

Human Resource Management: Labour Outsourcing from Malaysian Law Perspective

Kamal Halili Hassan
Faculty of Law
Universiti Kebangsaan Malaysia
43600 UKM Bangi, Selangor
Email: k.halili@ukm.my

Lee Jia Ping
Graduate Student
Faculty of Law
Universiti Kebangsaan Malaysia
43600 UKM Bangi, Selangor

Noorfajri Ismail
Faculty of Law
Universiti Kebangsaan Malaysia
43600 UKM Bangi, Selangor
Email: fajri@ukm.my

ABSTRACT

Business entrepreneurship and outsourcing are two activities which are interlinked to each other. Outsourcing of labour is not an alien term in the business arena. Outsourcing of labour encompasses a fusion of legal and economic issues. The legal rights of the employee and the economic benefits of the employer are often contradictory. Thus the function of labour law is to strike a balance between them to ensure a win-win situation. On one hand, an employer has the right to organise his business in a way to obtain maximum profit and on the other hand, employees have to ensure that their basic rights are protected under employment law. This article which adopts the legal analysis methodology (qualitative) is discussed from Malaysian legal perspective. In the Malaysian context, the Malaysian parliament has amended the Employment Act 1955 and a new section 33A has been incorporated into the amendment Act 2011 to protect workers employed under a contract for labour.

Keywords: Malaysian law, entrepreneurship, outsourcing, employer, employee

INTRODUCTION

Despite majority of entrepreneurs carrying out their businesses using employees employed under a contract of service, an increasing number of them undertake their businesses using workers under contract for labour. They sourced the workers from companies supplying workers. The workers are considered as working under a contract for labour or contract for services. Outsourcing may also take in the form of a business entity outsourcing part of their task to other entities to perform it. In an extreme view, outsourcing is considered as an innovative endeavour in entrepreneurship. Entrepreneurs find ways to minimise their production costs. Entrepreneurs who outsource part of their work will not have to shoulder the burden of managing their own human resources. Thus from the economic point of view, outsourcing is much cheaper than entrepreneurs undertaking the work by themselves. However from the labour point of view, outsourcing damages workers' rights. Not only security of tenure is at stake, other rights such as social security and employees' provident fund contribution is also at risk where 'employer' might not contribute on behalf of their employees. The law on outsourcing and its effects on employees in Malaysia are not very clear. This is seen from the implications of the 2011 amendment to the Employment Act 1955 – on the issue of outsourcing - which has been objected by many quarters especially the trade unions. This article examines this uncertainty by discussing outsourcing issues from the legal perspective.

Globalisation and intense competition have triggered many organisations to consider the difficulties in developing and maintaining their labours. This has caused many companies to engage with various kinds of sourcing strategies. According to Oshri, Kotlarsky and Wilcocks (2009), sourcing

encompasses various in-sourcing, captive offshoring, nearshoring and onshoring. Outsourcing can be defined as contracting a third party provider to carry out certain work or service for the employer. An agreed amount of money, length of time and scope of work is agreed upon between the two parties for such contract. The common examples of outsourcing practices in Malaysia are cleaning, catering, security, gardening and maintenance. The inclination to cut costs and business overheads has resulted in the outsourcing of task requiring little skill.

Sub-contracting and outsourcing of labour constitutes a return to the old (pre-Fordist) forms of work organisation. It was a common practice in the nineteenth century in Europe for workers to be subjected to labour hire arrangements as opposed to a long contracted service. The labour hire agreements signed either by the workers themselves or by a '*marchandeur*' or sub-contractor of labour, a client based arrangement for a specified work. '*Marchandeur*' was the workers' representative to labour-subcontractor where he appeared as their employer. The '*marchandeur*' then proceeded to have it performed by workers he remunerated or paid directly. This practice is regarded as labour trafficking and has been outlawed.

Malaysia has also been involved in the practice of labour outsourcing (see Table 1 in appendix). In Malaysia, outsourcing of labour has been practised since British colonisation. According to Trocki, (2007) the *kangani* system is a system that was introduced by Temenggong Daeng Ibrahim to develop the black pepper and *gambier* plantations in Johor. The word "*kangani*" means "*overseer*" or "*foreman*" in Tamil (Ooi 2004). The *kangani* was essentially a labour recruiter. He was sent by his employer to recruit workers from their home villages in India. He was paid a commission on each labourer recruited. He organised the founding of the settlement. On his return to Malaya, he usually acted as plantation foreman for the labour recruited. The *kangani* system of contract for labour lent itself to serious and frequent abuse of labour. Labourers being ill treated, forced to work for long working hours with little pay. Due to the unfair labour practice and sheer violation of human rights, the *kangani* system has been prohibited in Malaysia for a long time. The British Administration through the Employment Ordinance in 1955 had abolished indentured labour, bonded labour and the *kangani* in Malaya, effectively abolishing the middleman or the "*contractor for labour*" as employers.

REASONS FOR OUTSOURCING OF LABOUR

Entrepreneurs enjoy the right to run their businesses. Thus they can organise and reorganise their business entities with the primary purpose of making good profit. Reducing costs is an avoidable way to keep business venture viable and sustainable. Entrepreneurs take a stand that outsourcing helps them to save cost. Outsourcing of labour reduces financial burden of a company. It is one of the methods to bring a new life for a financially critical company. Those tasks that are not the core business of the company does not generate any profit for example cleaning the office but the company cannot operate properly without the cleaner services. To hire a team of permanent full time workers for cleaning will incur of lot of expenses. Furthermore, the company might not have sufficient work for the cleaners. Therefore, outsourcing the cleaning task to a contractor for labour will solve this problem.

During economic downturn, company suffers continuous losses albeit numerous attempts made to increase sales to generate profits. Thus, it is the right of the company to reorganise its business for the purpose of economy and survival of the company during hard times. This situation is discussed in the case of *Hume Industries (M) Bhd v Mohamad Shafie & Ors* [2005] 3 ILR 421, where Beranang (the company) outsourced the company's product to Kum Sang (the contractor) for economic or business reasons. Beranang plant was suffering losses for four years and the continued loss suffered had made it no longer economically viable to continue the production of its own products. Having complied with all the necessary procedures for retrenchment and acted with *bona fide* intention, the Industrial Court comes to a conclusion that the dismissal of the claimants by the company is with just cause and/or excuse. The company has the right to conduct outsourcing and retrench its labour. Via outsourcing labour the principal company might deal with the contractor for labour. The contractor would supply his workers to the principal company to perform the necessary task.

According to Alian Supiot (2001), the sub-contracting of former in-house activities has directly affected the workers. Worker will no longer benefit from working condition derived from collective agreements with the company. They will be subjected to different working terms and condition under the new employer which are usually less advantageous than the ones to which they were initially entitled. Alain Supiot says: "under legal sub-contracting, there is no legal relationship between one company and the employees of another. The employees depend more on decisions made by the principal rather than their actual employer". This is true where sub-contractor is financially

dependent solely on the principal. The principal determines not only the number of jobs, but also vocational training policies and working organisation. In such circumstances, most of the labour law provisions are ineffective. This includes for example representation, negotiation and bargaining structure. Important changes are taking place in the way power is exercised in the company. Such changes make it more difficult to deal with subordination. Subordination remains the major criteria in defining employment contract.

In most cases, employers have additional power i.e. the ability to extend at their discretion the employment contract upon expiry. This gives employer a powerful tool to influence worker behavior particularly in the case of young adults who more often than not begin their career under this kind of contract. The authors are of the opinion that the high unemployment rate has prompted employees to accept working condition that they would refuse if they knew they could readily find a job elsewhere. Unfair labour practices such as decreasing the pay in return of extension of contract might occur. Refusal of deduction of salary will cause the labour to lose his job since the contract for labour is going to expire soon. The contractor does not appreciate the experience, skill and contribution of the labour during the period of the contract. Instead of giving increment, the contractor is taking advantage of the labour.

THE EMPLOYER'S PREROGATIVE TO OUTSOURCING

It is the right of the company to organise its business in the way it likes for the purpose of economy or convenience provided that it acts *bona fide*. The decision to outsource labours is an exercise of the managements' prerogative. The employer has the right to reorganise its business and operations. When there is an excess of labours to the requirement of the business, the employer is entitled to discharge the excesses. This was permissible since in industrial jurisprudence the employer had the right to determine the volume of his labour force consistent with his business and organisation. When he decided that there was a need for retrenchment, he had the rights to reorganise his business for the purpose of economy or convenience provided he acted in good faith. In carrying out the retrenchment, the employer has to show that it was done fairly. A case law has manifested the rights of employer under managerial prerogative (*Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira* [1996] 4 CLJ 747).

Although the employer is given the power to freely manage its business under management prerogative, it does not mean the employer has an absolute power. The employer is bound to exercise his management prerogative with *bona fide* intention, without discriminating and victimising his employees. This is to ensure the employer will not exercise its rights arbitrarily and to prevent unfair labour practice. This is because power tends to corrupt, absolute power corrupt absolutely. Therefore, the right of an employer under management prerogative can be challenged in the court of law.

RETRENCHMENT OF EMPLOYEES DUE TO LABOUR OUTSOURCING

Outsourcing will trigger a situation where the current employees have no sufficient work to perform. The independent contractor takes over the task of the current employees. The employer might downsize its organisation by retrenching the excessive employees to achieve economic optimisation. Put it simply, retrenchment means the company's business still continues but portion of the staff is discharged as surplus or redundant in order to reduce costs (*Ipoh City & Country Club Berhad v Mohd Khurshaid Ramjan Din* [2006] 3 ILR 1758).

The law on retrenchment is clearly stated in the case of *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 CLJ 235. The court of Appeal in this case has stated as follows: "... Retrenchment means the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action" (per SK Das J. in *Hariprasad v Divilkar* AIR [1957] SC 132). Dunston Ayaduri (1992) defines redundancy as: "a surplus of labour and is normally the result of a reorganisation of the business of the employer and its usual consequence is retrenchment, i.e., the termination by the employer of those employees found to be surplus to the requirements of the organisation. Thus, there must first be redundancy or surplus of labour before there can be retrenchment or termination of the surplus."

The burden is on the employer to prove on the balance of probabilities that the employees' position had become redundant thus resulting in their retrenchment (*Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 CLJ 155). The employer has to take all necessary steps and adhere to all relevant factors laid out in the Code of Conduct for Industrial Harmony 1975 before retrenching the employees. The

Industrial Court may take such Code into consideration in delivering its decision. The Code establishes ways in handling such retrenchment. In circumstances where redundancy situation is likely to exist an employer should, in consultation with his employees' representatives or their trade union as appropriate, and in consultation with the Ministry of Human Resources, take positive steps to avert or minimise reductions of workforce by the adoption of appropriate measures.

The Code in any event had no legal force or sanction. It is depicted in the case of *Penang & S Prai Textile & Garment Industry Employees Union v Dragon & Phoenix Bhd Penang & Anor* [1989] 1 MLJ 481, where the first company failure to adhere to the guidelines in the code did not render the claimants retrenchment exercise unjustified.

In the case of *Alfred AK Galin & 10 Ors v The Sarawak Club* [2007] 1 ILR 305, the Industrial Court held that the employer i.e. Sarawak Club had taken all necessary steps and acted in accordance with the Code of Conduct for Industrial Harmony. The claimants on the other hand were unable to tilt the balance in their favour to demonstrate to the court that the club's decision to privatise its bar service was capricious, without reason, *mala fide* or was actuated by victimisation or unfair labour practice. The club had successfully demonstrated to the court that it had genuinely reorganised its operations to derive the maximum benefit it could from its operations as the club's bar was facing real financial problems. Further the club's alternative employment to the claimants would have for all intents and purposes have stimulated and promoted better and dynamic industrial relations.

From the decision of the court on the cases that have been brought forward, the authors opine that the company or employer is eligible to terminate the employees if it can prove that the company is suffering losses for a period of time and has take all necessarily procedure to retrench his employees. However, are these procedures enough to dilute the predicament encountered by the employees after being retrenched? Losing a job will not be a trivial matter because it involves the livelihood of the employees and their families. Unemployment will trigger social crime such as theft, robbery, burglary and other social ills; not to mention the psychological effects on the workers.

SECURITY OF TENURE AND DISMISSAL WITHOUT JUST CAUSE AND EXCUSE

The Industrial Relations Act 1967 (IRA) via section 20 empowers an employee to take action against his employer if he feels that he has been dismissed without just cause or excuse. The provision entitles the employee to claim for the remedy of retrenchment, although the Industrial Court rarely awards such remedy. In lieu of reinstatement, the Court may grant compensation. The employee may take action through this section if he is dismissed because of outsourcing. The employer cannot use the excuse of outsourcing by way of re-organisation to render the employee's services redundant (*Trident Malaysia Sdn Bhd v National Union of Commercial Workers* [1987] 2 ILR 190). The employer is not allowed to use the excuse of outsourcing to disguise intention to get rid of the employees by rendering their services redundant. situation occurs in the case of (*Ipoh City & Country Club Berhad v Mohd Khurshaid Ramjan Din* [2006] 3 ILR 1756).

The court is looking at the term "*just cause and excuse*" in the perspective of the employer to retrench the employees. The authors are of the opinion that at times the court is merely focusing on the act of the employer to terminate the employees. How about the employees? We have to look at the other side of the coin. The labour law is to protect the labour rights. The employees has done nothing wrong and yet be terminated to give way to the survival of the company. The survival of the company is at the expense of the employees. Who is going to fend for the employees' survival and their families? What happens if the employee is the sole bread winner for the family? What about those employees who have reached 50 years old, are they able to obtain another job in the light of the age factor? This is the reason why the International Labour Organisation (ILO) and Malaysian laws ensure that workers enjoy security of tenure. Although outsourcing is not outlawed, the exercise must be carried out minimally not to the extent of damaging workers' long term security of tenure.

The ILO (1997) states that outsourcing of labour has introduced a greater flexibility in employment and reduced the cost of labour. However, such statement is a contradiction in terms as outsourcing of labour will also affect workers' security of tenure. A central issue here is to what extent labour outsourcing will diminish employees' security of tenure. The labour who works under the contractors for labour may be hired and fired at any time by the principal and the contractor. There is no master and servant relationship between them and of course the issue of security of tenure will not come into the picture. In such a situation, the labour can be terminated even though there is no misconduct committed by the labour. The contractor for labour will not defend or represent the worker even though it is not the fault of the worker. This is because the contractor for labour depends on the

principal to give him the contract or job. The authors feel that it will not be too far-fetched to say that the contractor for labour is actually the client of the principal employer and getting a business deal is much more important than defending the rights of the workers.

To a large extent however, Malaysian law recognises employees' security of tenure. The Malaysian Court of Appeal in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 had affirmed that employees had the right to livelihood which is akin to the right to life under the Federal Constitution. Thus, the practice of labour outsourcing will certainly diminish this right. Employees working under the contract of labour outsourcing are subject to termination once the contract ends. In the long run, security of tenure will just be a good theory but not effective in real life. One problem of outsourcing is the status of the labour. Even if he is a labourer working under a business arrangement, he might not have a contract of service. In other words, he is not an 'employee' to either the 'primary employer' or 'immediate employer'. Failure to prove that he is an 'employee' employed under a contract of service will nullify his protection under statutes, be it the Employment Act (EA) 1955 or the IRA 1967. The Industrial Court does not have jurisdiction to hear the labourer's case if he is not an employee/workman employed under a contract of service.

UNIONISATION

The ILO (1997) indicates that the complete lack of job-security is found to be a major stumbling block in the unionisation of contract workers. Workers are moving from a company to another company, from one sector to another sector and from one industry to another industry. This mobility affects workers' attempt for unionisation. It prevents workers from joining a specific trade union since they are not staying permanently in a particular industry. Section 2 of the Trade Unions Act 1959 provides that members of a trade union must be workmen working in a particular place i.e West Malaysia, Sabah or Sarawak, within any particular establishment trade, occupation or industry or within any similar trades, occupations or industries. Section 26(1A) of the Trade Unions Act 1959 provides that members of any trade union must be employed or engaged in any establishment, trade, occupation or industry in respect of the registered trade union. The workers for contractor for labour have no way to fulfill this condition. Section 8 of the Employment Act 1955 and section 5 of the Industrial Relations Act 1967 provides for the right to freedom of association to workers. The provisions prohibit employers from incorporating into the contract of service a denial of worker to form or join a trade union. The provisions reinforced the constitutional guarantee entrenched under Article 10(1) (c) of the Federal Constitution on the right of citizens to form an association.

Without unionisation, there is no representative from the worker to negotiate with the principal employer or the contractor for labour. Hence, the workers are unable to protect their legitimate interests as there is no collective agreement or collective bargaining entered into between the principal employer or the contractor for labour. The workers who have no bargaining power are easily succumbed to unfair labour practices and victimised by either the contractor or the principal employer. This tripartite relationship has placed the worker in a disadvantageous position. The workers have no channel to voice their grouses and dissatisfaction over the unfair treatment.

EVASION OF CONTRIBUTION TO WORKERS' PROVIDENT OR SOCIAL SECURITY FUNDS

Evasion of contribution to the Employees' Provident Fund (EPF) and Employees' Social Security Organisation (SOCSO) has become an issue in outsourcing for labour. The former provides for a compulsory contribution provident fund which is payable to employees in full upon reaching the age of 55 years. The latter is to provide protection for employees and their families in situations where the employees sustain injury or death. One primary legal requirement under the respective Act for the contribution to EPF or SOCSO is that workers must be employed under a contract of service. In other words, the claimant must be employed as an 'employee' or 'workman'. Those engaged under a 'contract for services' are not protected. This gives rise to the problem: the company or business entity which receives the workers (the immediate employer) may refuse to contribute to EPF by arguing that the claimants/workers are not employed under a contract of service. The company that delivered the workers (the principal employer) also refuses to contribute to EPF by arguing that they only sourced the workers for the 'immediate employer'.

In some cases, deductions may be made to the salary but there might be no contribution made by the 'employer' to the EPF and SOCSO department. The contractors may not only refuse to

contribute on their employers' part but also illegally taken into possession the money that ought to be contributed to EPF and SOCSO department on the employees' part. This totally put the contract labours at a disadvantage. Some of the irresponsible contractors abscond without paying wages to the labours. The labours are left to fend for themselves without any prior notice of termination. The principal employers claimed that they have settled the payment with the contractors and it is the duty of the contractor to pay the labours. In this situation, works or services have been done by the labours but they are unable to get their wages. When the matter is brought up to the Labour Court or Industrial Court, a paper judgment was obtained. Some of the contractors may not be able to pay damages or other payment ordered by the Labour Court or Industrial Court while the other contractors cannot be located at all. We hope that with the amendment of new section 33A incorporated into the Employment Act 1955, the execution process of the Labour Court can be done efficiently. At least from the registers, the contractors can be traced, monitored and black listed to prevent the occurrence of the similar incident.

OCCUPATIONAL SAFETY AND VICARIOUS LIABILITY

Vicariously liability is also an issue in outsourcing of labour. Vicariously liability means that the employer can be held liable for any tortious act committed by the employees provided that the act was committed in the course of employment. This liability only exists in the relationship of master and servant or employer and employee and as between a principal and his agent. Three requirements must be satisfied in order for vicarious liability to arise. First, there must be a wrongful, or tortious act; second, there exists a special relationship that is recognised by law between the person alleged to be vicariously liable and tortfeasor, and third the tort is committed within the course of employment. The special relationship referred to here is limited to the employee-employer relationship (Norchaya Talib 2003). Since in issue of a contract of service is not clear in labour outsourcing, the vicariously liability issue also is uncertain. In the case of employees' accident, who will be vicariously liable: the principle employer or the immediate employer? Outsourcing of labour creates a new method of job performance. It is a case where more than one legal entity will control the manner in which an employee performs work. We call this relationship as a triangular relationship because it involves three persons i.e. employee and two other legal entities. There will be one employer and two or more legal entities controlling the performance of the work of the employees. This is a situation where the master and servant relationship is broken. The principal employer has no relation with the labours supplied by the contractors. One of the three requirements for vicarious liability cannot be satisfied. Hence, there is no vicarious liability on the part of the principal employer towards the labours.

Whether a person is an employee, and whether there is a special relationship between the parties, depends on whether the relationship is based on a contract of service or a contract for services. A special relationship exists in a contract of service but not a contract for services. A person who is in a contract of service is an employee whereas one who is in a contract for services is an independent contractor. This general rule is subjected to an exception that an employer is not liable for the torts of his independent contractors. An independent contractor is a person who, although working for the employer, is not controlled by the employer in the method or conduct relating to the performance of that work. An independent contractor is one who works under a contract for services. In principle an employer is not liable for the tort committed by his independent contractor. An employer may however be liable for the tort committed by his independent contractor if the employer is deemed to have committed a tort himself. This may arise in the four situations as follows:

- (a) Employer authorising the commission of a tort
A person who instigates, procures or authorises another to commit a tort is deemed to have committed the tort himself. Liability is imposed irrespective of the nature of the relationship between the employer and the primary tortfeasor, be it an employee, independent contractor or agent.
- (b) Tort which do not require intentional or negligent conduct by the tort
In the torts of nuisance, strict liability under the rule in *Rylands v Fletcher* [1868] UKHL 1 and breach of statutory duty, liability does not depend on either intentional or negligent conduct on the part of the employer, employee or independent contractor. The tort need not be

authorised or instigated by the employer. As long as the requirements under each particular tort are fulfilled, the tort is established and liability may be shifted over to the employer.

(c) Negligence of the employer

If damage is caused by the incompetence of his independent contractors in carrying out their duty, the employer will be liable for the negligence. This is due to the employer's personal negligence in failing to employ competent and skilled independent contractor. In the case of *Robinson v Beaconsfield RDC* [1911] 2 Ch 188, the defendants employed contractors to clean out cesspools of sewerage taken from the cesspools in their district but no arrangements were made for the disposal of sewage taken from the cesspools. The contractors deposited some sewage on the plaintiff's land. The court found the defendants liable for failing to make proper precaution to dispose of the sewage.

(d) Non delegable duties

An employer is also liable in situations where the duty is non delegable. Non delegable duties include activities that are inherently dangerous so that the employer cannot shift his duty of care to the independent contractor. Hazardous activities have been held to be non delegable and employers have been liable for the lighting of open fires on bush land and for negligence in reroofing a row of terraced house where difficulties with the joins between the houses were well known. The test seems to be whether the activity is inherently dangerous so as make the employer liable for any ensuing damage.

In *Lee Kee v Gui See & Anor* [1972] 1 MLJ 33, the defendants were liable for the negligence of their independent contractor who set fire to some unwanted branches and tree trunks on the defendants' land and then left the fire unattended that it spread to, and destroyed the property of the plaintiff. The court held that if a man lights a fire on his land to burn highly combustible material, he must take all reasonable precautions to prevent the fire from spreading. The duty is absolute and non delegable and it is irrelevant that the performance of his duty was given to a third party whose negligence subsequently causes the damage.

A person who does work for another may be an agent of the other. An agent is sometimes a 'servant' and therefore employee. However, an agent may also be an independent contractor. The general rule is that an employer will be vicariously liable for the acts of his agents who are also his employees. For those agents who are independent contractor, the employer will not be vicariously liable. An issue which require some consideration under liability in respect of agents is the liability of A as a vehicle owner to injury caused to C, a third party through the negligent driving of B. Naturally A will be liable if B is his employee who causes the accident in the course of employment. This principle has been expended to cases in which B is not A's employee. It was held in *Yeo Tin Sang v Lim Choo Kee* [1961] 27 MLJ 23, that the injury or loss is caused by a third person by wrongful act of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent. Here the plaintiff recovered damages from the defendant, who owned the car in question, when the driver, X, through his negligent driving caused injuries to the plaintiff.

The authors believe that a joint liability between the principal and the contractor for labour seem to the best solution. The contractor should be liable because the negligent act is caused by his worker who is within his control. There is a master and servant relationship between the contractor for labour and the labour. As for the principal employer, he has a duty to select capable contractor to perform the job. The contractor is representing the principal in performing the task. Therefore, the selection should be done carefully and various factors that need to be taken into account such as the capability and professionalism of the contractor and its labour, the goodwill and reputation of the contractor or the reliability of the contractor. As a result, the principal employer should be held vicariously liable to the negligent act committed by the contractor and its labour.

Under the Occupational Safety and Health Act 1994 (OSHA), both principal and immediate employers could be prosecuted for any accidents occurred at the work place due to negligence on unsafe place of work. Although legally both principal and immediate employers could be prosecuted, in practice however the prosecutor will decide to take action either on one of them, usually the employer who is directly at fault.

The Malaysia government has been planning new amendments to the Labour Laws, i.e. Employment Act 1955, Industrial Relations Act 1967, and the Trade Unions Act 1959, since 2010. The first of these amendments that has come before Parliament is D.R.25/2010 (Employment (Amendment) Bill 2010). The amendments were suggested by the National Union of Plantation Workers.

A new provision for definition of “*contractor for labour*” has been inserted into section 2(1) of the Employment Act 1955 to replace the definition of “*subcontractor for labour*”. The definition of “*contractor for labour*” is similar to “*subcontractor for labour*” except adding the word “principal” to the latter to widen the coverage of the parties involved and to further explain the relationship between principal contractor and subcontractor who supply labour. The new provision of section 33A of the Employment Act 1955 requires the contractor for labour who intends to supply or undertakes to supply any employee registers with Director General. Under this provision, the contractor for labour shall keep or maintain a record of information relating to supply of employees for the inspection and investigation of the relevant authority.

The purpose of inserting section 33A of the Employment Act 1955 is to ensure workers who are employed under contract for labour are protected and enjoy their rights under the Employment Act 1955. This noble attempt should not be misinterpreted as an encouragement or legalisation of outsourcing of labour by the government. Outsourcing of labour or contractor for labour has been practised for a long time in various sectors to support the country’s industrialisation. It is argued that is difficult now to put a halt to outsourcing labour that have been operating for years. However, with the new amendment, the Director General will be informed on the particulars of the contractors and their employees. This will enable the Ministry of Human Resources and other relevant authorities to trace the irresponsible contractors, keep abreast with the statistics of contract labours and to protect the contract labours.

RESPONSES TO THE NEW AMENDMENT

El Sen, Teoh (2011) remarked that trade unions and activists had voiced their opposition to the changes, describing them as “*anti-worker*” and “*anti-union*” even before the parliament passed the amendment. The trade union activists argued that the new provisions will lead to discrimination on workers as employers will largely use contractors to employ workers on their behalf. S Subramaniam, the Human Resources Minister disagreed and clarified that the purpose of the amendments was to “*protect the rights of workers and not to institutionalise the system*”. He added that a tripartite committee could recommend that certain sectors be excluded from the system. The function of the tripartite committee is to control the contractor-for-labour system. He also pointed out that the amended act allowed the minister to disallow any sector from depending on contractors to hire workers.

Syed Shahir Syed Mohamad (2010), the former President of the Malaysian Trade Union Congress, believes that these new amendments are not in consonant with the intent of the Employment Act 1955. According to him, the inclusion of these clauses would reduce employees working under the “*contractor for labour*” to a new sub-class of workers. Additionally, the amendment to define “*contractor for labour*” as employer is also against the ILO Decent Work Agenda, as it:

- (a) Does not provide opportunities for work that is productive;
- (b) Does not deliver a fair income;
- (c) Does not provide security in the workplace and social protection for families;
- (d) Offers no prospects for personal development and social integration; and
- (e) Instead, the proposed amendments contribute towards the creation of a new sub-class of workers.

According to Syed Shahir again: “the existing provisions in Parts VI, VII, XIIB, XIII, XIV and XV in the current Employment Act 1955 provides for workers under contractors and sub-contractors, agents as per the definition of employer under s 2 of the Employment Act 1955, any person or any establishment where any commerce, trade, profession or business of any description is carried on as per s 63A(1) of the Employment Act and therefore there is no need to introduce such an amendment including the proposed s 33A of the Employment Act 1955. Unlike the principal employer or the contractor who carries out work, the contractor for labour or labour supplier:

- (a) Does not own the means nor the factors of production or services and has no knowledge on how to carry-out work;

- (b) Does not possess capital nor technology nor are they innovators and definitely are not wealth generators; and
- (c) Are actually parasites living off the blood and sweat of the workers they possess”.

Without doubt, the new section 33A has two side effects. On one hand, it looks that the 2011 amendment of the Employment Act has legalised the contract of labour and employers will take that as an encouragement to continue employing contract for labours. On the other hand, the amendment Act is merely endorsing the already practices of labour outsourcing and to require the proper registration of labours under such contract. The trade unions which object to the amendment argued that with the new amendment it indicates that the current government encourages and hence legalises the practices of outsourcing. The government however feels that outsourcing is already an accepted practice in business and it would be better to require the ‘employer’ to register the workers so that government can monitor the situation.

CONCLUSION

The legal rights of the employee and the economic benefits of the employer are often contradictory. The function of labour law is to strike a balance between them to ensure a win-win situation. Under outsourcing of labour, the employer has the right to organise their business in a way to obtain maximum profit. However, the employees have to ensure that their basic rights protected under employment law. The Malaysian parliament in 2011 has amended the Employment Act 1955 and a new section 33A has been incorporated to protect workers employed under a contract for labour. The aim of the new amendment is to protect workers employed under outsourcing contract which require companies outsourcing workers to register them. However, registration of workers alone will not answer the persisting question whether the workers are well protected under as the EPF Act and the SOCSO Act. Issue of their right to contributions to the EPF or SOCSO also still remains unanswered. In the long term, workers’ security of tenure remains elusive.

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TABLE 1:

Top Rated Outsourcing Countries				
Country	Overall Rating	Cost Index	Resources/Skills	Workforce
India	7.1	8.3	6	1,430,000,000
Indonesia	6.9	8.6	4.3	1,033,000,000
China	6.4	7	5.6	780,000,000
Bulgaria	6.4	8.8	2.9	3,000,000
Philippines	6.3	9	2.8	39,000,000
Jordan	6.2	7.6	2.7	2,000,000
Singapore	6.5	6.4	5.7	3,000,000
Thailand	6	8.2	2.3	39,000,000
Lithuania	5.9	7	3.9	2,000,000
Egypt	5.8	9	0.9	26,000,000
Malaysia	5.8	7.9	2.2	12,000,000
Estonia	5.8	7.5	5.2	1,000,000
Chile	5.7	7.2	3	8,000,000
Hungary	5.6	6.9	3.4	4,000,000
Poland	5.6	6.1	3.6	17,000,000
Czech Republic	5.6	6.9	3.2	5,000,000
Ukraine	5.5	6.3	3.2	22,000,000
Romania	5.5	6.8	2.7	9,000,000
Latvia	5.4	7	2.7	1,000,000
Vietnam	5.4	7.4	2.5	46,000,000
Ghana	4.9	7.5	0.9	11,000,000
South Africa	4.6	6.9	0.6	17,000,000
Kenya	4.5	6.7	1.3	18,000,000
Senegal	4.3	7.1	0.2	6,000,000

Source: (<http://www.statisticbrain.com/outsourcing-statistics-by-country/>: retrieved on 13 May 2013)