (1996) 75 *Foreign Affairs* 4 at 106.

93 Hsin Huang MH, ‘An East Asian Development Model: Empirical Explorations’ (1988) in Berger PL and Hsin Huang MH (eds), *In Search of an East Asian Development Model*, 15.

94 G Papanek, ‘The New Asian Capitalism: An Economic Portrait’, in Berger PL and Hsin Huang MH (eds), *In Search of an East Asian Development Model* (1988).

95 *Supra* 92 at 107.

96 A World Bank Policy Research Report, *The East Asian Miracle: Economic Growth and Public Policy*. (1993). The eight countries comprise Hong Kong, South Korea, Singapore, and Taiwan, which were collectively known as the “Four Tigers” and the newly industrialising countries of Indonesia, Malaysia and Thailand. The eighth country was China.

97 Ibid.

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climate with strong leadership and guidance established in a business-friendly environment. It created a sound legal and regulatory structure, which favoured private investment.⁹⁸

The Asian economic miracle gave rise to the phenomenon of the “Asian Tigers”. It consists of South Korea, Taiwan, Hong Kong and Singapore⁹⁹ and the newly industrialised countries of Thailand and Malaysia. These economies have certain distinctive features such as a high growth rate, an improved standard of living, and an active support from the government towards economic development. This phenomenon of economic success has been described as a “second case” of capitalist modernity.¹⁰⁰ The influence of state paternalism, religious-philosophical values and traditional networking practices has enabled these economies to experience modernity that differs from that of the bourgeois form of Western modernity.¹⁰¹

Unfortunately, the paternalistic system of support provided by the state had a negative effect on the economy. One of the consequences was that it led to a distorted and a false depiction of the market economy. Such limitations could not be addressed in a transparent and effective manner. Generally, these reasons contributed to some of the economic problems in the late 1990s.

The volatile Asian economy also revealed some weaknesses in modernity.¹⁰² In its pursuit of liberalisation, some of the Asian economies resorted to excessive borrowing of foreign short-term capital. This policy contradicts Article 5 of the Articles of Agreement where the International Monetary Fund provide the currency swap facility among member states on a short-term basis. Its main purpose was to discourage countries from going into the international capital market for sovereign debt borrowing. The international capital market serves as a lender for the private sector rather than the public sector. The system did not function properly. In the 1970s, this purpose had become irrelevant. Banks and companies from Asia became exposed to tremendous risk as their economies relaxed their capital account controls.¹⁰³ In 1996, there was a tremendous inflow of private capital into Indonesia, Malaysia, South Korea, Thailand and the Philippines with a total of US\$93 billion compared to US\$41 billion in 1994.¹⁰⁴ Unfortunately, in 1997, the scenario changed with an outflow of US\$12 billion.¹⁰⁵

98 Ibid at 14.

99 The term “Asian Tigers” has also been referred to as the “Four Little Dragons”. See generally PL Berger and MH Hsin Huang (eds), *In Search of an East Asian Development Mode* (1998).

100 Ibid,

101 Ibid.

102 Ibid.

103 J Bhagwati, ‘The Capital Myth’ (1998) 77 *Foreign Affairs* 3.

104 Ibid.

105 Ibid.

According to the World Bank, almost US\$115 billion fled the Asia Pacific region between 1997 and 1998.¹⁰⁶

The Problems of Postmodernism in South-East Asia

The expression “modern” consist of two aspects – “hope” and, at the same time, “despair.” This prevails in an environment depicted by Berman as one that “promises adventure, power, joy, growth, transformation of ourselves and the world -and, at the same time, that threatens to destroy everything we have, everything we know, everything we are”.¹⁰⁷ The elements of disillusionment and fear of uncertainty become real as societies progressed from modernity to modernisation and postmodernism. Berman's depiction aptly summarised the experience of some Asian countries in recent years.

The image of success enjoyed by some of the Asian miracle economies that has been described by some authors as “Asia Rising¹⁰⁸” has been replaced by critiques with the term “Asia Falling”.¹⁰⁹ Some of the Asian economies went into terminal decline during the 1997-1998 crisis partly as a result of the rapid pace in which change occurred and also partly as a consequence of modernisation. The Asian financial contagion brought into focus the uncertainties that arise from the struggle within the process of modernity, modernisation and postmodernism. These processes have been severely tested during the financial crisis. In addition, there were allegations of institutional weaknesses, insufficient banking regulation, nepotism, corruption, and populist policies.¹¹⁰ As a result, the miracle economies have been transformed into “basket cases”.¹¹¹

In another analysis, Krugman argued that the Asian economic miracle was a “myth” as in the past, the mobilisation of resources, such as labour and capital has accounted for the high level of economic growth. He argued that this was the primary reason for economic success rather than improvements in efficiency.¹¹² This argument that rapid economic growth was attributed to investment spending rather than productivity growth seems to be proven when the fragile economic growth in Indonesia, Malaysia, the Philippines and Thailand was afflicted by the currency crises in 1997.

On the other hand, Radelet and Sachs indicated that the previous rapid growth experienced by the South-East Asian economies was due to factors such as the

106 DM Jones and M Smith, “Tigers Ready to Roar?”(1999) 55 *The World Today* 10.

107 *Supra* 23.

108 J Rohwer, *Asia Rising* (1995).

109 C Henderson, *Asia Falling?: Making Sense of the Asian Currency Crisis and its Aftermath* (1998).

110 S Radelet and J Sachs, ‘Asia’s Re-Emergence’ (1997) 76 *Foreign Affairs* 6.

111 *Supra* 92.

112 P Krugman, ‘The Myth of Asia’s Miracle’ (1994) 73 *Foreign Affairs* 6.

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experience of Japan in creating an economic environment for profitable private investment, establishment of a capitalist enclave, modernisation of political and economic institutions.¹¹³ This opinion was supported by Stiglitz who reported that¹¹⁴:

The East Asian ‘miracle’ was real. Its economic transformation of East Asia has been one of the most remarkable accomplishments in history. The dramatic surge in gross domestic product which it brought about is reflected in higher standards of living for hundreds of millions of Asians, including longer life expectancy, better health and education, and millions of others have rescued themselves from poverty, and now lead more hopeful lives. These achievements are real, and will be far more permanent than the present turmoil.

The above statement postulated the remarkable achievements and transformation of society as it moved from modernity towards the postmodernism phase.

Prior to the onset of the financial crisis, the South-East Asian currencies experienced a sharp appreciation and exports were being priced out of the European and Japanese markets. The decision to devalue the Chinese yuan in January 1994 exerted further pressure. Another factor was the considerable speculative investment in real estate markets. Local commercial banks faced a high risk of exposure as a result of excessive foreign borrowing, weak regulation and supervision of financial markets.¹¹⁵

The pastiche of economic crises in Malaysia, Thailand, and Indonesia began when the Thai baht was devalued in July 1997. Interest rates were raised to stop the decline of the different currencies. The situation was aggravated by policy and institutional weaknesses such as insufficient banking regulation, excessive borrowing by corporations and elements of corruption, nepotism, and populist policies.

Summary

As Asia emerges from the financial crisis, it faces a number of challenges. The need to create a stronger system of governance and law is vital, as this is consistent with the demand of a sophisticated and complex global economy. Rapid growth was achieved in the past despite a weak rule of law with a strong central government control over the judiciary.¹¹⁶

Debate on the Asian financial crisis has also centred on the notion of “crony capitalism” on one extreme while others have blamed a Western conspiracy theory

113 *Supra* 110.

114 J Stiglitz, *The Asian Wall Street Journal* February 2, 1998 cited in K Mahbubani, *Can Asians Think?* (1998) at 22.

115 *Ibid.*

116 *Supra* 114.

to undermine its economic success. However, from the social scientific perspective, Preston reported that “the crisis is symptomatic of deeper processes of inter-regional post-Cold War and post-Bretton Woods adjustment”.¹¹⁷ The dynamics of change -economic, social and cultural undergoes a pattern of stability, reconfiguration and some abrupt breaks.¹¹⁸ The crisis represents a period of acute but transient disruption. He concluded that:

“... there is no break presently identifiable, nor is there any evidently discernible process of intra-regional restructuring, and we are left with the comparatively mundane alternative view of transient disruption”.¹¹⁹

The Asian economies seem to have overcome some of the problems related to the crisis. They appear to be on the path to recovery in 2000.¹²⁰ The process of recovery would be successful if there is strict compliance with the reforms. Despite the positive Gross Domestic Products recorded in 2000, it is too early to conclude that there is full recovery from the Asian crisis.¹²¹

Modernity, Modernisation and Postmodernism in Malaysia

A discussion of Malaysia's experience with modernity, modernisation and postmodernism can be carried out by applying the guidelines provided by Preston¹²² who, has divided the historical development of Asia Pacific into the following phases:

- i. The pre-contact period with its distinctive politics, economics, cultures, social and institutional structures.
- ii. The reconstruction of indigenous forms-of-life period as a result of industrial-capitalism.
- iii. The process of decolonisation and nation building while lodged within the bipolar Cold War division of the region.
- iv. The current period of interdependence and distinctiveness within the global system.

117 PW Preston; ‘Reading the Asian Crisis: History, Culture and Institutional Truths’ (1998) 20 *Contemporary South-East Asia* 3.

118 S Strange, *States and Markets* (1988). Cited by Preston PW; ‘Reading the Asian Crisis: History, Culture and Institutional Truths’ (1998) 20 *Contemporary South-East Asia* 3.

119 *Supra* 117 at 247.

120 EJ Feulner, ‘Reform the IMF’ (2000), *Asiaweek*, July 7, 2000.

121 *Ibid*.

122 *Supra* 117.

Modernity in Malaysia

The first phase of the pre-contact period was characterised by traditional and customary indigenous practices. The traditionalistic agrarian society is simplistic in nature. The primacy of the group over the individual led to a collectivist form of orientation.¹²³ The informal system of customary law is influenced by a central legal order.

The second phase was marked by a reaction against external influence that arose from colonisation. During the first half of the century, Malaya under the administration of the British government pursued a conservative policy of social reform and development.¹²⁴ Aspects of modernity emerged during this time and there was an increased awareness of the need to modernise.

Modernisation in Malaysia

The third phase occurred when the country obtained independence in 1957. The post-colonial government embarked on an export-oriented industrialisation policy. The features of modernisation involve:

- (a) a drive towards export-oriented industrial products;
- (b) growth in multinational investment; and
- (c) a social re-engineering process.

In the 1970s, the government achieved success in its industrialisation programme. A combination of pioneer status incentives, tax exemption, low wages, inexpensive land, an educated workforce and adequate infrastructure attracted American and Japanese multinationals to invest in the country.¹²⁵ There was a substantial inflow of foreign investment capital and the standard of living improved with the transfer of technology.

In the 1980s, the policy of heavy industrialisation was adopted. Economic programmes to establish the 'national car project', steel complex, cement plants and motorcycle engine factories were carried out. The development of heavy industries marked an important phase in the modernisation process, as it was a step towards becoming an industrialised society. The programme of heavy industrialisation continued despite four main reservations concerning¹²⁶:

123 *Supra* 9.

124 KS Jomo (ed), *Privatizing Malaysia: Rents, Rhetoric, Realities* (1995).

125 BT Khoo, *Paradoxes of Mahathirism: An Intellectual Biography of Mahathir Mohamed* (1995).

126 *Ibid* at 120.

- (a) the small domestic market and low export potential of the products (automobiles and steel);
- (b) absence of economies of scale;
- (c) massive foreign borrowings and long gestation periods; and
- (d) over-dependency on foreign technology.

In 1971, a New Economic Policy (NEP) was introduced with the objective of fostering inter-ethnic economic parity and the eradication of poverty. It was an economic programme of affirmative action where the politically dominant Malays were enabled to enjoy a 30 per cent stake in the country's corporate wealth by 1990. The NEP was integrated into subsequent National Development Plans that were known as The Malaysia Plan.¹²⁷ Following this, the government implemented a number of programmes to acquire corporate wealth on behalf of the Malay community. It includes the creation of "trust agencies", new statutory bodies, government corporations, government-owned or controlled publicly listed companies, and government-owned or controlled private companies.¹²⁸ During the NEP, governmental involvement was evident in all the sectors of the economy. The conservative fiscal policies of the post-colonial era were replaced by massive foreign borrowings, which was used to finance industrialisation policies.

In the 1980s, the country suffered a severe recession. In September 1985, the country recorded negative growth for the first time since independence. The collapse of oil prices in 1986 aggravated the problem. However, it experienced an economic boom when export-oriented manufacturing companies from Japan and Taiwan relocated in Malaysia. The desire to achieve developed country status by the year 2020 was outlined in a development plan known as Vision 2020 by the Prime Minister.

Postmodernism in Malaysia

Postmodernism is marked by a period of uncertainty and fluctuations. It was worsened by the currency crisis in Malaysia. The reasons that account for this were mainly political in nature. In 1971, Malaysia's Gross Domestic Product per capita ranked third, behind Japan and Singapore, among East Asian nations. In 1990, it fell to fifth position behind South Korea, Taiwan, and Hong Kong as well. The problems that gave rise to the economic crisis in Malaysia consists of over-capacity in finance and manufacturing, over-reliance on foreign borrowing, weak banking regulation and allegations of crony capitalism.¹²⁹ A weak regulatory

127 In 1971, the country was in the second phase of the national development plan. It was known as The Second Malaysia Plan (1971-1975).

128 *Supra* 124.

129 *Ibid.*

framework fosters irresponsible lending practices and corporate abuse. There was a lack of stringent and prudent regulation. Although earlier efforts to reform certain fiscal and monetary policies were made, over-dependency on foreign-currency denominated debt became a serious problem. This was pointed out by Henderson where “the current account deficit of Malaysia was its most visible *Achilles Heel*”.¹³⁰

However, growth seems to be hampered by the process of re-engineering of macroeconomic policy under the NEP's positive discrimination programme. The heavily regulated economy led to a serious degree of alleged “cronyism” with government contracts and licences awarded to one main political party, which is the majority member of the ruling coalition. Clad described “the NEP's main instrument became a plethora of market-distorting, educational, business and public employment quotas, coercive ‘restructuring’ of corporate stockholding plus a succession of money-losing government corporations that rapidly became mini-fiefdoms”.¹³¹

In Malaysia, the process of modernisation has established a new form of corporate power, and a strong bureaucratically structured government. The NEP has resulted in the creation of an elite Malay capitalist class. In a study on the transformation of Malaysian business groups, Sieh reported that some of the consequences brought about by the NEP includes the following¹³²:

- (i) The extensive use of the corporate vehicle as a tool for social restructuring.
- (ii) Free enterprise was discarded when social engineering with bureaucratic capitalism created a group of Malay elite whose businesses were linked to political support.
- (iii) The Malay group obtained significant benefits from direct government participation in business. It led to a proliferation of government-owned and government-controlled private limited companies. The government provided substantial corporate equity to fund corporate takeovers by the Malays.
- (iv) Government-sponsored companies and public enterprises succeeded in establishing a Malay elite that straddles business and government.
- (v) New business ventures in Malaysia appear to be politically speculative rather than economically rational and productive.

130 *Supra* 109.

131 J Clad, *Behind the Myth: Business, Money and Power in South-East Asia* (1989) at 54.

132 ML Sieh Lee, ‘The Transformation of Malaysian Business Group’ in R McVey (ed), *Southeast Asian Capitalists* (1992).

- (vi) Although the economic gap between the races narrowed, there was a significant increase in intra-racial inequality as evidenced in income levels and asset ownership.¹³³

As a result of these factors, corporate development in Malaysia appears to be less encouraging. Corporate transparency and accountability seems to be limited due partly to the phenomenon of economic power concentration in the hands of an elite corporate group dominated by the Malays. The discipline by market forces on corporate behaviour is restricted due to the creation of a number of artificial obstacles such as government intervention in the corporate environment. The problem of politically connected conglomerates is indeed a formidable challenge.¹³⁴

In the 1980s, the Malaysian corporate sector suffered a number of financial disasters due to certain corporate malpractices such as reckless financial management and rampant business favouritism. A number of banks were in serious financial difficulties. It was likely to be aggravated by defects, which exists in the business restructuring programmes under the NEP. The situation became worse in 1997 when the stock market in Malaysia, Indonesia, the Philippines, South Korea and Thailand declined by more than three-fifths of their value in dollars.¹³⁵ The government blamed hedge fund speculators and capital flight for the crisis. The National Economic Action Council imposed currency controls to restore financial stability and address foreign debt without assistance from the International Monetary Fund.¹³⁶

Impact on Company Law in Malaysia

Company law reform in the postmodernism era is a daunting responsibility. The ambivalent relationship between law as an instrument of government control and law as a form of knowledge is under constant tension. Contemporary legal regulation requires a more active participation from the various strata of society as moral authority move towards diminution.¹³⁷ During the financial meltdown, a number of reforms were undertaken at a rapid pace to restructure the financial institutions. However, the compulsory restructuring programme undertaken by the state appears to reinforce the corporatist links between political parties and businesses.¹³⁸ Although it is argued that the removal of state regulation may lead to chaos, the interests of other “relatively powerless” victims of the crisis should also be given proper consideration and assistance.

133 Ibid.

134 Euromoney Publications PLC, *The Guide to Asian Debt Markets 2000* (2000).

135 Dk Emerson, ‘Americanizing Asia?’ (1998) 77 *Foreign Affairs* 3.

136 *Supra* 96.

137 S Jayasankaran, ‘Malaysia: National Interest’ (2000) *Far Eastern Economic Review*, July 6, 2000.

138 Ibid.

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In the second quarter of 1999, the economy in Malaysia was reported to have recovered as a result of a cheaper exchange rate and an increase in the export of electronic products.¹³⁹ Unfortunately, the past structural weaknesses and deficiencies remained even though some form of restructuring has occurred. Critics have argued that instead of actual reformation, the Asian model has been rationalised.¹⁴⁰ This argument is pertinent in Malaysia. In addition, a repeat of a far more severe crisis in the future seems likely. This was noted by Jones and Smith where “ironically, the failure to develop internal or external rule-governed procedures during the good times, has left Asian states and the regional arrangements they formed weak, unstable and increasingly vulnerable to the machinations of the global market place”.¹⁴¹

Corporate reforms seem to be given little attention. Companies that have links with the ruling majority political party have been reported to have been given preferential assistance.¹⁴² Furthermore, it is questionable whether the legal and regulatory framework is effective. This was again enunciated by Sieh as follows in the following observation¹⁴³:

“In Malaysia the lawmakers have gotten too involved in the game themselves, and few officials have the courage and independence to enforce the controls that do exist. This is particularly so because the government has utilised corporations not only as a means of getting things done but also as an extended arm of bureaucratic power. Officials thus have an institutional interest in preserving corporate freedom from public scrutiny.”

The effectiveness of companies legislation in Malaysia has been doubted due to the increase in the number of corporate failures. A fundamental re-examination of the law is required to enable companies to solve problems related to governance, ethical management and disciplined behaviour. It is unlikely that Malaysian companies will be able to survive global competition in the future if they continue with certain undesirable practices. It is vital that ethics be accorded serious consideration. The relationship between managerial ethics in corporate management and economic success cannot be denied given the intense international competitiveness. Clad explained this as follows¹⁴⁴

“the transition from the archetypal, high-ceilinged colonial office, ceiling fans twirling lazily overhead, to corporate conglomerates headquartered in soaring steel towers thus occurred with astonishing rapidity. South-East Asia's squat, unimaginative caterpillars were running into globally competitive butterflies imbued with Western management ethics. Or were they?”

139 Ibid.

140 Ibid.

141 *Supra* 135 at 19.

142 *Supra* 137.

143 *Supra* 132 at 125.

144 *Supra* 131 at 184.

He further succinctly observed the close relationship between businesses and politics as follows:¹⁴⁵

“But the point remained that ‘Western management’, in most cases, took second place to the drive and cleverness of ‘big men’ in the nexus of politics and business.”

Modern day corporate management requires an enhanced system of regulation. The existing legal framework may be ill-suited to face the complex corporate environment. Company law reform is vital to prepare companies to face the competitive pressure of globalisation. In the 1980s, the world economy has transformed into a different paradigm. Various terminologies such as capitalism, ‘disorganised capitalism’ and ‘post-Fordism’ have been used to describe the new structure. Featherstone described these phases as being “generally represented as entailing the de-monopolisation of economic structures with the deregulation and globalisation of markets, trade and labour”.¹⁴⁶ Wood noted that these economic changes would transform the way in which corporate and financial organisation function. The use of new technologies and new forms of communication such as the Internet with the growing influence of the information superhighway constitute a new phase of postmodernity.¹⁴⁷

Corporate law reforms have been carried out in Malaysia with particular reforms made in the banking sector. Initially, the government has made a decree to merge its 58 financial institutions into six “super banks”.¹⁴⁸ The purpose in consolidating the banks was to enable them to withstand foreign competition in 2003 when the financial markets are liberalised under the World Trade Organisation's agreement.¹⁴⁹ Unfortunately, there is the worry that the selection of the six banks is politically motivated as three of them are owned by the state.¹⁵⁰

Nonetheless, a higher level of accountability and transparency is required to prevent a recurrence of another financial crisis. In addition, there are other aspects of reform that need to be carried out as, suggested by Kim where “the proper way to cure the ills of individual societies is not to impose the terms of a police state but to emphasise ethical education, give high regard to spiritual values, and promote high standards in culture and the arts”.¹⁵¹

145 *Supra* 131 at 185.

146 M Featherstone (ed), *Global Culture: Nationalism, Globalization and Modernity: A Theory Culture and Society* (1990), 7.

147 EM Wood, ‘Modernity, Postmodernity, or Capitalism’ in RW McChesney; EM Wood and JB Foster, *Capitalism and the Information Age: The Political Economy of the Global Communication Revolution* (1998).

148 S Jayasankaran, ‘Merger by Decree’ (1999) 162 *Far Eastern Economic Review* 36, September 9, 1999.

149 *Ibid.*

150 *Ibid.*

151 DJ Kim, ‘Is Culture Destiny?’ (1994) 73 *Foreign Affairs* 6.

Summary

Modernisation and postmodernism tend to have a disruptive and disorienting effect on various aspects of social life. In Malaysia postmodernism appears to manifest itself in a desire to return to the indigenous culture. It has been postulated that there has been a resurgence in the Islamic religion following the recent elections. The resurgence occurred in the social, cultural and legal spheres as the country adopt a more Islamic outlook and practice. This was a reaction against the “Westoxification” of Asian societies reported by Huntington who states that modernisation and economic development “promote a resurgence of, and renewed commitment to, indigenous cultures”.¹⁵² The consequences of rural-urban migration such as, unfamiliarity with the urban setting, land occupations that breaks traditional local bonds, led to alienation, anomie and a crisis of identity. It is a religion that has often provided an answer.¹⁵³ In addition, modernisation results in greater economic wealth, which increases confidence in local heritage and cultural assertiveness.¹⁵⁴

On the other hand, impediments act to prevent more effective corporate reforms. Corporate disclosure needs to be enhanced and financial institutions should not be allowed to “hide behind a professed lack of information on what the hedge funds are doing”.¹⁵⁵ In a global economy, corporate misconduct should be disciplined by market forces rather than rigid adherence to the argument of producing a level playing field for all participants. State patronage of businesses act as an impediment to the fair and efficient reallocation of resources.¹⁵⁶ Economic efficiency should remain the ultimate justification for regulatory reform. The free operation of market forces is one of the effective means to ensure that company directors act in the best interests of the shareholders. Corporate disclosure and transparency are vital in the global context. The power of regulators must be enhanced to allow a higher level of transparency to be established. Non-compliance with corporate regulation would discourage multinational enterprises and inflow of foreign corporate investment. In Malaysia, such investment has declined in the 1980s from RM3,262 million in 1982 to RM2,926 million in 1983, RM2,138 million in 1984, RM1,725 million in 1985, and RM1,262 million in 1986.¹⁵⁷

152 SF Huntington, ‘The West Unique, Not Universal’ (1996) 75 *Foreign Affairs* 6.

153 Ibid.

154 Ibid.

155 JE Garten, ‘Lessons for the Next Financial Crisis’ (1999) 78 *Foreign Affairs* 2.

156 *Supra* 1.

157 KS Jomo, *Growth and Structural Change in the Malaysian Economy* (1990). Macmillan, New York at 76 cited in BT Khoo, *Paradoxes of Mahathirism: An Intellectual Biography of Mahathir Mohamad* (1995) at 138.

The Restructuring of Capitalism

In the future corporate world, Bill Gates commented that a new stage of capitalism would emerge.¹⁵⁸ The key determinant of the economic survival of the corporation depends on information. The quality of information acts as the basis for the perfection of the market economy. It has been postulated that the information highway will introduce a new age of "friction-free capitalism".¹⁵⁹ The advent of cyberspace technology would, in turn, lead to the demise of organised capitalism in the post-Fordist and postmodern world.¹⁶⁰ The new technology will realise Adam Smith's concept of markets in which "every buyer knew every seller's price, and every seller knew what every buyer was willing to pay" -what economists call "perfect knowledge" or "perfect information".¹⁶¹ Thus, a New World of low-friction and low-overhead capitalism is established with tremendous market information and low transaction costs.¹⁶² The electronic market will further create a universal frictionless market where targeting, research, product management, and sales communication permeate all aspects of virtual reality.¹⁶³

Similarly, the information revolution will give rise to new industries such as micro-robotics, bio-remediation, "virtual" conferencing, satellite-based personal communicators, and technology related to the digital highway. These would transform existing industries. The potential future revenue from these mega opportunities which is inherently global in nature amount to billions of dollars.¹⁶⁴ Companies that are unable to anticipate and participate in reaping these mega-opportunities would probably be sidelined and eventually become "dinosaurs". This was depicted by Prahalad as "like dinosaurs threatened by cataclysmic climatic changes, companies often find it impossible to cope with a radically altered environment".¹⁶⁵ However, it is mainly due to the inability to adapt to a fast changing environment that led to the extinction of dinosaurs. Companies differ, as they are able to employ a variety of strategies to survive, for example, by altering its "genetic coding".¹⁶⁶ Ironically, it may be true that in failing to "re-engineer its genetic code periodically", companies are subject to "the mercy of environmental upheaval as tyrannosaurus rex".¹⁶⁷

158 Bill Gates, *The Road Ahead* (1995).

159 Ibid.

160 M Dawson and JB Foster, 'Virtual Capitalism: Monopoly Capital; Marketing, and the Information Highway' in RW McChesney; EM Wood, and JB Foster (eds), *Capitalism and the Information Age: The Political Economy of the Global Communication Revolution* (1998).

161 Ibid at 61.

162 Ibid.

163 Ibid.

164 GH Prahalad, *Competing for the Future* (1994).

165 Ibid.

166 Ibid. Corporate genetics refers to the set of biases, assumptions and presuppositions about the structure of the relevant industry.

167 Ibid at 53.

The current diverse system of global governance requires close collaboration between states, international institutions, non-governmental organisations and individual citizens.¹⁶⁸ Non-state actors such as multinationals in global financial management have succeeded in creating a new “financial architecture”.¹⁶⁹ A transparent and accountable system of governance can be fostered through a set of international guidelines and codes on multinational investment.

Conclusion

The transformation from pre-modern passivity to the dynamism of modernisation followed by the disillusionment of postmodernism has a significant impact on the law. Although postmodernism seeks to reveal indeterminacy, its object is to cope with contradiction and paradox.¹⁷⁰ The postmodernists seek to highlight the predicament, anxiety and uncertainty of a fragmented and diverse society at the end of the twentieth century and beginning of a new century.¹⁷¹

Industrialisation and modernisation in Malaysia is predominantly state-driven and political patronage is prevalent in the corporate world. If this form of patronage is allowed to grow, the crisis of modernisation that threatens cultural and institutional traditions would also probably destroy the organisational structure and function of corporations. It might activate the phenomenon of “orderly disorder created by simple processes”. In other words, the notion of “Chaos Theory” postulated by Scott may be manifested.¹⁷²

Undoubtedly, good corporate governance is vital. Such a framework shows indirectly the degree of commitment that the government has in developing its overall legal, economic, social and administrative systems into one that is resilient to the challenges posed by the new economic era. This was evident in the three

168 *Supra* 31.

169 *Ibid.*

170 *Ibid.*

171 *Ibid* at 255.

172 RE Scott, *Chaos Theory and the Justice Paradox* (1993), cited in G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995) at 250.

economies of Taiwan, Hong Kong and Singapore that were least affected by the financial crisis.¹⁷³ Corporate governance in Malaysia will only be enhanced if recent reports of continued incidents such as abuse of power and political interference in the privatisation of projects are addressed in an appropriate manner.¹⁷⁴

173 K Mahbubani, *Can Asians Think?* (1998).

174 S Elegant, 'Malaysia Uncensored' (2000) *Far Eastern Economic Review*, July 6, 2000 at 29.