TEXT:

Introduction

In the precursor to this article n1 I analysed the development of the right to livelihood doctrine and the doctrine of procedural fairness within the newly constitutionalised labour law. I will in this paper, evaluate the relevance of the constitutional right to livelihood and the doctrines of procedural and substantive fairness to individual labour law and consider the possible areas in individual employment law where these legal conceptions may be applied. In this regard, the questions I seek to address are threefold.

Firstly, I question the significance and scope of finding a constitutional right to livelihood within the employment context. I then question the significance and scope of finding procedural fairness within the concept of equality in the context of individual labour law. Finally, I question the significance and scope of finding substantive fairness within the concept of equality in the individual labour law context.

The significance and scope of finding a constitutional right to livelihood within the employment context

The constitutional right to livelihood analysed from a Hohfeldian perspective of fundamental legal conceptions n2 has the effect of constitutionalising employment relations. It thus elevates the employment relationship to a constitutional status. Such is the case with both public and private employment, as fundamental constitutional rights operate on a vertical basis, between citizen and State as well as on a horizontal basis between private legal persons n3.

In the case of public employment, finding a constitutional right to livelihood has the effect of crystallising the concept of 'public office of status'. The consequence of this is that the interests of public servants will be protected by constitutional norms. As a result, the discretionary powers of the State as employer will be constitutionally regulated through a more robust application of judicial review principles. Administrative law theories and legal reasoning will
become more relevant to public employment. In Hohfeldian terms, public employees have the privilege or the liberty to earn a livelihood, which, once exercised, the Constitution protects against abuse. Where public servants enjoy certain statutory or constitutional rights, Hohfedian claim rights will exist.

In the context of private employment, the significance of finding a constitutional right to livelihood is that the contract of employment will be constitutionalised. This is because the subject matter of the contract, which is paid employment, is a matter about livelihood, an interest protected by the Federal Constitution. The rights and duties arising from the contract of employment are Hohfeldian claim rights with corresponding duties. The significance of placing the right to livelihood on a constitutional footing is that the contract of employment will be subject to constitutional norms. The stage is therefore set for traditional contract law principles, which may be rigid and out of sync with the realities of the modern employment relationship, to give way to an interpretation of the employment dispute that produces the best moral outcome in the Dworkinian sense. While the contract of employment will remain an important source of evidence in the pre-interpretive stage of interpretation, it will not settle the matter. Rather, the judge will construct a political theory based on the right to livelihood as a claim right with corresponding duties and proceed to discover the best moral outcome n4.

A question, which arises, is whether the right to livelihood should also protect probationers or be restricted to the protection of confirmed employees? It is arguable that the most important aspect of employment is the period of probation. The period of probation determines whether or not an individual is successful in securing continued employment. It is submitted that the right to livelihood should apply to the probationary period as the subject matter within the concept of 'probation' deals with earning a livelihood. The significance of subjecting probationary contracts to the right to livelihood is that the principles of procedural and substantive fairness discussed in the context of contracts of service or contracts of employment would apply to the probationary contract.

Therefore, the significance and scope of finding a constitutional right to livelihood within the employment context is that a new abstract theory of interpretation has been created in the field of individual employment law. This abstract theory paves the way for more detailed and concrete legal rules when the right to livelihood is read together with the principle of equality, which houses the doctrines of procedural and substantive fairness n5.

The significance and scope of finding procedural fairness within equality in labour law

The principles of procedural fairness and due process law have now been anchored within constitutionally entrenched notions of equality in common law jurisdictions like the United States of America n6, India n7 and Malaysia n8. It is useful to analyse the origins and scope of the doctrine before mapping out the significance and scope of finding procedural fairness within equality in the labour law context.

The origins of the doctrine of procedural fairness in common law jurisdictions lie in administrative law within the age-old principles of natural justice. The two rules of natural justice are audi alteram partem, commonly referred to as the right to be heard and the second rule, nemo judex in causa sua, commonly referred to as the rule against bias.

Thus, even with the birth of the first new modern written constitution in the world, i.e. the Constitution of the United States of America in 1787, the common law principles of natural justice were already reflected in numerous English judgments n9. It may be said therefore that the foundations of due process law lie in natural justice and natural law theory as propounded by Locke in the 16th century although the American Supreme Court has found a much more prolific theory within the due process clauses in Amendments V and XIV of the Constitution of the United States of America n10.

The same may be observed of Indian jurisprudence on notions of procedural fairness. Although the Indian Supreme Court judges have anchored the doctrine of procedural fairness in equality and have by and large followed the impetus set by the American Supreme Court, the basis of the doctrine of procedural fairness in India is common law natural
Similarly, in Tan's case, the Malaysian Court of Appeal observed that English common law had greatly influenced the administrative law of Malaysia.

An analysis of English administrative law reveals that the English courts have widened the original rules of natural justice to include broader notions of justice and fairness. There was thus a need for finding a new label for the broader law and that new label was 'procedural impropriety', which became commonly referred to by academics and the judiciary as 'procedural fairness'. The traditional rules of natural justice provided for fair hearings and the need for unbiased decisions. However, the extended procedural fairness doctrine embraces novel concepts like legitimate expectation, the right to reasons for decisions and the general duty to act fairly. Procedural fairness thus admits considerations not within the traditional confines of natural justice.

Further, given that different levels of statutory regulation apply to the employment relationship and that administrative tribunals are part of the labour law regime, common law administrative law principles became increasingly relevant in common law jurisdictions like the United Kingdom, Australia, India and Malaysia in interpreting these statutory provisions. Examples include the unfair dismissal regime and the discretionary powers of administrative officers within the relevant ministries responsible for the regulation of industrial relations. These statutory schemes saw the application of administrative law principles to labour law, both public and private.

Principles of administrative law have, by analogy, been applied to labour law, as the traditional law of contract could not provide the solutions to many problems within the employment relationship, some of which were ideological and which therefore needed legislative intervention. The law on unfair dismissal serves as the most relevant example. The contractual concept of wrongful dismissal was limited by contract law principles to proceedings alleging dismissal in breach of contractual terms governing termination of employment. A dismissal could not be challenged if the dismissal was carried out in accordance with the terms of a given contract in relation to notice or if the dismissal was due to breach of a fundamental term of the contract. The fairness of the dismissal from the perspectives of fairness, due process, proportionality or socio-economics was of no concern to traditional contract law theory.

Thus, the statutory law on unfair dismissal was passed to mitigate the harshness of the law of contract. Under the statutory regime, an employee can pursue a claim for unfair dismissal even though the employer observes the contractual terms as to dismissal or termination of the employment contract. The basis of the claim would be that the dismissal was nonetheless unfair, for reasons other than any contractual reason relied on by the employer. The tribunal would then have to assess the fairness of the dismissal in question and in the Malaysian context, decide if the dismissal was for just cause. If the dismissal was for misconduct, the tribunal would consider, among other factors, whether or not the employee was given a reasonable opportunity to be heard.

Therefore, apart from considering whether the actual dismissal was for just cause, which is a matter of substantive fairness, the dismissal procedure is also relevant to the issue of fairness.

If the tribunal was of the view that the employee was not given a reasonable opportunity to be heard or was of the opinion that on the facts, the dismissal was unfair as there was an absence of just cause, then the tribunal may either order the reinstatement of the employee or make an order of compensation in lieu of reinstatement.

Now that the right to livelihood is recognised as a fundamental human right guaranteed by and protected in the Federal Constitution, public law reasoning would increasingly be relevant to solving disputes in the employment field. A clearer nexus has thus been formed between public law and labour law. It must however be acknowledged that public law reasoning has always been relevant to regulated labour markets. Similarly, the stage has been set for public law reasoning to continue its relevance in deregulated labour markets which uphold libertarian values like the right to livelihood, within the right to life and the doctrines of procedural and substantive fairness, within the doctrine of equality.

However, the entire body of law on procedural fairness in administrative law may not be applicable or relevant to
labour law. It is therefore necessary to construct a framework of procedural fairness that may be applicable to labour law and which may influence the development of individual employment law within its newly constitutionalised regime.

A possible framework for the application of procedural fairness to Malaysian labour law

(a) The right to be heard

While public sector employees have an entrenched constitutional right to be heard within art 135(2) of the Federal Constitution n24 in matters of employment discipline, the position of private sector employees has been less certain.

Under Malaysian law, s 14(1) of the Employment Act 1955 ('EA') n25 requires a domestic inquiry to be held for employees covered by the EA, before an employer carries out any disciplinary action. Therefore, this section envisages the principles of natural justice to be observed in employment disciplinary actions. Although the High Court in Milan Auto Sdn Bhd v Wong Seh Yuen (Milan Auto) n26 viewed s 14(1) EA as a mandatory provision, the Federal Court, the highest civil court in Malaysia, on appeal n27 and in the case of Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal n28 (Wong), ruled that s 14(1) EA does not require a mandatory inquiry for all private sector employees.

In Wong, the appellant was dismissed from employment without due inquiry. The Industrial Court, a tribunal created under the Industrial Relations Act 1967 and having the jurisdiction to hear unfair dismissal claims held that the claimant had been unfairly dismissed by his employer without just cause or excuse on the ground that the employer had given the employee a pre-dismissal inquiry. On that basis, the Industrial Court had awarded the claimant compensation in lieu of reinstatement, but reduced the quantum of compensation because of the claimant's misconduct, which was substantively proven at the hearing. The employer applied to the High Court for an order of certiorari against the award of compensation in favour of the claimant and the claimant applied to the High Court for an order of certiorari against the award, as he was dissatisfied with the reduced compensation. Both applications were dismissed and both parties appealed to the Federal Court.

The Federal Court applied the curing principle under administrative law n29 and held that the failure of the employer to hold a domestic inquiry was curable through the de novo hearing conducted by the Industrial Court. In the words of Mohd Azmi FCJ n30:

In our view, the principle that an initial breach of natural justice by the employer could be cured by the Industrial Court inquiry, should not be grounded on whether the claimant was or was not an employee within the meaning of the Employment Act 1955. The curable principle must apply to all cases and must not depend on the salary of a workman.

The Federal Court in Wong was also of the opinion that:

To avoid the Industrial Court from being bogged down in extraneous matters and the niceties of the law, s 30(5) [of the Industrial Relations Act 1967] also provides: 'The court shall act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form.'

It is therefore essential that when a reference is made under s 20(3) [of the Industrial Relations Act 1967], the paramount function of the Industrial Court is to deal with 'the substantial merits of the case, without regard to technicalities and legal form', in addition to determining the dispute with a sense of urgency n31.

The question, which arises from the dictum above is whether the right to be heard is indeed an 'extraneous matter and nicety in law' amounting to a mere 'technicality and legal formality' or whether the right to be heard amounts to a substantive right? An individual may well have a substantive right to claim a certain procedure and the consequence of
that is the procedure claimed becomes a procedural right to the holder of the right. In the present context, that procedure would be the right to a fair hearing prior to being dismissed from employment.

However, the Federal Court in *Wong* has, by applying the curing principle in administrative law, diluted the express due process protection afforded to employees under s 14(1) EA. Further, Mohd Azmi FCJ in *Wong* has very clearly stated in the dictum quoted above that the curing principle will apply to all employees regardless of their income. Such an application of the curing principle to private sector employees not covered by the EA was achieved in the earlier case of *Dreamland Corp (M) Sdn Bhd v Choong Chin Soo* n32. As such, the courts have consistently applied the curing principle across the board to all private sector employees who may have been denied a pre-dismissal inquiry. The consequence of such an approach is that private sector employees do not have a right to a pre-dismissal inquiry.

The Federal Court in *Wong* was of the opinion that the wording of ss 20(1) and 20(3) of the Industrial Relations Act 1967 n33 limited the Industrial Court's jurisdiction to a review on substantive merits entailing a consideration of whether the dismissal was with just cause or excuse. The Industrial Court did not therefore have the jurisdiction to consider whether the dismissal was carried out in accordance with the rules of natural justice or procedural fairness n34.

On the effect of the statutory right of due inquiry under s 14(1) EA on the unfair dismissal regime created by ss 20(1) and 20(3) of the Industrial Relations Act 1967, the Federal Court held that the provisions under the Industrial Relations Act prevail as they were passed before the amended s 14(1) EA n35 came into force. The Federal Court relied on English principles of statutory interpretation and concluded:

> In our opinion, it should be presumed that the legislature by amending s 14(1) of the Employment Act 1955, did not intend to make any alteration in the existing law as contained in s 20 of the Industrial Relations Act 1967. General words of a particular amending Act of Parliament are not to be construed as to alter the existing policy of the law under the statute; much less the policy of the law under a completely different statute. The statutory requirement of 'due inquiry' under s 14(1)(a) of the Employment Act 1955 in the absence of clear intention by Parliament could not in any way excuse the Industrial Court from discharging its duty to enquire into the question of 'just cause or excuse' as required by s 20, notwithstanding the initial failure to hold a proper domestic inquiry n36.

It is respectfully submitted that the reasoning of the Federal Court above is not correct. Firstly, Parliament has expressed its 'clear intention' of requiring a pre-dismissal inquiry for all disciplinary actions. While the wording of section 14(1) EA n37 vests a discretion on the employer to punish employees for misconduct, the section clearly provides that this can only happen 'after due inquiry'. Therefore, Parliament intended a mandatory pre-dismissal inquiry for all dismissals for misconduct.

Secondly, while the Federal Court was correct in presuming that Parliament did not intend to alter the law and policy within the IRA when it passed the due inquiry law in s 14(1) EA, this does not mean that the Parliament accepted the position that a denial of a pre-dismissal due inquiry could be cured at the trial stage. Indeed, the law must be that the curable principle at common law for breach of natural justice cannot apply to a mandatory statutory right to a pre-dismissal inquiry. Any other construction would make a mockery of the statutory right.

Neither can it be said that Parliament acknowledged the view that the jurisdiction of the Industrial Court under s 20 IRA was confined to the substance of a dismissal and not its process. If process was not an important aspect of dismissal, Parliament would not have required a mandatory pre-dismissal inquiry. Parliament passed this law with the knowledge that the Industrial Court was the avenue for the settlement of disputes relating to dismissals.
Finally, while it is true that the Industrial Court is an administrative tribunal with its jurisdiction limited by the statute creating it, the Federal Court omitted a consideration of the award-making jurisdiction of the Industrial Court in s 30(5) IRA, which provides that 'The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form'. Principles of equity require fairness in all respects to be observed n38. This would encompass procedural as well as substantive fairness. While s 20(1) IRA deals with matters of substantive fairness, it may be argued that s 30(5) IRA includes procedural fairness. That being so, it would be within the Industrial Court's jurisdiction to consider whether a particular dismissal was carried out with due inquiry.

An attempt was made by a later Federal Court to augment the importance of the statutory right to due process in section 14(1) EA in Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd (Said) n39, where Edgar Jospeh Jr FCJ said:

[W]hen ... a claimant is an employee within the meaning of the Act [the Employment Act 1955], he has -- by s 14(1) thereof -- a statutory right to 'due inquiry' by his employer, and so, the approach of the Industrial Court -- or, for that matter, the High Court -- in considering the question whether the claimant had been dismissed without just cause or excuse would be to examine the decision not just for substance but for process as well n40.

However, the subsequent High Court decision of Ganesan G Suppiah v Mount Pleasure Corp Sdn Bhd n41 treated the dictum in Said as mere obiter dicta. This was on the grounds that the matter before the court was not one under s 20 IRA but a writ action in the High Court seeking a declaration on the breach of the statutory right to due inquiry under s 14(1) EA. As such, the Federal Court's ratio decidend in Wong has been followed by lower courts and remains uncorrected.

The Federal Court in Wong was concerned that if the Industrial Court ordered that the employee be reinstated to his former position due to the fact that the dismissal was carried out in breach of natural justice, the employer who had breached the due inquiry requirement could easily remedy that procedural breach by holding an inquiry and nonetheless proceed to dismiss the employee as the misconduct would already have been proven at the trial. In the words of Mohd Azmi FCJ:

In our opinion, the effect of any breach of natural justice should benefit the workman and not the party in breach. Thus, where on merits, the workman had clearly been dismissed with just cause or excuse, and natural justice had been sufficiently complied with by the Industrial Court, what real benefit would there be for him to be told that because of failure to hold a domestic inquiry, he had to go back and face an unhappy management, who as a matter of course, could remedy the procedural breach and dismissed [sic] him for the second time? We failed to see how such delay and duplicity of proceedings could be interpreted as contributing towards industrial peace and harmony ...

n42 The issue that remains unresolved is that the party that has breached his duty in not affording natural justice suffers no liability as a result of that breach.

However, the recent constitutional developments in this area, recognising the right to procedural fairness in matters affecting livelihood will have an impact on the Federal Court decisions of Milan Auto and Wong as those decisions were arrived at before the birth of the constitutional doctrines in Tan's case and Hong Leong.

The consequence of the constitutional pronouncements in Tan's case and Hong Leong is that procedural fairness is now a constitutional right where livelihood is at stake because an individual's livelihood can only be deprived in accordance with procedural fairness.
However, the principles of substantive fairness may sanction dismissal in a given case where on the merits of the case misconduct has been proven. In such circumstances, the remedy for breach of procedural fairness should not be reinstatement to the former position but compensation for the procedural breach. Fredman and Lee are of the opinion that 'there may be scope for arguing that breach of procedure should itself be a compensatable loss, even for the unmeritorious applicant as this would put some pressure on employers to conform to procedural justice even in what appears to be the most cut-and-dried case'.

It must also be added that the normal range of possible requirements under the natural justice right to be heard rule will also generally apply to employment relations under the doctrine of procedural fairness. These are the requirements of notice, a consideration of the need for an oral hearing, disclosure of evidence, the opportunity of cross-examination, and the need for legal representation. However, the nature of natural justice is such that it is not mandatory that the complete range of considerations within the right to be heard be applied in a given case. The application varies depending on the specific circumstances and requirements of each case. Guidance may however be sought from judicial precedents.

Therefore, although the scope of the applicability of the precise requirements of a fair hearing is uncertain, the right to be heard is mandatory in Malaysian labour law. This is because it is now a constitutional right. The only flexibility is the precise scope of application of the right.

The Court of Appeal in *Hong Leong* commented upon the nature of procedural fairness when Gopal Sri Ram JCA said:

I have expressed the extent and content of procedural fairness in general terms because cases may and do occur where it may not be feasible or desirable to accord any procedural fairness or, alternatively, the full breadth of procedural fairness in respect of a decision which may adversely affect those rights of which I have spoken.

In referring to the 'full breadth of procedural fairness', his Honour acknowledged the wide spectrum of fair procedures but did not comprehensively list them anywhere in the *Hong Leong* judgment. Neither has this been done by any other judge in any other common law jurisdiction. Rather, judicial recognition and application of the various requirements arising under the doctrine of procedural fairness has been spontaneous and context-specific. This is a result of the adversarial system of adjudication and the common law tradition.

The general right to be heard therefore exists as a claim right in the Hohfeldian sense whenever an issue of deprivation of an individual's livelihood, in the sense of income from employment, arises. There may be cases however, where an individual may not possess a claim right to be heard but may nevertheless have a legitimate expectation of a hearing or of some other procedural benefit.

(b) Legitimate expectation as an aspect of procedural fairness

One of the more recent common law innovations in administrative law is the doctrine of legitimate expectation. The origins of the doctrine may be traced to German administrative law and exists on a procedural and substantive level. I will firstly discuss the doctrine of legitimate expectation in the context of procedural fairness.

Legitimate expectations of procedural fairness arise where there has been a certain practice or if a certain promise has been made. Lord Denning first introduced the doctrine of legitimate expectation in England through the case of *Schmidt v Secretary of State for Home Affairs (Schmidt)* where he said:

The speeches in *Ridge v Baldwin*[1964] AC 40 show that an administrative body may, in a proper case, be bound to give a person
who is affected by their decision an opportunity of making
representations. It all depends on whether he has some right or
interest, or, I would add, some legitimate expectation, of which it
would not be fair to deprive him without hearing what he has to say.

A legitimate expectation necessarily, is not a right. Thus, Lord Denning extended the principles of natural justice to
cover situations short of a legal right, for it suffices, from the statement above, that a legitimate expectation alone may
require procedural fairness to be observed.

The context in which the doctrine was introduced in Schmidt was when Lord Denning opined that a foreign national
who had been given permission to enter and stay in the United Kingdom for a specific period had a legitimate
expectation of being allowed to remain for the duration permitted and such a permit could not be prematurely revoked
unless the foreigner was given an opportunity to make representations. On the facts of Schmidt however, the doctrine did
not apply because the foreign students' entry permits had expired and they were only applying for an extension and as
such had no right or legitimate expectation of being allowed to stay or of making representations.

The doctrine of legitimate expectation was next applied by Lord Denning in his dissenting judgment in Breen v
Amalgamated Engineering Union (Breen), which is relevant to labour law. In Breen, Lord Denning said that
judicial review applied to both, statutory as well as domestic bodies because some domestic bodies control the destinies
of thousands of people and they are as powerful as statutory bodies as 'they can make or mar a man by their decisions'.
The domestic body in this case was a district committee of a trade union, which did not approve an appointment of an
elected shop steward because of allegations of misappropriation of union funds. It was held by Lord Denning that since
Mr Breen had been democratically elected, he had a legitimate expectation that his election would be approved, unless
there were good reasons against him. As such, the committee should have informed him of the allegations and allowed
him to make representations.

The cases of Schmidt and Breen discuss the legitimate expectation harboured as a ground for claiming procedural
fairness of some sort. It is not the expectation of the procedure itself but the expectation of something else, of some
other benefit, which cannot be deprived without a hearing. Forsyth in his article speaks of this dichotomy as either a
legitimate expectation of some 'boon or benefit' or the legitimate expectation of a 'hearing' and goes on to say that the
content of the expectation depends upon the circumstances that give rise to it. In the Schmidt situation, the expectation
would have been to be allowed to remain in the United Kingdom for the duration of the permit; while in Breen, the
expectation was to be appointed as shop steward. As these expectations are recognised by the law as important and
legitimate, they therefore attract the protection afforded by the rules of natural justice or procedural fairness. In some
cases, procedural protection may suffice, but there is a growing realisation that if the protection of legitimate
expectations is to be taken seriously, then substantive protection is required. This substantive aspect of legitimate
expectations will be discussed later.

Returning to the Malaysian employment law context, the doctrine of legitimate expectation will be relevant where a
certain practice has continued or where promises have been made, which instil legitimate expectations. Examples
include the periodic renewal of fixed term contracts and official promises relating to promotions, transfers or job variations. In the case of periodic renewals of fixed term contracts, the doctrine would allow the employee concerned to harbour a legitimate expectation that the contract of employment in issue would be renewed in accordance with established practice. In the event that the employer does not renew the contract, the doctrine would require, at the minimum, a hearing in relation to the issue of non-renewal. This translates to the law requiring the employer to justify the non-renewal of a contract, which has been previously renewed. Although such a development interferes with the managerial prerogative of an employer to manage his concern, it is submitted that given the right to livelihood is a constitutional right, such moralising notions, like procedural fairness, on managerial prerogatives are justified. The employee would not have a claim right to a hearing as the contract under which such a claim right may have existed, would have been discharged. It is arguable that the employee concerned would also be entitled to substantive protection under the doctrine of legitimate expectation, thus entitling a renewal of the contract, with the onus on the employer to
explain non-renewal. However, a hearing in the first instance may result in such a renewal if the reasons for non-renewal are not accepted as reasonable. This would therefore produce the same outcome desired from treating the legitimate expectation as one of substance. From a libertarian perspective, treating the issue as a matter within procedural fairness balances managerial prerogatives with employee rights.

Common law examples of the doctrine of legitimate expectation applying to public service employment as a matter of procedural fairness include *Council of Civil Service Unions v Minister for the Civil Service (CCSU)* and *Cole v Cunningham (Cole)*. These cases would be relevant to analogous Malaysian circumstances. *CCSU* provides an example of a situation where the overriding public interest may allow a public authority to depart from an express undertaking or an established practice. In *CCSU*, employees at Government Communications Headquarters ('GCHQ') had for many years been allowed to join national trade unions and enjoyed a practice of prior consultation when their terms and conditions of service was sought to be altered. The dispute was in relation to the unilateral alteration of these conditions of service without consultation, the effect of which was that the employees at GCHQ were prohibited from being members of national trade unions on grounds of national security. Although civil servants did not have any right to trade union membership or right to consultation, Lord Fraser held that ‘even where a person claiming some benefit or privilege has no legal right to it as a matter of private law, he may have a legitimate expectation of receiving a benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law’.

On the facts of this case however, the court was satisfied that the Minister had correctly concluded that if she had consulted the employees, there may have been industrial action taken as a result and this would have threatened national security as the functions of GCHQ included the handling of highly sensitive government and military information. As such, the overriding public interest outweighed the legitimate expectations involved and the Minister was therefore justified in not consulting the employees at GCHQ. Of importance however, is the fact that judicial review of executive action lies to protect legitimate expectations.

In *Cole*, an applicant for reappointment to the Public Service was earlier told that if he resigned, he would leave the department with an unblemished record. The court held that this representation gave rise to a legitimate expectation that any decision as to future employment in the department would not be based on his past employment record without giving him an opportunity to be heard.

A Malaysian example of the application of the doctrine of legitimate expectation in judicial review proceedings of the executive in relation to the granting of an employment permit is the case of *JP Berthelsen v Director General of Immigration, Malaysia & Ors (Berthelsen)*. In this case, an American journalist was granted an employment permit for a period of two years. However, the Department of Immigration revoked his permit five weeks prior to its expiry and ordered him to leave the country by a certain date on grounds of national security. Abdoolcader SCJ held that the journalist had a legitimate expectation to be entitled to remain in Malaysia until the expiry of the permit and therefore if this expectation was going to be taken away, he ought to be given an opportunity to make representations as to any special hardship. Further, the court held that the public authority could not rely on a mere *ipse dixit* that national security was at stake but should adduce adequate evidence to justify the assertion of national security.

The doctrine of legitimate expectation as applied in *Berthelsen* protects foreign workers from the unjustified revocation of their work permits. The case assumes a greater importance in the context of the constitutional right to livelihood and fairness. In the case of foreigners, work rights derive from their work permits. Their contracts of employment are subject to the work permit. With *Tan’s case*, contracts of employment entered into between Malaysian employers and foreign workers will now be subject to the constitutional right to livelihood and doctrines of procedural and substantive fairness, like ordinary contracts of employment between Malaysian employers and Malaysian citizens. This is important because if they do not, then employers may evade these constitutional norms by employing foreign workers. A level playing field has therefore been created for all employees, regardless of citizenship.

(c) The giving of reasons for decisions leading to judicial review of reasons given
The procedural fairness requirement in *Hong Leong* that the Executive give reasons for a decision not to refer an unfair dismissal claim to the Industrial Court operates to empower the individual employee in relation to the citizen-State relationship vis-a-vis the right to livelihood doctrine. There is potential for the *Hong Leong* principle to be extended to judicial review of reasons in circumstances where the Minister furnishes reasons (as he is now required to). The High Court, in judicial review proceedings will now be able to review the Minister's reasons with a view to considering whether the Minister has taken into account irrelevant considerations or failed to take into account relevant considerations.

**The significance and scope of finding substantive fairness within equality in the labour law context**

The application of principles of substantive fairness within the concept of equality is best explained from the perspective of Indian constitutional jurisprudence, which is of highly persuasive authority for Malaysian law as the Malaysian constitutional provision on equality is in pari materia with the relevant Indian constitutional provision. The term 'fairness' and 'duty to act fairly' have also been used by the English courts in the realm of judicial review of substantive discretionary powers of the Executive. I offer a few suggestions of possible areas of development for this branch of individual labour law in both the public and private law domains.

**A possible framework for the application of substantive fairness to Malaysian labour law**

(a) Proportionality and punishment

In an earlier article, I highlighted the defect in the reasoning of the Court of Appeal in *Tan's* case in treating the issue of punishment as an aspect of procedural fairness and submitted that the correct analysis is one based upon the doctrine of proportionality within the principle of substantive fairness.

Lord Diplock in *CCSU* first introduced the European doctrine of proportionality into English law as a possible ground for judicial review. The doctrine has been subsequently used in the context of discipline and punishment for a wrongful action. There is thus no reason why the same approach should not be extended to issues of discipline within labour law. It is submitted that the doctrine of proportionality is more suited to public sector employment while the concept of reasonableness may be more appropriate to assessing punishment in private employment. This is due to the fact that the legislation relating to unfair dismissal defines an unfair dismissal as a dismissal without just cause or excuse. It is submitted that 'just cause' relates to a justified reason and that an unjustified reason would be unreasonable. It is however acknowledged that there is a very thin line between 'proportionality' and 'reasonableness' as a disproportionate punishment will necessarily also be unreasonable. However, 'proportionality' has a wider field of application and encompasses the balancing test, the necessity test and the suitability test, which have been used by the European Court of Justice and the European Court of Human Rights in the context of assessing the use of public power.

(b) Legitimate expectation as an aspect of substantive fairness

Forsyth comments that it is far easier to find reasons why legitimate expectations should not be given substantive protection than to look for reasons why they should be protected. He says some may argue that to hold a government to its word would be a fetter on lawful discretionary powers and would allow the principle of estoppel to operate. Also, the danger may be that the doctrine is invoked to give effect to *ultra vires* representations and that the courts would be drawn into the prohibited arena of review on merits.

Craig agrees that these are the common objections. However, both jurists do provide ways of overcoming such objections. The 'no fettering' objection can be resolved by acknowledging that if Parliament has imposed a duty on a public authority to make decisions or frame policies, then citizens should be able to rely on the decisions or policies so made. If the authority then wants to resile from its original stand and frustrate the legitimate expectations that it has...
generated, this should only be allowed if an overriding public interest so requires; otherwise, it would amount to an abuse of discretion.

In relation to ultra vires representations, two possible analyses were given. Firstly, it may be said that an ultra vires representation cannot be ‘legitimate’ and therefore will not attract protection. This view ignores the injustice suffered by citizens who have been unjustly misled by the administration. The second and better proposition would be to follow German law where in certain circumstances, compensation should be payable to an individual who has harboured such expectations. According to Forsyth, compensation would be payable if the need to protect the trust placed by the citizen in the validity of the administrative act outweighs the public interest in the legality of the administration. The outcome therefore would depend on the circumstances of each case, as the court would have to balance the competing interests. This would of course be quite revolutionary for some of the common law countries as compensation may not yet be available in their administrative law. The legitimate expectation cases in common law thus far have been in relation to intra vires practices and undertakings by public authorities and the main concern has centred on the fettering of discretion.

The Australian case of Attorney-General (NSW) v Quin (Quin) n72 provides useful discussion for public employment law. In Quin, the courts considered the doctrine of legitimate expectation from the perspectives of procedural and substantive fairness. The case concerned the reorganisation of magistrates in New South Wales under a new court system. A departmental circular provided that all existing stipendiary magistrates were to accede to the new office of magistrate under the Local Court Act 1982 (NSW). However, the Attorney-General later issued forms to the magistrates through which they were to apply for such appointment and statutory provisions provided that there may be situations where a former magistrate may not accede to the new office but may be appointed to some other office in the public service at the same salary. One hundred former magistrates applied for reappointment but only ninety-five were appointed. Quin was one of the five not appointed. In an earlier decision n73, the Court of Appeal held that Quin had a legitimate expectation of procedural fairness, which had not been met because the selection committee had taken into account an adverse report on him without notifying him of the contents of the report and giving him an opportunity to be heard. As the Local Courts had already been constituted, the Court of Appeal declaration had no immediate effect. The Attorney General later decided, through a policy change, that he would recommend suitable future applicants on the basis of competition and merit, regardless of whether or not the applicant was a former magistrate.

Quin alleged he had a legitimate expectation that his pending application should be in the same category as his former colleagues and should be considered according to its own merits and not in competition with other first time applicants. The legitimate expectation here was an expectation of a benefit and was therefore, substantive in nature. Although Mason CJ was prepared to acknowledge that in a given situation, there may be substantive protection of legitimate expectations, he did not see the Quin case as one such situation because he felt that the granting of substantive relief in this case would curb the policy making powers of the executive.

However, the English case of R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd (Hamble) n74 has enriched the jurisprudence in this area. Although the case did not concern public employment law, the issues are relevant to the field of public service employment. The issue in this case was whether a lawful material change of policy ought to be qualified by an exception that it will not affect those who had legitimate expectations built upon the old policy. The court made an interesting observation that the doctrine of legitimate expectation is closely bound with the European principle of legal certainty. Sudden changes in policy, especially those with retrospective effect, would offend the principle of legal certainty. It is submitted that there is no reason why the principle should not apply in the common law world, as the doctrine of legitimate expectation is itself borrowed from European jurisdictions. What needs to be done in a given case is a balancing process between the competing interests. Sedley J said that procedural and substantive protection of legitimate expectations is rooted in principles of fairness and that:

[I]t is the obligation to exercise powers fairly which permits expectations to be counterpoised to policy change, not necessarily in order to thwart it but ... in order to seek a proper exception to the
policy....While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern. To postulate this is not to place the judge in the seat of the minister. ...[I]t is the court's task to recognise the constitutional importance of ministerial freedom to formulate and to reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness out tops the policy choice which threatens to frustrate it n75.

Applying Sedley J's analysis to public service employment, the question of whether or not the individual civil servant's expectation attracts such legitimacy will be decided by the court as the final arbiter, on a case-to-case basis. The law should require the Crown, as employer, to exercise its discretion in a responsible and thoughtful manner. Policy changes should come with appropriate notice, transitional provisions and perhaps exceptions in deserving cases where justice may require that the old policy should apply. While legitimate expectations are less than rights, it must be remembered that what the law seeks to do is to protect these expectations and not guarantee them. This should be permissible in a liberal democratic society under the rubric of 'fairness'.

The Hamble decision is thus a refreshing change and brings the executive further into the realm of fettered discretion, which any democratic institution based on the rule of law, should embrace. The groundwork has been set for other common law jurisdictions like Malaysia to apply these principles to the sphere of public service employment, within the rubric of the constitutional right to livelihood.

It is submitted that the protection of substantive legitimate expectations as an aspect of substantive fairness is best suited to situations arising within public service employment as the focus is on the fettering of executive discretionary power. This line of reasoning will not therefore be applicable to private employment law. The reasonableness test within constructive dismissal and the emerging implied term of mutual trust and confidence within the concept of 'fairness' are more suited conceptions to be applied towards the contract of employment in private law.

(c) Reasonableness test in constructive dismissal and the influence of the overriding implied term of mutual trust and confidence

It is submitted that as the principle of 'fairness' encompasses the concept of 'reasonableness' n76, and that the right to livelihood is now a constitutional right operating between private legal persons within the statutory scheme of unfair dismissal in Malaysia, the stage has been set for a movement away from the traditional contract test for constructive dismissal to a test based on reasonableness.

It is further submitted that the implied term of mutual trust and confidence recognised within Malaysian employment law n77 in actual fact regulates the 'reasonableness' and 'fairness' of the conduct of the parties within the employment relationship in a variety of developing fact situations. As such, the concepts of 'reasonableness' and 'mutual trust and confidence' may be applied within the employment contract as aspects of substantive fairness. Such a development will produce a coherent body of law founded upon the constitutional principle of fairness.

The constitutional right to livelihood, the doctrines of procedural and substantive fairness and Parliament's power of abridgement and abrogation

In constructing this new constitutionalised framework for individual labour law, an important question arises whether, given that this framework has a constitutional basis, the principles enshrined are be treated as mandatory and
therefore automatically applicable or whether they may be curtailed or modified by legislation. If they may be curtailed or modified, the next question will be whether the courts through the process of judicial review may review these curtailments and modifications.

It is submitted that as the constitutional pronouncements introduced by Tan's case, Hong Leong and Rama Chandran are based on the entrenched fundamental rights of the 'right to life' and 'equality' within a Bill of Rights, the accepted principles of constitutional interpretation will apply to estop Parliament from unreasonably or disproportionately abridging or abrogating these fundamental rights within a supreme Constitution. The cardinal judicial review principle propounded by Chief Justice John Marshall in *Marbury v Madison* n78 would apply. The essence of the principle is as follows:

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the *very foundation of all written constitutions*. It would declare that an act which, according to the principles and theory of our government is entirely void, is yet, in practice, completely obligatory.

As such, Dworkin's Malaysian Hercules n79 would have to review the constitutionality of a purported Parliamentary law, which sought to either abridge or abrogate the right to livelihood or doctrines of fairness found within the Federal Constitution of Malaysia. Of relevance will be the doctrine of proportionality. As discussed above n80, the doctrine of proportionality encompasses the balancing test, the necessity test and the suitability test. In applying the balancing test Hercules will balance the ends which a Parliamentary law seeks to achieve against the means applied to achieve them and will decide if the impugned law was proportionate to the ends to be achieved. n81 In applying the necessity test, Hercules will consider whether a particular objective may be achieved by the least restrictive means. n82

**Conclusion**

This analysis has charted a possible framework for the continued evolution of a newly constitutionalised individual labour law doctrine. The common law of employment in Malaysia may be judicially developed to ensure individual labour interests are adequately protected and given the constitutional status they deserve.

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**FOOTNOTES:**
Entitled 'The Constitutional Right to Livelihood As a Developing Field in Malaysian Labour Jurisprudence'.


Possible areas of development are discussed in a later part of this paper.


Amendment V of the Constitution of the United States of America provides 'No person shall be ... deprived of life, liberty or property, without due process of law ...' and Section 1, Amendment XIV of the Constitution of the United States of America provides '...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' Note 9.

Jain MP, Changing Face of Administrative Law in India and Abroad, Indian Law Institute, New Delhi, 1982 at pp 1-25.


per Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at pp 410-411.


Aspects of the right to a fair hearing arising from the settled areas of administrative law and public employment law include the provision of adequate notice, a consideration of whether in the circumstances an oral hearing is desirable or if written representations would suffice, disclosure of all incremental evidence and an opportunity to rebut the same, a consideration of whether the right to cross-examine may be granted, the need to enter a plea in mitigation should liability be established within a discretionary punishment and a consideration of whether legal representation may be allowed.
n16 Aspects of the rule against bias include a consideration of whether there has been financial bias, policy bias or personal bias.

n17 Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149.


n20 Commonly referred to as termination simpliciter.

n21 In Malaysia, s 20 of the Industrial Relations Act 1967 allows an employee to seek reinstatement to his former position on the ground that the dismissal was without just cause or excuse.

n22 A matter for procedural fairness.

n23 A matter for substantive fairness.

n24 Part X of the Federal Constitution applies to the public services and art 135(2) of the Federal Constitution provides 'No member of such a service ... shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.'

n25 Section 14(1) of the Employment Act 1955 provides: 'An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry -- (a) dismiss without notice the employee; (b) downgrade the employee; or (c) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks."


n27 [1995] 3 MLJ 537.

n28 [1995] 2 MLJ 753.

n29 Calvin v Carr & Ors [1979] 2 WLR 755 cited in Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 at pp 763-765

n30 Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 at p 768.

n31 Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 at p 761.


n33 Section 20(1) of the Industrial Relations Act 1967 provides 'Where a workman, provided that such representations shall be made by the workman himself irrespective of whether he is a member of a trade union of workmen or not, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed';
Section 20(3) of the Industrial Relations Act 1967 provides ‘Upon receiving the notification of the Director General ..., the Minister may, if he thinks fit, refer the representations to the Court for an award.’

n34 Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 at pp 762-763.

n35 The present s 14(1) of the Employment Act 1955 was introduced in 1971 by Amendment Act A91/1971.

n36 Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 at p 769.

n37 Note 25.


n40 Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd [1997] 1 MLJ 352 at p 363.


n42 Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 at p 766.


n49 And procedural fairness.

n50 Hong Leong Equipment Sdn Bhd v Liew Fook Chuan[1996] 1 MLJ 481 at p 537.

n51 It is significant to note that Gopal Sri Ram in Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor [2001] 2 MLJ 257 at p 264 applied the doctrine of legitimate expectation. See the precursor to this article on 'The Constitutional Right to Livelihood as a Developing Field in Malaysian Labour Jurisprudence'.

n52 [1969] 2 WLR 337.

n53 [1971] 2 QB 175 at p 191.


n56 In relation to enforcement procedures, the employee would, in the case of non-renewal of the fixed term contract, treat the issue as one of dismissal and proceed to lodge an application for unfair dismissal under the Industrial Relations Act 1967. The Industrial Court would then have to decide, in light of the newly constitutionalised status of the employee, whether such non-renewal of the contract of employment was with just cause or excuse.

n57 [1985] 1 AC 374.

n58 [1983] 49 ALR 123.

n59 Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374.

n60 [1987] 1 MLJ 134.


n62 Padfield v Minister of Agriculture & Fisheries [1968] 1 All ER 694.


n66 Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at p 410


n68 Section 20(1) of the Industrial Relations Act 1967.


n70 Note 54.


n72 [1990] 93 ALR 1.


n74 [1995] 2 All ER 714.

n75 R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714.


n78 5 US (1 Cranch) 137 (1803) at p 175. Emphasis added.


n80 Note 69.

n81 See the case of *Australian Capital Television v Cth* (1992 - 1993) 177 CLR 106 in the context of Parliamentary abridgement of the implied constitutional freedom of speech and political communication.

n82 Note 69