In Defense of Soft Law and Public-Private Initiatives: A Means to an End? — The Malaysian Case

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This discussion offers a theoretical framework towards the discovery and amalgamation of conceptions within hard labor law and soft law initiatives which may spring from deliberately designed public-private initiatives as well as spontaneous market-driven responses. A case in defense of soft law is made for Malaysia on the basis of political realism. Agents of soft law initiatives are evaluated with a focus on public and private codes. I argue that for Malaysia, the stage is being set for divergent regulatory approaches to labor, with differing consequences and outcomes. Some of these outcomes, as will be illustrated, may not be consciously designed but are likely to occur spontaneously. The focus of the discussion will be on the changing nature of labor norms in individual employment law, the advent of human rights reasoning and the interdependence of the organic forces in a particular jurisdiction that drive the labor agenda. The discussion concludes with an argument in praise of soft law as a viable agent for driving change in hard labor law, whilst maintaining its soft law character, thus contributing to the varieties of hybrid labor regulation.

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INTRODUCTION

Malaysian industrial relations grew out of a climate of political compromise among ethnic groups in Malaysia for the sharing of political power. Therefore the legal and political culture that influenced the evolution of Malaysian politics has also molded formal industrial relations at the national level. A stark feature of the Malaysian industrial relations system is the tripartite relationship that forms the bedrock of labor law in the country. The members of this tripartite partnership model are the Malaysian Trade Union Congress,[1] the state[2] and the Malaysian Employers' Federation.[3] Laws and policies on labor are debated at this tripartite forum, with corporate power having the strongest lobby.[4] This comes as no surprise, given that since independence in 1957, Malaysia has relied heavily on foreign investment and affirmative action policies for the economic, corporate and social upliftment of the Malay Muslim majority race.[5]

The state's "Look East" policy of the 1980s, which was introduced by the then Prime Minister, Tun Dr. Mahathir Mohamad, in an effort to lure foreign investment through the promise of compliant in-house unions along the Japanese model, decreased the number of national trade unions in Malaysia and caused an increase in in-house unions. This was facilitated by the state, as it controls the registration, authorization and recognition of trade unions.[6] In any event, only about nine percent of the private workforce is unionized. Furthermore, Malaysian unions do not enjoy any political power or political platform, as the law expressly prohibits this.[7] The ruling coalition party, the National Front (BarisanNasional),[8] has been in

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1 A representative body for trade unions that is registered as a society under the Societies Act (Act 335) (1966) but which is not a federation of trade unions having the characteristics and powers of trade unions. This is because section 12 of the Trade Unions Act (Act 262) (1959) allows the State to prohibit duality of union representation. This has resulted in the fragmentation of trade unions.

2 In particular, the Ministry of Human Resources.

3 A society representing private sector employers in Malaysia, including multinational corporations.

4 JOMO K. SUNDARAM & PATRICIA TODD, TRADE UNIONS AND THE STATE IN PENINSULA MALAYSIA (1994).

5 BASU SHARMA, INDUSTRIAL RELATIONS IN ASEAN — A COMPARATIVE STUDY (1996).

6 Trade Unions Act (Act 262) § 12 (1959) (Malay.).

7 *Id.* § 52(2).

8 This is a political party largely made up of three component ethnic race-based political parties.

power since Malaysia gained independence and most of the protective labor legislation and common law has been the result of colonial influence.[9] There is hardly any sign of real improvement to labor rights through formal law reform. It is not surprising, then, that other forms of "regulation" have sprung up either through deliberate design or spontaneously through the market. These may be categorized as public-private codes, corporate codes based on the corporate social responsibility agenda, workplace policies, customary practices and judicial innovation.

This Article first explains the nature of public-private agreements and workplace codes operating in Malaysia with a view to establishing the hybrid nature of labor regulation. It then proceeds to construct a human rights-inspired status theory, which as I will demonstrate, provides a constitutional platform for individual employment law. The argument that follows is an assertion that this constitutionalized employment law theory has the potential of hardening soft law and offering a new regulatory theory for labor.

I. PUBLIC-PRIVATE AGREEMENTS WITHIN SOFT LAW CODES

The framework of political power in Malaysia is socially and culturally entrenched within the idea of "cooperation," which took hold after the bloody race riots of 1969, which led to the passing of affirmative action policies for the majority Malay Muslim race and the enactment of preventive detention laws designed to suppress freedom of speech in the interests of political and economic stability and the national good. "Industrial harmony" was introduced by the state as a political ideology that was related to the concept of "cooperation" and which required harmonious industrial relations between capital and labor. This "harmony" was perceived as an important goal for the realization of the state's economic aspirations.

It was in this spirit that the tripartite consultative forum comprising union representatives, employers' representatives and the state, as both regulator and employer, agreed upon the Code of Conduct for Industrial Harmony in 1975 (hereinafter the *Code*). The *Code* is a soft law initiative listing 50 specific "industrial relations practices" under four broad "areas of cooperation": responsibilities, employment policy, collective bargaining,

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9 *See, e.g.*, The Employment Act (Act 265) (1955) (Malay.) (generally applied to employees earning less than RM1500 a month (approximately $500), creating a minimum floor of safety net provisions in relation to hours of work, overtime pay, annual leave, sick leave, maternity benefits, etc.).

and communication and consultation. All these broad objectives contain details prescribing good governance at the enterprise as well as industry levels.[10] As a majority of employers are corporations, the principles upheld by the *Code* within these "areas of cooperation" are the sorts of concerns that come within the purview of corporate social responsibility, which requires the interests of employee-stakeholders to be given importance when making management decisions.

In relation to the "four broad areas of cooperation" discussed above, these include shared responsibility for issues like job competence, settlement of grievances, honoring agreements and respecting fair procedures; implementing employment policies which assure job security, transparent recruitment and wage processes, adequate job training, *bona fide* consultative redundancy and retrenchment exercises, and the creation of safe, healthy and pleasant work environments; voluntary settlement of recognition claims by trade unions, agreed formal procedures on negotiations during collective bargaining, clear procedures for settling collective disputes, and fair, consultative and expeditious procedures on disciplinary action; and effective ongoing communication and consultation on any matter which may affect employees, including present and future corporate plans and the establishment of joint consultation and works committees. This *Code* was introduced long before the focus and push for labor-related soft law initiatives by international bodies in the last decade.

Although the *Code* operates only as a guide, strictly speaks "soft law," and does not have legal force, the Industrial Court[11] is allowed to have regard to the *Code* in making its awards in relation to dismissals, retrenchment and union disputes.[12] The Industrial Court has done so on several occasions,[13] but it does not do so as a matter of practice. Employers therefore do not feel obliged to uphold the principles in the *Code* and initiate policies and practices within the "areas of cooperation." This is highly unsatisfactory, as greater incorporation by the Industrial Court of the *Code* within its awards would mean higher levels of compliance by employers. The current state of affairs, for Malaysia at least and for the moment, proves that standalone, voluntary "soft law" options do not work effectively in creating favorable outcomes for labor; it reflects the capitalist psyche behind the standalone *Code*, as

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10 ANANTA RAMAN, MALAYSIAN INDUSTRIAL RELATIONS LAW & PRACTICE (1997).

11 The statutory tribunal which considers unfair dismissal and union claims.

12 *See* Industrial Relations Act (Act 177) § 30(5A) (1967) (Malay.).

13 *See, e.g.*, Federal Hotels International SdnBhd v. Walter Rolf Reisner & Lorna Sea Swee Lan (Award 48 of 1987) (Malay.); Ling Ka Hong v. Crystal Establishment Bhd (Award 411 of 2010) (Malay.).

its voluntary nature and accompanying unenforceability was perhaps its greatest virtue to its proponents. However, although broadly dormant for thirty-five years now, it is my belief that the *Code* has the potential to and will bridge the public-private and hard law / soft law divide in Malaysian labor law. I venture to elaborate on the methods and framework required for such a development.

The task at hand is for local and international stakeholders, including NGOs, international organizations and regional bodies like LAWASIA, to lobby for change at various levels, by, for example, targeting multinational corporations and employer associations to adopt fair and employee-empowering workplace policies apart from and in addition to political lobbying for specific legislative goals at the national level. The work of the International Labor Organization (ILO) through its Decent Work Agenda and the United Nations Global Compact[14] may serve as examples operating at the international level to drive change at the local level. For Malaysia, these have translated into soft law policy statements by the state, in that in November 2008 the Ministry of Human Resources launched the government's National Action Plan for Employment,[15] which endorses the ILO's Decent Work Agenda. Apart from mainly being a national labor policy document,[16] this document encourages the creation of "effective partnerships" through the "development of a favourable policy environment, as well as capacity building of the partners." These are very broad statements that are amenable to different uses by different interest groups.

The challenge for those of us promoting the labor agenda is to create links in the nature of soft law initiatives and interpretive legal tools between these broad national statements and the various other agents of change. Examples of possible links would include the promotion and introduction of workplace policies like whistleblower protection, grievance procedures and mediation of employment disputes. The agents of change would primarily

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14 Russell D. Lansbury, *Workplace Democracy and the Global Financial Crisis*, 51 J. IND. REL. 599 (2009).

15 *See The National Tripartite Conference On Decent Work*, MINISTRY OF HUMAN RESOURCES, http://www.mohr.gov.my/index.php?option=com_content&view=article&id=868%3Athe-national-tripartite-conference-on-decent-work&catid=140%3Aspeech-yb-minister&Itemid=566&lang=en (last visited Dec.19, 2010).

16 In its focus on job creation, human capital development, promoting employment of older people, strengthening gender equality, integrating people with disabilities, indigenous people and social delinquents into the job market, regulating the informal sector and overcoming regional and sectoral employment disparities.

be corporations with their corporate social responsibility codes, which reflect their obligations towards inclusive, beneficial workplace policies and adjudicative bodies like industrial tribunals and civil courts, which are bodies responsible for the settlement of employment disputes. Hard law requires adjudicative bodies to resolve a dispute, but it does not impose a legislative requirement that the outcome be fair. Thus, the methodology employed by tribunals and civil courts in the settlement of disputes should reflect soft law aspirations of fairness found within the national labor policy and the *Code*. I will offer an appropriate theoretical framework towards this goal in a later part of this Article, after considering the nature of written and unwritten workplace codes in more detail.

II. WRITTEN AND UNWRITTEN WORKPLACE CODES

Codes at the Malaysian workplace level have been in existence for a very long time. Traditionally, these related to conduct and discipline at the particular workplace. Employees' legal entitlements were either regulated through individual contracts or through collective bargaining where applicable. Socioeconomic benefits that were annexed to contracts included medical benefits, dental benefits, paid marriage leave, paid compassionate leave, and paid maternity leave. Where these benefits have been incorporated into individual contracts of employment, they would exist as legal rights. However, where policy statements and aspirations are embodied in other documents like corporate social responsibility commitments and assertions in company annual reports, these by their very nature are unenforceable although they create legitimate expectations in employees' minds. Examples include consultation rights, equality in pay and position between men and women, retirement benefits in addition to statutory norms, commitment to training and team-building, provision of skills-enhancement grants leading to diplomas and degrees, formal and transparent performance-based promotion and bonus payment, etc.

An interesting observation in relation to company policies and codes is that while Malaysian employers are only legally obliged to observe and provide the legislative safety net benefits to employees earning less than RM1500 ($500) per month,[17] this statutory scheme has become a *de facto* default scheme whereby employers routinely provide these minimum benefits to *all* employees regardless of wages. In many cases, companies

17 *See* The Employment Act, *supra* note 9.

provide better benefits in order to remain competitive. The issue is whether these non-statutory provisions of benefits, which may or may not exist as contractual terms, are considered "hard law" or "soft law." These benefits are customarily given although they are not statutorily mandated nor are they expressly found in any national or company code. If companies unilaterally remove any of these benefits, will the issue become enforceable? Can an argument be made that these benefits have either become "entrenched" as customary labor law or exist as implied contractual terms? A very important example is the provision of paid maternity leave.

The statutory obligation under Malaysian law to employees covered by the safety net legislation discussed above is to pay 60 days paid maternity leave at the daily pay rate of the employee for up to five childbirths.[18] This amount is paid directly by the employer to the employee and is fully funded by the employer. There is no insurance scheme or any other financial scheme in operation to facilitate such payments. By and large, all employers make this payment to all female employees regardless of legislative coverage, and this has been the case over the last few decades, long before there was any talk of corporate social responsibility. Why is this so? This spontaneously occurring phenomenon in the labor market has not been researched as to its underlying reasons and motivations. My view is that the majority of employers pay this benefit and that they do so because the practice has been culturally entrenched with state support in a paternalistic labor market and society.

The legal questions which arise are whether this practice has become customary and part of the legal culture of the country. Does the payment have the quality of a "right" or "entitlement"? Is this "hard law" or "soft law"? The answer seems to lie in the middle in the hybrid nature of certain norms, because the practice is an unwritten custom and customs by their very nature only attract the quality of hard law if the courts recognize a particular custom as an implied term in the contract of employment. The stage is certainly set for a test case. The traditional law of contract cannot readily provide an answer to this quandary because the employment contract, by its nature, does not sit neatly within the definition of a business or commercial contract.

In my opinion, as the employment relationship is essentially a socio-legal one akin to the marriage relationship, it has to be viewed from the perspective of status and not contract in order to appreciate and further enhance the nature of obligations arising out of that relationship. I will next analyze the

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18 *Id.* § 37.

nature of the employment relationship and make a case for hybrid labour regulation.

III. TOWARDS HYBRID LABOR REGULATION

The employment relationship has, through the processes of definition and redefinition, evolved from one of status, which was the case with the feudalistic master and servant relationship, to one of contract in the eighteenth century, with the growth of the market and production. The traditional law of contract could not, however, resolve the conflict of interest between employers and employees in an industrial society. In the words of Khan-Freund,

> [t]he conflict between capital and labour is inherent in an industrial society and therefore in the labour relationship. Conflicts of interest are inevitable in all societies. There are rules for their adjustment; there can be no rules for their elimination. To that extent there is a certain parallel between labour relations and international relations. There must be rules designed to promote negotiation, to promote agreement, and to promote its observance, and there must be rules designed to regulate the use of such social pressure as must be available to both sides as weapons in the conflict.[19]

The conflict inherent in the labor relationship, as in international relations, is one where the two parties to the conflict want different outcomes and therefore have conflicting vested interests. While collective labor law is traditionally built upon this conflict model of industrial relations and the regulatory aspects of collective labor law have provided for negotiation and settlement of labor disputes, no parallel exists in individual labor law and for non-unionized workers. This is largely due to the enigmatic contract of employment with its aura of freedom of contract, which is itself a capitalist construct and tends to mask the subtle power-based realities underlying the individual employment relationship. Although the common law courts have utilized the methodology of implied terms to regulate the individual

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19 OTTO KAHN-FREUND, LABOUR AND THE LAW 17 (1977).

employment relationship,[20] the inadequacy and uncertainty inherent in the implication of terms and its scope of application remain critical.

To this end, I respectfully disagree with Langille's view that "the ethic of procedural labour law is freedom of contract and self-determination — what people call industrial democracy — and its results are basic rights which it is believed lead to better, but self-determined outcomes."[21] On the contrary, my view is that the ethic of procedural labor law is *the availability and assurance of a level playing field*, which freedom of contract cannot provide. Under the current climate of labor regulation in most market-driven economies, the responsibility for finding the "rules" required for balancing conflicts of interests within the employment contract has been spontaneously and ingeniously assigned to soft law through both international and national instruments championing notions of "corporate social responsibility" and "partnership." Whether or not this plan succeeds is dependent upon the institutional framework and organic dynamics among the agents responsible for change in any given country. For Malaysia and perhaps many other countries with similar characteristics, this is certainly not the case. What is needed is to find the level playing field within a neutral rights-based platform, the best being a human rights platform embedded either within the constitution or legislation, in the absence of a written constitution. Such a level playing field would have the capacity to provide apolitical regulation of the contract of employment.

Collins recognizes a new theme for regulating employment relations for competitiveness in a global economic market and uses the metaphor of "partnership" to describe a new relationship between capital and labor.[22] He argues that human capital is becoming increasingly important to businesses in a knowledge-driven economy and that instituting flexible and cooperative employee relations is essential to increasing production. Collins sees the facilitation and stabilization of flexible employment relations as the core of competitiveness and is of the view that neither deregulation nor mandatory labor standards achieve this goal. These observations support a hybrid mode of labor regulation.

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20 The English cases of *Post Office v. Roberts* [1980] I.R.L.R. 347 and *Mahmoud v. Bank of Credit and Commerce S.A.* [1998] A.C. 20 introduced the novel, overriding, implied term of mutual trust and confidence into employment contracts and the concept has been received into Malaysian jurisprudence.

21 Brian Langille, *Core Labour Rights — The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409 (2005).

22 Hugh Collins, *Regulating the Employment Relation for Competitiveness*, 30 IND. L.J. 17 (2001).

While traditionally labor relations were regulated through tradeoffs between capital and labor, Collins argues that flexible employment relations for competitiveness should be achieved through a "stable compromise of interests" and should reflect "principles of fairness" so that the inherent flexibility does not become vulnerable to opportunism. To achieve this "stable compromise of interests," Collins prescribes a revision of implied terms of contracts of employment, the creation of new legal institutions of workplace governance, and the enhancement of employers' ability to make credible commitments in return for functional flexibility on the part of employees. Collin's theme of maintaining flexible employment relations for competitiveness within a fair workplace, which emphasizes a "stable compromise of interests," augurs well for finding a new employment law which maps the public-private terrain by moving away from contract to status through the incorporation of corporate social responsibility codes and public soft law initiatives.

However, in a country like Malaysia, where collective bargaining and legislative provisions empowering labor are weak and unlikely to change, it is clear that hard law alone cannot create favorable outcomes for labor. Neither can soft law alone, as explained above, due to its voluntary and unenforceable nature. It is therefore my belief that for Malaysia and similar legal systems, the way forward in creating any meaningful outcome for labor issues, at least at the individual level, is through a hybrid system of labor regulation, where soft law plays a very important role in designing outcomes in hard law, albeit within a status-based human rights framework. The next part of the Article demonstrates how a human-rights inspired status theory of the employment relationship, which encompasses principles of fairness as applied within human rights jurisprudence, supports a hybrid approach to employment regulation.

IV. CREATING THE SYNERGY BETWEEN HUMAN RIGHTS JURISPRUDENCE AND SOFT LAW — FINDING THE RIGHT TO LIVELIHOOD

As discussed above, the constitution is most useful in that human rights discovered within it may be applied to the employment relationship because constitutional law allows apolitical reasoning and the employment relationship needs to be construed through the application of legal norms beyond contract law. However, a theoretical construct must first be created and be amenable to possible judicial interpretation. A recurring theme in the labor-related human rights discourse is the need for and difficulty of

categorizing the range of labor rights that should be protected under the human rights umbrella, the form these rights should take, i.e., procedural or substantive, normative or reflexive, and the issue of enforceability of these rights once articulated and formed.[23]

An innovative development in Malaysian labor law has been the recognition of the "right to livelihood" as a fundamental human right. While the constitutional "right to livelihood" has been recognized in Malaysia and India, the courts in the relevant judgments did not ground their reasoning on any theoretical conception of rights.[24] I venture to supply that omission herein by introducing a theory on the right to livelihood as a fundamental constitutional right, which, when utilized alongside soft law sources like national policy, public-private codes and corporate social responsibility codes, will have the capacity to produce tangible outcomes and thus solve the problem of unenforceability of standalone soft law options, thus creating a hybrid system of labor regulation.

The particular constitutional norm that I rely on is the "right to life" found in many constitutions,[25] which, as I will illustrate, encompasses the "right to livelihood" and, when read together with the constitutional "equality" clause, provides, in appropriate cases, the much needed ethic of a level playing field in labor relations through the application of administrative law principles relating to procedural and substantive fairness, which in turn have the capacity to incorporate soft law codes.

I rely on Hohfeldian jurisprudence and Dworkinian judicial methodology to demonstrate that in the absence of an express national or supranational legislative regulatory framework for labor, a constitutionalized status theory based on the Hohfeldian model may be developed through constitutional interpretation as a suitable dispassionate regulator of the employment relationship. Such a development, to the extent that it facilitates employability, redresses concerns that the legal status of labor-related social rights is ambiguous. However, it is conceded that the legal status of social rights which are purely dependent on welfare-type considerations will remain ambiguous because they involve policy considerations. Nevertheless, where

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23 Judy Fudge, *The New Discourse of Labour Rights: From Social to Fundamental Rights?*, 29 COMP. LAB. L. & POL'Y J. 29 (2007).

24 Vanitha Sundra-Karean, *The Constitutional Protection of the Right to Livelihood in Malaysia: A Reality or Mere Fallacy?*, 11 ASIA PAC. L. REV. 23 (2003).

25 *See, e.g.*, INDIA CONST. art. 21 (India); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 2(2) (Ger.); CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 9. (Sing.).

these are embodied in soft law codes and customs of a hybrid nature, they may become enforceable.

The nature of the language of rights becomes controversial, however, when dealing with employment-related issues rather than the normal discourses on civil and political rights because employment rights involve social and economic factors. I use Hohfeldian reasoning to first dissect the language of rights and then construct an applicable theory for employment law, which has the potential to embrace soft law sources to create desirable outcomes for labor. The essence of Hohfeld's argument is that fundamental legal conceptions need to be analyzed and understood in order to appreciate the true nature of legal relations and this includes the contractual employment relationship.

In *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*,[26] Hohfeld demonstrates that labels commonly used in the legal world do not accurately reflect the true nature of the circumstances they relate to or the true meaning of the word used. To Hohfeld, all legal relations may be accurately described on the basis of various *sui generis* fundamental legal conceptions consisting of jural opposites and jural correlatives. Jural opposites consist of directly opposite notions. These include the concepts of right versus no right, privilege versus duty, power versus disability, and immunity versus liability. Jural correlatives on the other hand consist of mutually dependant concepts, where one concept corresponds and exists in relation to the other. These include the notions of right with duty, privilege with no right, power with liability, and immunity with disability. Hohfeld gave numerous illustrations of judges using the word "right" indiscriminately when the concept being referred to was not in essence a legal right capable of being enforced, but rather either a privilege, a power or immunity.[27] Hohfeld called a legally enforceable right a "claim right" and thus distinguished proper claim rights from general so-called prima facie generic rights, which upon deeper analysis were either unenforceable or did not attract the necessary correlative duty.

Further, Hohfeld was also of the opinion that a privilege, power or immunity could exist independently and need not be part of a core right. This is because Hohfeld recognized an analytical divide between claim rights on the one hand and privileges, powers and immunities on the other. He viewed privileges, powers and immunities as legal advantages, conferring

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26 Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

27 *Id*. at 30, 36, 37, 41.

some sort of advantage in law on the privilege-holder, power-holder or immunity-holder. Taking the example of a privilege to illustrate Hohfeld's perspective, the advantage involved would not be the ability to enforce the privilege in a proactive way, but rather the entitlement to protect the privilege from being unlawfully interfered with, as a response to a specific encroachment of the privilege.

In the context of the employment relationship, job security and the protection against unfair dismissal would be examples. The focus within the employment relationship should therefore be on the nature of concepts that regulate the relationship and on the consequences that may flow from possible breaches. For example, the implied term of mutual trust and confidence, the duty of cooperation and the duty to obey lawful and reasonable orders are concepts that exist within the common law employment relationship. However, the precise scope and application of these concepts would not only depend upon settled judicial precedents but also upon soft law codes, customs and practices operating within the particular workplace, industry and at the national level. This is so because the right to livelihood theory offered in this Article recognizes and acknowledges the existence of a complex chain of hard, hybrid and soft law norms within the employment relationship.

In applying a Hohfeldian analysis to the question whether the right to livelihood may exist as a constitutional claim right, the starting point would be an inquiry into the existence of the source of such a right. Part II of the Federal Constitution of Malaysia, entitled "Fundamental Liberties," contains a list of civil, political and economic rights, liberties and freedoms. The process of legal reasoning requires a two-stage inquiry into finding a right to livelihood within the concept of a right to life. Firstly, the question arises whether as a matter of interpretation, "life" can include "livelihood" and, if so, the grounds or reasons for finding such. Secondly, if the right to life can and does encompass the right to livelihood, what then is the juridical nature of the "right" to livelihood? Having demonstrated that Hohfeldian fundamental legal conceptions involving jural correlatives and jural opposites seek to clarify the true nature of legal relations, it is next necessary to examine the judicial role in clarifying these conceptions, in particular the conception of a "right" to livelihood.

Any legal theory, which has constitutional arguments or theories at its foundation, must rely upon a non-formalist and non-positivist judicial attitude for its development and application. This is because a constitution generally and a bill of rights specifically are not formalistic or positivistic documents amenable to merely literal interpretation, but are living political documents capable of creative and purposive exposition with a view to

producing best possible outcomes.[28] A formalistic or positivist approach to the interpretation of the constitution would in most cases favor the literal rule and exclude other possible interpretations. In this regard, Dworkin in *Law's Empire*[29] best explains the judicial role in constitutional interpretation because his perception of law is one of justification, which requires an interpretation that makes the best moral sense and makes a good institutional fit, thus taking into consideration the institutional dynamics and legal traditions of the particular jurisdiction. This approach supports hybrid systems of labor regulation because interpretations can have regard to soft law sources outside the constitution.

Dworkin advocates a normative theory of law by requiring the best moral interpretation of existing social practices of law. Existing social practices of labor law include the various institutions entrusted with the responsibility of maintaining a civil society for labor, which include the courts, the legislature, the executive, corporations that have committed to the United Nations Global Compact under the corporate social responsibility agenda,[30] and the various institutional frameworks providing for orderly social relations like the constitution, the contract, the concept of trust, obligations in tort, principles in equity, the scope of proprietary rights, etc.

Dworkin requires the best *moral* interpretation because law must have moral sense in order to be justified as a coercive force that impacts upon people. To him, the best moral sense is achieved where an equal concern and respect for people is expressed. As such, Dworkin's foundational principle of interpretation is equality in the abstract sense. Within the context of individual employment law, this would imply an equal concern and respect for employers and employees.[31]

To this end, Dworkin sees law as integrity in that the best politics

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28 Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1 (2000); Lord Irvine of Lairg, *Activism and Restraint: Human Rights and the Interpretive Process*, 4 EUR. HUM. RTS. L. REV. 350 (1999).

29 RONALD DWORKIN, LAW'S EMPIRE (1998).

30 Sixty three corporations in Malaysia at the moment. *Participants & Stakeholders*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/participants/search?commit=Search&keyword=&country[]=139&joined_after=&joined_before=&business_type=all&sector_id=all&listing_status_id=all&cop_status=all&organization_type_id=&commit=Search (last visited Feb. 1, 2011).

31 In *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 M.L.J. 261 (Malay.) and *Hong Leong Equipment SdnBhd v. Liew Fook Chuan* [1996] 1 M.L.J. 481 (Malay.), the Malaysian Court of Appeal held that the right to livelihood in article 5(1) of the Federal Constitution was to be read with the principle of equality in article 8(1) of the Federal Constitution in order to apply the administrative

determines the right outcome. Therefore, the judge who is entrusted with adjudicating a particular dispute should firstly embark on a pre-interpretive task of ascertaining all the legal materials relevant to the case at hand. The legal materials envisaged in the context of individual employment law based on the constitutional right to livelihood theory would be the specific contract of employment, express and implied terms of the particular contract, applicable statutory provisions, judicial precedents, general common law principles applicable to individual employment, and the relevant constitutional provisions of the country under study. These resources are those of existing legal practices. The judge will then have to construct a political theory that coheres with these existing legal practices and interpret the legal resources before him in the light of that political theory in order to produce the best solution to the legal problem at hand. In the context of a constitutionalized individual employment law, which seeks to ground employment rights as human rights, the political theory that needs to be constructed in the pre-interpretive and interpretive stages would be the theory that recognizes the right to livelihood as a constitutional right. The judge then moves on to the second stage of interpretation, which Dworkin calls the interpretive stage, where he applies the political theory to the facts at hand in order to reach a conclusion.[32]

A third, post-interpretive stage applies in "hard cases," where there is no clear rule or precedent that may be applicable to the issue at hand. Dworkin's theory of judicial adjudication is most relevant in human rights jurisprudence where most cases may be described as "hard cases," being controversial cases or cases without settled judicial precedents or legal rules. At this stage, the judge would have to take moral facts into consideration in order to produce the best outcome and may be involved in a process where the interpretation "folds back into itself" and has the effect of changing the original rule or rules which formed the pre-interpretive and interpretive stages, but which could not produce the best moral outcome. An illustration involving the post-interpretive stage is provided below in the context of discovering a "right to livelihood" within the concept of the "right to life."

It is important to recognize at this juncture that to Dworkin, the "interpretive attitude" of the ideal judge, "Hercules," involves the three stages of interpretation, which are applicable in relation to concrete conclusions to legal problems at hand as well as to the construction of general legal theory.

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law principle of fairness to determine if dismissals were unfair. For critique, see Sundra-Karean, *supra* note 24.

32 DWORKIN, *supra* note 29, at 65-68.

Therefore, the three-stage process involving pre-interpretation, interpretation and post-interpretation would apply not only to the solution of individual employment disputes based on the right to livelihood, but would be equally applicable to the initial construction of the right to livelihood theory.

Dworkin's idea of interpretation contrasts interpretation with description and normativity. A descriptive approach to discovering meaning merely describes a thing and does not prescribe anything. A normative approach to discovering meaning may or may not describe anything, but will prescribe something. On the other hand, to Dworkin, interpretation may involve various descriptions and normative assertions, but its aim is to discover the best moral outcome. This is why Dworkin's interpretive process involves the pre-interpretive, interpretive and post-interpretive stages discussed above.

In analyzing whether "life" can include "livelihood" as a matter of interpretation of general legal theory, one must bear in mind that when Dworkin's "Hercules" construes a provision in a constitution, he does not merely interpret the text literally, but often embarks upon an exposition of the meaning of a particular legal concept within such a living document, taking into consideration issues of institutional fit. Dworkin also differentiated between concepts and conceptions. Conceptions involve legal arguments, which are latent within the concept, and quite often a general legal concept involves different possible conceptions.[33]

Likewise, in construing the meaning of a "right to life" within the Malaysian clause in article 5(1) of the Federal Constitution, which provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law," while the starting point must surely be an analysis of the express words used, the express words reveal a variety of possible conceptions. Although the word "right" does not appear anywhere in the text of the clause or its heading, which reads "Liberty of the Person," because this clause appears in the section of the Constitution which deals with human rights and which constitutes the Bill of Rights section, the common reference to this particular clause as the "right to life" clause by judges and academics is understandable and acceptable as common legal practice and as a common legal concept.[34]

What is required is an analysis of whether, firstly, the concept of "right" refers only to the conception of a Hohfeldian claim-right; and secondly, whether the concept of "life" includes the conception of "livelihood." The

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33 *Id*. at 71-72.

34 Richard G. Wilkins & Jacob Reynolds, *International Law and the Right to Life*, 4 AVE MARIA L. REV. 123 (2006).

legal resources available to the judge in the pre-interpretive stage are the relevant constitutional provisions as well as the existing cases that have interpreted the concept of a "right to life." The case for analysis is thus a "hard case" in the Dworkinian sense because there are no settled judicial precedents or legal rules that are applicable to the question whether the "right to life" can include the "right to livelihood." "Hercules" therefore needs to proceed to the interpretive stage and construct a political theory, which fits the institutional framework of the legal system under study. In the context of the Malaysian legal system, "Hercules" will find that the political system encompassing its institutional framework is one of liberal democratic government.[35]

However, this process will not yet provide an answer to the pivotal question, as this is a "hard case." "Hercules" will therefore venture into the post-interpretive stage in order to discover the best moral answer to the question whether a "right to life" can include a "right to livelihood." This best moral answer must meet the Dworkinian requirement of institutional fit within the Malaysian liberal democracy in order to make sense. Only then will the resulting law have integrity or coherence, as the law must fit within the legal system under consideration.[36]

In analyzing whether the concept of "life" includes the conception of "livelihood," a starting point may be the *Oxford Dictionary*, which defines "life" as "the condition that distinguishes animals and plants from inorganic matter; including *the capacity for growth, functional activity and continual change* preceding death."[37] Therefore, *"the capacity for growth, functional activity and continual change"* for the purpose of staying alive must logically involve the liberty of earning a livelihood, whether it is through hunting and gathering or through the market. Neither any other person nor the state should have the right to unlawfully interfere with an individual's liberty to earn a livelihood in order to grow, function and develop as a human being. Such a conception is not only logical, but also morally desirable.

The post-interpretive method where the interpretation "folds back into itself" and changes the original rule occurs when the Malaysian "Hercules"

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35 This is due to the fact that Malaysia operates under a system of constitutional monarchy and parliamentary democracy, with the Federal Constitution occupying the status of supreme law of the land where elections are required and where the fundamental liberties of citizens are, subject to a few exceptions, reasonably protected within an entrenched Bill of Rights.

36 DWORKIN, *supra* note 29, at 225-28.

37 CONCISE OXFORD ENGLISH DICTIONARY 283 (Catherine Soanes & Angus Stevenson eds., 11th ed. 2004) (emphasis added).

extends the judicial precedents, which applied the concept of "life" only to analyzing the death sentence in criminal law,[38] to apply to the conception of "livelihood." The resulting best outcome of finding the conception of a "right to livelihood" within the concept of a "right to life" fits neatly within the Malaysian liberal democratic system and does therefore have integrity and institutional fit in the Dworkinian sense.[39] A consideration of the juridical nature of this "right to livelihood" is crucial to understanding its scope of application. This is a task that "Hercules" will have to undertake on a case-to-case basis.

In analyzing whether the concept of "right" refers to a claim right using Hohfeldian methodology, it is submitted that the fundamental conception within the generic "right to life" clause above is not a claim-right but a privilege. Indeed, Hohfeld acknowledged that the closest synonym to a legal "privilege" was legal "liberty" or legal "freedom."[40] It is "legal" to the extent that it provides some advantage in law. This conceptual meaning of the generic "right to life" is captured by the express wording of the clause within article 5(1) FC above and also by its heading, in that article 5(1) of the Federal Constitution is worded in the negative and the word "liberty" is used in its heading.

As the jural correlative of a privilege is a no-right, it is submitted that the fundamental conception in article 5(1) is that "[a] person's privilege to live and enjoy personal liberty shall not be interfered with save in accordance with law." To put it differently, all other citizens and the state have no right to interfere with an individual's personal liberty and his liberty (or privilege) to live, unless such interference is lawful. Conversely, the Hohfeldian jural opposite of a privilege is a no-duty. Applying the fundamental conception of the jural opposite to the generic "right to life," while all persons have the liberty to live and earn a livelihood, they also possess a no-duty to live and a no-duty to earn a livelihood.

Having demonstrated that as a matter of interpretation and construction, "life" does include "livelihood," and that the "right" is actually a privilege, in the sense of its being a liberty or freedom, the next question which arises involves the determination of the juridical nature of the generic "right to livelihood" within the context of individual employment relations *vis-à-vis*

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38 Attorney General v. Chow Thian Guan, 1 M.L.J. 51 [1983] (Malay.); Public Prosecutor v. Lau KeeHoo, 1 M.L.J. 157 [1983] (Malay.); Public Prosecutor v. Yee Kim Seng, 1 M.L.J. 252 [1983] (Malay.).

39 *See* Kirby, *supra* note 28; *see also* Irvine, *supra* note 28.

40 Hohfeld, *supra* note 26, at 36.

the contract of employment and the various soft law sources discussed herein.

The juridical nature of the "right" to livelihood in an employment setting may be explained from a Hohfeldian perspective as containing variable legal positions, which include claim rights, privileges, powers or immunities, according to the circumstances to which they appertain. The possible legal relations that may arise in modern-day employment positions are either, firstly, the contractual relationship between a private employer and employee, or secondly, the employment relationship between a public servant and the state. The state as employer would be regulated under principles of administrative law, while soft law considerations would be more relevant to private employers.

V. CONSTITUTIONALIZED EMPLOYMENT RELATIONS AND THE FAIRNESS PRINCIPLE — AN AVENUE FOR SOFT LAW?

The questions that arise next are: So what if the right to livelihood is constitutionally safeguarded; and what does this mean to the individual employee? The practical effect of recognizing the "right to livelihood" as a fundamental human right is that the contract of employment becomes imbued by the principles of procedural and substantive fairness found within the constitutional concept of "equality" enshrined in most constitutions and human rights legislation, if a juridical link exists between the "right to life" clause and the "equality" clause in the respective constitution or legislation.

Article 8(1) of the Federal Constitution provides: "All persons are equal before the law and entitled to the equal protection of the law." The juridical link between article 8(1) and article 5(1) that was discussed above was found within the word "law" in article 5(1), wherein the court held that "law" includes the Constitution and, therefore, the equality clause. By relying on persuasive precedents of the Indian Supreme Court, the Malaysian Court of Appeal expanded the concept of "equality," which essentially means "non-arbitrary," to include the conceptions of "fairness" and "reasonableness." Such an interpretation or rather exposition of the Constitution is that a combined reading of articles 5(1) and 8(1) produces the legal principle that "No person shall be deprived of his livelihood save in accordance with the principles of procedural and substantive fairness."[41]

Consequently, contracts of employment and the ensuing employment

41 Sundra-Karean, *supra* note 24.

relationship may be constitutionally tested alongside the ethos of traditional administrative law requirements of the right to be heard, the right to reasons for disciplinary action, the enforceability of procedural and substantive legitimate expectations, and the need for proportionality and fairness in the managerial right to discipline and punish.[42] The source of these legitimate expectations could well arise from corporate social responsibility codes. Therefore, when legal disputes arise in the context of unfair dismissal or breach of contract litigation, the constitutionalized doctrine may be applied on a case-by-case basis. Cases on breach of the employment contract may attract more flexible implication of terms, with terms of fact introduced under the rubric of "substantive fairness," incorporating commitments in soft law documents like the Malaysian 1975 Code of Conduct for Industrial Harmony.

Apart from the aim of building a coherent body of employment law, the practical and moral importance of developing case-law along this hybrid mode of interpretation is the educational role and influence such a development would have upon workplace culture, human resource management practices and norm-setting, which is what *really* matters to most individuals. The first legal position involving a contractual relationship between a private employer and an employee has, at its foundation, the common law contract of employment, which gives rise to various contractual rights and duties. The employee has thus exercised his constitutional privilege or liberty to earn a livelihood by entering into contractual relations.

The rights and duties arising from the contract of employment amount to claim rights with correlative duties in the Hohfeldian sense. As such, the "right" to livelihood envisaged within a constitutional doctrine can include claim rights with corresponding duties within the contract of employment. In essence, the contract of employment within a chain of legal norms[43] is subject to the constitutional right to livelihood. The consequence is that the contract of employment has been "constitutionalized" or given a constitutional status, and is thus subject to constitutional norms generally and the constitutional right to livelihood specifically. This is because the constitutional right to livelihood, like all other constitutional rights, operates on a vertical as well as on a horizontal basis.[44] The vertical basis of operation involves relations between the citizen and the state, while the horizontal basis

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42 Vanitha Sundra-Karean, *Charting New Horizons in Procedural Fairness and Substantive Fairness in Individual Employment Law*, 6 MAL. L.J., at i (2007) (Malay.).

43 HANS KELSEN, PURE THEORY OF LAW 221-33 (1967).

44 Aharon Barak, *Constitutional Human Rights and Private Law*, *in* HUMAN RIGHTS IN PRIVATE LAW 13 (Daniel Friedmann & Daphne Barak-Erez eds., 2001).

of operation involves relations between private legal persons. As the contract of employment involves private legal relations, constitutional norms would apply horizontally in employment relationships.

The employment relationship between a public servant and the state, on the other hand, does not involve the common law contract as its basis, but is based on the principles of administrative law. This is because public servants generally hold office at the pleasure of the Crown.[45] Therefore, administrative law principles applying to holders of public power would generally apply to the Crown or to the state as employer. Consequently, in Hohfeldian terms, the nature of the constitutional right to livelihood applicable to a public servant would be in the nature of a privilege and not a claim-right to be in employment. Thus, the privilege-holder would not be able to take any positive steps against the state to enforce the privilege. The state would, however, be under a duty not to prevent the privilege-holder from lawfully earning a living. Therefore, the privilege-holder would have a claim right that the state should not unlawfully prevent the pursuit or continuance of employment. This explains the applicability and relevance of administrative law principles to the regulation of public employment law and the lawful use of the discretionary powers of the state, where soft law policy considerations are relevant.

Similar reasoning would also apply to the relationship between general citizens and the state with respect to the "right" to livelihood. The "right" in this sense would not be perceived as a claim-right against the state to provide employment or welfare benefits, with a corresponding duty on the part of the state. This is because an analysis of judicial adjudication based upon Dworkinian jurisprudence will not see "Hercules" finding the right to social security within the right to livelihood, as "Hercules" will not engage in the formulation of policy.[46] The "right" to livelihood would therefore operate as a privilege, which would stop the state from unlawfully interfering with a citizen's liberty to earn a living. For example, forced labor in times of peace or legislation increasing the minimum working age in the absence of a legitimate aim may be found to be unlawful interference with the liberty to earn a livelihood. Such legislation, if passed, would be amenable to judicial review of its constitutionality.

Consequently, based on Hohfeldian reasoning there will not be any

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45 Ridge v. Baldwin [1964] A.C. (H.L.). However, in circumstances where public servants are employed on the basis of a contract of employment between the employee and the Crown, administrative law principles will still apply, as the employer in question is the state, exercising public power.

46 DWORKIN, *supra* note 29, at 243-44, 311-12, 410-13.

positive duty on the part of the state to provide employment or social security benefits; the state would also not be under any positive obligation to regulate the labor market and may allow the market to organize itself through private treaty and endeavor. Thus, though it may be desirable for labor, the state will not be obliged to create social rights like a minimum floor of statutory terms and conditions of work or a statutory scheme to address unfair dismissal.

In the event that the labor market is left to mainly private endeavor without satisfactory statutory norms regulating the individual labor relationship, as in the case of some Asian economies, the private employment relationship will fall back onto the common law contract as its regulator. Such is the fate of workers in countries with weak unionization and non-comprehensive safety net legislation, Malaysia being an example. The legal question, which should arise, is whether the common law contract of employment may be subject to the constitutional norms within the constitutional fabric of the jurisdiction in question. An affirmative answer would save soft law sources like corporate codes and national policy statements from being contracted out of. These would exist under the broad rubric of "fairness" within the constitutional norm of "equality."

Collins has argued that

> the rigid distinction between the public and private law has inhibited the development of a more radical perspective within labour law which requires the power of employers to be justified by more than appeals to agreements to market transactions. Once managerial power is likened to governmental power, old questions concerning the absence of democracy and respect for civil liberties in the workplace begin to press upon us with renewed intensity.[47]

Collins, while recognizing the need for translating "public law ideas of rights into a form and content suitable for reasoning in private law" through the approach of inter-textuality, expresses concern that hybrid reasoning may "pursue policy considerations at the expense of considerations of private autonomy."[48] It is hoped that this contribution to the debate allays Collins' fears.

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47 Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 IND. L.J. 1, 14 (1986).

48 Hugh Collins, *Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization*, 10 DALHOUSIE L.J. 1, 4, 16 (2007).

Teubner says,

> if it is true that today's private governance regimes are producing vast amounts of law that govern, regulate and adjudicate wide areas of social activities then the question of a "constitution" for these private regimes is as pressing as the constitutional question was for the monarchical political regimes in recent European history.[49]

To this end, this Article answers Teubner's call for a "constitution" regulating private employment law.

CONCLUSION

It may now be said that with the judicial recognition of the "right to livelihood" as a fundamental constitutional right in Malaysia,[50] the rigid distinction between public and private law in the field of employment relations may slowly disappear, especially with greater reliance upon public-private initiatives and with the introduction of corporate social responsibility codes for labor. The agents responsible for facilitating this shift from hard to hybrid labor regulation are the industrial tribunals, the civil courts, lawyers, academics and human resource practitioners. Where soft law sources are incorporated into tribunal awards and court judgments through creative interpretation and utilization of the right to livelihood theory, they will become hard law. However, where soft law sources have not been litigated upon, they will remain soft law with a hybrid, chameleon-like character having the potential to harden. It is hoped that the agents of change will rise to the occasion.

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49 Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 SOC. & LEGAL STUD. 399, 414 (2000).

50 For a discussion of judicial opportunities seized and lost, see Vanitha Sundra-Karean, *The Constitutional Right to Livelihood as a Developing Field in Malaysian Labour Jurisprudence*, 5 MAL. L.J., at lxxxviii (2007) (Malay.).