Hobbism and the Problem of Authoritarian Rule in Malaysia

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When Malaysia gained independence from British rule in 1957, it embraced a 'supreme' written Constitution that included an extensive bill of rights that protects the right to life and liberty, the right to due process, the principle of equal protection before law, as well as civil and political rights.[1] This constitutional framework seemed conducive to a culture of constitutionalism where organs of government are under a legal duty to uphold constitutional norms that might be enforceable by judges through judicial review, which would systematically orient political power to serve the rights and interests of legal subjects. As such, the constitutional framework seemed aptly designed for the aspiration to realize the ideals of democracy and the rule of law.

Unfortunately, this aspiration has gone unrealized. A major source of this problem is political. Malaysia has a Westminster system of government where the executive is derived from the majority party in Parliament.[2] But unlike Great Britain, where the Westminster system has led to a robust democracy, Malaysian politics is ethnocratic and authoritarian. The same political party, the United Malay National Organization ('UMNO') has held power since 1957. UMNO is committed to an ethnocratic political paradigm that favours the Malay ethnic majority.[3] Over time, the UMNO-led government has been able to control Parliament so that it has been able to limit civil and political rights and to curtail constitutional checks on its power. [4] This has allowed the government to pursue ethnocratic and authoritarian rule and to subvert the ideals of democracy and the rule of law. [5]

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[1] Article 4 (1) reads as follows: 'This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. Part II of the Constitution sets out a bill of rights protecting the right to life, liberty, and due process, the principle of equality before law, a ban on slavery, a ban on retrospective legislation, as well as a list of civil and political liberties. Part IX lays out provisions relating to the judiciary, including provisions safeguarding the "judicial power" of the courts to determine matters of law as well as provisions giving the highest court, now known as the Federal Court, an advisory jurisdiction on constitutional matters. As we shall see, some of these provisions have been amended to reduce the power of the courts to decide constitutional issues.

[2] I use the term 'government' to refer to the executive.

[3] For an explanation of the rise of ethnocratic rule in Malaysia, see Geoffrey Wade, 'The Origins and Evolution of Ethnocracy in Malaysia' (2009) *Asia Research Institute Working Paper Series* No. 112.

[4] The Constitution has been amended over 50 times since the creation of the Constitution. In attacking this trend, it has been argued that "the Constitution is treated in a somewhat cavalier fashion" because these amendments have often been geared toward short-term political gain, see H. P. Lee, *Constitutional Conflicts in Contemporary Malaysia*, 1995, p. 119.

[5]Malaysian politics has been variously described as "semi-authoritarian," "semi-democratic,""soft-authoritarian" or "pseudo-democracy" to capture the fact that the Malaysian government, while not predatory of its citizens, practices selective accountability. For a recent analysis of the state of Malaysian politics, see Thomas B. Pepinsky, 'Turnover Without Change' 18 *Journal of Democracy* (2007), p. 113.

The political factors that contribute to the problem of authoritarian rule in Malaysia raise vexing questions about whether democratic politics can flourish in a society afflicted by deep ethnic cleavages. Likewise, they raise difficult questions about institutional design, especially in relation to an attempt to create a Constitution that might be a focal point for a way to encourage either integration or accommodation to overcome such cleavages.[6] These are important questions to address in the Malaysian context.

These questions are crucial but I think there is a more fundamental problem that underlies Malaysia's seemingly stalled constitutional project. There is reason to think that officials have been working under the grip of an inherently authoritarian conception of legal authority that has led them to derail Malaysia's constitutional project. Until this problem is appreciated, there is a danger that even the best effort to construct an institutional framework that might better produce a meaningful democracy that operates within a commitment to the rule of law will not succeed. Put another way, this problem is a legal one as much, if not more, than it is a political one.

In this paper, I argue that Malaysia's problem of authoritarian rule is in part due to the influence of Hobbism upon official thinking about legal authority. As I explain below, Hobbism is a conception of legal authority that captures the major ideas in Thomas Hobbes's legal and political philosophy.[7] Hobbes is widely thought to provide an authoritarian conception of law as an answer to the problem of destabilizing social disagreement. However, I should clarify that I do not intend Hobbism to be an interpretation of Hobbes's philosophy; the aim here is not an exegesis on Hobbes work. Rather I use Hobbism, as a heuristic that captures a pervasive pattern of thought amongst officials that has led them to make practical judgments about the law that have been damaging to democracy and the rule of law while proving congenial to the rise of

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[6] For a leading examination of the link between what political science says about institutional design for divided societies and constitutional theory, see Sujit Choudhry ed., *Constitutional Design for Divided Societies: Integration or Accommodation?*, 2008, especially pp. 5-40.

[7] Hobbism is a term coined by David Dyzenhaus to capture the authoritarian reading of Hobbes' work so my account of Hobbism draws heavily from his work, see David Dyzenhaus, *Hard Cases and Wicked Legal Systems: Pathologies of Legality*, 2nd edn., 2010, pp.205-09. In Dyzenhaus' view, Hobbes is not a Hobbist and in fact creates the basis for a democratic conception of legal and political authority, see David Dyzenhaus, 'Hobbes and the Legitimacy of Law', 20 *Law and Philosophy* (2001), p. 1. Though some object that the term "Hobbist" is perhaps awkward and jarring (sometimes because it makes them think of Hobbits), I will stick with it. The term is useful precisely because it is jarring and allows me to distance myself from Hobbes's specific views about law and politics (as I am not convinced that Hobbes is Hobbist) and because the term now has a place in legal philosophy as a conception of legal authority associated with a particular mode of legal reasoning and a broader conception of truth in law and politics as matters of "plain-fact." This "plain-fact" conception of truth holds that truth in law and politics turns on publicly accessible facts, especially historical facts. Elsewhere, I develop this idea by drawing on a mix of Dyzenhaus's account of plain-fact legal reasoning discussed in the book cited above and Ronald Dworkin's account of the "plain-fact" view of law, outlined in Ronald Dworkin, *Law's Empire,* 1986, pp. 6-11. There, I argue that the influence of plain-fact truth in law and politics has stalled debate between ethnocrats and liberals about the fundamental principles of political morality that inform the Malaysian legal-political order. Under the influence of plain-fact thinking, they do not explicitly engage each other at the level of normative considerations of value and are distracted by the tendency to look to historical fact. Each supposes that history somehow provides an objective basis by which to adjudicate their debate. However, the result is that each side makes circular arguments about history that presuppose the truth of their particular political commitments thus leading to a stalemate. see R. Rueban Balasubramaniam, "Malaysia's Blocked Social Contract Debate" in Andrew Harding & Amanda Whiting eds., *Law and Society in Malaysia: Pluralism, Islam, and Development* (under review).

authoritarian rule.[8] It is worth understanding the nature of Hobbism because it sheds light on how Malaysian officials have been drawn into a way of thinking about the role of law as an antidote to the problem of political instability and how this way of thinking has led to authoritarian consequences.

The analysis thus begins by articulating the central features of Hobbism before focusing on three episodes in Malaysia's legal and political history as focal points for showing its influence in official thinking. These are the period surrounding the formation of the Malaysian Constitution, the 'May 13' racial riots in 1969, and the efforts of Dr. Mahathir Mohamad, Malaysia's longest serving and most authoritarian Prime Minister, to control the courts. I focus on these events because they are widely taken to mark either a turn towards authoritarianism or the consolidation of authoritarian power. By doing so, I gesture towards how Hobbism continues to affect contemporary Malaysian law and politics, but contemporary Malaysia warrants a separate analysis that only makes sense once the long-term influence of Hobbism is brought into perspective.[9] It is this focus on Hobbism and its influence in shaping Malaysia's legal and political identity that is the primary concern of this paper. I hope that the argument presented here will show that Hobbism has had a profound effect on Malaysian law and politics from the beginning and that the current state of play in Malaysian politics must be viewed against the backdrop of these effects.

HOBBISM

Hobbism is a conception of legal authority designed to overcome a particular political problem.[10] That problem is destabilizing social conflict or chaos. This problem is thought to arise from the fact that individuals are apt to disagree about right and wrong since they hold different conceptions of right and wrong according to their 'natural' individual reason. As a result, it is presumed that they cannot be counted on to engage in meaningful social cooperation as their propensity to disagree generates the never-ending prospect of destabilizing social conflict. To resolve this problem, individuals must give up their right to rely on their natural reason in deference to a centralized authority or sovereign capable of imposing its will upon them as an artificial standard of right reason. This artificial standard of right reason works as a focal point around which individuals can coordinate their conduct.

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[8] For an argument as to why Hobbism carries an inherently authoritarian pragmatic tendency, see David Dyzenhaus, 'Why Positivism is Authoritarian' *American Journal of Jurisprudence* (1992), pp. 83-112, p. 86.

[9] Arguably, the pressing issue in Malaysia today is a debate over Malaysia's so-called 'social contract', an unwritten agreement between Malaysia's Founding Fathers that is deemed implicit in the Malaysian Constitution. The disagreement is between ethnocrats and liberals who therefore disagree about the principles of political morality that underlie the legal-political order and over matters of constitutional interpretation. This debate is also linked to a disagreement about whether Malaysia is an Islamic or a secular state. As I suggested in the prior footnote, these debates are currently at a stalemate because of the influence of Hobbism, which prevents the parties from making sense of the rule of law as a mediating concept that disciplines political judgment so that both sides to assert their political and legal perspectives without adequately grounding these in the Constitution. See my analysis in "Malaysia's Blocked Social Contract Debate" in Andrew Harding & Amanda Whiting eds., *Law and Society in Malaysia:Pluralism, Islam, and Development* (under review).

[10] Hobbism is a form of legal positivism. In modern legal philosophy, legal positivism is related to an analytic claim about the nature of law encapsulated in the Separation Thesis, the thesis that there is no necessary connection between law and morality. However, Hobbism harks back to political positivism, a variant of legal positivism that precedes modern analytic legal positivism. For a discussion of the relationship between these different versions of legal positivism, see David Dyzenhaus, 'The Genealogy of Legal Positivism' (2004) 24:1 *Oxford Journal of Legal Studies*, p. 39.

And because order is always better than chaos, it is also presumed that it is rational for individuals to consent to the creation of such a sovereign. The central features of Hobbism, as a model of legal authority, derive from this proposed solution to the problem of disorder.

There are three main features. First, individuals within society must be able to identify something as an expression of the sovereign's will without resorting to their natural reason. Second, they must be able to identify that will as determining how they should behave. Third, individuals must be able to identify the content of the sovereign's will without having to fall back on their natural reason. This third feature translates into the requirement that legal subjects should view claims of the law as content-independent and peremptory reasons for action. Claims of legal validity are content-independent reasons for action to the extent that legal subjects are to view such claims as binding in virtue of their status as valid law and not because their content. And these claims are peremptory reasons for action in that legal subjects should treat them as displacing their natural reason.[11] The status of something as a valid law, understood as content-independent and peremptory reasons for action, is both necessary and sufficient condition for grounding the idea of legal obligation within Hobbism.

These requirements suggest a particular picture of law and legal order. On this picture, law should consist of a series of commands that meet a sources test, a test that looks to publicly accessible social facts and not to moral argument. Therefore, Hobbism privileges a manner and form requirement as a test of legal validity, that is, whether laws have issued from technical legislative procedures.

By corollary, Hobbism is hostile to a constitutional bill of rights or the idea that there could be unwritten constitutional values that govern the meaning and validity of law. The introduction would only reproduce the intractable conflicts about value that produce the problem of chaos, the very problem that Hobbism aims to resolve. Therefore, Hobbism requires that courts work as passive reporters of the sovereign's will so that judges should not read into the law values that are not explicit in legislation.

The emergent picture of law is thus as a 'top-down' instrument for projecting the judgments of the sovereign to legal subjects.[12] The law is designed to allow the unadulterated transmission of the sovereign's judgments as legal content that the legal subject should be able to identify, interpret, and obey law without relying on his or her own natural reason. Importantly, this content must be unadulterated to ensure the effective communication of the sovereign's will as artificial reason that supersedes the legal subject's natural reason. And it is top-down the perspective of legal officials is the sole perspective from which to adjudge the meaning and validity of law while the perspective of the legal subject is not systematically relevant to such judgments.[13] Again, this is because the latter's perspective is thought to be the root cause of the problem of chaos that Hobbism is intended to overcome. Therefore,

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[11] For an elaboration of this conception of legal reasons drawing from Hobbes, see H. L. A. Hart, 'Commands and Authoritative Legal Reasons' in H. L. A. Hart, *Essays on Bentham: Jurisprudence and Political Theory*, 1982, pp. 243-268.

[12] The term is taken from Lon Fuller's characterization of legal positivism as a 'top-down' or 'one-way' projection of authority from ruler to ruled, see Lon L. Fuller, *The Morality of Law*, 2nd edn, 1963, p. 192.

[13] Thus, Fuller also argues that positivist image of law implies a "managerial" model of social organization that privileges the perspective of the superior, see Fuller, *Morality of Law*, pp. 207-209.

legal officials are under no duty that is internal to their role qua legal officials to engage the perspective of legal subjects within Hobbism so Hobbism lacks the resources to make sense of the ideals of democracy and the rule of law as ideals that take seriously the legal subject's right to participate in legal decision-making processes.

Consequently, Hobbism is an inherently authoritarian conception of legal authority. If officials are under no duty to engage the perspective of legal subjects when making judgments about the meaning and validity of law, then officials are under no distinctly legal duty to account to legal subjects. And since officials enjoy a monopoly over legal coercion, Hobbism puts them in a position to dominate legal subjects because they have the capacity to arbitrarily interfere with the choices that legal subjects would otherwise be entitled to make over their salient interests without the latter being able to bring the former to account for such interference.[14] Significantly, official domination is not merely a side effect of Hobbism. Rather, the role of legal officials within the model requires that they dominate legal subjects since the latter are the source of the problem of disorder or chaos that officials are empowered to resolve; official domination is part of the solution to this problem.[15] Hence, Hobbism is not merely antithetical to democracy and the rule of law as ideals that aim to empower legal subjects. It is positively antagonistic to such ideals.

Indeed, the inherently authoritarian character of Hobbism means that it is a conception of legal authority well suited to legitimizing authoritarian rule. Its legitimizing force derives from Hobbism's central tenet that any order is better than chaos so that it does not matter what values officials determine should constitute order. As long as officials are able to ensure order, they are entitled to presume that legal subjects rationally consent to their rule even if the latter may dislike the values that officials determine constitute that order. Legal officials can invoke this presumption to legitimize the demand that legal subjects should obey the law to avert the danger of chaos.

The legitimizing power that Hobbism can provide for authoritarian rule means it is congenial to the legitimization of ethnocratic rule. Defenders of ethnocratic rule argue that the normative justification for such rule is that it allows for political stability in the face of ethnic disagreements that may result in open social conflict. This is supposed to overcome the authoritarian character of the ethnocratic political paradigm.[16] The normative justification thus offered in defence of the paradigm is precisely the normative basis to Hobbism: stability is always better than chaos regardless of the values that constitute that order. Therefore, officials can argue that an ethnocratic political program is legally legitimate if it assures political stability.

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[14] See Phillip Pettit, *Republicanism: A Theory of Freedom and Government*, 1996, pp. 52-58.

[15] For the argument that Hobbes' solution to the problem of disorder entails that legal officials dominate legal subjects, see Phillip Pettit, *Made With Words: Hobbes on Mind, Society, and Politics*, 2007, Chapter 8. But for an argument against this view, see David Dyzenhaus, 'How Hobbes Met the 'Hobbes Challenge' (2009) 72 *Modern Law Review*, pp. 408-506; see also Lars Vinx, 'Constitutional Indifferentism and Republican Freedom' (2010) 38(6) *Political Theory*, p. 1.

[16] It is worth noting that Hobbism is implicit in the normative justification offered for ethnocracy or ethnic-democracy as a device for moderating deep ethnic cleavages. It is argued that ethnocratic rule is normatively defensible even if it entails authoritarian rule because it is superior to open ethnic conflict or ethnic cleansing as a way of moderating ethnic cleavages, See Sammy Smooha, 'The model of ethnic democracy: Israel as a Jewish and democratic state' (2002) 8: 4 *Nations and Nationalism* (2002), p. 475, p. 481.

However, the inherently authoritarian character of Hobbism also suggests that it can be a catalyst for the rise of ethnocratic and authoritarian rule. If legal officials embrace it as the operative conception of legal authority in a political climate where the ethnocratic political paradigm is present but not yet ascendant, they may make decisions about what the law requires in reaction to concerns about political stability which enable the ascendance of the ethnocratic paradigm and authoritarian rule while undermining the ideals of democracy and the rule of law because Hobbism lacks the resources to serve these ideals. As shall be seen, this is precisely what has happened in Malaysia.

THE FORMATION OF THE MALAYSIAN CONSTITUTION

To appreciate why, it is necessary to start with the challenging political context that surrounded the formation of the Malaysian Constitution. This context involved deep ethnic divisions. A full account of how this context emerged would require an examination of the dynamics of British colonial rule.[17] In brief, the British adopted a mass immigration policy that opened the doors to immigrants from China and India aimed at building a labour force capable of exploiting Malaya's rich natural resources but did nothing to foster integration among the races.[18] And, as Geoffrey Wade has recently shown, the British played a significant role in encouraging a system of preferential treatment towards the Malays as having a 'special position' under the colonial legal framework aimed at legitimizing colonial control over the country, a role that lays the basis to the emergence of the ethnocratic political paradigm.[19] In this vein, it is also worth noting that the British worked with an ideology requiring a conception of legal authority expressive of Hobbism where law is used to dominate the colonial legal subject in Malaya so as to civilize the latter to enable a functioning social order to emerge.[20]

But rather than rehashing the full details of British colonialism in Malaya and how that history of colonialism implicates reliance upon a Hobbist conception of legal authority to effect colonial rule in the country, I shall start with a debate in 1946, with the creation of the Malayan Union, about the question of citizenship of non-Malays who had been brought in by the British. The debate arose when the British proposed a new Malayan Union that would give all races equal citizenship, a departure from the previous mode of colonial governance that affirmed the special position of the Malays as the recognized rulers of the country. The Malays reacted strongly against this proposal, arguing that non-Malays were mere visitors brought in by colonial masters who should not enjoy equal citizenship to the Malays. Malay resistance to this idea was also fueled by the fact that the Chinese were economically in a far superior position so there was worry that the latter would outstrip the former socially and economically, and eventually, politically. Almost instantly, UMNO was born to defend Malay interests. In turn, the Indians mobilized to form the Malayan Indian Congress ('MIC'), and the Chinese joined the Malayan Chinese Association ('MCA'). The MCA was in large part a British creation formed to divert Chinese support away from the

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[17] William Case, *Politics in Southeast Asia: Democracy or Less*, (2003), p. 102.
[18] For an account of this history, see T. N. Harper, *The End of Empire and the Making of Malaya*, 1999.
[19] See Wade, 'The Origins and Evolution of Ethnocracy in Malaysia', pp. 1-17.
[20] See Collin Abraham, *The Naked Social Order: The Roots of Racial Polarization in Malaysia* (2004), pp. 19-79.

Malayan Communist Party ('MCP'), a party perceived to be largely allied with Chinese interests. The MCP was engaged in guerilla-warfare with the British and posed a sufficient threat to lead the British to declare a state of emergency. This was a reminder that the stakes surrounding the debate over citizenship were high and posed a real threat to the security and stability of the country.

However, British pressure on political leaders to reach a compromise and the desire by the parties themselves to secure independence meant that UMNO, the MIC, and the MCA were able to cooperate to create an Alliance Party ('the Alliance') to compete in elections for seats in a newly constituted Federal legislative council in 1953. Campaigning under the theme "Independence in Four Years," the Alliance emerged victorious in the elections even though the relationship between the Alliance members resembled a mere *modus vivendi*; there was no firm commitment to resolve the vexing question of equality of citizenship between all races. Still, the Alliance's electoral win signaled its resolve to gain independence.

Recognizing this resolve, a constitutional commission, headed by the British Law Lord, Lord Reid, was created to design the Constitution. The Alliance articulated the mandate for the Reid Commission in a memorandum. The Alliance had no trouble setting out the intended form of government. It chose a Westminster model of government according to which there would be would be a bicameral legislature made up of an elected Lower House, the *Dewan Rakyat*, and an appointed Upper House of Senate, the *Dewan Negara*. The Prime Minister and the Cabinet would be appointed from majority party in the *Dewan Rakyat*.[21] The memorandum further created the office of the Yang Di-Pertuan Agong or King, as the constitutional head of government thus envisaging that each of the eleven Malay Sultans would take turns being *Agong*. Importantly, the Alliance set out an extensive bill of rights, and designated provisions affirming the principle of the separation of powers, especially the need for need for judicial independence.[22] The memorandum thus seemed to reflect a commitment by elites to the rule of law and democracy.

However, this commitment was somewhat at odds with what came to be an ethnocratic component within the Constitution. This component arose because the question of citizenship remained heavily contested. But due to British pressure to find a resolution, the parties settled on a compromise position. Consequently, the memorandum continued to recognize a special position for the Malays as Bumiputera or 'sons of the soil.' This would signify that the Malays would be beneficiaries of an affirmative action program, a provision that would later come to be embodied in Article 153 of the Constitution. Article 153 would give the Malays certain exclusive land rights and a quota of positions in the civil service and in the military. The memorandum also recognized Malay as the official language and Islam as the official religion. In return, all non-Malays born in Malaya would receive citizenship but others would be subject to an eight-year residency requirement.

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[21] For an account of the adoption of the Westminster model in the Commonwealth, see S. A. de Smith, *The New Commonwealth and its Constitutions*, 1964. For a more recent analysis of this subject, see Andrew Harding, 'The "Westminster Model" Constitution Overseas: Transplantation, Adaptation, and Development in Commonwealth States' (2004) 4:2 *Oxford University Commonwealth Law Journal*, p. 143.

[22] See Joseph Fernando, *The Making of the Malayan Constitution: MBRAS Monograph No. 31*, 2002, p. 69.

The Reid Commission adopted virtually all of the Alliance's proposals on the structure of government, citizenship, and language. But it was uncomfortable with the ostensibly ethnocratic aspects of the memorandum expressed in the proposed Article 153. It felt that these aspects were at odds with the aspiration towards democracy and the rule of law. However, realizing that these provisions would have to be swallowed if the Constitutional project was to proceed in a timely manner, it tried to put in place safeguards to control "overbearing presence of communalism." Apart from inserting a 15-year time limit on the provision recognizing the special position of the Malays, the Commission sought to bolster the bill of rights.[23] It included a constitutional supremacy clause to ensure all exercises of political power would have to adhere to constitutional norms affirming civil liberties such as the freedom of speech, assembly, and association and the principle of equality before law. Finally, the Reid Commission followed the American and the Indian Constitutions by inserting an explicit provision protecting the rule of law and the principles of natural justice. This was intended to spotlight the centrality of judicial review as a check on government. Their clear intent was to protect certain key interests of the legal subject from political interference by ensuring that citizens would not be vulnerable to domination under a government committed to an ethnocratic political paradigm.[24]

However, UMNO resisted the Reid Commission's efforts. It argued that the changes to the proposed constitutional document did not adequately protect Malay interests. The 15-year sunset-clause was replaced with a more ambiguous clause providing for review from "time to time" and leaving it to the *Agong* to protect the "legitimate interests" of non-Malays. In addition, the Reid Commission's proposal to include an explicit protection of the principles of natural justice was rejected and replaced with a curiously worded Article 4(3), declaring that there should be no challenge against a legislative act "on grounds that it makes provisions with respect to any matter…to which Parliament…has no power…." This seemed to undercut the power of the courts to review the constitutionality of legislation completely, leading Lord Reid to remark that the changed version of the document, especially the new Article 4(3), was "deficient" because it granted too much power to the central government.[25] But with time running out in terms of the broader timetable for independence, these deficiencies were simply papered-over. Thus, on 31st August 1957, the country ratified its new supreme Constitution and begun it life as an independent nation as the Federation of Malaya.

Here it is instructive to note that the leader of UMNO, Tunku Abdul Rahman, who also stood to be Malaysia's first Prime Minister, nevertheless endorsed the document as suitable to the Malaysian context. He said that the document allowed sufficient 'flexibility' that would enable a strong central government to operate 'unimpeded by too much legal propriety' within the challenging political context that was to face the country.[26] This endorsement appeared to presuppose Hobbism as the operative conception of legal authority that should inform the interpretation of the Constitution. As leader of UMNO, the

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[23] Ibid., p.132.

[24] Ibid., p.133.

[25] Reid described the new Article 4(3) as "at best maladroit." See Fernando, *The Making of the Malayan Constitution*, p. 182.

[26] Lim Hong Hai, 'The Eve of Independence Constitutional Debate on Fundamental Liberties and Judicial Review: a Window on Elite Views and Constitutional Government in Malaysia' (1982) 9 *Journal of Malaysian and Comparative Law*, p. 19, p. 27.

Tunku had also been responsible for the changes criticized by Reid, changes that sought to weaken constitutional constraints on government. And, as the Tunku's remarks suggest, he favoured a conception of government free of too many legal constraints. These remarks allude to the difficult political context that involved questions about political stability, precisely the concern that animates Hobbism.

Strictly speaking, however, his remarks were disingenuous from the perspective of Hobbism. He speaks of a government 'unimpeded by too much legal propriety,' which suggests that the government might face some legal limits on its power. But as Andrew Harding has observed, the Tunku "appears not to have realized where his arguments might lead." Harding's observation is about the all too "executive-minded" thinking behind the Constitution.[27] Here, it should be noted that the Tunku was known to be a democrat. And even though he was the ruler of UMNO, an avowedly ethnocratic party, the Tunku was a moderate ethnocrat willing to cooperate with other ethnic groups. However, Harding's comment points to a mismatch between the Tunku's political conviction and his juridical ones by suggesting that the influence of Hobbism in his thinking might work to outstrip his democratic commitments so that the ruling government might interpret the Constitution in a way that does not entail any meaningful legal limits on its power.

Indeed, in an early review of the Constitution, Harry Groves, an expert on comparative constitutional law argued that the Constitution was poorly designed because it failed to clarify how constitutional constraints on state power might be enforced. He argued that the document lacked any meaningful basis to judicial review as a curb on legislative and executive power. Noting the change to Article 4(3), Groves argued that it was unclear precisely how citizens could challenge legislation as unconstitutional through judicial review.[28] He felt that Article 4(3) seemed to qualify the Constitution's claim to supremacy by preventing any challenge against a legislative act that went beyond Parliament's powers under the Constitution. This cast the role of the courts in "considerable doubt," given that the provision appeared to undermine the power of judges to review official acts for their constitutionality.[29] Groves also registered the worry that the Constitution's provisions for emergency powers permitted the government to suspend almost totally the bill of rights and to remove any limits to legislative and executive power.[30] These provisions on a state of emergency appeared to remove any role for judicial review by giving Parliament the power to enact special anti-subversion legislation that was "inconsistent" with fundamental rights. Again, Groves' arguments capture the underlying influence of Hobbism in the design of the Constitution as explaining the ambiguous status of judicial review. Judicial review is antithetical to Hobbism because it an obstacle to the smooth transmission of executive judgments about what the law requires. Equally, the influence of Hobbism on constitutional design also explains the inclusion of vast emergency powers that worked to give Parliament a legally unlimited power in a state of emergency.

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[27] Andrew Harding, Law, *Government and the Constitution in Malaysia*, 1996, p. 38.

[28] Harry E. Groves, 'Fundamental Liberties in the Constitution of the Federation of Malaya —A Comparative Study' *Howard Law Journal* (1959), p. 190, p. 213.

[29] Ibid., p. 214.

[30] Article 149 through Article 151 though consider Article 150 (5), in: "…while a Proclamation of Emergency is in force, Parliament, may, notwithstanding anything in this Constitution, make laws with respect to any matter, if it appears that the law is required by reason of the Emergency." Article 150(6) makes any promulgation under Article 150 non-justiciable "on the ground of inconsistency with any provision of this Constitution."

Soon after the Constitution came into force, it became apparent that Hobbism had infiltrated the judiciary, especially in relation to the power of Parliament during an emergency. The judges held that Parliament could claim to uphold the Constitution simply by following manner and form requirements for legislation during an emergency even if the content of a law might appear to infringe constitutional safeguards of rights. In these cases, the precise issue was whether Parliament could delegate the power to legislate during an emergency. The judges upheld this view and argued that the courts had no legal basis with which to control Parliament.[31] By doing so, the judges presupposed Hobbism's requirement that law should be valid so long as it emanates from technical procedures for legislation, quite apart from its content. By corollary, the judges swept aside the perspective of the legal subject as irrelevant to judgments of legal validity. Verily, their decision was especially Hobbist because it allowed for Parliament to act as a legally uncontrolled sovereign during an emergency where there is thought to be a threat to the political order.

These decisions led another constitutional commentator, S. Jayakumar, to criticize the courts.[32] He attacked the judges for failing to appreciate that the entire point of a written constitution was to put in place a system of "constitutional supremacy" by setting out "limitations and restrictions" on governmental powers.[33] In this regard, he thought that the judicial failure to uphold the idea of constitutional supremacy was, in part, the result of poor constitutional design as he argued that the Constitution's bill of rights granted Parliament too many escape hatches from the constitutional duty to respect rights especially in the case of a state of emergency.[34] He observed, "Parliament's power to legislate in this situation [state of emergency] reaches an unprecedented zenith."[35] However, his major point was that the courts had misinterpreted the law.[36] In Jayakumar's view, constitutional interpretation should not take place in a vacuum and that careful consideration of Article 150, which governs Parliament's powers in an emergency, stipulates that these are "special" powers, marking that they were exceptional from the perspective of legality and had to be tightly controlled. So the judges had erred in giving Parliament an unlimited power of delegation. Jayakumar thought that the courts were wrong to abdicate its function in declaring itself unable to control Parliament in a state of emergency. In his view, "…some limits to delegation must be considered inherent in a system where governmental powers are sought to be limited by a 'supreme' written constitution and where judicial review of unconstitutional governmental actions forms an integral basis for the maintenance of the rule of law."[37] Jayakumar then warned that unless judges were to read-in these values, an

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[31] *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli* [1966] 2 M L J 187; *Eng Keock Cheng v. Public Prosecutor* [1966] 1 M L J 18.

[32] S. Jayakumar, "Constitutional Limitations on Legislative Power in Malaysia" (1967) 9:1 *Malaya Law Review*, p.96.

[33] Ibid., p. 97.

[34] For example, Jayakumar drew a comparison between the Constitution's protection of the right to life, liberty, and due process and the equivalent protection under the Indian Constitution. Article 5 states, "no person's life or liberty shall be deprived save in accordance with law" whereas the Indian equivalent bars deprivation without "reasonable procedure established by law."

[35] Ibid., p.111.

[36] See *Eng Keock Cheng*, p. 20.

[37] See Jayakumar, 'Constitutional Limitations', p. 114.

authoritarian government might one day usurp the Constitution, using it, ironically, as the basis for legitimizing arbitrary power rather than affirming the rule of law.[38]

The tenor of Jayakumar's arguments suggest the more general point that if officials, like judges, continue to be influenced by a flawed conception of legal authority that gives Parliament a legally uncontrolled power, then there is a risk that officials will create a situation where an authoritarian government could use the law itself and the Constitution as both an instrument and as a cloak for arbitrary power. This would prove to be a prescient warning as a confluence of ethnic conflict, political instability, and a state of emergency would soon allow Hobbism's influence on official thinking to work as a catalyst for the emergence of authoritarian rule that the government could exploit to legitimize such rule.

THE 'MAY 13' RIOTS

In early years after independence, politics in Malaya was relatively open and democratic.[39] Indeed, in 1963, the federation was even expanded to include Sabah and Sarawak (and briefly, Singapore) thus forming Malaysia. However, the democratic system broke down when widespread ethnic violence and rioting erupted in the wake of the 1969 general election. In what is now known as the "May 13 riots," Malays and Chinese clashed when it became evident that the ruling UMNO party stood to lose a substantial number of seats in Parliament at the hands of a Chinese dominated opposition party, the Democratic Action Party ("DAP"). At the center of the controversy appeared to be issue of racial sensitivities. As Goh Chong Teik observes, "[t]he unwritten law regarding communal issues was violated by both the Alliance and opposition parties when they indulged in open public and heated debate over such [the issue of Malay rights and citizenship] subjects." [40] The riots were thus an explosion of Malay anger.[41]

In reaction to the breakdown in social order, the Tunku declared a state of emergency and suspended the election. Ordinary modes of government were held in abeyance for a period of nearly two years. Instead, control of the country was put in the hands of an ad hoc National Operations Council ('NOC'). However, the Tunku did not head the NOC, as he had fallen out of favour within UMNO. Instead, it was headed by the then Deputy Prime Minister, Tun Abdul Razak. Unlike the Tunku, who was a moderate ethnocrat who was willing to accommodate the interests of non-Malays and to resist the demands of the hard-line ethnocrats within UMNO, Razak was far more sympathetic to these so-called

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[38] Ibid., p. 117.

[39] Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, 1977, p 1, 150-152.

[40] Goh Chong Teik, *The May 13th Incident and Democracy in Malaysia*, 1971), p. 24.

[41] It should be noted that this view of the events is controversial. A more recent account of the history behind the May 13 riots makes the compelling case that the riots were orchestrated by UMNO ultras in an attempt to overthrow the Tunku and his followers who were thought to be too accommodating to non-Malays, especially the Chinese. This new account is probably more correct since the official account operates as a kind of dogma that the ruling government consistently utilizes to justify authoritarian controls over the citizenry. However, I do not deal with this more recently articulated view of the causes behind the May 13 riots in detail because I do not think it makes a material difference to my argument about the basic dynamics that have produced authoritarian and ethnocratic rule, which implicate the Hobbist model of law. For this account, see Kua Kia Soong, *May 13: Declassified Documents on the Malaysian Riots of 1969*, 2007.

'ultras' who felt that the current constitutional arrangements "conceded too much to the Chinese." [42] He had sole authority to exercise the powers of government.[43]

Razak's leadership of the NOC and his eventual succession to the Tunku as Prime Minister after the emergency ended meant that an opportunity arose for the pursuit of a more robust ethnocratic program. But this would require a much stronger central government and a much-weakened Parliament that could not effectively oppose such a program. In short, it would require an authoritarian power capable of serving the ethnocratic cause. Undoubtedly, Parliament's effectiveness had been undermined during the emergency when the NOC was in complete control. However, the status of the legislature as a democratic institution was significantly damaged when ordinary modes of government were eventually reconvened after the Alliance could be certain to regain a two-thirds majority upon the reconvening of the suspended elections. Having done so, it amended the Constitution to limit civil and political rights on the grounds that the riots had been caused by open disagreement among citizens on issues of ethnicity. Speech on certain 'sensitive' issues pertaining to the questioning of the Malay special position under Article 153 of the Constitution was banned as an explicit exception to the freedom of speech.[44] In addition, sedition laws were strengthened to fortify this ban so that it would even be sedition to speak about these matters in Parliament. Finally, members of the political Opposition were also subject to detention without trial under the Internal Security Act 1960 ('ISA'), which was amended to allow detention of those who might threaten "inter-racial harmony."

Having altered the legal landscape in this way, the Razak-led government was able to turn Parliament into a mere rubber-stamp for executive policy. Politically, this meant that the executive was now in a position to act as a legally unlimited sovereign that could pursue a more aggressive ethnocratic program by firmly aligning its will to the interests of the Malay ethnos. Emerging victorious from the new elections, the coalition led by Razak, appointed a new Cabinet that reflected the shift in the balance of powers within the coalition with only one non-Malay Minister. In 1971, the Malay dominated government unfolded a New Economic Policy ("NEP") designed to address socio-economic inequality between the Malays and Chinese on the grounds that such inequality was to blame for the May 13 riots. The NEP was thought to further the aims of Article 153 so that it would be against the law to question the NEP in light of the recent amendments making such questioning unlawful. Therefore, the changes to the legal landscape shaped by Hobbist assumptions about legal authority allowed the government to pursue a more robust ethnocratic stance.

Harold Couch, an analyst of Malaysian politics, argues that these changes signaled a political shift towards authoritarian politics and a decisive break from democratic politics.[45] However, there was no juridical shift because the changes to the legal landscape simply

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[42] Barry Wain, *Malaysian Maverick: Mahathir Mohamad in Turbulent Times*, 2009, p. 26.

[43] Cyrus V. Das, 'The May 13th Riots and Emergency Rule' in Andrew Harding & H. P. Lee eds, *Constitutional Landmarks in Malaysia: The First 50 Years 1957-2007*, (2007), p. 103, pp. 110-111.

[44] An amendment to the Constitution's protection of free speech banned speech on certain "sensitive subjects" related *inter alia* to Malay rights. The Malaysian Courts have interpreted to cover speech in Parliament, see *Public Prosecutor v. Mark Koding* [1983] 1 MLJ 111. For details of the various changes to the law, see Andrew Harding, 'The Rukunegara Amendments of 1971' in Andrew Harding & H. P. Lee eds, *Constitutional Landmarks in Malaysia: The First 50 Years 1957-2007*, (2007), p. 115, pp. 120-7.

[45] Harold Crouch, *Government and Society in Malaysia*, 1996, p. 98.

reflected the ongoing influence of Hobbism as the principal lens through which officials tended to view legal authority and served to make this influence explicit. Throughout, these changes were justified on the grounds that open ethnic disagreement had caused the riots. The character of this justification reflects precisely the political basis to Hobbism in the idea that authoritarian controls by government over the citizenry who are sources of chaos. As noted earlier, this way of thinking about how law should respond to the problem of chaos was implicit in the Tunku's views about the attractiveness of the Malaysian Constitution and his belief that it allowed the government to respond to the challenging political context without facing 'too much legal propriety.' In this connection, the changes to the legal landscape after the May 13th riots merely bring to the surface these latent Hobbist assumptions. The changes wrought to the Constitution after the riots seek to enable the government to operate as a legally unlimited sovereign capable of imposing its will through authoritarian means upon the populace who were, in turn, constructed as passive recipients of legal authority that could not assert their fundamental rights. They are faithful to Hobbism's requirements for a legal order where there are no obstacles to the effective imposition of the sovereign's will upon legal subjects as a source of artificial reason to be obeyed to the exclusion of their own natural reason except that in the Malaysian context, the artificial reason of the sovereign is yoked to an ethnocratic political program. However, the Hobbist justification for this program remains in the idea that ethnocratic rule would be a superior alternative to open ethnic conflict so that such rule is justified on the grounds that it averts the danger of chaos. In this way, even those who oppose the ethnocratic political program can be expected to accept that program as legally legitimate.

Perhaps the May 13 riots had somewhat ironically opened the door to a measure of candour by government about its desire to defend an ethnocratic political stance, a stance that would require the government to openly endorse an authoritarian Hobbist view of legal authority as an instrument of domination over legal subjects. If so, the legal changes noted above can be seen as the beginning of an attempt to recalibrate the legal framework to make it truer to the key assumptions of Hobbism, a project that Dr. Mahathir aggressively pursued during his tenure as Prime Minister.

THE MAHATHIR ERA

Dr. Mahathir came to power as Prime Minister in 1981 with a reputation as an ethnocrat and Malay populist. He had developed this reputation in the fallout of the May 13 riots when he was a practicing medical doctor and fledgling politician within UMNO. After the riots, he wrote a letter to the Tunku blaming him for the riots and asking for his resignation. He accused the Prime Minister of failing to understand the plight of the Malays and failing the Malay cause. Because Dr. Mahathir's views seemed antithetical to the efforts by political parties to achieve a measure of social unity as a basis for social stability during the period of political fragility following the riots, the Tunku expelled him from UMNO. Then, during his expulsion, Dr. Mahathir published *The Malay Dilemma*, a political tract that expanded on why he thought the government had failed to sufficiently further Malay interests.[46] He argued that

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[46] Mahathir bin Mohamad, *The Malay Dilemma*, 1970. The book is perhaps most notable for the argument that the government should assume a paternalistic role in protecting Malay interests because there are "hereditary"

unless more was done to boost the socio-economic status of the Malays, they risked being swamped by immigrant Chinese and Indians much like the "Red Indians" in America.[47] He argued for ethnocratic rule and a program of affirmative action that would pervade all aspects of the economy in both the public and the private sector. As Khoo Boo Teik has observed, "[s]ince 1969, no one in Malaysia has arguably been so totally identified with the Malay cause as has Mahathir." [48]

It is vital to note, however, that even though he thought that the government should act in the name of the Malays, Dr. Mahathir was not a democrat. He did not think that it should actually represent what the Malays might or might not actually think or desire. Indeed, as Prime Minister, Dr. Mahathir wanted to change the Malay mindset, which he thought contributed to their relative socio-economic backwardness. He consistently argued that the Malays should change how they think if they wished to be competitive and to achieve progress.[49] Dr. Mahathir embraced a paternalistic and authoritarian vision of government and openly advocated the idea of benevolent dictatorship. In his view, there must be a 'strong hand' to keep citizens under control and to prevent the danger of 'chaos' in Malaysia's ethnically divided society because citizens lacked sufficient maturity to engage in democratic self-governance in virtue of their tendency to engage in destabilizing social conflict. [50]

In expressing this belief, Dr. Mahathir seemed to articulate a view of political rule that required Hobbism for its realization. Indeed, he was an arch-Hobbist because he took a very dim view of institutional forms associated with the separation of powers and checks and balances as these forms only worked to impede effective governance by purporting to impose legal limits on governmental power.[51] Earlier Prime Ministers, like the Tunku or even Razak, might have been latent Hobbists. The Tunku, for instance, unintentionally paved the way for the authoritarian use of law. And Razak used the law as an authoritarian tool to resolve a genuine problem of political instability. Yet, both were not openly hostile to democratic forms. Dr. Mahathir, on the other hand, openly rejected these forms. This meant that he was committed to removing obstacles to the operation of law as an instrument for smoothly transmitting the will of the executive-dominated legislature.

Here, the courts came in for his attention as an obstacle requiring removal. The occasion for doing so arose quite soon after Dr. Mahathir came to power and was fuelled by a congruence of high stakes politics and the Prime Minister's general irritation with judicial review. Soon after taking office, his government was rocked by accusations of scandal as well as an economic depression. In addition, there was a significant split of party loyalty within UMNO itself creating for the first time a contest for party leadership. This debacle struck right at the heart of Mahathir's Prime Ministership since by convention the leader of UMNO is also Prime Minister. Although he tried to protect his position against these pressures, the

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factors that contribute to the inherent inability of the Malay race to compete in the domain of commerce. For a response, see M. Bakri Musa, *The Malay Dilemma Revisited: Race Dynamics in Modern Malaysia*, 1999.

[47] Ibid., p. 70.

[48] Khoo Boo Teik, *Paradoxes of Mahathirism: An Intellectual Biography of Mahathir Mohamad*, 1995, p. 17.

[49] See Dr. Mahathir Mohamad, *Malays Forget Easily*, 2001.

[50] Bernama Press, 'Benevolent Dictator the Solution in Iraq, Dr. Mahathir says' April 12, 2006 at http://www.puterismusings.net/2006/04/benevolent-dictator-solution.html.

[51] See Khoo, *Paradoxes of Mahathirism*, Chapter 6 and 7.

courts proved a barrier to his efforts as judges struck down several of the Prime Minister's decisions that were taken to protect his interests. In one instance, he tried to limit the fallout from press exposure of scandals by issuing an order to deport an American journalist writing for the *Asian Wall Street Journal*.[52] However, the courts invalidated the decision on the ground that the government had failed to respect the principles of natural justice. In another case, the judiciary upheld a challenge against the government's decision to refuse the grant of a publishing permit for an opposition newsletter in the Malay language.[53] The courts also granted *locus standi* to the leader of the opposition for a motion seeking an injunction to stop the award of a lucrative tender because of an alleged conflict of interest favouring the Prime Minister.[54] Then, the judiciary asserted their right to engage judicial review under the Constitution, and struck down legislation granting the Prosecutor very wide powers to transfer cases already in progress before lower courts.[55] As Khoo puts it, parties challenging Dr. Mahathir seemed to find success in courts as an 'independent' forum.[56]

Importantly, this measure of judicial activism was a departure from the court's generally conservative trend towards judicial review. Judges had been deferential to Parliament and the executive in the past. As Crouch points out, 'judges shared the broad conservative outlook of the rest of the Malay elite…. And rarely showed interest in reinterpreting the law in ways that might restrict the prerogatives of the government and its bureaucracy.' [57] It is also likely that judges thought that the government could be trusted to exercise a measure of political restraint and decency, making it unnecessary for strict judicial review of legislative and administrative action. This approach to the judicial role is explicable on the grounds that the judges had internalized a conception of their role grounded in Hobbism and were wiling to give the government leeway to ensure political stability so judges did not take a strong approach to judicial review. However, Dr. Mahathir was different from previous Prime Ministers because he was willing to engage in authoritarian measures even when there was no apparent threat to political stability.[58] Rather, his authoritarianism seemed to flow directly from political self-interest. Thus, by the mid-1980s, the courts indicated a change in direction vis-à-vis judicial review. In a lecture delivered in

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[52] *J. P. Berthelsen v. Director of Immigration* [1987] 1 MLJ 134.

[53] *Persatuan Aliran Kesedaran Negara v. Minister for Home Affairs* [1988]1 MLJ 440.

[54] *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12.

[55] *Dato Yap Peng v. Public Prosecutor* [1987] 2 MLJ 311.

[56] See Khoo, *Paradoxes of Mahathirism*, p. 284.

[57] Crouch, *Government and Society in Malaysia*, p.138.

[58] In fact, Dr. Mahathir had allowed racial politics to escalate so that he could plausibly manufacture the claim that authoritarian measures against his critics were necessary to avert political instability. Thus, in late 1987, he used the ISA against them, detaining over 100 people, including some members of his own political party. By doing so, he played the role of a legally unlimited sovereign to prevent the danger of chaos in the true fashion of Hobbism. In this way, the ISA proved to be a convenient tool of political control over critics and the Opposition. Therefore, it is plausible to conjecture that the Prime Minister would have had good strategic reasons for wanting to control the courts to ensure that they would not overturn these decisions through judicial review. Indeed, the courts had sought to find ways to do so. However, I do not emphasize this point in the paper because the major reason for his attempt to decisively smash judicial independence seemed to be that his political survival was on the line. For my analysis of the judicial reaction to the Prime Minister's use of the ISA, see R. Rueban Balasubramaniam, 'The Karam Singh Case' in Andrew Harding & H. P. Lee eds, *Constitutional Landmarks in Malaysia: The First 50 Years 1957-2007*, (2007), p. 88, pp., 94-6.

London in 1988, the then head of the judiciary, Tun Salleh Abas, confirmed that Malaysian Courts had wanted to affirm their commitment to the rule of law.[59]

Therefore, one might understand Dr. Mahathir's frustration with the courts as a reaction to the judges' unwillingness to stick to a conception of the judicial role faithful to Hobbism, where judges would be passive reporters of legislative will. Now judges were willing to interpret the law by reference to written and unwritten constitutional values and to strike down legislative and executive decisions that could not be interpreted to adhere to these values. Thus, he attacked the judiciary. This stance is nicely captured in an interview with Dr. Mahathir published in *Time Magazine* rather ironically entitled 'I know how the people feel,' where he argued:

> The judiciary says [to us], "Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation." If we disagree, the Courts will say, "We will interpret your disagreement." If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to interpret it our way. If we find out that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish."[60]

As H. P. Lee points out, Dr. Mahathir's remarks displayed a weak grasp of the rule of law. In Lee's words, '[i]n many countries committed to the rule of law curial constraints imposed upon the exercise of ministerial powers are commonplace' so that governments do not 'rail' against the judiciary. [61] Rather, organs of government are cooperative partners in an overall rule-of-law project where the legislative and executive branches recognize that judges play a crucial role by indicating the extent to which the legislature or executive has properly complied with the rule of law.[62] They view judicial review as a call for self-correction to ensure that law and policy is properly justified by reference to appropriate rule-of-law values, especially if there is a supreme written constitution that embodies these values. Alternatively, the government must openly declare an intention to depart from the rule of law and bear the high political costs of doing so.

But Dr. Mahathir did not see judges as partners in a rule-of-law project. As an arch-Hobbist, he felt that judges are subordinate to the legislature and must refrain from interpreting the law in a way that either dilutes or blocks the express reasons that Parliament had in mind in passing that law. They must refrain even if Parliament's intention in passing a law is to disserve the fundamental rights of legal subjects enshrined by the Constitution. This meant that when judges sought to remind him of his role to uphold the rule of law, the

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[59] See Tun Salleh Abas, "The Role of the Independent Judiciary" (The Sir John Foster Galaway Memorial Lecture delivered at University College London, 4th November 1988. See also Tun Salleh Abas & Das K., *May Day for Justice*, 1989.

[60] "I Know How the People Feel," *Time Magazine*, 24 November, 1986, 18 cited by H. P. Lee, 'A Fragile Bastion Under Siege—The 1988 Convulsion in the Malaysian Judiciary' (1989-1990) 17 *Melbourne University Law Review*, p. 386, p. 390.

[61] Ibid., 389.

[62] See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, 2006, p. 147.

Prime Minister did not see this as an occasion to self-correct. Nor did he see it as requiring that he expressly disavow the rule of law. Rather, following Hobbism, Dr. Mahathir's claim about protecting the legislative mandate of Parliament is best understood as expressing the idea that legislation is legally legitimate merely because it issues from manner and form requirements for legislation. Here, it is important to keep in mind that since Dr. Mahathir's executive dominated Parliament, his lament about losing the power of legislation was not really a lament about the loss of a democratic power to legislate. Rather, it is about the loss of the government's power of effective rule, that is, the government's ability to articulate and impose a political program that it claimed to serve the ethnocratic program, which in turn is assumed to further the goal of political stability. Hence, for Dr. Mahathir, compliance with the rule of law had nothing to do with upholding any values beyond these goals. From his point of view, any legislation that serves these goals is legally legitimate even if the legislation infringes the constitutional rights of legal subjects. Dr. Mahathir's Hobbism thus allowed him to claim legal legitimacy for authoritarian actions.

Perhaps sensing that this was an unpalatable understanding of the rule of law to adopt when there was no genuine problem of political instability in issue, the Lord President, Tun Salleh, took the unusual step of giving the Prime Minister a lesson on the separation of powers and judicial review.[63] He took this opportunity when the leader of the Opposition filed a motion in court for contempt of court against Dr. Mahathir for his remarks. The action was dismissed but not before Tun Salleh suggested that the Prime Minister laboured from a 'misconception of the role of the courts.' [64] At this stage, it had become clear that the battle between the Prime Minister and the courts was not purely political. It was also juridical as judges sought to dislodge the Prime Minister's understanding of legal authority and the rule of law as deeply mistaken. Therefore, their battle was against the overarching influence of Hobbism behind that understanding.

However, Dr. Mahathir soon moved to take a decisive blow against the judiciary. The quarrelling within UMNO reached the courts when a dispute broke out over the result of an internal party election. Much to the Prime Minister's dismay, the High Court held that UMNO was not a lawful association, as one of its branches had not properly registered under the Societies Act 1966, rendering the whole organization illegal.[65] This decision went on appeal before the Supreme Court, which would have worried Dr. Mahathir because of his ongoing conflict with the judges.

Indeed, by this point, the judges were equally worried about this conflict. Tun Salleh wrote a private letter to the *Agong* registering the judiciary's collective concerns about the Prime Minister's diatribe against the judges. In the letter, he registered that this diatribe was not only in violation of the Constitution's protections of judicial independence; it risked bringing the courts into disrepute.

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[63] Tun Salleh seemed willing to revert to Hobbism when national security was in issue because he would defer to the executive in its use of the power to detain without trial under the ISA on grounds that national security was in issue. See Rueban Balasubramaniam, 'The Karam Singh Case', p. 95.

[64] *Lim Kit Siang v. Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383.

[65] *Mohamed Noor bin Othman v. Mohamed Yusof Jaafar* [1988] 2 MLJ 129. For a detailed analysis of the case, see A. J. Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 *International Comparative Law Quarterly*, p. 57.

Claiming that the *Agong*, had allegedly found the letter objectionable and complained to the Prime Minister. Dr. Mahathir summoned Tun Salleh to his office and asked him to resign. Tun Salleh refused. This set in motion constitutional proceedings to remove the judge on grounds of 'misconduct' under Article 125.[66] In the midst of grave doubts about the impartiality of the proceedings, Tun Salleh and two other judges of the Supreme Court were removed.[67] Dr. Mahathir's effort to control the judges seemed to work as the Supreme Court overturned the lower court's decision rendering UMNO unlawful.[68]

However, this was not all. Parliament amended the Constitution and deleted the term 'judicial power' from Article 121.[69] Prior to the amendment, Article 121 stated that the 'judicial power of the Federation shall be vested into High Courts of co-ordinate jurisdiction.' Post-amendment, the Article states: 'There shall be two High Courts of co-ordinate jurisdiction … and shall have such jurisdiction and powers as may be conferred by or under federal law.' Since the Constitution defines 'federal law' as including 'any Act of Parliament,' the intention behind the amendment is clear. As Andrew Harding points out, the judicial power amendment aimed to restrict "the power of the judiciary to introduce into statute law and the Constitution concepts which do not expressly appear in them."[70] The purpose of the amendment is thus to remove the courts as a meaningful obstacle to the smooth transmission of legislative content, the meaning and validity of which are to be solely determined by the executive-controlled Parliament.

This amendment is nothing less than an attempt to systematize and entrench Hobbism within the Constitution. Practically, the judicial power amendment has allowed government lawyers to rely on legislative privative clauses that purport to limit or ban judicial review thus allowing the government to decide precisely when it would be accountable to legal subjects for interferences with constitutional rights. They try to ground the constitutional basis of these clauses in the judicial power amendment. Therefore, the government's intention behind the amendment manifests Dr. Mahathir's stance as an arch-Hobbist because the aim is to prevent the courts, and by implication, the constitutional bill of rights, from working as a meaningful constraint on political power. In keeping with Hobbism, this would allow Parliament to exclude the relevance of the legal subject's perspective when it comes to judgments about the meaning and validity of law. And this allows government to practice selective-accountability in being able to select when it will be legally accountable to legal subjects for its actions. Consequently, the judicial power amendment operationalizes the authoritarian character of Hobbism by paving the way for the government to dominate legal subjects.

[66] For an excellent account of the events that led to the dismissal of the judges, see Lee, 'Fragile Bastion Under Siege'.
[67] For a riveting account by one of the Supreme Court judges involved in the Tun Salleh affair, see Datuk George Seah, "The Hidden Story", The Malaysian Bar (26th April, 2006) online: <http://www.malaysianbar.org.my/index.php?option=com_content&task=view&id=1332&Itemid=27>
[68] *Mohamed Noor bin Othman v. Haji Mohamed Ismail* [1988] 3 MLJ 82.
[69] The amendment also clarified Islamic or *Syariah* Courts would retain separate jurisdiction from secular Courts, but I do not deal with this aspect of the amendment.
[70] See Andrew Harding, *Law, Government and the Constitution in Malaysia*, p. 134.

CONCLUSION

In this paper, I have argued that there is a significant juridical root to the problem of authoritarian rule in Malaysia. That root is Hobbism, an authoritarian conception of legal authority as a solution to the problem of political instability. I have shown its influence by focusing on three pivotal events in Malaysia's legal and political history: a) the history surrounding design and interpretation of the Malaysian Constitution by officials; b) in the changes to the legal landscape after the May 13 racial riots, and c) the efforts of Dr. Mahathir Mohammed, an arch-Hobbist who sought to give Hobbism an explicit basis in the Constitution itself. The analysis aims to provide a more nuanced picture of the factors that contribute to the problem of authoritarianism in Malaysia and to suggest that these factors are not purely political; they also have a basis in how officials conceive of legal authority. Indeed, the analysis suggests that the latter is perhaps the weightier factor because the grip of Hobbism renders officials unable to serve the ideals of democracy and the rule of law even if they wield politically good intentions to do so. Gripped by Hobbism, officials can be led down a path towards authoritarianism despite their good intentions because Hobbism is a conception of legal authority that lacks the resources with which to make sense of the ideals of democracy and the rule of law. Of course, this logic will be something that authoritarian officials can exploit if they explicitly wish to pursue an authoritarian political agenda. My argument shows that the influence of Hobbism has worked in both ways to produce the problem of authoritarianism in Malaysia. It has subverted well-minded officials from affirming the ideals of democracy and the rule of law while allowing authoritarian politicians to exploit Hobbism to serve their authoritarian aims. I fear that Hobbism is so well entrenched in the legal and political culture that Malaysian law and politics will not easily transition to more meaningfully express a commitment to serve the ideals of democracy and the rule of law. Part of the problem is that those who desire to engage in such reform believe that they need to overcome the problem of authoritarianism as something that issues purely from bad politics; they are not mindful of the juridical dimension to this problem. The influence is likely to be enduring to the extent that it is a tacit pattern of thought about legal authority that remains in the background that nevertheless exerts a profound influence over how officials exercise political judgment.