LABOR-ONLY CONTRACTORS: NEW GENERATION OF *"CABOs"*

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I. HISTORICAL BACKGROUND

The scourge of exploitation remains pervasive as it was before the advent of the Labor Code. Although some of the old practices had been officially discarded, others reappeared tailored to suit the greed of the modern entrepreneurs.

For one, the *cabo*[1] system continues to thrive because of the ignorance of the workers. The roots that fertilized the system had its origin from the Chinese workers called "coolies" whose services were "leased" by crafty entrepreneurs on a *pakyao* basis.[2]

During the Spanish regime, the *cabos* took it upon themselves to pay the wages of the workers on a *pakyao* or per *piraso*[3] basis, impose discipline, select those who will work, and dictate the amount to be paid. The *cabo* was the lord and master as he determined the economic lifeline of the workers and their families. The workers owed their fealty to the *cabo*, and looked upon him with deep gratitude like a father of a big family providing their daily sustenance.

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[1]The common concept of *cabo* as practiced in shipping companies for arrastre and stevedoring services is a slight variation to the one that prevailed to the in the early period. The latter was applicable to almost any kind of undertaking. *See* the High Court's definition in Chapter II.

[2]Navarro v. Barredo, 50 O.G. 5907, cited by Federico B. Moreno, *Philippine Law Dictionary* (1972) p. 337. Actually, the practice is more than the meaning given by the Supreme Court. Rather, it is akin to a contract of undertaking on a package-deal basis where the workers perform the job upon the specifications and instructions of the contractor.

[3]Per *piraso* is similar to the practice of piecework. However, the Labor Code in Article 101 simply provided that "in order to ensure the payment of fair and reasonable wage rates, preferably be based on time and motion studies or in consultation with representatives of workers and employers' organizations."

The paternalistic orientation of the Filipinos made easy the operationalization of the practice, and was bolstered by the Christian virtue of submissiveness. The workers or *peons*[4] could not question the authority of the *cabo* in relation to labor and productivity precisely because he was viewed as the provider of life. The absence of labor laws, particularly on wages and security of tenure, was complemented by the primitive Christian practice of *padrino*[5] system. The *peons* made the *cabo* the godfather or *ninong* of their children. Even if the approach was an extension of the paternalistic *compadre*[6] tradition, it was in truth anchored on economic survival. Everytime the *cabo* visited the dwelling of his *peon* or *bata*[7], he was received with great pride and sense of security. He was lavishly treated and made the most important guest. As aptly described by Professor Aganon:[8]

> The *Cabo* system as practiced in some situations (*i.e.* in stevedoring, and in agriculture) has been familistic and paternalistic, according to accounts of some researchers. In other cases, especially when the *Cabo* and his men do not get to meet each other very often, it is quite formalistic. It is also characterized by autocratic relations since everything is decided for the worker-contractuals.
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> Value orientation is anchored on such norms as *pakikisama* (going along with), *pakikiramay* (giving sympathy), *hiya* (shame) and *utang na loob* (debt of gratitude). Thus workers realize that to survive under the system, they must make *pakikisama* not only with the *Cabo*, but with the personnel of the company where they are assigned. This is not only true in spirit, but above all, in financial matters.

The *cabos* succeeded in placing themselves as part of the elite class in the community. As the sole labor negotiator, they were in fact negotiating for the entire amount to be paid under the then accepted practice of *pakyao*. As shrewd labor-suppliers, they resorted to the unquestioned malpractice of

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[4]Manual laborers who are mostly unskilled and unlettered.

[5]Literally means "godfather". Persons who are influential, wealthy or considered close to the family are honored by the parents to be their child's "godfather".

[6]A term used by parents to address the godfather of their child, and vice versa. It also denotes closer relations, the godfather being the foster father of the child.

[7]A bodyguard or confidant of the *cabo*. By honoring the *cabo* as the godfather of the child would somehow elevate the worker's status to that of a *bata*.

[8]Marie E. Aganon, *A Typology of Labor Relations in the Philippines* (Unpublished Doctor's dissertation, University of the Philippines, Quezon City, May 31, 1990), pp. 134-135.)

either deducting a percentage fee or by outrightly pegging the amount of wage.

Admittedly, individualized *pakyao* labor is fair, if not advantageous to the worker. But if the contractor will hire workers to carry out the project, the *kaltas*[9] will necessarily take its place in the relations between the beneficiary of the services and the former. The *contratistas*,[10] as labor-bidders are often called, are redundant in the relations between the workers and the beneficiaries of the service, except for their talent in securing clients. As lately interpreted by the Supreme Court in *Dingcon v. Guingona, Jr., et al.*,:[11]

> Indeed, the criteria for daily wage rate contract can hardly be applied to *pakyao* arrangements, the two being worlds apart. In *pakyao* a worker is paid by results. It is akin to a contract for a piece of work whereby the contractor binds himself to execute a piece of work for the employer, in consideration of a certain price or consideration. The contractor may either employ his labor or skill, or also furnish the material (Article 1713, Civil Code). Not so in a contract on a daily wage basis, where what is paid for is the labor alone. Under the `*pakyao*' system, payment is made on a lump sum; the laborer makes a profit for himself, which is justified by the fact that any loss would also be borne by him. On the other hand, no profit inures to the daily wage worker and no materials are furnished by him. The *pakyao* arrangement is not without its advantages. The tendency to dilly-dally on the work, generally experienced in a daily wage contract, is hardly present in labor on a `*pakyao*' basis. The latter can also be more flexible, with the need of supervision reduced to the minimum. It is not necessarily frowned upon. In fact, it is recognized in the Labor Code (Article 101)... .
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> Recourse to a *pakyao* labor contract, therefore, is not necessarily disadvantageous. In this case, it was entered into only after public bidding pursuant to existing regulations through canvass among the qualified `bidders.'... .

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[9]Ostensibly the *kaltas* represents the percentage or fixed commission taken by the *cabo* in return for giving the worker his day's work, or something in excess of the amount of check-off if the worker is represented by a purported labor union.

[10]The *contratistas* before the advent of labor-only contracting were the *cabos* themselves. They enter and finalize the contract with the employers for any undertaking. Today, the *contratistas* are prevalent in the construction projects supplying mostly unskilled and semi-skilled workers.

[11]162 SCRA 786-787 (1988).

During hours of work, the *cabo* was assisted by his *kapatas*[12] or *bisor* (supervisor) as they are lately called. The *kapatas* was the *cabo's* most trusted confidant, and he supervised the job assignment. If the job was for the loading or unloading of cargoes, it was the *kapatas* who gave the *peons* a piece of stick or wrote in Chinese characters or a "lanking" marker on the cargo everytime they passed the plank. The sticks were similar to the Chinese chopsticks, except that they are marked with certain colors. The number of sticks determine the number of passes which, in turn, reflected the number of sacks each have loaded or unloaded, thus determining the rate a *peon* would receive.

The *cabo* determined how the job assignment should be carried out. To enforce his will, he made it sure that he or his *kapatas* had the necessary men to carry out the orders. Below the *kapatas* were the *bata* or *alalay* ready to enforce the order. The punishment imposed by the *cabo* was his law, and decisions were final. The *cabo* could fire on the spot any worker he considered unfit to work, could order an erring *peon* to pay unconscionable amount of damages, or even inflict corporal punishment usually carried out by his *alalay* [13] or *bata*.

There was no Department of Labor and Employment to temper the harsh relations between labor and capital. Even after the creation of the then Bureau of Labor, many workers were still unaware that it was tasked to protect their rights and interests. Neither could they directly complain to the entrepreneur about the policies of the *cabo*. Being the master in his own right, the *cabo's* status was acknowledged as a pivotal component under the then existing labor relations.

Although the entrepreneur could only deal with the *cabo*, it was the latter's responsibility that the job assignment be accomplished promptly without loss or damage. Beyond that, the *cabo* acted not as an arbiter between labor and capital, but for the latter. Even if he was in truth a social parasite, it was most advantageous because the imposition of discipline was totally relegated to him. Invariably, the *cabos* of the past

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[12]Literally means a job supervisor. However, during the Spanish and early American regimes, the *kapatas* was more than just a job supervisor. He was the business associate of the *cabo* such that his duties was more of overseeing the job assignment in the interest of the *cabo* than of the employer.

[13]The *alalay* is similar to the *cabo's bata*. They mostly performed the job of a muscleman.

were the kingpins in their respective localities. To make their power visible, they maintained a stable of smalltime hoodlums interchangeably called *alalay* or *bata*. With a mere snap of the *cabo's* fingers, the *alalay* would not hesitate to "take care" of the recalcitrant *peon*.

The *modus operandi* of the *cabo* can be likened to that of the Italian *mafiosi*, except that he was not looked upon with disdain by the people in the community. He was respected by all the social classes, and out of reverence his *peons* called him *amo* or *panginoon*.[14] To the workers, he was the giver of employment. To the traders and entrepreneurs, he was the expediter of their labor requirements. To the early politicians, he was their natural ward leader. And to the church hierarchy, he was the philanthropist and the occasional *hermano mayor*.[15] Conscious of his social obligations, he did not hesitate to give donations, particularly on church-related activities. As a whole, perceptions about him was one of a wise and judicious elder.

The social standing of the *cabo* was truly unique. Although purporting to be at the center between labor and capital, the two social classes would not dare antagonize him. His accumulated resources made him a part of the *ilustrados* who could use both his economic and political leverage to protect or even advance his own interest. As the indigenous kingmaker, he was the most sought-after person during elections. Often a *cabo* would boast as to who would be the next mayor. His word was faithfully observed by the *peons*. As the new moneyed-class whose pipeline of wealth came from the sweat of the laborers, the *cabo's* usurious activity in extending financial assistance in times of distress was rather perceived as an act of generosity. The act of providing loan or *bale*[16] petrified the relationship of *utang na loob*.

II. TRANSITION UNDER THE AMERICAN REGIME

The coming of the Americans witnessed the decline of the *cabo* system. The *cabos* who once exerted great economic and political influence had to adapt to the new mode in labor relations. The system had to combine

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[14]Literally means lord and master.

[15]A title given to the host on occasions of celebrating the patron saint of the town or community. The fiesta is marked by a lavish party hosted by the *hermano mayor* to the guests and dignitaries including the members of the clergy.

[16]It actually means an advance wage payment made before the service is rendered, but with interest deducted from the salary when finally received by the worker.

its modus operandi with the European techniques. Since the American system in labor relations is anchored on trade unionism, the *cabo* system naturally had to be discouraged. Although not completely eradicated, it nonetheless passed a series of transformations to cope up with the pace of increased trading activities and the emergence of corporations. Thus, as a form of business engaged in the supply of labor, the *cabos* managed to restructure their practice by adopting the Italian and Irish techniques.

It was the Italians who conceived the system of collecting a certain amount of protection fee both from the employers and the workers. Although similar to the Chinese *tong* system, many accepted the practice with an aura of fraternal kinship. Since many of them during the turn of the century were poor, ignorant and unskilled, kinship and identification were used by them as vehicles for protection and assistance. Later on, the fraternal organizations were transformed into criminal syndicates.

The American authorities were strict in requiring employers to pay the wages directly to the workers. In this connection, the mob avoided negotiating directly with the employers, and instead played the role of arbiters and pacifiers between labor and management. If the workers had problems, it was the mob who fixed the matter for them. For the employers, it was worth the price. They had no labor problems to reckon with, and their establishments secured against other syndicates demanding protection racket.

On the other hand, the Irish who became famous as dockworkers fashioned out their own *modus operandi*. They organized the dockworkers to form their organizations headed by a *boss*. The technique was similar to our local *cabo* system, except that it was projected as a legitimate association. The *boss* was the one who negotiated with the maritime companies and shipowners for the supply of labor. The variation is that he negotiated not on a *pakyao* basis, but for a minimum wage and for the stability of employment with a certain fee going to the association.

The *boss* was very powerful that he selected who among the dockworkers could work. He could likewise generate artificial labor unrest if the shipowner or arrastre operator failed to come to terms with him. Just like his local counterpart, the *boss* was also assisted by the union's team

leaders or shop stewards[17] to help in supervising the job assignment and to impose his will.

When trade unionism in America was finally organized into nationwide federations, the control of the mobsters gradually declined. However, the local *cabos* instead of imbibing the federation concept of trade unionism, adopted the mobster operations in supplying labor. The natural exigency to imbibe was brought about by the prevailing ignorance of the workers, absence of labor and social laws, and the non-existence of a government agency that would look after their welfare. To the *cabos*, the idea of trade unionism or forming a federation was absolutely alien. They had no knowledge how a labor union operates, and were ignorant of the benefits by forming a federation. In fact, they reacted with suspicion to its introduction as a threat to their existence.

The American system of trade unionism was in all aspects contrary to the *cabo* system. First, by law and by political fiction, trade unionism demarcated the relations between labor and capital. Under the *cabo* system, there was no such demarcation because of the absence of laws on labor relations, and the system was accepted as a form of legitimate business. Second, the concept of trade unionism brought the whole range of labor relations within the orbit of the law, while the *cabo* system operated independently as plain labor trading. Third, trade unionism created new laws protecting the welfare and rights of the workers, including the liability of the employers which could no longer be entrusted to the *cabos*. Fourth, trade unionism meant the emergence of the State as an active third-party in labor-management relations. Fifth, even if the new concepts of collective bargaining and strike were unacceptable to the employers, nonetheless they were innovations to the old practice where the one-man *cabo* dictated everything from the marketing of labor to the imposition of discipline.

Because the American system of labor relations rendered difficult and unattractive the *cabo* system, it was marginalized to where the need for

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[17]The shop steward is the key individual in the handling of grievances in a unionized company. He is the lowest man in the elected union hierarchy and the link in the day-to-day communication between the workers in the shop and the front-line management personnel. As a rule, the steward is elected by the workers of his unit, which, in the case of a large plant, is a department. Depending on the union, he may or may not receive special training; depending on individual contract arrangements, he may be relieved of all or part of his production duties." DICTIONARY OF MODERN ECONOMICS 536 (1973).

labor was not regular. It persisted in big haciendas and in most port facilities. As accurately defined by the Supreme Court:[18]

> The *cabo* system is an arrangement between a shipping company and a labor organization, for arrastre and stevedoring services, whereby the latter (as an independent contractor) engages the services of its members as laborers who are paid on union payrolls, and the charges for such services are made directly by the union against the consignees and owners of the cargoes, all without the intervention of the shipping company.

The classical definition about the practice remains valid today. It endures because there are areas in production and activities where the employers are not constant even if the job assignment is continuous.

III. LABOR ORGANIZATIONS AS LABOR-ONLY CONTRACTORS

With a new doctrine preached by American labor leaders, the *cabos* were compelled to clothe themselves with a new outfit. It became necessary to adjust to the new conditions that required legitimacy by forming an independent trade union with no specific employer to bargain with, or one whose bargaining leverage is determined by its own strength. As businessmen that once supplied labor, the *cabos* thus became the first batch of notorious Filipino labor leaders. The facade of a trade union became imperative because of the looming threat to declare the system illegal.

Through their own created unions, the *cabos* did not only manage to retain most of their powers, but succeeded in refining their *modus operandi.* First, aside from keeping intact the power to negotiate with the establishments, they simply transposed their role from that of labor suppliers to that of labor leaders purporting to protect the welfare of their union members. Second, although they managed to retain the *pakyao* system, they just adjusted to the limitations of the law like complying with the minimum wage law. In many instances, they failed to comply with the law. Third, they succeeded in institutionalizing their unique status of being called "floating" trade unions operating outside the orbit of a true labor federation covered by the laws on labor relations. On the contrary, it was the government that bowed down to their pressure for recognition as legitimate labor federations with their locals not tied down to any

[18]Allied Free Workers Union v. Compania Maritima, 19 SCRA 276 (1967).

establishment one can truly call a legitimate employer. Fourth, labor unions acting as labor suppliers they usually enjoy a "close shop" union security clause in their collective bargaining agreement with the management.

The emergence of the State as an active participant in labor relations with the corollary laws protecting the workers exorably contradicted to the viability of labor organizations as the supplier of labor. In fact, they are not supposed to pay the wages of the workers. To begin with, labor organizations exist only to protect the workers. As an organization, it merely serves as a dynamic pressure group in securing the interest of the members in a given bargaining unit. However, as unions evolve into federations made up of a minimum of ten (10) locals,[19] their interests transcend to the society's economic and political issues, whether directly or indirectly related to the conditions and welfare of the workers.

For instance, a union enjoying the status of a recognized collective bargaining agent can bring the wage issue directly to the employer, while a federation, acting on its own, can tackle the wage issue only against the State by pressuring the government to legislate a new minimum wage law. On the other hand, a labor organization acting as labor-only contractor cannot exercise the function of an agent for the workers in a collective bargaining negotiation precisely because its interest is integral with the employer-beneficiary of human services. Its existence and probability to expand is co-terminous with the employer .

Sad to say, one factor that allowed the survival of the *cabo* system has been attributed to the labor leaders' misplaced insistence in securing a "close shop" agreement with the employers in their collective bargaining agreement. Being a valid and legal union security clause, corrupt union leaders have their own agenda to pursue their selfish interests. In fact, the Labor Code expressly recognizes the existence of this type of union security clause.[20] Particularly, Article 248 (e) of the Labor Code, as amended, to quote:

> (e) To discriminate in regard to wages, hours of work, and other terms and conditions of employment in order to encourage or discourage membership in any labor organization. Nothing in this Code or any other law shall stop the parties from requiring membership in a recognized collective bargaining agent as a condition of employment,

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[19] LABOR CODE, art. 237 (a).

[20] S. ALCANTARA, PHILIPPINE LABOR AND SOCIAL LEGISLATION ANNOTATED 437 (1985).

> except those employees who are already members of another union at the time of the signing of the collective bargaining agreement. Employees of an appropriate collective bargaining unit who are not members of the recognized collective bargaining agent may be assessed a reasonable fee equivalent to the dues and other fees paid by members of the recognized collective bargaining agent, if such non-union members accept the benefits under the collective agreement: Provided, That the individual authorization required under Article 241, paragraph (o) of this Code shall not apply to the non-members of the collective bargaining agent.

In one case, the Supreme Court rendered a decision recognizing the validity of the "close shop" agreement, to quote:[21]

> There is no need for us to take sides and give reasons because our Congress, in the exercise of its policy-making power, has chosen to approve the close shop, when it legalized in Sec. 4, sub-section (a) paragraph 4 of Republic Act 875 (Magna Carta of Labor) 'any agreement of the employer with a labor organization requiring a membership in such organization as condition of employment', provided such labor organization properly represents the employees" (*National Labor Union v. Aguinaldo's Echague*, G.R. No. L-7358, May 31, 1955).
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> The foregoing pronouncement of this Court had been reiterated in the cases of *Tolentino, et al. vs. Angeles, et al.*, G.R. No. L-8150, May 30, 1956; *Ang Malayang Manggagawa ng Ang Tibay Enterprises, et al. vs. Ang Tibay, et al.* G.R. No. L-8258, December 23, 1957; *Confederated Sons of Labor vs. Anakan Lumber Co., et al.*, G.R. No. L-12503, April 30, 1960; *Bacolod-Murcia Milling Co., et al. vs. National Employees Worker Security Union*, 53 O.G. 615.
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> A close shop agreement has been considered as one form of union security whereby only union members can be hired and must remain union members as a condition of continued employment. The requirement for employees or workers to become members of a union as a condition for employment redounds to the benefit and advantage of said employees because by holding out to loyal members a promise of employment in the close shop, the union wields group solidarity. In fact, it is said that "the close shop contract is the most prized achievement of unionism" (*National Labor vs. Aguinaldo's Echague, Inc., et al., supra*).

Although the Court may have its good intention in legalizing the "close shop" union security clause, in practice such observation no longer holds true, particularly with what is really going on among labor unions

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[21] Juat vs. Court of Industrial Relations, *et al.*, G.R. No. L-20764, November 29, 1965.

enjoying the extraordinary privilege. As defined, a close shop agreement is one where:[22]

> An enterprise in which, by agreement between the employer and his employees or their representatives, no person may be employed in any or certain agreed departments of the enterprise unless he or she, becomes, and, for the duration of the agreement, remains a member in good standing of a union entirely comprised of or of which the employees in interest are a part (Rothenberg 48, cited in *Confederated Sons of Labor vs. Anakan Lumber Co.*, 107 Phil. 915; *Findlay Miller Timber Co. vs. PLASLU*, 6 SCRA 227). A plant or shop covered by an agreement whereby an employer binds himself to hire only members of the contracting union who must continue to remain members in good standing to keep their jobs. In other words, an agreement providing for a close shop which is an establishment where only members of a union in good standing are hired or retained. (*NLU vs. Aguinaldo's Echague*, 97 Phil. 184).

Originally, labor unions seeking a close shop agreement are aiming to maintain a degree of stability in a given unit of production. However, this orthodox thinking presupposes an independent union that is responsible for the keeping of industrial peace, and capable of imposing discipline to avert costly, internecine, and even violent intra-union squabbles. As it is, the existence of a "close shop" agreement is often utilized as a facade by employers to prevent the inroads of unionism. Hence, in its objective sense, a "close shop" union security clause is intended to monopolize labor in a given unit. As described by Professor David:[23]

> There is a stevedoring company that gets the contract to load or unload cargo. There is also a stevedoring union which has an agreement with the company that the latter will hire its stevedores from his union and from nowhere else. This collective bargaining agreement between the union and the company also specifies how much the stevedores will receive from the company, what benefits they are entitled to aside from their wages, the manner of payment of wages, and other conditions of employment. One of the provisions of the agreement requires that the stevedores were to be divided into gangs consisting of three classes of stevedores, namely, the cabo, the antiguos, and the modernos.

Under certain conditions, employers themselves encourage the incorporation of this type of union security clause. In effect, unions enjoying a close shop union security clause are of two types: the first is the *titular*

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[22]P. V. FERNANDEZ, LABOR RELATIONS LAW 150 (1980).

[23]R. S. DAVID, *Human Relations on the Waterfront: The Cabo System*, XV PHILIPPINE SOCIOLOGICAL REVIEW 136 (1967).

close shop union, and the second is the *dominant close shop union.* Under the *titular of close shop union,* there exists a union in a given enterprise but, in truth, a company union whose officers were handpicked by the management. The purported CBA is in reality a "sweetheart contract" wholly advantageous to the management. The union officers are dummies or are in cahoots with the management commonly understood as *kasabwat*[24] because they connive to peg the benefits to a minimum or even violate the Labor Code in return for the unwritten understanding only the leaders and the company officials know. Being a titular union, the distinguishing feature in their "close shop" arrangement is the purported power of the union leader to recommend workers for employment, and is being exercised by him with some sort of guaranty that the recommendees are not *panggulo* (trouble maker) or *anay* (termite), a terminology understood by trade unionists as one who seeks to slowly sow disenchantment in the ranks of the members. The unusual relationship between the union and the management only benefits the union officers. In the end, it is still the management that controls the union, except that it is using the officers to prevent the formation of an independent trade union.

Professor Marie E. Aganon, in her dissertation on the types of labor relations in the Philippines, pointed out how this kind of union operates. While she stressed on the *sabwatan* concept, there are instances of management-union collaboration of which the latter is in fact dominated by the former, and the mechanism that strengthens this unique type of relationship is the incorporation of a "close shop" agreement in the CBA. It is the "close shop" agreement that finalizes the status of the union as a sham or titular union. As she describes the situation:[25]

> A defining feature of LR (Labor Relations) type is the sweetheart relationship between the union and management. The union is usually company dominated whether it was deliberately established by the management, or whether it started as a legitimate union organized by the workers themselves. It is profit-oriented, and because of this operation, management tries to institute a union or coopt an existing one so as not to threaten the state of affairs or its profit-making ventures.

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[24]In relation to a given collective bargaining unit, the term "kasabwat" has an encompassing meaning. The union officers are either in cahoots with the management, acting as its eyes and ears, or are not doing anything to protect and improve the welfare of the members. The CBA is nothing but a "sweetheart" contract, executed by both parties merely to justify the existence of a union and to prevent the inroads of trade unionism.

[25]AGANON, *supra* note 8, at 120-121.

> Management tries to sell the idea: "in unity we fortify the company." Management attempts to coop the union into the system to exert control over it. Formal-autocratic relations predominate in this kind of LR. The union is in cahoots with management in its undertakings - thus, it maintains its collusive role while sabuatan LR persists.
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> Rule-making nevertheless, is unilaterally done by management, with occasional union participation. Management dominance and control over the workers and the union is very strong. Workers who are members of the union are helpless under the circumstances, and can hardly ever complain or else they incur management's displeasure. There is practically no union bargaining power as the company giveth or taketh away as it pleases.

On the other hand, if the union is strong that it succeeded in exacting a "close shop" agreement through its own strength, it may eventually be engaged in a *cabo* system. Their close shop union security clause is usually characterized by the dominance of the union through the power and influence of the *cabo* or *boss* as interchangeably referred to. In which case, the labor union may evolve into a labor supplier, much that it is already dictating the terms and conditions of employment, not in relation to improving the workers' welfare, but in entrenching its position to monopolize power as the pretended employer of the members. This, notwithstanding the horse trading and invisible financial outlays in return for an insignificant across-the-board wage adjustments and benefits, if any.

Since the workers can be employed only if they join the union, in effect it is the union that hires and imposes the terms and conditions of employment. The contract of employment is not between the employer and the employees. Rather, it is between the union and the employees. In some cases, a union enjoying the extraordinary privilege merely provides a list of workers who will be allowed to work for the day. The *cabo* determines the status of the members as to when they will become regular or permanent.

Sordid as it is, the management is virtually relieved of the legal duties and obligations to its employees like deducting the latter's contributions to the Social Security System, Medicare, and in remitting the same to the System. While the union pretends to be magnanimous in undertaking these mandatory social justice obligations, for every amount collected from the wage of the members, it makes a *patong*[26] or padding

[26]Literally means payroll padding. Here, the "cabo" is charging the employer an amount more than what he is actually giving to the workers.

under the guise of service charges which no worker will dare question. In many instances, even if a given unit of production would require the regular engagement of human services, the *cabo* would demand that the service contract be on a *pakyao* basis. Invariably, it is the *cabo* that dictates how much a worker will receive, and the excess pocketed in the name of the union. Often it is done with the tacit knowledge or even tolerance of the employer. Similarly, if the union observes the statutory minimum wage, the killing is done by exacting a substantial amount of daily check-off which otherwise is normally collectible on a monthly basis.

The contributions that accumulate thus allow the *cabo* to hire and maintain an *alalay* or *bata,* commonly understood as *tirador*[27] (hitman). The tenuous position upon which the *cabo* stands makes imperative the constant need to consolidate his position, and he exercises this by imposing discipline to erring workers. Usually, the *alalay* or *bata* are plain thugs who are listed in the company payroll just to execute the orders of the*cabo.* They do not owe loyalty to their supposed employer, but only to the *cabo.* As this type of labor union continue to consolidate power, the*cabos* sometimes evolve as kingpins that politicians and law enforcers pay homage to for various reasons.

Since the existence of this type of labor union is anchored on a quid pro quo basis, the name of the game is accommodation or *bigayan.* As the vicious cycle continues, the *cabo* eventually gains prominence and influence. The bad guy image that overshadowed him in his initial quest for power is transformed to one of magnanimity or *maunawain* to all sort of problems brought to his attention. Having attained a pedestal pasture whose leadership nobody from among the members can easily fill-up, his powers are beyond contention.

In some instances, a *cabo* who succeeds in establishing a name of his own is even more powerful than his supposed employer. This is the reason why some unions falling under the category of a dominant close shop union are dynastic. The father who is the founder or the victor after some violent intra-union struggle is usually succeeded by his son. If the son is wise enough to imbibe the *machismo* image of the father, he can hold on to the union like any family-owned business enterprise. Conversely, if the successor-son is weak, power struggle will ensue as some of the followers, usually former

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[27]The "bata" or "alalay" is given this extraordinary job assignment like quealling labor unrest caused by defections, to silence those who will expose union anomalies, or in deterring other union leaders from encroaching in what he perceives as his exclusive turf.

comrades, will attempt to breakaway and seek recognition as the bargaining agent. This transition is often bloody and costly for everybody.

Although the *cabo* system is officially being discouraged, the practice is also rampant among seasonal plantation workers, haciendas, logging companies and those engaged in smalltime construction or *contratistas*.. The more obvious, of which the Department of Labor and Employment has not banned pursuant to the Labor Code, is the practice by some labor organizations to supply laborers to arrastre operators and maritime companies. Many of the dockworkers or *estibadores* or *estiba* are virtual peons whose continued employment is dependent on the labor leader with an organizational network as a waterfront labor union. For that matter, it is only after *bisor* or supervisor has chosen the men who will work for the day can the *estiba* board the ship to load or unload cargoes, and they call this *atraka*.[28] The practice persists despite condemnation by the International Labor Organization (ILO) and other world trade federations.

The dockworkers' union, by supplying labor to franchised arrastre operators, is in reality practicing the *cabo* system for it operates semi-independently from the company. It is only the close shop agreement in the collective bargaining agreement that accords them the status of a legitimate labor-union. In an article written by Professor David, he made observations of the hierarchical structure of the *cabo* system in the water front. Since it was written in the late 60's, terminologies have changed although referring to the same position or function. The term *cabo* has been replaced. Rather, the union leader is now called the *boss*; the *antiguo* referring to the "bisor" or shop steward or supervisor; *moderno* in reference to "temporary estiba"; and the *tulog* or *tara*.[29] To quote from him:[30]

> The recognized regular gang therefore is composed of one cabo or gang boss, five antiguos and five modernos. At one time or another, the *antiguo* had once been a moderno himself. In his work as a *moderno*, he gradually acquired a certain degree of skill that entitled him for promotion to *antiguo*. The *moderno* is the relatively unskilled stevedore who works in the hatches of the ship. He is also called the *moderno-bodegero*. He is the lowest in the ranks of stevedores. One may ask at this point who promotes the *modernos* to *antiguo*. Officially, it should

[28]Literally means to attack. In the waterfront the term has acquired a new connotation which is to board a vessel to unload or load its cargoes.

[29]The jargons now used in the waterfront for workers who are not actually rendering service, but receiving salaries higher than the estibas. They constitute mostly the "alalays" or "batas" of the union boss.

[30]DAVID, *supra* note 23, at 136.

> be the stevedoring company. In practice, it is really the cabo who determines who is *antiguo* and who is *moderno*. But what about the *cabo*? Who designates him *cabo*? Again, because of the provision agreed upon by both the company and the union, it is the prerogative of the company to appoint the *cabo* or the gangboss. In practice, it is the union that decides who should be cabo.

In Professor David's observation, the *cabo* has reference to the shop steward who is sometimes called supervisor or *bisor* having loyalty not to the employer, but to the union where he belongs. Since the problem has reference as to who really wields the authority, the real *cabo* is the union leader himself. The term *cabo* has been discredited that they abandoned it in favor of the American way of calling him *boss*.

The features of the organizational structure and hierarchy of authority are virtual characteristics of the *cabo* system. It is still the *boss* who negotiates with the arrastre operator, employ the *estiba* who will be given their work assignments, *labas*,[31] or *patrabaho* by the *bisor*, hire and terminate the workers, and determine their status either as regular or temporary. Although some provide the basic benefits required by law, the union leader enjoys enormous financial outlays and prerogatives.

Admittedly, the *estiba* receives just above the minimum wage which is much better compared to workers employed by labor-only contractors. However, even if the *estiba* receives a fair wage, he is paid on a per *labas* basis which means that if not given his day's job assignment, he will not receive any salary. For instance, if there are less vessels docking at the pier, the *estibadores* are rotated. During lean periods, individual *estiba* can average only three *labas* per week. If computed on a monthly basis, his income will obviously fall below the minimum wage as compared to a contracted-out worker who is required to work on a daily basis. Second, the *kaltas* or union dues are collectible on a per "labas" basis. On the other hand, contracted-out workers do not pay any union dues or "kaltas" because that portion is assumed to have been paid by the lessor or beneficiary of human services to the labor-only contractor under the sophisticated jargon of service contract. Since the "estibadores" pay their union dues on a per "labas" basis, the total amount is definitely much higher to the regular check-off obtained by unions in any of the country's top 1000 corporations.

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[31]It means daily job assignment or to be included in the list who will report for work.

Others resort to some of the unions' unfair labor practices like listing of ghost employees, demanding negotiation fees, and "featherbedding" defined as "the practice by some unions or its agents in causing or attempting to cause an employer to pay or deliver or agree to pay or deliver money or other thing of value, in the nature of an exaction, for services which are not performed, as when a union demands that the employer maintain personnel in excess of the latter's requirements".[32]

Lately, this kind of union malpractice is called "tara", and usually only those closely associated with the "boss" are listed in the payroll without rendering any service. The practice is also rampant among agricultural workers and among "contratistas" involved in government projects.

Labor organizations cannot pursue dual and contradictory roles. They cannot act as suppliers of labor and at the same time pretend to be the wage bargainers for the workers, except under certain and extreme conditions mutually beneficial to the employer and to the labor organization. This situation is amplified in the case of the dockworkers where shipping companies refuse to directly hire workers. Dockworkers in domestic shipping, who are called "porters",[33] form their own associations to supply labor and at the same time dictate the rate they can charge from the passengers.

Through their "boss", the "porters" are accredited by the shipping company as the official handlers of passenger cargoes, and are dictating the rate per cargo or "bagahe", depending on how many men will it take to load or unload them. No dockworker who is not a member of the association can negotiate to handle the cargo of the passengers. However, in return for this unusual arrangement, the "boss" enjoys some privileges, and is paid by the maritime company for the maintenance and stability of work at the piers or "pantalan". This is the main reason why the "cabo" system remains as the accepted mode in the hiring of workers at the piers. The usual "no-work-no-pay" applies when there are no ships plying the route.

Labor organizations acting as labor-only contractors can never evolve into a real federation. In theory and in practice, they cannot perform effectively as wage bargainers for the workers whether at the employer or

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[32]ALCANTARA, *supra* note 20, at 444.

[33]Baggage helpers are operating and rendering their services to domestic shippers.

State level. In fact, this is one reason why the modern corporate practice of cloning companies, service agencies and manpower placements eased them out as suppliers of labor. It is also on this score why traders and entrepreneurs who were influenced by the Americans became antagonistic to the old practice. They disliked the "cabos" because they dictated the terms and conditions of employment, particularly the amount to be paid. In fact, some union leaders wield more power than the most trusted manager of the employer. American-oriented businessmen prefer the open labor market approach because they can determine the actual price of labor in accordance with the law of supply and demand.

The advent of labor and social legislations only intensified the contradictions between the "cabos" and the businessmen. Many of the "cabos" embezzled the wages of the workers. Some are even engaged in illegal exactions. Likewise, generous benefits given by few employers were opposed for fear that it would result in the decline of their influence. The acceptance of the foremen and supervisors as separate from the rank-and-file added anxiety in losing the loyalty of their "alalay" or "bata". Since they enjoy more benefits than the ordinary workers, the "cabos" had their instinctive hatred on them. In fact, labor experts attribute the death of the "kapatas" as a component in the "cabo" system to the emergence of the foremen and supervisors, while the "alalay" and the "bata" becoming an extension of the employers' personality owing loyalty to the latter.

Today, the adulterated "cabo" system remains a practice because of the continuing ignorance of the workers and of the depressing low productivity. Cheap labor, undervaluation of labor, underemployment, high unemployment rate, inability of the government to enforce labor laws, internecine squabble among labor leaders, and the overall high cost of production all contribute to the resiliency of the practice. As the economic conditions deteriorate, particularly on the purchasing value of the peso, the practice is continually transforming and evolving new techniques of exploitation.

IV. LABOR-ONLY CONTRACTING V. DOMESTIC EMPLOYMENT AGENCY

Prior to the effectivity of P.D. No. 442, as amended, otherwise known as the Labor Code of the Philippines, domestic employment agencies were the vogue in the hiring of domestic helpers. They became popular and

were in demand in obtaining "katulong", "alila", "yaya", servants, gardeners, househelpers, drivers, "bodegeros", waitresses and waiters, cooks or "kusinero", laundry women or "labandera", errands or "boy", and other forms of domestic menial jobs.

Under this practice, workers from the province are recruited by the employment agencies through their "ahente".[34] After being transported to Manila, they stay in the office of the agency. While waiting for clients, they are only provided subsistence meals. Occasionally, they are allowed to make "bale". Although not given in cash, it is the employment agency that dictates the price of the commodity chargeable in advance from the clients who will hire them.

While under custody, nothing is provided to the recruited workers except for sustaining their physical survival, and that aspect is taken into account only to avoid liability. Occasionally, physical violence is being inflicted by the personnel or proprietor of the agency for minor infraction. In some cases, female recruits are sexually abused. The more notorious ones are used by white slave traders in the traffic of women, especially minors. In general, recruits do not enjoy any degree of freedom except to rarely communicate to their parents about their condition in the city.

The relationship of the househelpers with the domestic employment agency actually begins on the day they are transported to Manila by the "ahente" and ends on the day they are handed over to the client needing their services. This procedure makes their status just one step higher from that of a slave because the period upon which they will work without compensation is determined by the amount of agency fee and advances allegedly incurred. With regard to the "ahente" and the agency, they are virtual slave traders.

For instance, upon the signing of the contract by the client to hire a domestic househelper, the agency will submit an itemized charges that must be paid. It is only after they are paid that the agency discharges the domestic helper. Charges usually include the transportation fare of the househelper, fee for the recruiter, expenses for board and lodging while waiting for a client, the "bale" or advances incurred, agency fee, the so-called permit or license fee, the police and other clearances. Sometimes

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[34]The recruiter of the employment agency. He is provided a transportation allowance by the agency and paid by the number of recruits.

there is the "paubaya"[35] given to the poor parents of the recruited domestic helper for entrusting their daughter. Even on the assumption that nothing unfortunate will happen, like being trapped into white slavery, all the expenses incurred will be charged in advance by the agency from the hiring client with the poor worker rendering service for three to six months, or even one year without remuneration. In other words, without being aware of the transaction, the househelper is chained in debt. This is the reason why many of them escape or are compelled to commit crimes.

Despite the sad state of affairs experienced by househelpers, the practice has its advantages compared to the current mode of labor-only contracting. First, before they are turned over to their employer-masters, the domestic employment agency must be paid of all the expenses. In effect, the relations between them and the agency is automatically cut off. The agency is no longer entitled to a monthly premium fee from their wages. Although the househelpers are mired in debt, they are on their own to work up to such time when they will finally receive their salary. Second, after the hiring clients have recovered the expenses paid by way of the services rendered by the househelpers, the latter are free to demand or negotiate for higher wages beyond the amount agreed upon by the agency with their employers. They are even free to resign or seek better employment opportunities elsewhere. Third, unlike labor-only contracting, domestic employment agencies recruit mostly ignorant and unskilled workers to render service to upper and middle class families.

With this, it can be inferred that the practice is to outrightly sell the services of the househelpers although done in the name of agency fee. In labor-only contracting, it aims to strip naked the contracted-out workers of their basic rights under the law. Even assuming that the wage received is comparatively higher to workers obtained from domestic employment agencies, still many receive below the minimum wage, and are not provided free board and lodging, and medical attention.[36]

Other domestic employment agencies provide in their contract agreement with the hiring clients the so-called "replacement guaranty." This means that the agency is under obligation to replace the domestic

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[35]"Paubaya" is usually given by the "ahente" to the parents or guardian of the recruited worker to cultivate their trust that nothing will happen to their daughter. It is also intended to economically shore-up the family of the recruited worker if she contributes to its finances.

[36]LABOR CODE, art. 148.

worker if the latter decides to return to the agency before the expiration of the guaranteed period; is not acceptable to the hiring client; or abruptly abandons his employment, and the advances have not yet been fully paid in the form of services.

However, this does not mean that the client seeking a replacement will not pay additional charges. In many instances, domestic employment agencies connive with the househelpers. This practice, in fact a form of racket, that once proliferated in Metro Manila made the domestic employment agencies very unpopular. The modus operandi is that after the agency has been paid by the hiring client, the househelper will escape and return to the agency. There the proprietor will share the amount paid, and the househelper will again allow herself to be hired by another unwary client.

Nothing much can be done to stop the racket. In the first place, nobody can compel the househelpers to render service against their will or without compensation. Otherwise, such will create legal problems like being sued for serious illegal detention. Second, the so-called "replacement guaranty" is lopsided in favor of the agencies, meaning they are only obligated to replace the domestic helper, but not to return the money paid by the hiring clients. In which case, the promise to replace is contingent on the availability of another househelper willing to render service to a complaining client.

Thus, while the "replacement guaranty" will require the new househelper to work without compensation to recover the loss of one who abandoned her work, the period for which she will not receive remuneration will be lengthened due to the additional charges paid by the client. In other words, it is always the agency that makes money in the business of trading human services with the domestic helpers shouldering the burden they have no idea of whatsoever.

Despite the seeming advantages enjoyed by domestic househelpers compared to contracted-out workers, they have been left out to work for their own protection and welfare. For example, domestic househelpers have been excluded in the wage adjustment of the minimum wage law that is being enacted every now and then because Article 43 of the Labor Code has fixed

their wage rate since November 1, 1974 which remains officially effective to date. [37]

> Art. 143. *Minimum Wage.* - (a) Househelpers shall be paid the following minimum wage rates:
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> (1) Sixty pesos (P60.00) a month for househelpers in Manila, Quezon, Pasay and Caloocan cities and the municipalities of Makati, San Juan, Mandaluyong, Muntinlupa, Navotas, Malabon, Paranaque, Las Pinas, Pasig, and Marikina in Rizal Province;
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> (2) Forty-five pesos (P45.00) a month for those in other chartered cities and first-class municipalities; and
>
> (3) Thirty pesos (P30.00) a month for those in other municipalities.

Talking of the accumulated and incremental benefits, *Article 166 (g) of the Employees' Compensation Law; Section 8(j) (1) of R.A. No. 1161, as amended, otherwise known as the Social Security Law; and Section 4(e) Of P.D. No. 1519, as amended, otherwise known as the Revised Medicare Act* likewise exempted domestic helpers from compulsory coverage. In fact, even to file a complaint with the National Labor Relations Commission for unpaid wages, the Labor Code has imposed a burdensome condition before they can exercise their inherent right by pegging a certain amount. To quote the Labor Code:[38]

> ART. 217. Jurisdiction of Labor Arbiters and the Commission. - (a) Except as otherwise provided under this Code, the Labor Arbiters shall have original and exclusive jurisdiction to hear and decide, within thirty (30) calendar days after the submission of the case by the parties for decision without extension, even in the absence of stenographic notes, the following cases involving all workers, whether agricultural or non-agricultural:
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> ...
>
> *6. Except claims for employees' compensation, social security, medicare, all other claims arising from employer-employee relations, including those of persons in domestic or household service, involving an amount exceeding Five Thousand Pesos (P5,000.00), whether or not accompanied with a claim for reinstatement.* (Emphasis supplied).

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[37]LABOR CODE, art. 143.
[38]LABOR CODE, art. 217(a) 6.

In effect, househelpers are left to attend for themselves and negotiate with their employers to improve their welfare in a kind of "individualized bargaining negotiation". But for the fact that most of them are ignorant and unskilled, seldom do they bother. Many abandon their job often without the knowledge of their employer, thus forfeiting the unpaid wages which should not exceed fifteen (15) days.[39] If they are lucky enough to be employed by a generous and benevolent "amo" or employer, generally they enjoy a much higher net income compared to the contracted-out workers considering the free board and lodging[40] and amenities accorded them. With respect to having them included in the Social Security System, Employees' Compensation and Medicare, only a very small percentage of the employers bother to register them for coverage.

As domestic helpers were gradually enlightened about their rights, many avoided the clutches of the domestic employment agencies. Instead, they seek the assistance of their provincemate or "kababayan" through an unofficial urban network system called "recomenda" or "katiwala".[41] It does not guarantee anything to the prospective employer, except that the helper is being recommended by a fellow househelper who is a provincemate of the employer or by the one recommending. Sometimes, workers applying under this network demand cash advances to defray their personal expenses. However, the practice has created problems to many employers because some of the "rekomendados" are in cahoots with criminal syndicates known as "akyat bahay" or "limas bahay" gangs,[42] or kindnappers pretending to apply as domestic helpers. Many of the victims have pointed to their former servants as lookouts or advance parties of criminals.

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[39]LABOR CODE, art. 149, 2nd par.

[40]LABOR CODE, art. 148, *supra*.

[41]The system is a unique and indigenous way of recruiting domestic helpers. Usually, this is done by househelpers who served their employer-masters for quite a long time. The employer's reliance on the recommendation is based on the service record of the one recommending; that the recommended person is a relative or a native of her province.

[42]Criminals specializing in robbery by carting away all the items they can find in the house. They usually take advantage if nobody is in the house or when only the househelpers are left to take care of it. In many cases, househelpers have been pointed to as lookouts or have collaborated with the robbers.

V. EMERGENCE OF LABOR-ONLY CONTRACTING

The successive enactment of labor and social laws correspondingly hastened the worker's encroachment in management policies. Labor today is not just treated as a property, but more importantly, it mandates the State to protect the worker's rights and welfare as it involves public interest. New labor laws do not only deal on their rights and benefits, but also allow them to have a strong voice. Invariably, labor legislations rendered the practice of unions acting as suppliers of labor less viable and appealing.

Simultaneous with the decline of the "cabo" system was the emergence of the practice of labor-only contracting. Under this practice, the purported unions were transposed to that of purported employers openly engaged in the supply of labor. As new traders, they specialize in the supply of human services. Under the Labor Code, the term "cabo" refers to "a person or group of persons or to a labor group which, in the guise of a labor organization, supplies workers to an employer or an ostensible independent contractor".[43]

Today, the *cabo* system has just taken a new outfit under the guise of labor-only contracting. The old "cabo" is now an unabashed labor lessor doing business just like any legitimate enterprise that generates lucrative income. Since labor-only contractors are being opposed by organized labor, they resort to misleading advertisements like calling their new outfit as service agency, manpower placement, clerical and office specialists, entertainment promotions, job recruitment office, employment consultancy, or even job or independent contractors. Because modern business transactions transcend national boundaries, ventures akin to labor-only contracting have been accepted as legal because of the exigencies brought about by the nature of employment, high cost of labor, and in preventing labor unrest. Thus, the proliferation of security, investigative and detective agencies; overseas recruitment and placement agencies; entertainment promotions; and manning agencies. Be that as it may, the Labor Code defines labor-only contracting, to quote:

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[43]IMPLEMENTING RULES AND REGULATIONS OF THE LABOR CODE, Book V, Rule I, Section 1(dd).

> Art. 106. Contractor or Subcontractor.
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> ...
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> There is `labor-only' contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. In such cases, the person or intermediary shall be considered merely as an agent of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.

An analysis of the definition will clearly indicate a transposition in the position of the labor supplier to that of a purported employer refined to suit to the existing labor conditions, vis-a-vis the requirements of modern business in need of specialized conduits. The definition neither quantified the difference between a "cabo" nor a labor-only contractor so as to extend a degree of plausibility for its legalization.

The practice widened the scope of exploitation because aside from the instinct of economic greed, the labor-only contractors play the role of indirect union busters. Coupled by the inherent defects in labor laws, labor-only contracting paved the way for the circumvention of the laws which, ironically, the law itself has justified by sheer acquiescence. Their status as mutated form of employers rendered difficult, if not impossible, the formation of a legitimate labor organization[44] in a given enterprise or industry. In most cases, they are dummies of cocky employers out to defraud the workers of all the benefits granted them by law. This is the reason why contracted-out workers cannot even visualize on their retirement benefits, much less taste the fruits of the much talked-about social legislations.

Routinely, labor-only contractors do not remit their contributions to the Social Security System, Employees' Compensation, and Medicare. As one would put it, labor leasing is a freewheeling business that becomes more lucrative as the economy deteriorates. It is big-business' last hope against the virus of welfarism, and a bomb that can blast all the promises of social justice.

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[44]Legitimate labor organization means any labor organization duly registered with the Department of Labor and includes any branch, local or affiliate thereof. - OMNIBUS RULES IMPLEMENTING THE LABOR CODE, Book V, Rule I, Section 1, (h).

As a product of human aberration, its existence has no rationality. Labor-only contracting does not provide any functional purpose in the mode of production. Neither can its emergence be considered as an epoch that characterized the radical transformation of society, vis-a-vis altered the dynamic forces of production. On the contrary, labor-only contracting is the evolution of a higher form of slavery for it attempts to combine the invisible laws of the free market economy and the infra-structures of legal limitations to satisfy the demand for cheap labor by the emerging master-entrepreneurs.

Labor-only contracting distorts the usual course in modern labor relations. For the fact that the practice has succeeded in legally institutionalizing itself, it now threatens to destroy the accepted and conventional mode in measuring the real value of human talents, skills, and services. With its gradual and pavlovian acquiescence, the same could ultimately lead to the widespread leasing human services which, by any language, is a sophisticated form of slavery.

Accordingly, labor-only contracting as a mode in hiring human services became popular because of the haphazard legislation of labor and welfare laws which turned out to be contradictory to our system of free enterprise. Because of this structural defect in our economic system and in our lackadaisical disposition of labor laws, a new and dangerous practice emerged. It seems that the practice is the employers' response to the growing power of labor perceived to be cuddled by the government through legislation. This theory has become plausible because as early as in the 60's, when Congress began to legislate labor laws and wage adjustments, employers felt that they were being pushed to the wall, and the unilateral fixing of the minimum wage did not tally with the workers' productivity to guaranty return of investments. .

Even as the country was slowly being left behind by its neighbors in industrial growth in the 70's, Congress through artificial means continued to subsidize labor through an array, but disjointed system of welfare programs. As the legislation on wage increases and other allowances continued because of political considerations, the dark side of it began to emerged in the late 70's, that the cost of our labor is one of the highest in the region in contrast to their real productive output. The traditional culprit of capital scarcity was superseded by the high cost of labor such that it has become a hindrance to our quest to speed-up development and industrialization.

Thus, the serious disparity between the artificial high wage imposed by law and the truth about the country's very low gross national product opened the floodgates towards the proliferation of labor-only contracting. Even if labor-only contractors will not violate all existing labor laws, they knew there was enough room for circumventing them. Being a new mode in labor relations engaged in an unorthodox practice not anticipated by Congress, they do not only provide a cheap source of labor, but a solution to the problems affecting labor.

Even if employer-beneficiaries are aware that most labor-only contractors violate the minimum wage law, they eagerly cooperate with the latter in excluding their contracted-out workers from the compulsory coverage of the Social Security System, Medicare, and Employees' Compensation. Employer-beneficiaries being in constant position in labor relations do not bother to take into account such responsibilities because the service contract is on a package-deal basis. Whether or not the contracted-out workers are receiving their salary on time, or are not paid the exact amount of wage is outside of their concern. As long as the amount paid in the service contract was accepted by the labor-only contractors, that is for them to resolve.

On the other hand, labor-only contractors, being the variable component in labor relations, can easily declare themselves bankrupt to avoid liability. In such a case, they are exempted from the payment of separation pay because the Labor Code failed to squarely resolve the issue of separation pay arising from bankruptcy, serious losses or financial reverses.[45] If worse comes to worst, they just fold-up and wantonly deny the claimant workers of employer-employee relations to avoid payment of backwages.

With labor-only contracting now becoming a pervasive problem, some suggest that the country adopt the free market wage approach. Accordingly, by discontinuing the practice of subsidizing wages by legislation and instead allowing the value of human services to freely interplay with the market forces to seek its own level, labor-only contracting will become an uneconomical venture. Labor-only contractors will have no place under this natural arrangement because the employment

[45]LABOR CODE, art. 283.

contract between the seller and the buyer of human services will reflect the approximate baseline in the prevailing value of labor called wage.

Since it is the prevailing value of labor under the free market wage approach that will clinch the contract between the worker and the employer, labor-only contractors will find themselves uncompetitive and less attractive to their clients - the employer-beneficiaries. This is bound to happen because labor-only contractors can never put a price tag on the head of their workers where there are sellers for the same kind of services who are offering them directly and at a cheaper price. There is no much choice for them because their survival as lessors of human services is absolutely dependent on the surplus value[46] produced by labor, a practice much worse than the one conceived by Karl Marx in his *Das Capital* treatise. Accordingly, while the capitalists have appropriated the surplus value produced by labor that portion, now commonly known as profit, has been legalized by the system. Profit derived from property ownership is the cornerstone of the free enterprise economy, and the concept covers all items directly or indirectly produced by labor.

In the case of the labor-only contractors, they are neither the owners of the commodity where labor has been rendered to enhance its value, nor are the masters of the workers they are leasing to the employer-beneficiaries. They have no rightful place even within the system of free enterprise. If they exist it is due to defects which are not inherent, but the consequence of the gap between the real value of labor and the artificial minimum wage imposed by law. Stated otherwise, labor-only contracting will thrive in situations where there are huge unemployed and underemployed workforce, and there exists at the same time a policy of legislated labor cost which has become too prohibitive for the employer-beneficiaries. And in order to sustain the need of employer-beneficiaries for human services unburdened by the impositions of the law, they are compelled to connive with the labor-only contractors.

The free market wage approach cannot by itself eradicate the problem of labor-only contracting. The factors that cause the proliferation of the practice do not only pertain to the pegging of the wage, but include the circumvention of all laws relative to the security of tenure, payment of

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[46]"(T)he source of profit is the difference between the value of the worker's labour-power and the value he produces. The value which the worker produces over and above the value of his labour-power is called surplus value." - *See* J. EATON, POLITICAL ECONOMY 74 (1970).

incremental and accumulated benefits, and the formation of labor unions in business establishments. After all, they add to indirectly increase the cost of labor. Hence, while it is possible that under the free market wage approach, the practice may be minimized because labor cost will be determined by its prevailing market value in the economy, there is still the possibility that it will persist. For instance, employer-beneficiaries will continue to patronize the services of the contracted-out workers if in the final costing of the total amount of the incremental and accumulated benefits like the across-the-board wage increases, and other benefits consequent to the existence of a CBA, the retirement and other incentives given in recognition of the workers' loyalty and dedication will prove to be more costly by directly hiring them. In other words, the name of the game is how to exactly debase the workers of the benefits so as to allow them only the basics of human survival.

The common belief about the practice is that it is out to make a big percentage cut on the wage of the workers. Although accurate it is only a part of the scheme. This misconception persists because most cases involving labor-only contracting are focused on the demand for backwages and violation of the minimum wage law. What the general public fails to perceive is that these complaints are only the tip of the iceberg, so to speak. Behind the emergence of labor-only contracting as a vogue among business establishments is the flexibility in which labor-only contractors are able to anticipate all the legal actions that might be taken against them, specifically in the enforcement of the Labor Code provisions pertaining to employment status, labor relations, and incremental and accumulated benefits.

The existing provisions of the Labor Code have only managed to plug the loopholes dealing on the payment of backwages. In fact, most cases involving backwages are filed by workers directly hired by their employers. Cases filed by contracted-out workers against their employer-beneficiaries are often dismissed for lack of merit or settled by the complainants themselves because of the difficulty in pursuing the case. Beyond that, the Labor Code has yet to define and impose limitations on what constitutes a job or independent contracting which today is being used as a front to abort trade unionism and deny the workers of all the incremental and accumulated benefits brought about by the transition in their employment status from temporary to regular employees.

To date, the Supreme Court in interpreting the Labor Code on labor-only contracting has only succeeded in pointing out the relationship between the supplier and the beneficiary of labor, and their complementary functions in degrading the value of labor by way of leasing-out the services of human beings. By applying the standard legal analysis in judging if one is engaged in labor-only contracting, the High Tribunal, in one case debunked the claim that the workers are temporary.[47] The legal criteria of capital, investment, tools, equipment, machineries, and work premises in deciding a given case do not necessarily hold true because job or independent contractors likewise possess the same characteristics. To quote a case decided by the High Court:[48]

> The NLRC's finding that Lipercon was not a mere labor-only contractor because it has substantial capital or investment in the form of tools, equipment, machineries, work premises, is based on insubstantial evidence, as the NLRC pointed out, that `it (Lipercon) claims to be possessed among others, of substantial capital and equipment essential to carry out its business as a general `independent contractor'. (p. 25, Rollo)
>
> The law casts the burden on the contractor to prove that he/it has substantial capital, investment, tools, etc. The petitioners, on the other hand, need not prove the negative fact that the contractor does not have substantial capital, investment, and tools to engage in job-contracting.
>
> The jobs assigned to the petitioners as mechanics, janitors, gardeners, firemen and grass-cutters were directly related to the business of Novelty as a garment manufacturer... .
>
> The legal effect of a finding that a contractor is not a true independent contractor or `job contractor' but merely a `labor-only contractor' was expounded in *Philippine Bank of Communications v. NLRC*,[49] to wit:
>
> > ...The `labor-only' contractor - *i.e.*, `the person or intermediary' - is considered `merely an agent of the employer.' The employer is made by the statute responsible to the employees of the `labor-only' contractor as if such employees had been directly employed by the employer. Thus, where `labor-

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[47]Philippine Bank of Communications vs. NLRC, et al., G.R. No. L-66598, December 19, 1986.

[48]G. R. No. L-86010, October 3, 1989, 178 SCRA 273.

[49]*See* note 2, *supra*.

> only' contracting exists in a given case, the statute itself implies or establishes an employer-employee relationship between the employer (the owner of the project) and the employees of the `labor-only' contractor, this time for a comprehensive purpose: `employer for purposes of this Code, to prevent any violation or circumvention of any provision of this Code.' The law in effect holds both the employer and the `labor-only' contractor responsible to the latter's employees for the more effective safeguarding of the employees' rights under the Labor Code.
>
> Hence, a finding that a contractor is a `labor-only' contractor is equivalent to a finding that there exists an employer-employee relationship between the owner of the project and the employees of the `labor-only' contractor since that relationship is defined and prescribed by the law itself.[50]

Noticeable in the decision is the failure to pierce the veil about the concept and nature of labor-only contracting. Rather, the High Court simply justified its arguments by connecting the inseparableness of the mandate provided for in Articles 280 and 281 of the Labor Code, to quote:

> Art. 280. Regular and Casual Employment. - The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreements of the parties, an employment shall be deemed regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.
>
> An employment shall be deemed to be casual if it is not covered by the preceding paragraph: Provided, That, any employee who has rendered at least one year of service, whether such service is continuous or broken, shall be considered a regular employee with respect to the activity in which he is employed and his employment shall continue which such actually exists.
>
> Art. 281. Probationary Employment. - Probationary employment shall not exceed six (6) months from the date the employee started working, unless it is covered by an apprenticeship agreement stipulating a longer period. The services of an employee who has been engaged on a

[50]Industrial Timber Corporation vs. NLRC, et al., G.R. No. 83616, January 20, 1989, 169 SCRA 348-349.

> probationary basis may be terminated for a just cause or when he fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of his engagement. An employee who is allowed to work after a probationary period shall be considered a regular employee.

This observation was amplified in the Philippine Bank of Communications case, to quote:[51]

> ...The undertaking given by CESI in favor of the bank was not the performance of a specific job - - for instance, the carriage and delivery of documents and parcels to the addresses thereof. There appear to be many companies today which performs this discrete service, companies with their own personnel who pick up documents and packages from the offices of a client or customer, and who deliver such materials utilizing their own delivery vans or motorcycles to the addresses. In the present case, the undertaking of CESI was *to provide its client -- the bank -- with a certain number of persons able to carry out the work of messengers.* Such undertaking of CESI was complied with when the requisite number of persons were assigned or seconded to the petitioner bank. Orpiada utilized the premises and office equipment of the bank and not those of CESI. Messengerial work -- the delivery of documents to designated persons whether within or without the bank premises -- is of course directly related to the day-to-day operations of the bank. Section 9 (2)... does not require for its applicability that the petitioner must be engaged in the delivery of items as a distinct and separate line of business. Succinctly put, CESI is not a parcel delivery company, as its name indicates, it is a recruitment and placement corporation placing bodies, as it were, in different client companies for longer or shorter periods of time. It is this factor that, to our mind, distinguishes this case from *American President Lines v. Clave, et al.*, 114 SCRA 826 (1982) if indeed such distinguishing away is needed.
>
> The bank urged that the letter agreement entered into with CESI was designed to enable the bank to obtain the temporary services of people necessary to enable the bank to cope with the peak loads, to replace temporary workers who are out on vacation or sick leave, and to handle specialized work. There is, of course, nothing illegal about hiring persons to carry out "a specific project or undertaking the completion or termination of which (was) determined at the time of the engagement of (the) employee, or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season" (Article 281, Labor Code). The letter agreement itself, however, merely required CESI to furnish the bank with eleven (11) messengers for "a contract period from January 19, 1976 --". The eleven (11) messengers were thus supposed to render "temporary" services for an indefinite or

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[51] *Supra* note 15, at 9-10.

> unstated period of time. Ricardo Orpiada himself was assigned to the bank's offices from 25 June 1975 and rendered services to the bank until sometime in October 1976, or a period of about sixteen months. Under the Labor Code, however, any employee who has rendered at least one year of service whether such service is continuous or not, shall be considered a regular employee (Article 281, Second paragraph). Assuming, therefore, that Orpiada could properly regarded as a casual as distinguished from a regular employee of the bank, he became entitled to be regarded as a regular employee of the bank as soon as he had completed one year of service to the bank. Employers may not terminate the service of a regular employee except for a just cause or when authorized under the Labor Code (Article 280, Labor Code). It is not difficult to see that to uphold the contractual arrangement between the bank and CESI would in effect be to permit employers to avoid the necessity of hiring regular or permanent employees and to enable them to keep their employees indefinitely on a temporary or casual status, this to deny them security of tenure in their jobs. Article 106 of the Labor Code is precisely designated to prevent such a result.

If one will examine and understand why labor-only contracting amounts to a subtle form of slavery, the practice itself has to be determined. If it is primarily engaged in the leasing of human services, despite pretensions of having substantial capital and investment, no doubt he or that company is a labor-only contractor. Hence, between the contracted-out workers and the beneficiaries of human services, the role of the labor-only contractors is too burdensome to the former. Labor-only contractors survive on the percentage profit obtained in the contract with their clients who are the ultimate beneficiaries of human services regularly supplied to them. Although at its face value they are redundant, under the accepted mode in labor relations, they serve a vital purpose of shielding the beneficiaries of the service from any actual or imaginary labor unrest. Through this seemingly simple mechanism, the fear of the employer-beneficiaries are laid to rest. Invariably budding labor unions are effectively thwarted by the systematic conspiracy between the two.

If by analogy, the Supreme Court pointed at security agencies as the direct employers of the guards,[52] then how can plain labor lessors be considered employers when the contract entered into by them is a contract of lease? Can one truly say that the wages paid by labor-only contractors solidify the argument that they are qualified to be called employers when the earned wages are derived from the income brought about by labor rendered by the contracted-out workers in favor of the beneficiary of their

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[52]Eagle Security Agency, Inc. vs. NLRC, et al., G.R. No. L-81314, 173 SCRA 486-487 (1989).

service? Are the labor-only contractors the owners of the products whose value were enhanced by labor? Is their income based on property ownership where human labor was applied? Stated otherwise, are labor-only contractors the owner of the workers to entitle them to a monthly premium on the wages paid by the beneficiaries of the service?

A second thought about the concepts of direct and indirect employers will reveal that they are plain legal extrapolations borne out of human imagination. They serve no functional purpose, except to justify the continued mulcting of the workers who are trapped in the nefarious practice. But for the security guards, the purpose is valid, for in case of liability, it is the agency that is considered the direct employer, and to quote a decision:[53]

> Premises considered, the security guards' immediate recourse for the payment of the increases is with their direct employer, EAGLE. However, in order for the security agency to comply with the new wage and allowance rates it has to pay the security guards, the Wage Order made specific provision to amend existing contracts for security services by allowing the adjustment of the consideration paid by the principal to the security agency concerned. What the Wage Orders require, therefore, is the amendment of the contract as to the consideration to cover the service contractor's payment of the increases mandated. In the end, therefore, ultimate liability for the payment of the increases rests with the principal.

The failure of the government to curb the problem of labor-only contracting emerging in various disguises has been brought about by the failure to understand the problem itself. At one point the Supreme Court ruled that employer-employee relations is not subject to contract agreement between the lessor of human services and the beneficiary-lessee of human services. In the case of *Tabas v. California Manufacturing Co., Inc.*,[54] here is how the Supreme Court gave its reasons:

> The existence of an employer-employee relations is a question of law and being such, it cannot be made the subject of agreement. Hence, the fact that the manpower supply agreement between Livi and California had specifically designated the former as the petitioners' employer, will not erase neither party's obligations as an employer, if an employer-employee relations otherwise exists between the workers and either firms. At any rate, since the agreement was between Livi and California, they alone are bound by it, and the petitioners cannot be made to suffer from its adverse consequences.

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[53]*See* note 8, *supra.*

[54]G.R. No. L-80680, 169 SCRA 500-501 (1989).

If employer-employee relations cannot be the subject of a contact agreement, then why classify labor-only contractors as agents of the employers? Be that as it may, a contract of agency is perfectly valid, provided it is the person himself who will render the service. Article 1868 of the Civil Code provides:

> Art. 1868. *By the contract of agency a person binds himself to render some service* or to do something in representation or on behalf of another, with the consent and authority of the latter. (Emphasis supplied)

On this score, how can the High Court be so eclectic about the problem by considering labor-only contractors as agents when to engage in the leasing of human services through a profit-oriented business establishment is universally abhorred? If the Supreme Court simply ruled to make the beneficiary of the labor services the only person or entity liable, logically and by the same functional purpose, the problem will die a natural death. Employer-beneficiaries of the service will no longer bother to go through the rigmarole in circumventing the law only to be adjudged as the sole guilty party. As it elaborated in the *Tabas Case*:[55]

> [N]otwithstanding the absence of a direct employer-employee relationship between the employer in whose favor work had been contracted out by a "labor-only" contractor, and the employees, the former has the responsibility, together with the "labor-only" contractor, for any valid labor claims (Citing *Philippine Bank of Communications vs. NLRC*, No. L-66598, December 19, 1986, 146 SCRA 347, 356), by operation of law. The reason, so we held, is that the "labor-only" contractor is considered "merely an agent of the employer," (*Supra*, 356), and liability must be shouldered by either one or shared by both.

Even if the Court will consider the relationship between the employer-beneficiary and the labor-only contractor as unique or, more accurately, a misplaced form of agency, that alone is a recognition in-fact of the practice that justifies its existence and makes it lucrative despite the "stringent conditions" imposed by law. Pure legal extrapolation will not solve the problem. Rather, the drive to engage in labor-only contracting boils down to economics where profit in our structurally defective policiy in adopting a free enterprise economy and at the same time legislating wages beyond the real and actual value of labor have gained a preponderant view.

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[55]*See* note 22, *supra*.

Thus, the artificial gap generated by legislated wage against real wage now serves as the parameter to make lucrative the practice of labor-only contracting. The surplus value that used to be an exclusive profit of employer-beneficiaries is now shared by labor-only contractors, a situation that defies basic economic logic. The sharing of the profit derived from pure labor is made valid because the practice is premised on the idea of separating three entities represented by the employer-beneficiary, the labor-only contractor, and the contracted-out worker.

VI. MANPOWER PLACEMENT AGENCY AS LABOR-ONLY CONTRACTOR

Since labor-only contractors style themselves as service agencies or manpower placements, their clientele covers all business, commercial and industrial establishments eager to abort their labor problems and avoid payment of the costly benefits accruing out of the workers' regularization. Clients are not burdened by the across-the-board wage-adjustments borne out of a collective bargaining agreement which is essentially conditioned on the existence of a legitimate labor union negotiating on equal footing with the management. Neither can they be compelled to automatically comply with the wage rate, nor are bothered by such labor nuances as mid-year bonus or 14th-month pay. For that matter, they do not even care to provide the most elementary form of concern like giving their contracted-out workers clothing and transportation allowances, rice, and other forms of commodity subsidy. Since employment is based on a service contract, maternity, vacation, service incentive leaves, etc. are not taken into account. This, even if the law dictates the granting of such benefits.

The growing awareness of organized labor and their subsequent demand for more benefits to cushion the income of the workers from the impact of double-digit inflation, and the spiraling cost of basic commodities all added up to the temptation to resort to the practice of leasing human services. Employer-beneficiaries are one in assessing that their operational expenses will dramatically jack-up upon the formation of a labor union whose first order, no doubt, is to review the existing working conditions and welfare of the workers in a given bargaining unit.

On the other hand, prospective labor-only contractors wanting to organize their own outfit focus their attention on the "license theory" believing that once granted the legality of the business can no longer be

questioned. Sad to say, instead of considering their license as a privilege, they treat it as an authority that would accord them protection against real and imaginary harassment. The factuality about the nature of the business, whether or not openly engaged in labor-only contracting is thus rendered moot and academic. Ultimately, problems affecting between the labor-only contractor and the contracted-out workers are confined only to the issues of complying with the statutory minimum wage and of paying the backwages.

The single act of securing a privilege to recruit can altogether make their operations legal. Even if the Labor Code imposes stringent conditions, the granting of a license to operate and authority to recruit[56] will help much to facilitate their operations. This is the reason why applicants wanting to operate their own manpower or placement agencies will do everything, like bribing and corrupting labor officials just to secure that much-needed privilege. Once the license to operate and the authority to recruit are granted, the *modus operandi* inherent in the business will take its course. Labor-only contractors can thus act just like any legitimate businessman even if, in fact, their enterprise is one engaged in the leasing of human services.

To begin with, service agencies or manpower placements operate as separate and independent suppliers of labor, and their functional role is undoubtedly for the benefit of the employer-beneficiaries availing of the practice. For example, employer-beneficiaries being the stable and constant factor in production will have to find ways and means to relieve themselves of the incessant demand for more benefits that tend to accelerate upon the formation of a union. On the other hand, labor unions being a dynamic pressure groups are susceptible to the ups and downs of the economy. To obstruct, if not prevent, the inroads of labor agitation, the only feasible way is to device a legal method by creating two separate legal personalities; one representing the labor-only contractor (service agency or manpower placement); and the other representing the employer-beneficiary or the true employer. The artificial splitting of legal personalities is made feasible because the Labor Code provided the idea, to quote:[57]

> (e) 'Employer' includes any person acting in the interest of an employer, directly or indirectly. The term shall not include any labor organization or any of its officers except when acting as employer.

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[56]*See* the definitions in Article 13 (b), (d), (e) and (f) of the LABOR CODE. Refer also to Secs. 2, 3, 5, 6, 7, 8, 9, 19, 20, 21, 23, 24, 25, and 26, Rule V of the Omnibus Rules Implementing the Labor Code.

[57]LABOR CODE, art. 212(e).

Since labor-only contractors can negotiate service contracts with any business, commercial, and industrial establishment, the wage or value of labor is artificially retarded, and the incremental and accumulated benefits sacrificed by the unavoidable dictates of competition. Hence, service agencies and manpower placements are prevalent in such activities as janitorial, messengerial, sales, marketing, clerical, and even among white collar jobs whose contracts are executed under the subtle classification of "technical" or "contractual consultants" on such routine productive activities as public relations and advertising, marketing, and even on the viability of the business because the practice is open to all forms of legal subterfuge.

Labor-only contractors generally apply two techniques in circumventing the law, to wit:

First, the system of employment rotation. Under this technique, before the six (6) months probationary period expires, the workers are transferred to another employer-beneficiary. The period is crucial because under the Labor Code, employers whether direct or indirect, possess the greater leeway in determining the status of the workers.[58] Note that the term employment under this technique has no reference to the workers' employment with the employer-beneficiary, but with the labor-only contractor.

To make the practice tenable, it is the service agency or manpower placement that requests the employer-beneficiary to return the workers to the mother unit (labor-only contractor) for the purpose of transferring them to another client where it has an existing service contract. The transfer has to be executed before the lapse of the six (6) months probationary period. Even if the affected workers are efficient and highly productive, the employer-beneficiary has to accede to the procedure because it forms part of the *modus operandi* it entered into with the labor-only contractor.

The objective is to effectively terminate the contract without any legal impediment. Conversely, if the workers are returned to their mother unit, the contract they entered into, for all intentions and purposes, had been terminated insofar as the employer-beneficiary is concerned. If they are eventually transferred to another client, technically they are under a new contract.

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[58]LABOR CODE, art. 281.

Since the contracted-out workers are intentionally rotated, they are placed out of work and their status is known in the trade as "floating," meaning on a standby status awaiting new job assignment from clients. This mode of reassigning workers to other employer-beneficiaries has been accepted as legal if the parties involved are security agencies.

Despite this contracted-out workers who have been rendering intermittent service beyond six (6) months seldom file a complaint for the following reasons: First, they do not know which of the two entities is their true employer. Second, labor-only contractors do not really terminate their services, but simply place them on a "floating" or on a standby basis waiting for a new client. Third, contracted-out workers seldom make a case against their employer-beneficiary because the latter can always raise the defense of absence of contractual relations. Fourth, even if they have in fact been working intermittently beyond the probationary period, it is not Article 281 of the Labor Code that will govern, but the 2nd paragraph of Article 280, a provision of law applicable only to units of production where work is not continuous. For that matter, labor-only contractors are not constant units in labor relations because their so-called employees are not "engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer".[59]

As "floating" employees, they do not receive any salary from the agency. In the case of *Agro Commercial Security Service Agency, Inc. v. NLRC*,[60] here is how the High Court observed about the practice:

> [T]hey admittedly remained in `floating status' for more than six (6) months. Such a `floating status' is not unusual for security guards employed in security agencies as their assignments primarily depend on the contracts entered into by the agency with third parties. Such stipulated status is, therefore, lawful.
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> The `floating status' of such an employee should last only for a reasonable time. In this case, respondent labor arbiter correctly held that when the `floating status' of said employees lasts for more than six (6) months, they may be considered to have been illegally dismissed from the service. Thus, they are entitled to the corresponding benefits for their separation.

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[59]LABOR CODE, art. 280.
[60]G.R. No. L-82823-24, 175 SCRA 797 (1989).

Beyond pronouncing its legality, the practice of "floating" the security guards after serving for a period of time with the employer-beneficiary is done because of the risk involved in entrusting armed personnel in securing the premises for quite a long time.

Since the nature of employing guards has not been incorporated in the Labor Code, to justify the "rotation" or "floating" after their tour of duty with the client, the Supreme Court has to rely on Article 286 to protect their security of tenure. To quote:[61]

> ...Thus, when the labor arbiter rendered his decision, he considered those who have been out of work or "floating status" for a period exceeding six (6) months to have been terminated from the service without just cause thus entitling them to the corresponding benefits for such separation. We agree.
>
> ...
>
> From the foregoing it is clear that when the bonafide suspension of the operation of a business or undertaking exceeds six (6) months then the employment of the employee shall be deemed terminated. By the same token and applying the said rule by analogy to security guards, if they remained without work or assignment, that is in "floating status" for a period exceeding six (6) months, then they are in effect constructively dismissed.

Even if the factor of security is the reason for allowing the "floating" of the guards, security agencies have nonetheless taken advantage in this gray area of the law to effectively ignore the security of tenure of the guards, vis-a-vis of preventing the formation of a union, and from paying the accumulated and incremental benefits due them.

Now, a question is asked: if security agencies are allowed to "float" their guard-employees routinely, then what law will prevent labor-only contractors from doing the same to their contracted-out workers? This question is posed because the *ratio decidendi* in the *Agro* case failed to cite the issue of security. For that matter, labor-only contractors posing as manpower placement agencies are employing the technique to precisely violate the law not to mention that some are involved in the actual swindling of the workers by demanding exorbitant placement and processing fees on imaginary employment prospects. In fact, the practice is being

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[61] Agro Commercial Security Service Agency, Inc. v. NLRC, 175 SCRA 796, *supra*.

carried out to avoid liability that may entail after the employee's long years of service, and to prevent the inevitable change of employment status from casual to regular, or from temporary to permanent.

The net effect of this technique is to place the workers in perpetual probationary or temporary status. Worse, their employment is not in relation with the employer-beneficiary where they are actually rendering their services, but with the labor-only contractor. For the employer-beneficiary, the technique is a big bargain in cutting down labor costs.

Second, they apply the technique of drastically terminating the workers. If the worker is perceived as a potential threat either to the labor-only contractor or to the employer-beneficiary, termination is done by simply allowing the contract to expire. This way, they appear more civil, while the poor worker is out of job for good.

It must be pointed out that under the Labor Code, to legally dismiss a worker from the service such must be based on valid and legal grounds:[62]

> Art. 282. Termination by employer. - An employer may terminate an employee for any of the following just cases:
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> (a) Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;
>
> (b) Gross and habitual neglect by the employee of his duties;
>
> (c) Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;
>
> (d) Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representative; and
>
> (e) Other causes analogous to the foregoing.

When a worker is not rehired, it means that the effectivity of his termination is either based on the expiration of the contract with the labor-only contractor, or that the employer-beneficiary refused to renew the service contract which undoubtedly would evolve the concerned worker. In

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[62]LABOR CODE, Title I, Book VI, art. 282.

other words, the termination was enforced not on the grounds cited in Article 282 of the Labor Code, but by the connivance between the labor-only contractor and the employer-beneficiary using a different legal parameter. They apply the Civil Code provisions to make the process tenable of which neither of them are the sellers nor purchasers, but lessors and lessees of human services. In the final analysis, the person actually rendering the service is a stranger to the contract where his mental and physical labor are the objects of lease.

Service agencies or manpower placements need not fabricate charges like inefficiency, incompetence, or low productive output to justify their cause of action. All that is needed to make their action credible is to argue that no employer-employee relations exist because the employer-beneficiary is no longer interested in the services of a particular worker, and no law can compel the service or manpower placement agency to retain and pay for the wage of an idle worker.

The application of this technique seriously confronts the more aggressive and militant workers for squarely, they do not stand on solid grounds to bargain on anything including their retention in the service. Outside of the legal niceties, the plus factor of tremendous labor surplus undermines the value of their services. In effect, contracted-out workers are expendable commodities. If rejected by the employer-beneficiary, the labor-only contractor can just select from the list of workers awaiting to be hired.

The routine termination of the contracted-out workers produces artificial fluctuation in the value of labor concretized in the measly amount of wage they receive. Every worker who allows his services to be leased will have to begin on the wage ceiling offered by the labor-only contractor. This pathetic situation is aggravated by competition, thus affording the employer-beneficiary the advantage to choose the lowest bid offered by competing labor-only contractors.

The consequence of cutthroat competition makes the service agencies and manpower placements vulnerable to the invisible laws of supply and demand if only to win the service contract. Instead of competing on the value of labor measured by the prevailing market demand for human services, they compete on a lowest-bid basis to obtain a service contract without regard on whether or not they can comply with the minimum wage law. By pulling the value of labor within the orbit of economic competition, labor is unabashedly converted into a plain commodity disposing workers with the labor-only contractor acting like commodity or commercial brokers. Further,

since the arrangement is based on service contract, the reduction in the value of labor compels them to brazenly violate the statutory minimum wage law if only to remain within the competitive range.

Since labor-only contractors are organized, the limits of the labor market are made worse on the following grounds: First, since labor-only contractors are engaged in bidding, the lowering in the amount of service contract does not directly affect them, but the leased-out workers who are forced to accept low wages just to secure employment. Second, if, on the other hand, employment prospects turn for the better, it is not the leased-out workers who will benefit from the increased offer, but the labor-only contractors. The windfall brought about by the increase in the price of the service contract will never be shared with the contracted-out workers, but absorbed as profit. Third, even if labor-only contractors desire to increase the wage rate of their contracted-out workers on the basis that the economy is reaping the fruits of prosperity, such a positive step will not be taken into account because any increase in wage is bound to become a dangerous precedent. Invariably, while labor-only contractors may be able to attract efficient workers they may loose, their service contract later on. Fourth, the padding system representing the net profit of the labor-only contractors is not taken directly from the beneficiaries of the service, but from the contracted-out workers whose wage rate must be pegged at all costs. Fifth, contracted-out workers have no choice because among themselves they compete to secure that much-needed job placement from the clients of the labor-only contractors.

In which case, employer-beneficiaries possess the greater leverage to manipulate to a very low level the value of human services. Firstly, they simply toss back to the service agency or manpower placement the fixed contract price of which the latter, in order to survive, must offer the lowest bid. This means that the offer must be acceptable to the employer-beneficiary. Bluntly stated, no service contract means no business for the labor-only contractor. Secondly, by competing in the open market, the price quotation of the service contract is reduced instead of being fixed as provided by law. This, notwithstanding that the minimum wage once promulgated can no longer be pulled down. Invariably, the fluctuation in the cost of labor is not caused by the tantrums in the economy like inflation, recession, stagflation, etc., but by the naked dog-eats-dog competition among labor-only contractors.

When the workers themselves compete in the open market, those who are gifted with the best skill, ability, and talent are taken in. Their

individual and natural advantage play an important role in determining their chance to secure employment. This kind of competition is more apparent when there is an acute shortage of employment opportunities or a glut of white collar workers who cannot be absorbed by their chosen profession.

However, when labor-only contractors are allowed to tamper with the laws of supply and demand, the common belief of selecting the best and the brightest will hardly apply. The idea of hiring the best worker based on his inherent talent, skill or ability is virtually replaced by the price tags labor-only contractors offer to their clients. For that matter, the pricing of labor itself undergoes two crucial stages.

The first stage is between the labor-only contractor and the prospective contracted-out worker. Here, it is the labor-only contractor that offers his wage-price to the worker. If accepted, the worker, is placed in the waiting list.

The second stage is the pricing in the service contract. Usually, this procedure is on a lowest-bid basis. Considering that labor-only contractors are engaged in bidding, they have no idea as to how much they will eventually pay their contracted-out workers, this even after considering the expected profit. If the earlier wage offered is beyond the ceiling acceptable to the employer-beneficiaries, the salary is subjected to adjustment. This is the reason why many labor-only contractors are tempted to violate the minimum wage law with some even failing to pay the backwages. The net effect in the tampering of the supply and demand of labor means starvation pay and low productivity for the contracted-out workers.

VII. TWO-TIER CONTRACTING TECHNIQUE

The resurrection of the baneful "cabo" system with a new garb called labor-only contracting has not only made difficult the prosecution of cases involving illegal termination and unfair labor practice, but distorted the entire legal structures in the proper determination of employer-employee relations. The application of the "control test" in labor laws has been rendered useless because labor-only contractors have tailored the contract in such a way as to prevent the contracted-out workers from attaining regular or permanent employment status. They have taken full advantage of the two-tier contracting technique to legally cut off the contracted-out workers' linkage with the employer-beneficiary.

Although the contract to hire human services is within the realm of labor relations, the substance of the contract is still within the orbit of the Civil Code, to quote:[63]

> Art. 1305. *A contract is the meeting of the minds between two persons whereby one binds himself,* with respect to the other, to give something or *to render some service.* (Emphasis supplied)

The meeting of the minds of the contracting parties is pivotal because the contract to hire human services connotes the existence of direct relationship between the hiring employer and the worker. For instance, when a corporation hires the services of a worker through its *bonafide* agent, there is that legal presumption that he was taken in personally, directly, and there was a meeting of the minds between them on the terms and conditions of employment. Besides, employment contracts can be perfected even by mere oral agreement, and such is valid and enforceable.[64] In other words, employer-employee relations should always be direct insofar as the worker and the entity in need of his services is concerned.

If Article 212(e) of the Labor Code makes a provision for an indirect employer, such is absolutely absurd because the mutual obligation to perform is between the worker and the employer, and not between the latter and the labor-only contractor. This is most logical and legally tenable because Article 105 of the Labor Code prohibits the practice of indirect payment of wages much that there is no such concept as indirect wages.

Hence, when a stranger or third party, like a labor-only contractor, is allowed to enter into the picture, the legal structures in employment contract is either destroyed or is emasculated. There is no meeting of the minds between the worker and the employer, but only between the latter and the labor-only contractor, the contractor not an employer in the real sense of the word. This line of reasoning is more in consonance with the principle of civil law that "contracts take effect only between the parties, their assigns and heirs." Consequently and as a general rule, they cannot produce any effect upon third persons, in conformity with the principle of *res inter alios acta aliis neque prodest.*[65]

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[63]CIVIL CODE, art. 1305.

[64]LABOR CODE, art. 280; Sara, *et al.* v. Agarrado, *et al.*, 166 SCRA 629 (1988).

[65]D. P. JURADO,COMMENTS AND JURISPRUDENCE ON OBLIGATIONS AND CONTRACTS 276 (1969), *citing* CASTAN at 399.

Although the Civil Code provides that some contracts can be made in favor of third parties, as in insurance contracts and contracts *pour autrui* as in Article 1311 of the Civil Code, basic contracts are not and should not be allowed to incorporate such legal mechanism because it is contrary to law, public order and policy, customs, and morals. A service contract between the labor-only contractor and the employer-beneficiary can never favor the contracted-out worker. This is the reason why the Supreme Court has decreed that employer-employee relations are not subject to agreement[66] nor can an employment contract be assigned to person not a party to the contract.[67] In like manner, contracts to hire human services whether regular, temporary, daily, per hour, per project, piece rate, package deal or turn-key basis, or by home assignment should not include third-parties because labor laws do have social implications.

Such approach in compartmentalizing labor contracts will reduce the status of the workers to that of beasts of burden. In fact, while the beast can be the subject of a lease contract, say to plow a piece of land, it is in a much better position because there is that legal presumption that the lessor being the owner, the duty to protect the animal is inherent in him. In this case, the labor-only contractors who make business by leasing-out human services are not the owner-masters of the contracted-out workers. Their duty is not towards protecting their leased-out workers, but of securing the rights of the employer-beneficiaries, and of overseeing that the workers are performing the assigned tasks in return for a profit that will be generated out of the service contract. In other words, the practice creates a device that will placate the accepted system of direct employment relationship between the employers and the workers.[68]

Beyond the fixation of law, indirect employment will generate unrest and economic instability. The practice will disturb the legally demarcated principles in labor relations where the rights and obligations of the contracting parties are defined. In fact, political philosophers are unanimous that social stability can only be maintained if anchored on just and rightful laws. As accurately described in the *Tabas et al v. California Manufacturing Co., Inc. et al.* case:[69]

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[66]Tabas, *et al.* v. California Manufacturing Co., Inc., *et al.*, *supra*, *see* note 20.

[67]Hydro Resources Contractors Corp. v. NLRC, *et al.*, G.R. No. L-80143-44, 168 SCRA 390 (1988).

[68]Eagle Security Agency, Inc. v. NLRC, *et al.*, *supra*, *see* no. 19.

[69]169 SCRA 502-503, *supra*.

> There is no doubt that in the case at bar, Livi performs "manpower services" (*Rollo, id.*, 119), meaning to say, it contracts out labor in favor of clients. We hold that it is one notwithstanding its vehement claims to the contrary, and notwithstanding the provisions of the contract that it is an "independent contractor" (*Id.*, 120). The nature of one's business is not determined by self-serving appellations one attaches thereto but by the tests provided by statute and prevailing case law. (Citing Sevilla v. Court of Appeals; G.R. Nos. L-41182-3, April 15, 1988.) The bare fact that Livi maintains a separate line of business does not distinguish the equal fact that it has provided California with workers to pursue the latter's own business. In this connection, We do not agree that the petitioners had been made to perform activities "which are not directly related to the general business of manufacturing" (Rollo, *id.*, 130), California's purported "principal operation activity." (*Id.*) The petitioner's had been charged with "merchandising [sic] promotion or sale of the products of [California] in the different sales outlets in Metro Manila including task and occasional [sic] price tagging" (Id.), an activity that is doubtless, an integral part of the manufacturing business. It is not, then, as if Livi had served as its (California's) promotions or sales arms or agent, or otherwise, rendered a piece of work it (California) could not have itself done; Livi, as a placement agency, had simply supplied it with the manpower necessary to carry out its (California's) merchandising activities, using its (California's) premises and equipment. (*See* Philippine Bank of Communications v. NLRC, 358.).

In labor-only contracting, the contracted-out workers are absolutely detached from the person actually benefiting from their services in view of the fiction of law created by the practice. Even if the Labor Code emphasizes direct relationship, it does not make sense. As far as the contract between the labor-only contractor and the hiring employer-beneficiary is concerned, the contracted-out workers are not privies to the contract which will require them to render their services.

Under the two-tier contracting technique, the first tier is the contract between the worker and the labor-only contractor. The signing of said contract is merely intended to confirm the willingness of the worker to have his services leased under the terms and conditions dictated by the labor-only contractor. However, the employment prospect, meaning his opportunity to actually render service and receive payment, is contingent on the chance of the labor-only contractor to secure a service contract from an employer-beneficiary which is the second tier of the contract.

Since the first tier of the contract is contingent and a condition precedent, the worker is at the outset without any bargaining leverage. Legally, he cannot demand an *inchoate* right like seeking assurance for an eventual permanent position and to bargain on the terms and conditions of employment for in truth, such do not exist. The worker is not dealing with a true employer where he can squarely raise conditions for his own protection and welfare, or much more dictate the price of his labor.

Technically, the employment status of the contracted-out worker should begin on the day he signed the first tier-contract. However, since the practice is essentially a two-layered contract formatting, the perfection of the worker's contract to render service will start only upon the signing of the service contract or second tier contract as it will mark the day he will be required to render his service to the employer-beneficiary. By that, the contracted-out worker is no longer a party to the contract, but a participant who is legally obligated to render service. Thus, while the contracted-out worker is required to work under the second-tier contract, he cannot invoke said contract even on the ground of protecting his basic rights.

The layering of contracts made more vicious the cycle of exploitation. Whereas under the free labor-market approach, the workers had the option to directly sell their labor to any employer. Today, they are no longer free to do so. The direct access of the workers to the open market to sell their labor equally accorded them the freedom to desist if the amount of compensation is not equivalent to their services or skills. In other words, services were well within their control because direct employer-employee relation was observed and practiced as it should be. No middlemen were allowed to engage in the anomalous practice of leasing-out human services, and the so-called employer-beneficiaries unknown to them.

The fact that the contracted-out workers have no control as to whom they will actually render their services, labor-only contractors are able to stretch their imaginative methods in circumventing the law. For instance, before the Supreme Court finally resolved to prohibit the "assigning of contracts of employment",[70] many manpower or placement agencies for overseas employment took advantage of this theoretical loophole thinking it as perfectly valid and legal. It became their most convenient scheme to compartmentalize the relationship between the lessor-contractor and the

[70]Hydro Resources Contractors Corp. v. NLRC, *et al.*, *supra*, 168 SCRA 389-390, (1988).

lessee-beneficiary of human services. The scheme legally provides a safe exit for the employer-beneficiaries to escape liability on such issues as breach of contract on the status, and terms and conditions of employment. As ruled by the High Court:[71]

> The records show that the petitioner entered into a joint venture with Abdul Gafar Jamjoon by forming a limited company under the Saudi Arabia Laws called Jamjoon Hydro Contracting Company with petitioner owing 40% and JamJoon 60%.
>
> The defense of petitioner is that inasmuch as it had assigned the employment contracts of private respondent to JADRO, there is no employer-employee relationship between it and the private respondents.
>
> Policy Instruction No. 22 of the Department of Labor and Employment provides as follows:
>
> > Construction workers to be hired and employed by duly registered and authorized joint venture companies shall be deemed direct employees of such corporation."
>
> Obviously, this policy instruction is designed to protect the well-being of Filipino workers overseas so that a labor contractor remains to be an employer of an employee even if there is an assignment of the contract of employment.

It is apparent that the open labor market approach has taken in a new dimension in labor relations. Saddled by the tremendous unemployed workforce, many are compelled to channel their employment prospects to gullible lessors of human services only to deprive them of their inherent right to dictate the price of their services. What compounds to their misery is the fact that the service or second-tier contract reflects the baseline of the competition, and not the real value of labor.

The irony is that while the government is too preoccupied in deregulating business like removing controls and subsidies on basic commodities, it has on the other hand, imposed with cunning vigor, tighter restrictions on the price of labor. Worse, by sanctioning the existence of labor-only contracting the government has impliedly denied the workers of their only power to bargain directly the cost of their labor with the prospective employers.

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[71] *Id.*

As said, labor-only contractors are the notorious clone brothers of the traders and brokers in business. They manipulate, if not connive, in reducing to the hilt the price of human services. Like the slave traders of the past, they operate with impunity and without regard to society. Other than effectively pegging to a pathetic level the value of labor, the formatting of the two-tier contract renders bleak the chance of the workers to exercise their constitutional right to form associations to protect their welfare and interests. More than these, labor-only contractors need only a small amount of capital to bankroll their operations for advertisement and public relations. Their need for an office is only made necessary to put up a facade of having a processing center for their alleged employment or placement services. Those disguised as "job" or "independent contractors" provide their workers with handy tools and disposable equipment just to meet the criteria set by the Labor Code. Thus, when complaints crop-up, they simply vanish into thin air to avoid the long arm of the law. In fact, many of the service and manpower placement agencies are fly-by-night corporations.

VIII. ACCUMULATED AND INCREMENTAL BENEFITS DENIED

Jurisprudence on the liability of the employer, whether referring to the lessor of human services commonly understood as manpower placement agencies or to the lessee of such services or employer-beneficiaries, pertains only to wages. Both the beneficiary of the service and the labor-only contractor are jointly and solidarily made liable only to the extent of the unpaid amount of wages. However, with respect to the accumulated and incremental benefits, our courts have yet to elaborate on the matter.

Accumulated and incremental benefits are beyond question intended to cushion economically the workers during their retirement, to saddle them up during old age or twilight years, for their medical expenses, to make them financially independent from their family, and to share the fruits of their labor to their loved ones, especially the disabled and handicapped members of the family. Yet, despite the underlying principles of social justice, many are being deprived of these benefits, either by systematic conspiracy or by ignorance caused by the harsh reality of generational poverty, as further explained:

First, contracted-out workers do not understand these aspects of social legislations. Noticeable among the activities in the annual

"tripartism in labor relations" is the usual attention accorded by the parties on questions of upgrading wages, of complying with the statutory minimum wage, of finding out ways and means to improve labor-management relations, and of promoting the health and safety standards of the workers. On the benefits granted by the Social Security System, Medicare, Employees' Compensation, or the optional Pag-Ibig Loan Fund, sad to say they have been woefully neglected that our workers have to work it out themselves to know the benefits granted to them by law. If they cannot avail of them, they simply close their eyes in securing loans from the so-called "five-six" or loan shark.

Second, absence of a law and a system where the various benefits will automatically operate in cases of death, hospitalization, or plain need to cushion the workers' day-to-day struggle for economic survival. For instance, if a worker files a complaint with the Labor Arbiter, say, for unpaid wages, overtime pay, premium and holiday pay, *etc.*, the complaint should automatically mean an examination of the remittances and contributions to the Social Security System, Employees Compensation, Medicare, and of the PAG-IBIG membership. This should be made ministerial for the Department of Labor and Employment because by law, its role is always in the interest of labor by seeing to it that the workers are amply protected and secured.

Under the present set-up, decisions rendered by the NLRC are wholly confined to the issue of reinstatement, payment of backwages, and sometimes of imposing damages. The workers are still required to file a separate complaint for non-membership with the System or non-remittance of their contributions. For that matter, even members have to fend for themselves just to find out how much they have contributed or the amount they are entitled to borrow.

Third, since those deprived of their right to enjoy the accumulated or incremental benefits by their employers would nonetheless require litigation, however most ignorant and poverty-ridden workers avoid it as much as possible. Litigation is the last option they would undertake just to obtain said benefits. A worker who had the harrowing experience of accepting an out of court settlement just to obtain a portion of his unpaid wages, either because he could not afford to hire a lawyer to represent him. Many think that it is not worth their while, especially after realizing that they are fighting a rather powerful opponent whose connections and ability to circumvent the law they cannot hope to match.

A worker who managed to secure his employment through a labor-only contractor or through the *cabo* system, will never be able to taste the benefits accorded him by law. If he dies of natural death, and at that time was a temporary or casual worker, the common recourse of his dependents is to merely secure the unpaid wages, if any. But for the fact that at the time of death he was temporary, the Social Security System, if he was registered, will only provide the so-called funeral benefit which could amount only to P6,000.00.[72] His family cannot avail of the death benefit provided for in Section 13 of R.A. No. 1161, as amended, because temporary workers are excepted by the System from compulsory coverage. Specifically, Section 8(j) (8) of The Social Security Law, provides:

> (j) Employment - Any service performed by an employee for his employer, *except...*
>
> (8) Such other services performed by temporary employees who may be excluded by regulation of the Commission. *Employees of bona fide contractors shall not be deemed employees of the employer engaging the services of said contractors.* (As amended by Sec. 5, P.D. No. 735, S-1975). (Emphasis supplied).

Fourth, exclusivity of jurisdiction in the filing of complaints. Since each administering agency has its own sphere of jurisdiction, the contracted-out worker or his relatives will have to undertake several courses of action in order to collect all the benefits due him. Much that these agencies do not operate automatically upon the death of the worker, ignorance and inability on how to claim is thus relegated to oblivion - a reason attributed to the continued accumulation of funds by the System.

The integration in one complaint all claims for benefits is justified because death means an end to all that the legal fiction of employer-employee relationship. The State, by mandate of the law, should faithfully perform its duty to afford protection to labor. Rather, what is observed is a highly compartmentalized system of dispensing these benefits. Specifically, the Labor Code, as amended, provides:[73]

> Art. 217. Jurisdiction of Labor Arbiters and the Commission. - (a) Except as otherwise provided under this Code, the Labor Arbiters shall have original and exclusive jurisdiction to hear and decide, within thirty

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[72]*See* REP. ACT No. 1161, as amended, sec. 13-B.
[73]LABOR CODE, art. 217.

(30) calendar days after the submission of the case by the parties for decision without extension, decision without extension, even in the absence of stenographic notes, the following cases involving all workers, whether agricultural or non-agricultural:

1. Unfair labor practice cases;

2. Termination disputes;

3. If accompanied with a claim for reinstatement, those cases that workers may file involving wages, rates of pay, hours of work and other terms and conditions of employment;

4. Claims for actual, moral, exemplary and other forms of damages arising from the employer-employee relations;

5. Cases arising from any violation of Article 264 of this Code, including questions involving the legality of strikes and lockouts; and

6. *Except claims for employees' compensation, social security, medicare and maternity benefits, all other claims arising from employer-employee relations, including those persons in domestic or household service, involving an amount exceeding Five Thousand Pesos (P5,000.00), whether or not accompanied with a claim for reinstatement.*

(b) *The commission shall have exclusive appellate jurisdiction over all cases decided by Labor Arbiters.*

(c) Cases arising from the interpretation or implementation of collective bargaining agreements and those arising from the interpretation or enforcement of company personnel policies shall be disposed of by the Labor Arbiter by referring the same to the grievance machinery and voluntary arbitration as may be provided in said agreements." (Emphasis supplied)

A worker, by virtue of his employment, is contributing to facilitiate progress and prosperity in whatever manner or capacity he may be engaged. However, in case of death arising from natural illness, his heirs are entitled under the law to receive only P6,000.00 funeral benefit, and a very small lump sum equivalent to the length of service, if qualified. But being a perennial casual or temporary worker, his dependents or heirs are not entitled to receive any other benefit despite the number of years he rendered because of the intermittent nature of employment. Bluntly stated, the amount received is just enough to launder a dead man to his graveyard without fanfare, so to speak. Precisely, labor-only contractors apply the

two-tier contracting system in order to avoid contributing to the Social Security System, Medicare and the Employees' Compensation.

Looking objectively at the situation, one can conclude that the government is partly to blame for the depressing condition of the contracted-out workers. Existing labor and social laws have provided so many exceptions on the coverage for membership. Notwithstanding, it has not been realistic enough to increase the amount of funeral benefit at least to make it at par with the P30,000.00 death compensation by virtue of judicial legislation on quasi-delict cases.

If the worker at the time of death was in a "floating" status, the relatives will get nothing. His death now becomes a liability to the bereaved members of the family. He was a helpless pauper who lived on a day-to-day basis. He had no savings inasmuch as the nature of his employment would not permit him to enjoy that basic right to save a few pesos to shoulder him in his final journey to eternity.

On the other hand in cases involving death thru reckless imprudence, the Supreme Court has fixed the amount of compensation to P30,000.00,[74] notwithstanding that the person at the time of death was unemployed or idle. In other words, contracted-out workers who contribute to production are least protected. While the relatives of the unemployed person who died of accident can sue because the Civil Code gives them the recourse to recover damages contracted-out workers cannot. This is the most shabby way of treating the workers, considering that there is an array of laws all supposedly anchored on that encompassig slogan of social justice.

In an interview with a relative of one temporary worker who died of natural illness, here is how he summarized their day-to-day struggle for survival, and to quote him *verbatim*::

> *Mabuti pa ang walang trabaho na nagbibilang lang ng poste, pag nasagasaan, may trenta mil agad. Pero, kami na employado ng ahensiya, pag nagkasakit at namatay, palibing lang ang biyaya at yon ay galing pa sa SSS, kung masuwerte ka. Ang halaga ay anim na libo lang. Ika nga, kunsuwelo de bobo.*
>
> *Abonado ka pa dahil sa ang ataul at palibing dito sa Maynila ay lagpas na sa dose mil. Isipin mo na doon pa ang patay isasalpak sa wall niche.*

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[74]*See* People v. Cruz, 142 SCRA 576; People v. Aldenita, 145 SCRA 451; and People vs. Ramilo, L-69579, January 7, 1987.

Wala kaming ibang benepisyo dahil sa hindi naman kami isinasali sa SSS kahit na ilang taon na kaming nagserbisyo sa ahensiya. Mas madalas kaming "floating" kaysa may trabaho. Hindi naman kami puweding manalo dahil sa putol-putol daw ang aming trabaho sa Kompanya at palipat-lipat pa.

Yong tungkol naman sa Medicare at Employees Compensation, hindi na namin alam yan. Ano pa? Ni sahod nga namin ay below minimum, at kung minsan bitin pa.

Kaya, kami ay isang kahig at isang tuka kung mayroon tutukain. Ngayon, kung walang labas, pa extra-extra na lang o kaya sabit sa iba na ang bigay ay kahit na magkano makaraos lang ang pamilya.

The Social Security System has acquiesced to their exemption from compulsory membership due to the intermittent nature of employment. One can just surmise the reasons behind this. Probably, because of the nature of employment, it becomes administratively not feasible to control and regulate them, or that their exemption is the prize of a lobby.

Conclusively, accumulated and incremental benefits insofar as most contracted-out workers are concerned remain a mirage. While some employment agencies and *cabo* practitioners do insure their workers, they do so under the casualty or group insurance policy. But considering the negligible amount of premium, the relatives of the deceased workers only receive an average of P6,000.00. Adding this to the funeral benefit provided, the amount is just enough to defray the burial expenses, no more no less.

Even on the aspect of casualty or group insurance, some labor-only contractors and *cabo* practitioners do not spend a centavo. The premium paid for the policy is often deducted from the salary of the workers themselves. As one labor-only contractor would put it, the covered workers or their relatives are the ultimate beneficiaries of the proceeds, and it is but logical for them to shoulder the payment of the premium.

This is the reason why, in many instances, the families of the deceased contracted-out workers extend the period of *palamay*[75] because gambling is allowed within the premises where the deceased lay in state.

[75]To join in the funeral wake. As a form of tradition, gambling is allowed within the vicinity where the deceased lay in state. The *lamay* last for several days, and anybody, even a stranger, who wants to gamble can join under the guise of extending his *pakiramay* or sympathy to the relatives of the deceased.

The *tong*[76] collected is intended to defray the burial expenses. The extended funeral wake has nothing to do with tradition, but out of poverty of which, the "tong", helps to generate funds for the burial services.

Out of this pretended generosity, other labor-only contractors and *cabos* also make their routine killing by acting as agents of the insurance companies to obtain the annual commission fee. They demand all sorts of processing fees even if it will only require the mere filling-up of certain forms. Invariably, in every aspect of this most degrading form of exploitation, labor-only contractors and some *cabos* make a profit while the ignorant workers are mired deeper into the pit of pathetic helplessness.

IX. CONTROL TEST

Basic in the determination of employer-employee relations is the application of the "control test". Under this test, "it is the employer that controls or reserves the right to control the employee not only as to the result of the work to be done, but as to the means and methods by which the same is to be accomplished."[77]

The "control test" evolved as a legal device because of the rampant violations in the payment of wages. Many workers were outrightly denied by their employers as employees, while others simply refuse to pay the exact amount of wages for their services. Employers raise all kinds of obstacles to disconnect or deny employer-employee relationship. Denial often come when issues such as retirement benefits, sick leave, maternity leave, service incentive leave, overtime, and holiday premium pay and other forms of additional expenses chargeable against the employers crop-up.

In a long line of decisions on the "control test," the item that is discernible is the nature of employment. Either the respondent-employer claims to be a "project" employer, "job" or "independent contractor". They raise their defense to avoid liability by denying the existence of employer-employee relations. Mechanical as the court in making them liable, it cites

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[76]A 10% commission taken by the relatives of the deceased from the proceeds of the gambling either on a per game basis or on the total amount won. Gamblers usually practice honesty in setting aside their "tong" in return for the free coffee and biscuits served.

[77]Investment Planning Corporation of the Philippines vs. Social Security System, G.R No. L-19124, November 18, 1967; Madrigal Shipping Company, Inc. v. Nieves Baens del Rosario, *et al.*, G.R. No. L-13130, October 31, 1959.

the accepted elements in determining employer-employee relations. To quote some of the recently decided cases on this perennial problem:

> We have consistently ruled that in determining the existence of an employer-employee relationship, the elements that are generally considered are the following (a) the selection and engagement of the employee; (b) the payment of wages; (c) the power of dismissal; and (d) the employer's power to control the employee with respect to the means and methods by which the work is to be accomplished. (Hydro-Resources Contractor Corp. v. Labor Arbiter Pagalilauan, G.R. No. 62909, April 18, 1989; Tabas, *et al.* v. California Mfg. Co., *et al.*, G.R. No. 80680, January 26, 1989; Continental Marble Corp. v. NLRC, 161 SCRA 151; Bautista v. Inciong, 158 SCRA 665; Broadway Motors, Inc. v. NLRC, 156 SCRA 522; Besa v. Trajano, 146 SCRA 501; Rosario Brothers, Inc. v. Ople, 131 SCRA 72; Shipside, Inc. v. NLRC, 118 SCRA 99; Mafinco Trading Corp. v. Ople, 70 SCRA 139) The employment relation arises from contract of hire, express or implied. (Citing Yu Chuck v. Kong Li Po, 46 Phil. 608 (1924). In the absence of hiring, no actual employer-employee relation could exist.[78]
>
> It is true that the "control test" expressed in the following pronouncement of the Court in 1956 case of *Viana v. Alejo Al-Lagadan*:[79]
>
> In determining the existence of employer-employee relationship, the following elements are generally considered, namely: (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employees' conduct - although the latter is the most important element (35 Am. Jur. 445). ...
>
> has been followed and applied in later cases, some fairly recent. (Feati University v. Bautista, 18 SCRA 119; Dy Keh Beng v. International Labor and Marine Union of the Phil., 90 SCRA 163; Rosario Bros. v. Ople, 131 SCRA 72; National Mines and Allied Workers Union (NAMAWU) v. Valero, 132 SCRA 578) Indeed, it is without question a valid test of the character of a contract or agreement to render service."[80]
>
> We have repeatedly held in countless decisions that the test of an employer-employee relationship is four-fold: (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of

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[78]Ruga v. National Labor Relations Commission, G.R. No. L-72654-61, 181 SCRA 273 (1990).

[79]99 Phil. 408, 411-412.

[80]Insular Life Assurance Co., Ltd. v. NLRC, G.R. No. L-84484, 179 SCRA 464 (1989).

dismissal; and (4) the power to control the employee's conduct. It is the so-called "control test" that is the most important element. (Citing Bautista v. Inciong, 158 SCRA 665 Continental Marble Corp., *et al.* v. NLRC, G.R. No. 43825, May 9, 1988; Asim, *et al.* v. Castro, G.R. No. 75063-64, June 30, 1988; Brotherhood Labor Unity Mov't. in the Philippines v. Zamora, 147 SCRA 49 [1987]; Investment Planning Corp. of the Phil. v. Social Security System, 21 SCRA 924 [1967]; Mafinco Trading Corp. v. Ople, 70 SCRA 139 [1976]; Rosario Brothers, Inc. v. Ople, L-53590, 131 SCRA 72 [1984]; Shipside, Inc. v. NLRC, G.R. No. 50358, 118 SCRA 99 [1982]; American President Lines v. Clave, *et al.*, G.R. No. 51641, 114 SCRA 826 [1982]). This simply means the determination of whether the employer controls or has reserved the right to control the employee not only as to the result of the work but also as to the means and method by which the same is to be accomplished.[81]

In determining the existence of an employer-employee relationship, the following elements are generally considered:

1) the selection and engagement of the employees;

2) payment of wages;

3) the power of dismissal; and

4) the power to control the employees' conduct. (Citing Social Security System v. Court of Appeals, 39 SCRA 629 [1971])

It is clear, therefore, that private respondents are petitioner's regular employees who enjoy security of tenure and who cannot be dismissed except for cause.[82]

In determining the existence of employer-employee relationship, the following elements are generally considered, namely: (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; (4) the power to control the employee's conduct - although the latter is the most important element (Brotherhood Labor Unity Movement of the Philippines v. Zamora, 147 SCRA 49 [1987]; Social Security System v. Court of Appeals, 156 383 [1987]; Broadway Motors, Inc. v. NLRC, 156 SCRA 522 [1987]; Bautista v. Inciong, 158 SCRA 668 [1988] and Asim *et al.* v. Castro, *supra.*[83]

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[81]Makati Haberdashery, Inc. vs. NLRC, G.R. No. L- 83380-81, 179 SCRA 452-453 (1989). Citing Social Security System v. Court of Appeals, 156 SCRA 383 [1987]).

[82]Agro Commercial Security Services Agency, Inc. vs. NLRC, *et al.*, 175 SCRA 795-796, *supra.* Citing Article 279, Labor Code; American President Lines v. Clave, 114 SCRA 826 [1982] and Social Security System v. Court of Appeals, *supra.*

[83]Development Bank of the Philippines v. NLRC *et al*, 175 SCRA 543 (1989).

To exemplify, a case in point is the following:

> A lawyer, like any other professional, may very well be an employee of a private corporation or even of the government. It is not unusual for a big corporation to hire a staff of lawyers as its in-house counsel, pay them regular salaries, rank them in its table of organization, and otherwise treat them like its other officers and employees. At the same time, it may also contract with a law firm to act as outside counsel on a retainer basis. The two classes of lawyers often work closely together but one group is made up of employees while the other is not. A similar arrangement may exist as to doctors, nurses, dentists, public relations practitioners, and other professionals.
>
> This Court is not without a guide in deciding whether or not an employer-employee relations exists between the contending parties or whether or not the private respondent was hired on a retainer basis.
>
> As stated in *Tabas* case:
>
> This Court has consistently ruled that the determination of whether or not there is an employer-employee relation depends upon four standards: (1) the manner of selection and engagement of the putative employee; (2) the mode of payment of wage; (3) the presence or absence of a power of dismissal; and (4) the presence or absence of a power to control the putative employee's conduct. Of the four, the right-of-control test has been held to be the decisive factor.[84]
>
> To determine the existence of an employer-employee relations, this Court in a long line of decisions (Viana v. Al-Lagadan, 99 Phil. 408, citing 35 Am. Jur. 445; Investment Planning Corp. v. SSS, G.R. No. L-19124, November 18, 1967, 21 SCRA 924; SSS v. Court of Appeals, G.R. No. 28134, June 30, 1971, 39 SCRA 629; Mafinco Trading Corp. v. Ople, G.R. No. 37790, March 25, 1976, 70 SCRA 139; SSS v. Cosmos Aerated Water Factory, Inc., G.R. No. L-55764, February 16, 1982, 112 SCRA 47) has invariably applied the following four-fold test: [1] the selection and engagement of the employee; [2] the payment of wages; [3] the power of dismissal; and [4] the power to control the employee's conduct."(40 Sara, *et al.* v. Agarrado, *et al.*, G.R. No. L-73199, 166 SCRA 629 [1988])

With the advent of labor-only contracting, the application of the "control test" has become variable, and legally difficult to pinpoint. The difficulty stems from the transposition as to who is actually controlling the

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[84]Hydro Resources Contractors Corp. v. Pagalilauan, *et al.*, 172 SCRA 402-403, *supra.*

day-to-day activities of the worker. Under the conventional method, the right to control the job performance belongs to the beneficiary of the service. However, this supposition no longer holds true. Instead of focusing on the issue of benefit or ownership, perception is centered on the payment of wages.

Whether under the *cabo* system or under the guise of a service agency or manpower placement, the lessors of human services are the ones who pay the wages of the workers. They legally obligate themselves because they assume that the act of paying the wage is the most important element in our jurisdictionally adhered "control test" theory.

From the point of view of the contracted-out workers, the payment of wages must observe the conventional procedure. It is with the labor-only contractor whom they signed their contract of employment. Since the two-tier contract formatting is being made to operationalize, it thus becomes irrelevant whether or not their employer is a downright *cabo* or a labor-only contractor. What is important is that they receive their wages and are able to identify the person paying them.

Even if the Supreme Court has, in its various decisions, placed much emphasis on the "right of the employer to control the means and methods and how the job is to be accomplished by the worker", this test alone will not suffice, for often the person exercising the act of paying the wage is not the beneficiary of the services rendered by the worker. In fact, the same question is asked: how can the end-user, or beneficiary of the service exercise such right to control when they can raise the same defense of not being the employer nor a party to the contract of employment in view of the fact that he is not the one paying the wages?

It is indeed difficult to determine the preponderance of control if based on the factors of ownership/beneficiary, on one hand, and the payment of wages, on the other hand, because of: One, entry of a third party in the contractual relations between the employer and the employee. Second, absence of a law that will prevent the payment of wages unless the person or entity is the owner of a given unit of production or beneficiary of the undertaking. In fact, the mandate that wages should be paid directly to the workers[85] is obviously misleading. At a glance, the provision appears to be absolutely perfect because workers rendering their services are required to

[85]LABOR CODE, art. 105.

directly receive their wages. The catch is: will this mandate apply if the supposed payor is not the beneficiary of the service or the owner of the commodities whose value was enhanced as a result of productive labor? Did the framers of the Labor Code, by design, intend to allow any party to pay the wages of the workers even if he has nothing to do with the subject matter arising from the reciprocal obligation of to do and to give?

With labor-only contracting playing a key role in labor relations, the control test is thereby transferred from one actor to the other. Even if in reality it is the employer-beneficiary who actually controls and benefits from the job performance of the workers, these aspects are mere suppositions because the power to hire and terminate supersedes that of the power to control. Although the employer-beneficiary dictates the day-to-day activities, it becomes irrelevant because the power to hire and terminate is primordial in determining employer-employee relations insofar as the contracted-out workers are concerned.

If the unwanted worker is terminated upon the behest of the employer-beneficiary, the person who execute the act of firing him is the labor-only contractor. Invariably, there is no way for for the worker to know the valid reasons for his termination because all that the labor-only contractor will do is to recall him. By that the worker is reverted to the status of a "floating" employee awaiting another employer-beneficiary in need of his services. Should the labor-only contractor decide to place him in a perpetual "floating" state, the ominous signal is clear that he has been terminated for good. This is the reason why labor-only contractors make it a point to pay pro forma the wages if only to satisfy the legal requisites of control because it changes the dimension in labor relations absolutely in their favor.

To clarify the theoretical basis about the payment of wages, the Labor Code[86] provides, to quote:

> Art. 105. Direct payment of wages. - Wages shall be paid directly to the workers to whom they are due, except:
>
> (a) In cases of force majeure rendering such payment impossible or under other special circumstances to be determined by the Secretary of Labor in appropriate regulations, in which case the worker may be paid through another person under written authority given by the worker for the purpose; or

[86]LABOR CODE, art. 105.

> (b) Where the worker has died, in which case the employer may pay the wages of the deceased worker to the heirs of the latter without the necessity of intestate proceedings. The claimants, if they are all of age, shall execute an affidavit attesting to their relationship to the deceased and the fact that they are his heirs, to the exclusion of other persons. If any of the heir is a minor, the affidavit shall be executed on his behalf by his natural guardian or next of kin. The affidavit shall be presented to the employer who shall make payment through the Secretary of Labor or his representative. The representative of the Secretary of Labor shall act as referee in dividing the amount paid among the heirs. The payment of wages under this Article shall absolve the employer of any further liability with respect to the amount paid.

This provision is elaborated further by Section 5, Rule VIII, Book III of the Implementing Rules and Regulations of the Labor Code, to quote:

> Sec. 5. Direct payment of wages. - Payment of wages shall be made direct to the employee entitled thereto except in the following cases:
>
> (a) Where the employer is authorized in writing by the employee to pay his wages to a member of his family;
>
> (b) Where payment to another person of any part of the employee's wages is authorized by existing law, including payments for the insurance of the employee and union dues where the right to check-off has been recognized by the employer in accordance with a collective agreement or authorized in writing by the individual employees concerned; or
>
> (c) In case of death of the employee as provided to the succeeding section.

What is conspicuous about Article 105 of the Labor Code and the Implementing Rules and Regulations is that the payment of wages has reference only to the workers. Both failed to incorporate a two-way street policy by imposing direct payment of wages only by the owner-beneficiary, meaning that no person, corporation, partnership, association, organization, union or federation shall be allowed or permitted to pay the wages of the workers if he/it is not the owner-beneficiary of the service.

The absence of a provision that will require only the owner or beneficiary of the service to pay the wages of the workers gives the labor-only contractors the status of an employer even if they have no interest whatsoever in the undertaking. The philosophical basis about this supposition is anchored on the premise that in order to benefit from the

service, say the input of labor in the processing of a commodity, one must be the owner of the labor-subjected property or one whose interest will be enhanced by the undertaking. Otherwise, such would result in a prosaic situation that will justify the existence of labor-only contracting as a form of business.

Ownership of an enterprise where the workers are rendering their services is the only logical basis upon which one can be called an employer. The purpose and interest of the undertaking, including the liability, forms part of his capital which will be enhanced by the input of labor done by the hired workers who are rightly called employees. Even if the owner-beneficiary will not make profit out of the undertaking, the liability to pay remains because labor itself is a commodity[87] which is the subject matter of a contract, specifically called contract of employment.

Under the current practice, labor-only contractors are not the owners of the items being processed nor the beneficiaries of the undertaking. Neither do they have the necessary capital for, in truth, their survival is based only on the percentage profit they can exact in the rigorous business of leasing-out human services. They will never benefit from the venture because their interest is only confined to the leasing of human services which ought not to be tolerated under any system of civilized labor relations.

Since it is the lessee of human services that will benefit, the maximization of production is his foremost concern, and this justifies the rationale of control defined as "how the means and methods of production will be accomplished by the contracted-out workers". The only concern of labor-only contractors is to provide manpower with minimum skills, and after accomplishing that role, the factuality of control to accomplish the job is now the equivalent of what it takes to lease-out human services. Conclusively, the means and methods of accomplishing a given task becomes the end purpose itself of which the Supreme Court has more or less been objective. To quote a few decided cases that dealt on this aspect:

> From the four (4) elements mentioned, We have generally relied on the so-called right-of-control test (Citing LVN Pictures, Inc. v. Philippine Musicians Guild, 1 SCRA 132, 173 (1961), citing Alabama Highway Express, Co. v. Local, 612, 108 S. 2d. 350) where the person for whom the services are performed reserves a right to control not only the end

[87]F. ENGLES, ANTI-DUHRING 243-245 (1969 ed.)

> to be achieved but also the means to be used in reaching such end. The test calls merely for the existence of the right to control the manner of doing the work, not the actual exercise of the right. (Citing Dy Keh Beng v. International Labor and Marine Union of the Philippines, 90 SCRA 161 (1979)."[88]
>
> ...It should, however, be obvious that not every form of control that the hiring party reserves to himself over the conduct of the party hired in relation to the services rendered may be accorded the effect of establishing an employer-employee relationship between them in the legal and technical sense of the term. A line must be drawn somewhere, if the recognized distinction between an employee and an individual contractor is not to vanish altogether."[89]
>
> Finally, noticeably absent from the agreement between the parties is the element of control. Among the four (4) requisites, control is deemed the most important that the other requisites may even be disregarded. (Feati v. Bautista, G.R. No. L-21278, December 27, 1966, 18 SCRA 41) Under the control test, an employer-employee relationship exists if the "employer" has reserved the right to control the "employee" not only as to the result of the work but also to the means and methods by which the same is to be accomplished. (LVN Pictures, Inc. v. Phil. Musicians Guild, G.R. No. 12582, January 26, 1961; 1 SCRA 312; Investment Planning Co., Inc., *supra*; SSS v. Court of Appeals, G.R. No. 25406, December 24, 1968, 30 SCRA 210; Phil. Refining Co., Inc. v. C.A., No. L-29590, September 30, 1982, 117 SCRA 84). Otherwise, no such relationship exists."[90]

The Labor Code should prohibit the payment of wages to the workers unless the payor is the legitimate owner-beneficiary of the undertaking. If incorporated as part of the procedure in labor relations, such legal mechanism will contribute greatly to eliminate third-parties in employment contracts who have no other functional role, but to leech the income of the workers.

Employer-beneficiaries usually shield their act of controlling the day-to-day activities of the workers by claiming mere "supervision" in the undertaking no matter how flimsy and preposterous it may be. This, they assert because in labor relations the concept of "control" and "supervision" have different meanings and implications. On the other hand, even if labor-only contractors will admit of having no actual control in the job performance, such cannot be taken into consideration because the *first tier* or

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[88]Ruga v. National Labor Relations Commission, 181 SCRA 273-274, *supra*.
[89]Insular Life Assurance Co., Ltd. vs. NLRC, 179 SCRA 464, *supra*.
[90]Sara *et al.* v. Agarrado, *et al*. 166 SCRA 630, *supra*.

the contract signed by the workers vest them the power to hire and terminate.

The unorthodox dichotomization of control has led to the conceptualization of outlandish labor relations theories where the employer-beneficiaries are called *de facto* controllers, while the labor-only contractors called *de jure* controllers. In effect, the concept of control assumes two separate meanings depending on whose interest one is trying to protect.

Looking at the current situation, it is only in the Philippines where, perhaps, the concept of a *de facto* and a *de jure* employer exists. And as an overtly legalistic country, our courts will naturally uphold the *de jure* employer or the labor-only contractor much that it is with him where the workers signed their contract of employment, receive their salaries, and the entity they can point out as responsible for their termination from the service. The net result about this theoretical syllogism is that the employer-in-fact is ridiculously superseded by the legal concept of an employer-in-law. In the end, all the jurisprudence about the control test is thus rendered out of context.

The Supreme Court in a decision concretized the theoretical factors that will distinguish a labor-only contractor from a job or independent contractor as formulated in Sections 8 and 9, Book III, Rule VIII of the Implementing Rules and Regulations of the Labor Code. In the case of Broadway Motors, Inc. v. NLRC,[91] the High Tribunal delved much on the elements of control:

> [U]nder the Work Contract, Apolinario supplied only "labor and supervision (over his "Contract Workers") in the performance of automotive body painting work which the company (*i.e.*, Broadway Motors) may from time to time, award to him under (the) contract". Apolinario also undertook to "hire and bring an additional workers as may be required by the company, to handle additional work load or to accelerate or facilitate completion of work in process." Petitioner Corporation supplied all the tools, equipment, machinery and materials necessary for Apolinario to carry out his assigned painting jobs, which painting jobs were executed by Apolinario and his men within the premises owned and maintained by petitioner Corporation. The control and direction exercised by petitioner Corporation over the work done by Apolinario and his "Contract Workers" was well-nigh complete, as indicated earlier. There was, furthermore, no evidence adduced by petitioner Corporation to show that Apolinario has substantial capital

[91]G.R. No. L-78382, December 14, 1987, at 8-9.

> investment in "VM Automotive Repair Service" or that "VM Automotive Repair Service" carried on, in its own premises, a car repair business operation separate and distinct from that engaged in by petitioner Corporation, an operation the tools and equipment of which were owned by Apolinario and the customers of which were not customers of Broadway Motors. What the evidence of record reveals is that the alleged "Contract Work" carried out by Apolinario and his "Contract Workers", excepting overtime work, was performed during regular working hours six (6) days in a week, which circumstance must have made it virtually impossible for them to carry on any additional and independent auto painting business outside the premises of Broadway Motors. Finally, Apolinario and his men were engaged in the performance of a line of work -- automobile painting -- which was directly related to, if not an integral part altogether of the regular business operations of petitioner Corporation -- *i.e.*, that of an automotive repair shop."

Hence, the "control test" the workers used to know has assumed a relative and functional purpose in labor relations. The purpose upon which the test is being applied is solely for the party who wants to take advantage of it. Thus, if the employer-beneficiary is sued by the worker, say for illegal termination, he can readily point to the contract of employment signed by the workers. On the other hand, if it is the labor-only contractor, his liability, even if solidary with the employer-beneficiary, is dependent on the service contract determinative as it is whether or not the latter will rehire the worker.

X. LIABILITY

The Labor Code makes the employer jointly and severally liable with the contractor or subcontractor in the payment of wages to the workers. Paragraph 2, Article 106 of the Labor Code in part provides:

> ...In the event that the contractor or subcontractor fails to pay the wages of his employees in accordance with this Code, the employer shall be jointly and severally liable with his contractor or subcontractor to such employees to the extent of the work performed under the contract, in the same manner and extent that he is liable to employees directly employed by him.

The same is reiterated in Article 109, to quote:

> Art. 109. Solidarity liability. - The provisions of existing laws to the contrary notwithstanding, every employer or indirect employer shall be held responsible with his contractor or subcontractor for any violation of any provision of this Code. For purposes of determining the extent of their civil liability under this Chapter, they shall be considered as direct employers."

However explicit the provisions on the issue of liability, the law tends to overlook the procedural realities involved in the contracting out of the workers. Liabilities arising from employer-employee relations have several aspects and may come from the malicious acts of either the employer or the worker. The worker, by serious conduct or willful disobedience to the lawful orders of his employer or representative in connection with his work; gross and habitual neglect of his duties; fraud or willful breach of trust reposed in him by his employer or duly authorized representative; commission of a crime or offense against the person of his employer or any immediate member of his family or duly authorized representative; and, other causes analogous to the foregoing may be terminated from the service.[92] On the other hand, the employer, by committing serious insult on the honor and person of the employee; inhuman and unbearable treatment by the employer or his representative; commission of a crime or offense against the person of the employee or any of the immediate members of his family; and other causes analogous to any of the foregoing, an employee may terminate his services.[93]

When the Labor Code imposed a joint and solidary liability to the employer-beneficiary and the labor-only contractor, by inference, it recognized the existence of the practice of labor-only contracting as a fact in labor relations. The mandate by any legal proposition, connotes the existence of two entities; recognized by law and accepted by the courts. The mechanism to merge their liability, no doubt, hastened the payment of damages, but not to render a verdict that one entity is illegal. Thus, based on this premise, there appears to be a sinister design to provide a loophole in the law with an aura of justification.

Had the framers of the Labor Code zeroed in on the employer-beneficiary by imposing on him the burden of paying the liability, no labor-only contractor in whatever camouflage can possibly survive. More than this, no sane employer-beneficiary will connive in resorting to the two-tier

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[92]LABOR CODE, art. 282.
[93]LABOR CODE, art. 285.

contract formatting for in the eyes of the law only one employer will bear the responsibility. Besides, labor-only contractors will not have any lucrative basis to continue their operations. Employers-beneficiaries will equally perceive the arrangement onerous. They will not have to undergo the regmarole in resorting to the two-tier contract formatting knowing that labor-only contractors can easily raise the defense of non-liability in such an event.

Because of this prosaic situation in labor relations, the determination as to who will bear the liability does not deal on the issue of solving the problem about the leasing of human services. Rather, the process merely assured the leased-out workers of their wages because the complaint is not to determine whether or not a given service agency or manpower placement is engaged in labor-only contracting, but in finding out the legal personalities of the employer-beneficiary and the labor-only contractor if they are one and the same entity. If they constitute two separate business entities, joint and solidary liability will perfectly apply and the pronouncement to prohibit the practice is shelved out as an issue in the case. The issue of labor-only contracting thus becomes a separate case that will allow labor-only contractors to raise another set of evidence in defense of the legality of their trade.

In other words, decisions imposing a joint and solidary liability merely reinforce the chance of the contracted-out workers to secure their unpaid wages, but not on the status of labor-only contractors as a superfluous party in labor relations contributing to the unnecessary jacking-up in the cost of labor. To cite recent decisions on this matter:

> Petitioner (Corporation) conveniently overlooks the fact that it had voluntarily assumed solidary liability under the various contractual undertakings it submitted to the Bureau of Employment Services. In applying for its license to operate a private employment agency for overseas recruitment and placement, petitioner was required to submit, among others, a document or verified undertaking whereby it assumed all responsibilities for the proper use of its license and the implementation of the contracts of employment with the workers it recruited and deployed for overseas employment [Section 2(e), Rule V, Book I, Rules to Implement the Labor Code (1976)]. It was also required to file with the Bureau a formal appointment or agency contract executed by the foreign-based employer in its favor to recruit and hire the former, which, contained a provision empowering it to sue and be sued jointly and solidarily with the foreign principal for any of the violations of the recruitment agreement and the contract of employment [Section 10(a) (2), Rule V, Book I of the Rules to Implement the Labor Code (1976)].

> Petitioner was required as well to post such cash and surety bonds as determined by the Secretary of Labor to guarantee compliance with prescribed recruitment procedures, rules and regulations, and terms and conditions of employment as appropriate [Section 1 of Pres. Dec. 1412 (1978) amending Article 31 of the Labor Code].
>
> ....
>
> These contractual undertaking constitute the legal basis for holding petitioner, and other private employment or recruitment agencies, liable jointly and severally with its principal, the foreign-based employer, for all claims filed by recruited workers which may arise in connection with the implementation of the service agreements or employment contracts (*See* Ambraque International Placement and Services v. NLRC, G.R. No. 77970, January 28, 1988, 157 SCRA 431; Catan v. NLRC, G.R. No. 77279, April 15, 1988, 160 SCRA 691; Alga Moher International Placement Services v. Atienza, G.R. No. 74610, September 30, 1988].[94]

Another case stated that:

> Rule V, Book I of the Omnibus Rules Implementing the Labor Code defines the duties and/or obligations of a duly licensed placement and recruiting agency. Section 2(e) of the said Rule requires a private employment agency to assume all responsibilities for the implementation of the contract of employment of an overseas worker. Section 10(a) (2) also of the same Rule provides that a private employment agency can be sued jointly and severally with the principal or foreign based employer for any violation of the recruitment agreement or the contract of employment.
>
> The new Rules and Regulations Governing Overseas Employment (1985) promulgated by the Governing Board of the POEA provides in Book II, Rule II, Section 1(d) (3) that a private employment agency shall assume joint and solidary liability with the employer with the implementation of a contract of employment.[95]

In one case, the Court ruled that the private recruitment agency is not jointly and severally liable with the employer for claims and liabilities arising from the implementation of the contract of employment. To quote that unusual decision:[96]

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[94]Royal Crown Internationale vs. NLRC, G.R. No. L-78085, 178 SCRA 575-576 (1989).

[95]Alga Moher International Placement Services vs. Atienza, et al., G.R. No. L-74610-11, 166 SCRA 179 (1988).

[96]Feagle Construction Corporation v. Dorado, *et al.*, 196 SCRA 488 (1991).

> ... when an overseas worker persuades local representative of the principal or recruiter to send him abroad to work despite the refusal of said local representative or recruiter to accede to the request due to the unstable condition in the area of work desired so much so that the regular payment of the remuneration of the employee or worker and the security of temure cannot be assured, and still such employee or worker insists in taking a calculated risk by signing a waiver by rendering the local representative or recruiter free from any liability to said employee or laborer arising from such overseas employment, thus in such instance, the local representative or recruiter cannot be jointly and severaly held liable with the foreign principal or employer for any claim of such employee or worker arising thereunder.

If one will ask, how can the local recruiter be absolved from liability on the basis that the worker himself insisted in being deployed for overseas employment when one of the conditions imposed on the agency is to see to it that workers sent abroad are protected? Is the placing of our workers for overseas employment anchored on "take it at your own risk" basis? Surely, such would create a dangerous precedent because all that a shrewd recruiter will do is to let the applicant sign a waiver stating that the local employer is absolved from all liabilities. This new perception will render meaningless the idea of protecting the workers. Rather, employment contract, other than being a contract of adhesion, mandates the employers to safeguard the welfare and security of the workers. The provision specially applies to agencies for foreign job placement. To let the contracted-out workers sign a waiver is to practically debase them of all the laws intended to secure their protection and welfare. By that decision, it would seem that a judicial abrogation of the labor laws has taken place to cause a serious set-back to tighten the screw against unscrupulous recruiters.

The determination on the status of the employer will not serve any purpose. When the court discovers that the labor-only contractor just clothes itself with the accepted features of a "job" or "independent contractor", no punishment will be meted against him. This happens because the law is phrased in such a way that it will only focus on the liability in the payment of wages.[97] In effect, even if labor-only contracting is deemed *mala prohibita*, the law has no teeth, so to speak. The Labor Code although explicit in prohibiting the practice is mute on the imposition of correctional penalties like imprisonment or fines, or both. Conversely, if the court will make the employer-beneficiary and the labor-only contractor jointly and

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[97]LABOR CODE, art. 283.

severally liable, it lightens the burden for either of the co-defendants can demand reimbursement half of the amount paid to the claimant workers.

Conclusively, the judgment is meant to merge the two purported business entities before the eyes of the law for the purpose of guaranteeing the payment of wages. In the case of *Philippine Bank of Communications vs. NLRC,*[98] the Supreme Court amplified this point, to quote:

> Under the general rule set out in the first and second paragraphs of Article 106, an employer who enters into a contract with a contractor for the performance of work for the employer, does not thereby create an employer-employee relationshp between himself and the employees of the contractor. Thus, the employees of the contractor remain the contractor's employees and his alone. Nonetheless, when a contractor fails to pay the wages of his employees in accordance with the Labor Code, the employer who contracted out the job to the contractor becomes jointly and severally liable with his contractor to the employees of the latter "to the extent of the work performed under the contract" as if such employer were the employer of the contractor's employees. The law itself, in other words, establishes an employer-employee relationship between the employer and the job contractor's employees for a limited purpose, *i.e.*, in order to ensure that the latter get paid the wages due them.

No doubt that there are certain types of employment where a third party is essential to operationalize the system. For instance, security agencies are allowed by law to act as intermediaries to secure the clienteles' need for protection and investigation on matters affecting their interests. Likewise, manning agencies have generated enormous demand for Filipino mariners to man foreign vessels plying the seven seas. The same is true to our skilled workers where admittedly we have a tremendous surplus whose abilities are competitive with workers from highly industrialized countries.

With respect to workers for overseas employment, placement agencies have been allowed for several reasons, but with certain limitations. First, direct hiring is not allowed. Article 16 of the Labor Code is quite specific. Second, only placement agencies for overseas employment can guaranty the payment of liability that might be incurred by delinquent foreign employers or principals. In fact, the Labor Code requires the posting of a bond before they are issued a license to operate[99] and an authority to

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[98]*Supra*, at 7.

[99]LABOR CODE, art. 13 (d).

recruit.[100] Third, to accelerate employment prospects abroad without exactly burdening foreign employers in having to organize a local office. Fourth, in the case of manning agencies, the accepted international practice is to hire seafarers through such agencies. Fifth, with respect to entertainment promotions, the problem is more than legal. As long as this country is suffering from an acute unemployment problem, many of our idle women will be lured to apply as some sort of entertainers in Japan, Korea, Taiwan, and Hongkong.

For these reasons, cases involving these types of employment have been recognized. In fact, security agencies, which by analogy apply the same legal mechanism as that of agencies for overseas employment, the Supreme Court referred to them as the direct employers, while the employer-beneficiaries called indirect employers. On this score, the imposition of a joint and solidary liability finds its most logical and legal justification. As decided in one case:[101]

> This joint and several liability of the contractor and the principal is mandated by the Labor Code to assure compliance of the provisions therein including the statutory minimum wage (Article 99, Labor Code). The contractor is made liable by virtue of his status as direct employer. The principal, on the other hand, is made an indirect employer of the contractor's employees for purposes of paying the employees their wages should the contractor be unable to pay them. This joint and several liability facilitates, if not guarantees, payment of workers' performance of any work, task, job or project, thus giving the workers ample protection as mandated by the 1987 Constitution (Article II Sec. 18 and Article XIII Sec. 3).
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> In the case at bar, it is beyond dispute that the security guards are the employees of EAGLE (Citing Article VII Sec. 2 of the Contract for Security Services, Rollo, p. 34). That they were assigned to guard the premises of PTSI pursuant to the latter's contract with EAGLE and that neither of these two entities paid their wage and allowance increases under the subject wage orders are also admitted (Labor Arbiter's Decision, p. 2, Rollo, p. 75). Thus, the joint and several liability of the principal and contractor is appropriate. (*See* Del Rosario & Sons Logging Enterprises, Inc. v. NLRC, G.R. No. 64204, May 31, 1985, 136 SCRA 669).
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> The solidary liability of PTSI and EAGLE, however, does not preclude the right of reimbursement from his co-debtor by the one who paid (*See* Article 1217, Civil Code). It is with respect to this right of

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[100]LABOR CODE, art. 13 (f).

[101]Eagle Security Agency, Inc. vs. NLRC, *et al.*, 173 SCRA 485-486, *supra.*

> reimbursement that petitioners can find support in the aforecited contractual stipulation and Wage Order provision.

Further, the liability conceived by the Labor Code pertains only to the consequences arising from the fact of employment. Those who wish to avail of the big labor bargain do not have in mind the liability during and after employment which means payment of the incremental and accumulated benefits brought about by long years of service. Labor-only contractors do not intend to reach that stage where they will incur liability brought about by the retirement of the workers, paying substantial amount of separation pay arising from long years of service, and other benefits corollary to the existence of a collective bargaining agreement. Precisely, they are limiting the tenure of the contract to prevent their contracted-out workers from attaining the status of regular employees. Contracted-out workers are terminated even before they can entertain the thought of becoming permanent.

If a contracted-out worker is terminated pursuant to a contract, the issue will only be confined to the status of employment like demanding reinstatement with backwages. Nothing about the acts of unfair labor practice, and refusal to comply with the provisions of the CBA can be raised because the worker was leased-out without his knowledge. Worse, that short stint of employment will be used against him. Being a perennial temporary worker excepted from the compulsory coverage of the Social Security Law, his prime years is thus put to waste.[102]

The employer-beneficiary, on the other hand, need not argue such justifying causes as labor-saving device, redundancy or retrenchment.[103] He only need to categorically state that the leased worker was turned-over to the service agency in compliance with the service contract. In either case, the employer-beneficiary can select which of the two contracts is most favorable to justify his action. After all, nobody can be compelled to violate contractual relations which, as every body knows, is the law between the parties.[104]

The contract of employment signed by the workers with the labor-only contractor, no doubt, is favorable to the latter. Since such is a *contract of adhesion,* prepared by lawyers beholden to the contractor, the ignorant

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[102]Section 8[j] (8), *supra, see* 80-81.
[103]LABOR CODE, art. 283.
[104]*See* CIVIL CODE, arts. 1306 and 1308.

worker cannot really do anything about it, but sign his name. He cannot question the lopsided provisions for, in the first place, he is not in a position to do so. Often than not, he does not even understand what is written in the document. A contracted-out worker, cannot seek the help of the union because industries availing of the practice are often sanitized of the problems brought about by trade unionism. Worse, the slightest hint of asserting a right will dearly mean the non-renewal of his contract.

The trappings imposed in the contract of employment is the converging point of interests between the labor-only contractor and the employer-beneficiary. The framework of the contract freely allows them to circumvent the law with amusing ease. To the labor-only contractor, the act of terminating the worker is a matter of legal necessity. To the employer-beneficiary, it is a matter of compliance. Conclusively, all arguments about the circumvention of the law are reduced to *argumentum ad absurdum*.

Since the two-tier contract technique is uniquely tailored against the contracted-out workers, the mandate to impose solidary liability is rendered superfluous. Hence, while the Labor Code masquerades itself as the "*magna carta* of the workers", the blighted truth is that it will never come to their succor even on such fundamental issue as security of tenure.

In fact, the most serious problem affecting joint and solidary liability is in the field of overseas employment and the so-called "entertainment promoters". True, the local recruitment agencies are solidarily liable in the event the workers are fired from the service before the contract expires; that physicial injuries are inflicted, or that they are sexually assaulted by their foreign employers. In which case, the performance bond filed by the employment agency is an insurance to secure prompt payment for the victim-worker.

However, unscrupulous foreign labor-only contractors have taken over the practice that rightfully belongs to the foreign beneficiaries of the service. Foreign employer-beneficiaries legitimately in need of contract workers are required by their own government to secure the services of their licensed recruiters much that they are prohibited to directly hire foreign nationals. Adding complication is the fact that contracts dictated by foreign recruiters provide that all liabilities shall be heard and tried only in the country where the aggrieved workers came from.

Looking at the aspect of venue, it would seem to favor the local workers. However, a closer examination of the contract entered into by local

overseas recruitment agencies with the foreign recruiters or principals reveals that if the latter fails to pay the agreed wage or has not paid the wages of the recruited workers, they cannot be sued in their own turf by the local agencies. Nothing can be done about the situation because the liability arising from the violation of the contract provides that the venue must be filed in the Philippines. Invariably, complaints cannot be instituted against foreigners because the contract can only be invoked here. Smart as they are, it has never been the intention of the foreign recruiters and employers to set foot in this country only to be promptly arrested.

Besides, there is no such provision in the Labor Code about entertainment promotions. Nonetheless, this uncanny situation has tacitly been encouraged by the Philippine Overseas Employment Administration (POEA) all because of the need to generate foreign exchange earnings. As one entertainment promoter loudly spoke before a crowd of prospective "Japayukis", the entertainment promotion need to be professionalized; that the industry has to be upgraded, and must be protected. Now: what entertainment is the fellow talking about? What kind of professionalization must be undertaken when most of our entertainers in Japan are mere karaoke singers, ago-go dancers, bar entertainers, hostesses, guisha girls and some even ending up as prostitutes? What is this monthly percentage taken from their earnings with some drudging in the bawdy corners in Japan's red light district? Is this the kind of industry worth the protection of the government?

On top of these, the so-called entertainment promoters and their captive recruits made a rally before the Department of Labor and made a fuss about their "industry" before the media when in truth there is no law that grants them a license to operate. Surely, those mockery done before the public and in front of our labor officials is absurd. Unless of course one will dare to venture out and think about the possible relationship existing between our officials and these modern-day slave traders.

XI. INHERENT CONTRADICTIONS

Within the framework of the Labor Code, there are phrases and words which can never be defined and construed with accurate precision. Since such phrases and words appear to be outside the orbit of legal hermeneutics, they are always subjective in favor of those who wish to pursue the practice of labor-only contracting. Obvious among these are the

contradictory and confusing phrases and words in Article 107 of the Labor Code:

> Art. 107. Indirect employer. - The provisions of the immediately preceding Article shall likewise apply to any person, partnership, association or corporation which, not being an employer, contracts with the independent contractor for the performance of any work, task, job or project.

Except to state that it has correlation with Article 106 of the Labor Code, no mandate is imposed on the provision to ban the practice. Neither Article 106 categorically prohibits indirect employment which, in most cases, is engaged in labor-only contracting. Rather, Article 106 recognizes the existence of the practice by mandating that contractors pay in accordance with the provisions of the Labor Code, to quote:

> Art. 106. Contractor or subcontractor. - Whenever an employer enters into a contract with another person for the performance of the former's work, the employees of the contractor and of the latter's subcontractor, if any, shall be paid in accordance with the provisions of this Code....

Taken together, the tenor of the provisions is to simply see to it that the contracted-out workers are paid the statutory minimum wage although it is most flagrantly violated because of the two-tier contract formatting.

Even if Article 109 of the Labor Code makes explicit that contractors and subcontractors shall be considered direct employers, and a bond may be required to secure the payment of wages, such is not sufficient to safeguard the loopholes in the law. For instance, Article 108 of the Labor Code provides:

> Art. 108. Posting of bond. - An employer or indirect employer may require the contractor or subcontractor to furnish a bond equal to the cost of labor under contract, on condition that the bond will answer for the wages due the employees should the contractor or subcontractor, as the case may be, fail to pay the same.

At its face value, the idea of posting a bond favors all the parties including the contracted-out workers. To the actual user or beneficiary of the service, there is the assurance that he alone will not shoulder the burden of responsibility. However, what is not understood is why direct employers who, are often disguised as "job" or "independent contractors" or "subcontractors", are required to post a bond by the employer-beneficiaries of the service? Rather, bonds are demanded by some employers because they

want to avoid the possible burden of paying alone the liability, although many direct employers known sometimes as "contractors" and "subcontractors" can easily declare themselves bankrupt just to pass on the burden of responsibility. It is for this reason why employer-beneficiaries, being the constant factor in production and are prone to suit, would insist that direct employers, or contractors or sub-contractors post a bond before the signing of a service contract.

In the case of *Eagle Security Agency*,[105] the Supreme Court ruled that the beneficiary of the services rendered by the guards is the indirect employer. To quote that portion:

> [T]he contractor is made liable by virtue of his status as direct employer. The principal, on the other hand, is made an indirect employer of the contractor's employees for purposes of paying the employees their wages should the contractor be unable to pay them. This joint and several liability facilitates, if not guarantees, payment of workers' performance of any work, task, job or project, thus giving the workers ample protection... .

The flaw in this supposition is how can contractors or sub-contractors, as direct employers, generate their own funds to assure the workers of their wages when the funds they intend to pay is basically contingent on their ability to secure a service contract? This, even without rationalizing on the common problem of wage pegging that often results in the violation of the minimum wage law.

Objectively, there is really no way for the labor-only contractors to assure the contracted-out workers of their wages if the principals or indirect employers falter in their obligation.[106] But being the constant factor in production, it is not wise for them to deny the workers of their wages. It is impossible, if not far more difficult, for them to evade liability. As said, as long as they are paying the amount agreed upon in the service contract and whether or not the package price will suffice to meet the minimum wage law is beside the point. What the contracted-out workers will actually receive is a problem only the labor-only contractor will have to resolve.

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[105]173 SCRA 485, *supra*.

[106]Being the constant factor in production employer-beneficiaries or principals avoid reaching this kind of situation.

In the case of foreign-based employers, the law requires the local agency to post a bond,[107] much this is the only way to guaranty the payment of backwages, and other liabilities in the event of a breach of employment contract. They can be validly classified as direct employers because as far as the applicability of our laws are concerned, foreign employers are beyond our jurisdiction. Hence, the rationale why recruitment agencies are required to post a bond to guaranty the payment of wages.

Again, the requisite sounds logical. However, a second look about the condition will indicate that it serves the interest of the employer-beneficiaries or indirect employers because the bond is designed to safeguard the regular turnover of the huge amount of money intended to pay the wages of the workers. Besides, it sustains the contractual relations between the labor-only contractor and the employer-beneficiary. The bond has nothing to do with the contracted-out workers or is meant to protect them. Rather, the condition only adds burden because labor-only contractors with marginal capital and can hardly clinch a big deal are compelled to squeeze dry the salaries of their contracted-out workers just to keep them afloat.

The irony about the requirement is that most labor-only contractors simply juggle the funds by securing a surety bond[108] which means that they need only to pay regularly a very small amount of premium to pursue their business operations.

Be that as it may, Article 108 uses the word "may", meaning that it is not mandatory for the direct employers to post a bond. If the employer-beneficiary will not insist, nothing about it can be done. In such a situation, it can be gleaned that the labor-only contractor and the employer-beneficiary are one and the same person. The dual personalities are merely being used as a cover to operationalize the two-tier contract formatting. Besides, neither does the law impose a ceiling on the amount of bond to be posted. Hence, if they are one and the same person, more or less he can estimate the capital outlay needed for the extra expense of putting-up a bond.

Thus, addressing to the realities about the practice, many of the labor-only contractors are dummies or are in cahoots with the employer-beneficiaries such that to require them to post a bond would amount to asking them to take their money out of their right pocket only to place them in

[107]LABOR CODE, art. 31.
[108]LABOR CODE, art. 108.

their left pocket. This, employer-beneficiaries routinely execute not because they have in mind the idea of doling out marginal wages, but to completely sanitize their constant position from the inroads of trade unionism of which the CBA is the most priceless victory for the workers. The regularization of the workers is the most dreaded event unscrupulous businessmen want to avoid at all costs.

XII. PROHIBITING VS. REGULATING

The features enumerated in Section 9, Rule VIII of the Implementing Rules and Regulations of the Labor Code categorizing an employer as engaged in labor-only contracting is obviously inadequate, if not vague. To quote the provision:

> Sec. 9. Labor-only contracting. - (a) Any person who undertakes to supply workers to an employer shall be deemed to be engaged in labor-only contracting where such person:
>
> (1) Does not have substantial capital or investment in the form of tools, equipment, machineries, work premises and other materials; and,
>
> (2) The workers recruited and placed by such person are performing activities which are directly related to the principal business or operations of the employer in which workers are habitually employed.
>
> (b) Labor-only contracting as defined herein is hereby prohibited and the person acting as contractor shall be considered merely as an agent or intermediary of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.
>
> (c) For cases not falling under this Article, the Secretary of Labor shall determine through appropriate orders whether or not the contracting out of labor is permissible in light of the circumstances of each case and after considering the operating needs of the employers and the rights of the workers involved. In such case, he may prescribe conditions and restrictions to ensure the protection and welfare of the workers.

Section 9(c) of the Implementing Rules and Regulations is an elaboration supposedly of the last paragraph of Article 106 of the Labor Code, to quote:

> The Secretary of Labor may, by appropriate regulations, restrict or prohibit the contracting out of labor to protect the rights of workers established under this Code. In so prohibiting or restricting, he may make appropriate distinctions between labor-only contracting and job contracting as well as differentiations within these types of contracting and determine who among the parties involved shall be considered the employer for purposes of this Code, to prevent any violation or circumvention of any provision of this Code.

One of the features that will classify an employer as engaged in labor-only contracting is the amount of "substantial capital" or "investment". However, whether the capital or investment comes in the form of handy and disposable tools, equipment, machineries, work premises, and other materials is a 64-dollar question. The amount may range from one hundred pesos to one million pesos, depending on how one will stretch his imagination to justify the lucrative business of leasing out human services.

Legally, the word "substantial" can never be defined unless there are quantifiable factors that an employer, for instance, is engaged in labor-only contracting. The nature of the business itself has to be looked into. In its absence, the name of the game is mere approximation on what is deemed considerable to give connotation to the meaning of "substantial". On many occasions, courts have made inference by just quantifying the given factors or requisites of the law that would favor a party to a case. If such features will favor the greater factors, there is substantial compliance. Thus, "substantial compliance" has been taken into account in cases affecting obligations not strictly mandated or required by law.

In the case of Section 9(1) of the Implementing Rules and Regulations, the word "substantial" has no reference to the amount of capital which, in its absence, can never be quantified by judicial proceedings. Tools, equipment, machineries, work premises and other materials, stated in general terms, are relative as the words "substantial compliance". Philosophically speaking, unsubstantiated terminologies are floating in the realm of metaphysics. Adding to this is paradoxical lumping of legal terminologies in the 3rd paragraph of Article 106 of the Labor Code. What is obvious is the use of contradictory and incompatible legal terms. The lumping together of the words to "regulate", "restrict" and "prohibit" reveals either of a muddled logic or a design to distort the fundamental purpose of the law.

For instance, to "regulate" as used in Section 2444(1) of the Administrative Code "means and includes the power to control, to govern, and to restrain; but `regulate' should not be construed as synonymous with `suppress' or `prohibit'".[109] To be more precise, the American courts interpreted the word to "regulate" as:[110]

> A power to regulate implies a continued existence of the matter to be regulated. (citing State v. Clarke, 54 Mo. 17, 33, 14 Am. Rep. 471; State v. McCann, 72 Tenn. (4 Lea) 1, 13.)
>
> To `regulate' is to govern or direct according to rule; to adjust, order or govern by rule, method, or established mode; to control, govern, or direct by rule or regulations. (citing Cauble v. Beemer, 177 P.2d 677, 683, 64 Nev. 77.)
>
> `Regulate' means to adjust by rule or method, to direct, to rule, to govern, to methodize, to arrange. Every element of his definition involves restraint, the exercise of a power over a thing by which its activities are ruled or adjusted, or directed to certain ends. (State ex. rel. Saperstein v. Bass, 152 S.W.2d 236,238, 177 Tenn. 609.)

The important item in the definition is the acknowledgment about the continued existence of the matter to be regulated. It is allowed to continue or to exist, subject to the conditions imposed by the governing body.

On the other hand, to "restrict" means "to keep within limits; to hold down; to limit; to confine; or to restrain within bounds".[111] For the sake of accuracy, we have to refer again to foreign interpretations:[112]

> The primary meaning of the word `restrict' is to limit. (citing Cobb v. Burress, 200 S.W.2d 694, 697, 213 Ark. 298.)
>
> To `restrict' is to restrain within bounds; to limit; to confine, and does not mean to destroy or prohibit. (citing Dart v. City of Gulfport, 113 So. 441, 444, 147 Miss. 534.)

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[109]MORENO, *supra* note 2 *citing* Kwong Sing vs. City of Manila, 41 Phil. 108.

[110]36-A WORDS AND PHRASES 303-304 (1962).

[111]WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (USA: Collins & World Publishing Co., Inc., 1977 ed.).

[112]37-A WORDS AND PHRASES 103 (1950).

Finally, the word "prohibit" means "to forbid, as by law; to refuse to permit; or to interdict by authority".[113] On this score, American courts are more or less uniform in their interpretation:[114]

> The words `prohibit' and `restrict' are not synonymous. (citing Forest Land Co. v. Black, 57 S.E.2d 420, 424, 216 S.C. 255.)
>
> The derivative meaning of `prohibit' is to hold back, while the basic meaning is to forbid by authority. When certain conduct is defined by law as a crime and penalties are prescribed therefor, conduct is `prohibited' by law. (citing Andrews v. Goodman, 177 S.E. 876, 878, 115 W.Va. 702.)
>
> The word `prohibit' when used in a grant of police power to a city, giving it a right to prohibit certain occupations, etc., is not materially different from the word `prevent.' In fact, `prevent' is the stronger word, conveying the idea of prohibition and the use of means necessary to give it effect. (citing In re Jones, 78 Ala. 419, 425.).

If it is "prohibited", it is being banned, forbidden or interdicted because it is contrary to law, customs, public policy, public order, and morals. Legislation to this effect is an expression to make the practice *mala prohibita*, although it is universally acknowledged as *mala in se*. In which case, to prohibit the practice is to exercise an inherent power of the State which is in accordance with the United Nations declaration to eliminate all forms of slavery of which the Philippines is a signatory.

As stated, these legal terms cannot co-exist in one provision without prejudicing the law itself. With the above jurisprudence, it is clear that labor-only contracting is either allowed because of the words "regulate" and "restrict", but with certain limitations, controls and conditions; or that is meant to be "prohibited", meaning that it should not be allowed, and any person or entity engaged in labor-only contracting can be held liable.

Since everybody is permitted to make his wild guess about the intention of the law, it thus becomes apparent that the framers of the Labor Code have no interest in eradicating the practice. For example, if the purpose is to "regulate", *sine qua non* the law is under obligation to issue a set of standards to be observed by those wanting to engage in the practice. It is the set of standards that will justify the activities with the Department

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[113] WESBTER'S DICTIONARY, *supra*.

[114] 34 WORDS AND PHRASES 458 (1957).

of Labor seeing to it that they comply with the law. Invariably, even if they are engaged in a disguised labor-only contracting activity for as long as they follow the limitations, controls and conditions, no sanction can be imposed on them. Equally, the word "to restrict" carries the same legal presumption that the law imposes a degree of limitations for such an undertaking.

The uncanny thing about the so-called limitations, controls, and conditions set in Section 9[115] is the vagueness of the provision itself, such that the benefit of the doubt always favors the person wanting to organize his business or in defending an existing one. In other words, the State cannot just prohibit a thing simply because it believes that the item is inimical to public interest. The governing authorities must accord to the person affected the elementary rule of due process, like telling him bluntly that the leasing of human services is prohibited because labor-only contracting presupposes ownership of the laboring person. To sanction the practice would mean the technical revival and legalization of slavery which has already been relegated as a practice of the past.

At any rate, the contradictory and incompatible terms can never be interpreted to favor the legality of labor-only contracting in whatever disguise it may attempt to project itself in labor relations. The phrases "what is permissible in light of the circumstances of each case", and "considering the operating needs of the employer"[116] only justify the existence of this subtle form of slavery. The patent ambiguity in the provision can never be cleared by extrinsic evidence, or in Latin *ambiguitas verborum patens nulla verificatione excluditur*. Besides, Article 106 of the Labor Code is a positive law mandating its prohibition because it absolutely degrade the workers worse than the beast of burden.

While the beasts of burden are protected by their owners, the contracted-out workers are not because the interest of the labor-only contractors is confined to protecting their service contract. If the contracted-out workers are no longer of serviceable value, labor-only contractors can just select from their "floating" workers, and the cycle will continue because of the surplus of unemployed workforce. In the meantime, free workers seeking direct employment will find themselves less viable in the open labor market because direct selling is gradually being replaced by the system of indirect selling done through the practice of labor-only contracting.

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[115]OMNIBUS RULES IMPLEMENTING THE LABOR CODE, Rule VIII, sec. 9, *supra*.
[116]OMNIBUS RULES IMPLEMENTING THE LABOR CODE, Rule VIII, sec. 9 (c).

Since the Labor Code has failed to categorically delineate the fine difference between "labor-only contracting" and "job" or "independent contracting", a stricter interpretation is to prohibit the practice both on moral and legal grounds considering that it is socially and economically detrimental to the well-being of the workers. This interpretation is in consonance with the covenant of the International Labor Organization (ILO) to uplift the welfare of the workers one of which is for the complete eradication of all shades of slavery. In fact, to give substance and meaning to this view, Article 4 of the Labor Code provides:

> Art. 4. Construction in favor of labor. - All doubts in the implementation of the provisions of this Code, including its implementing rules and regulations, shall be resolved in favor of labor.

All practices that tend to threaten the welfare of the workers should be looked into and prohibited at the outset. This is-so because even in light of the tremendous safeguards accorded them, the cornerstone of all contracts of employment is still anchored on the truth that they are contracts of adhesion, and the workers like the sellers of any commodity can only vouch on the integrity of their labor and skills in order to survive.

XIII. LABOR-ONLY CONTRACTING VERSUS INDEPENDENT CONTRACTING

The problem about the practice of "job" or "independent contracting" lies in the vague characteristics thus far enumerated in the Implementing Rules and Regulations of the Labor Code. The provisions failed to cite clear-cut conditions to delineate "job" or "independent contracting" from labor-only contracting. Specifically, Section 8, Rule VIII of the Implementing Rules and Regulations provide the following conditions:

> Sec. 8. Job contracting. - There is job contracting permissible under the Code if the following conditions are met:
>
> (1) The contractor carries on an independent business and undertakes the contract work on his own responsibility according to his own manner

> and method, free from the control and direction of his employer or principal in all matters connected with the performance of the work except as to the result thereof;
>
> (2) The contractor has substantial capital or investment in the form of tools, equipment, machineries, work premises, and other materials which are necessary in the conduct of his business.

In the more popular case of *Mafinco Trading Corporation vs. Hon. Blas F. Ople,*[117] the Supreme Court forwarded the standard criteria whether or not one is engaged in job or independent contracting, to quote:

> In determining the existence of employer-employee relationship, the following elements are generally considered, namely: (1) the selection and management of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employees' conduct - although the latter is the most important element. (Viana v. Al-Lagadan and Piga, 99 Phil. 408, 411; citing 35 Am. Jur. 445).
>
> On the other hand, an independent contractor is `one who exercises independent employment and contracts to do a piece of work according to his own methods and without being subject to control of his employer except as to the result of the work'. (Mansal v. P.P. Gocheco Lumber Co., supra.).
>
> Among the factors to be considered are whether the work is part of the employer's general business; the nature and extent of the work; the skills required; the term and duration of the relationship; the right to assign the performance of the work to another; the power to terminate the relationship; the existence of a contract for the performance of a specified piece of work; the control and supervision of the work; the employer's powers and duties with respect to the hiring, firing, and payment of the contractor's servants; the control of the premises; the duty to supply the premises, tools, appliances, material and labor; and the mode, manner, and terms of payment." (56 C.J.S. 46).

As a general rule, job or independent contracting is legally tenable. The tenability stems not from the extrapolation of terms or in the manipulative use of semantics, but brought about by mankind's recognition of the necessity to divide labor, an uncoordinated specialization of skills that contributed greatly to progress. As aptly defined:[118]

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[117]G.R. L-37790, March 25, 1976.

[118]Douglas Greenwald and Associates, Dictionary of Modern Economics: A Handbook of Terms and Organizations (New York: The McGraw-Hill, 2nd ed.), 1973.

> A method of production in which each worker specializes in some aspect or step of the production process. Division of labor is characteristic of a modern industrial economy; it increases nation's productivity. In a chronological division of labor, one man carries out one step in production, another man does his part, and a third then adds his share, until the finish product emerges. x x x. They include the greater skill acquired in specialization, the avoidance of wasted time in shifting from one task to another, and the employment of persons best suited to particular types of work. For Adam Smith's classic example of the division of labor, *see* The Wealth of Nations, x x x.

Admittedly, job or independent contracting is the most visible and acceptable form of a division of labor. It has an inherent and separate form of activity; specialized, unique, acknowledged, and existing under any given economic set-up and social climate.

In our situation, job or independent contractors have several features. First, they are characterized by the skill of the individual, instead of the usual group specialization like the project contractors. Since, it is the individual that possesses the skill, each can operate independently from the other. Second, they rely solely on their individual capacity and capital such that they need not necessarily hire workers to work for them. If they occasionally work in groups, they are usually partners to a venture. Third, their skill or talent are rather exceptional, recognized, and difficult such that there is no need for substantial capital or investment in the form of tools, equipment, machineries, work premises, and other materials to carry on their trade. Fourth, like the project contractors, they are free to apply their own means and methods to accomplish their job assignment. If occasionally they need some equipment, they are usually handy or are provided by those requiring their services. Fifth, payment is usually direct, and based on commission or percentage basis. If the undertaking is specific, it is usually on a "pakyao" basis. Sixth, job assignments are more or less continuous although independent compared to that of the project contractors. Seventh, and most important, they can only present as badge their experience, knowledge and skill which are often non-transferable to others.

Thus, based on these considerations, job or independent contracting cannot just be prohibited without disrupting certain aspects of production. They are numerous, although many are also engaged in what can be termed as "peripheral" and "incidental" productive activities, and their services cannot be integrated to any given productive unit because of the nature of

their talent, skill, profession, and know how. As explained in the case of *Sara*:[119]

> [P]rivate respondent was an independent contractor, who exercising independent employment, contracted to do a piece of work according to her own method and without being subject to the control of her employer except as to the result of her work. She was paid for the result of her labor, unlike an employee who is paid for the labor he performs. (Investment Planning, supra; Mansal vs. Gocheco Lumber, 96 Phil. 941)
>
> The verbal agreement devoid as it was of any stipulations indicative of control leaves no doubt that private respondent was not an employee of petitioners but was rather an independent contractor.

There are several types of job or independent contractors like smalltime carpenters, plumbers, house and car painters, auto repairmen, electricians, electronic and appliance repairmen, commission sales agents, etc. Among professionals, they are represented by the independent accountants, architects, lawyers, doctors, and those who rely mainly on their profession, skills and ability. Often, they perform on the basis of a given specific duty. In one case, the Supreme Court has considered insurance agents as independent contractors, and no doubt they possess all the characteristics mentioned, to quote:[120]

> Logically, the line should be drawn between rules that merely serve as guidelines towards the achievement of the mutually desired result without dictating the means or methods to be employed in attaining it, and those that control or fix the methodology and bind or restrict the party hired to the use of such means. The first, which aim only to promote the result, create no employer- employee relationship unlike the second, which address both the result and the means used to achieve it. The distinction acquires particular relevance in the case of an enterprise affected with public interest, as is the business of insurance, and is on that account subject to regulation by the State with respect, not only to the relations between the insurer and insured but also to the internal affairs of the insurance company. (Citing 43 Am. Jur. 2d, pp. 73-91) Rules and regulations governing the conduct of the business are provided for in the Insurance Code and enforced by the Insurance Commissioner. It is, therefore, usual and expected for an insurance company to promulgate a set of rules to guide its commission agent in selling its policies that they may not run afoul of the law and what it requires or prohibits. Of such character are the rules which prescribe the

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[119]166 SCRA 631, *supra*.

[120]Insular Life Assurance Co., Ltd. vs. NLRC, 179 SCRA 465, *supra*.

> qualifications of persons who may be insured, subject insurance applications to processing and approval by the Company, and also reserve to the Company the determination of the premiums to be paid and the schedules of payment. None of these really invades the agent's contractual prerogative to adopt his own selling methods or to sell insurance at his own time and convenience, hence cannot justifiably be said to establish an employer-employee relationship between him and the company.

Although job or independent contracting cannot stand with predictable continuity, neither can the practice be integrated to a given unit of production. In the case of *Development Bank of the Philippines vs. NLRC,*[121] the Supreme Court decided against the respondent by merely applying the tautological definition of an "independent contractor" peculiar to the case, to quote:

> Respondent CSC is an independent contractor which employed the private respondents for the specific purpose of managing and operating the said sugar mill-refinery complex. It was respondent CSC which exercised the right of control over the conduct of private respondents in the performance of their functions and petitioner DBP never had a hand over their supervision. The right of control test "where the person for whom the services are performed reserves a right to control not only the end to be achieved but also the means to be used in reaching such end" belonging to respondent CSC is determinative of the existence of an employer-employee relationship. (Sevilla vs. Court of Appeals, 160 SCRA 179-180 [1988]).

The existence of job or independent contracting is dictated not by the exigency to abort the formation of labor unions, but by the nature of the undertaking being conditional to a specialized undertaking. In this regard, here is how the Supreme Court explained the meaning of a job or independent contractor engaged in a specific undertaking:[122]

> The petitioner cannot insist that the private respondent had been hired "for a specific undertaking i.e. to handle the backlogs brought about by the seasonal increase in the volume of her work." (Rollo, id., 10) The fact that she had been employed purportedly for the simple purpose of unclogging the petitioner's files does not make such an undertaking "specific" from the standpoint of law because in the first place, it is "usually necessary or desirable in the usual business or trade of the employer," (Citing Pres. Dec. No. 442, art. 280, supra.) a development

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[121]175 SCRA 543-544, *supra.*

[122]Beta Electric Corporation vs. NLRC, *et al.*, G.R. No. L-86408, 182 SCRA 387-388 (1990).

> which disqualifies it outrightly as a "specific undertaking", and in the second place, because a "specific undertaking" is meant, in its ordinary acceptation, a special type of venture or project whose duration is coterminous with the completion of the project, (See e.g., Sandoval Shipyards, Inc. vs. NLRC, Nos. L-65689, 66119, May 31, 1985, 136 SCRA 674; PNOC-Exploration Corporation vs. NLRC, No. L- 71711, August 18, 1988, 164 SCRA 501) e.g., project work. It is not the case in the proceeding at bar.

Despite these features, labor-only contractors shield behind the vague provisions of Section 8, Rule VIII of the Implementing Rules and Regulations of the Labor Code if only to project themselves as self-styled "job" or "independent contractors". Since many cannot really meet the criteria of a real job or independent contractor, they devised a scheme like entering into a contract with employer-beneficiaries where their contracted-out workers perform "peripheral" or "incidental" productive activities. The contracted-out workers finish the semi-manufactured products or act as agent-sellers of the products to the consumers even if such activities are continuous. However, if the item is something that will have to be finalized, the same is sold to a front company for distribution to the public. This is most rampant among industries engaged in the semi-manufacturing and processing of goods.

Under this supposition, "peripheral" and "incidental" productive activities are being carried out to create an impression of a division of labor which otherwise requires no exceptional talent, skill or ability on the part of the workers performing the job. For instance, in companies where "job" or "independent contractors" operate, the questions that crop-up are: First, can the so-called job or independent contractors be integrated? Second, if they cannot, will their permanent separation hasten production? Third, can they be treated individually in terms of experience, knowledge and skills? If nothing of these sorts will affect the company, then the "job" or "independent contractors" are plain labor-only contractors because workers with minimum skills can easily perform the job.

In the Philippines, labor-only contractors strive to clothe themselves with the features of "job" or "independent contractors". Among their techniques are: First, while resorting to the usual contractual relation, they are only engaged to manufacture or process semi-finished products, again on a "pakyao" basis. Despite the employer-beneficiary's claim of being separate, their function is rather exclusive and specified under the contract. Second, although they have the power to hire, fire, and determine the wages of the contracted-out workers, the contractual relations

with their "exclusive" clients is so adjusted to prevent the workers from attaining the status of a regular or permanent employee. This is the reason why many purported job or independent contractors pay their workers on a piece-rate, by consignment basis, or by taking advantage of the homeworkers. Third, if they are involved in manufacturing or processing, they are not free to sell the consigned products to the open market. They are under obligation to return or "resell" the finished products to their "exclusive" clients, to a sister, or front company. Fourth, often the purchaser of the finished products is the supplier of the materials. Fifth, although some own tools, equipment, machineries, and have their own work premises, they are often leased or supplied by their "exclusive" client-contractors. Sixth, employment contracts are mostly on a temporary basis and come during peak seasons, or on consignment/quota basis if engaged in sales. Big department stores, plantations, manufacturers and distributors of food products, novelty items, and cosmetics usually hire the services of contracted-out workers to facilitate sales and distribution. The practice is most noticeable during Christmas season among department stores, and for plantation owners during harvest time. Seventh, contracted-out workers perform incidental activities even if such is continuous like janitorial, messengerial, advertisement, repair and services, or anything not directly related to the main line of production being undertaken by the employer-beneficiary. This is being carried out for purposes of product-cost reduction, to avoid payment of incremental and accumulated benefits, to evade legal complications on the security of tenure, and to reduce the chance of the workers to organize their own union.

Whereas before, only plantation and agricultural workers were considered seasonal, today the same is true to urban and industrial workers because of the rampant utilization of contracted-out workers by most business, commercial and industrial establishments. Absurd as it is, the seasonal reliance on contracted-out workers has nothing to do with climactic conditions affecting crop planting and harvesting. Rather, their transformation into seasonal workers has been brought about by the practice, a trend that is proving to be more economical to the employer-beneficiaries, notwithstanding the flexibility within which they can circumvent the law. Hence, if the hiring of our urban and industrial workers is made seasonal, then all that boast about the constitutional right of the workers to a security of tenure is thus exposed as a fallacious assumption.[123]

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[123]CONST. (1987), art. XIII, sec. 3, 2nd par.

Equally, the idea of labor as a constitutionally recognized property right of the workers is rendered nugatory because of the new mode in leasing-out human services.[124] To begin with, the right to sell one's labor is an indivisible right because it is the worker's only capital for survival. For somebody to lease-out the worker's services means that he is no longer the owner of himself, but a plain commodity owned by somebody else. True, the owner may sell or lease his property, and to exercise such acts is perfectly within his prerogatives because his labor is his property. However, for a stranger to lease a property not belonging to him is absolutely absurd, and no amount of legal extrapolation can justify the existence of labor-only contracting as a practice in derogation of the absolute and universal right of everyman to be free.

Conclusively, job or independent contracting in the Philippines is not focused on accomplishing the project. In fact, they do not deal on projects. Rather, the practice is aimed at reducing labor costs. The contractual relations of the so-called "job" or "independent contractors" with their "exclusive" clients form part of the secret deal of which the courts will never be able to scrutinize. All they need is to present the features favoring their status as alleged "job" or "independent" contractors.

XIV. JOB OR INDEPENDENT CONTRACTORS AS PROJECT CONTRACTORS

There are job or independent contractors which the Labor Code has categorized as "project contractors". The nature of their undertaking is for the construction of primary circuits of production so that their clients/customers can pursue their chosen commercial and industrial operations. Heavy and medium industries rely much on them for the planning and construction of specialized factories, plants, or business establishments. Once installed, the project contractors are out of service, while the plant or factory will begin to manufacture and process, or use such place to sell products directly or indirectly to the consuming public.

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[124]Philippine Movie Pictures Workers Association, Inc. v. Premiere Productions, Inc., G.R. No. No. L-5621, March 25, 1953; Bondoc v. Peoples Bank & Trust Co., Inc. *et al*, G.R. No. L-43835, March 31, 1981; Batangas, Laguna, Tayabas Co. v. Court of Appeals, *et al*, , G.R. No. L-38482, June 18, 1976.

Engineering firms undertake such projects as constructing complex and modern superhighways, bridges, dams, buildings, and prefabricated structures and concrete stresses of whatever type. The more specialized ones install conveyor belts, smokestacks, water and/or chemical tanks, filtration systems, centralized airconditioning system, storage silos, condensers, insulators, boilers, integrated and automated production units all essential and primary to the manufacturing and processing of goods. In the Philippines, the Atlantic Gulf & Pacific Corporation (AG & P), Engineering & Equipment Industries (EEI), Philippine National Construction Corporation (PNCC), and the Meralco Industrial Engineering and Supply Corporation (MIESCOR) ideally represent such companies.

Among industrialized countries, project contractors are engaged in shipbuilding; construction of oil rigs; building of modern electric trains; production of offshore drilling machines; fabrication of pipes of all types; designing of heavy machineries such as turbines of various types, heavy duty generators, and transformers, specialized condensers including those used in nuclear reactors, heavy hydraulic machines; installation of petrochemicals and integrated plants; manufacture specialized tools for mining, etc. Among the world's giants are such corporations as Seimens of Germany; Kawasaki, Marubine, Hitachi, and Mitsubishi Industries of Japan; Hyundai of Korea; in the U.S. by Westinghouse, General Electric, and Litton Industries, etc.

Once completed, the project contractor or engineering firm, as commonly known, will scout for another project. In the meantime the firm is compelled to reduce its workforce. Invariably, some project workers, as they are called, lose their job, while their contractor maintains an skeletal force to pursue scientific research and development, and maintenance. As the Supreme Court explained this type of contract-servicing:[125]

> Members of a work pool from which a construction company draws its project employees, if considered employee by the construction company while in the work pool, are non-project employees or employees for an indefinite period. If they are employed in a particular project, the completion of the project or any phase thereof will not mean severance of employer-employee relationship. (Policy Instruction No. 30)

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[125]Philippine National Construction Corporation vs. NLRC, G.R. L-85323, 174 SCRA 193 (1989).

> ...Any employee who has rendered at least one year of service, whether such service is continuous or broken, shall be considered a regular employee with respect to the activity which he is employed and his employment shall continue while such actually exists. (Art. 280, Labor Code.)
>
> A project employee is one whose "employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season. (Sec. 280, Labor Code; Sandoval Shipping, Inc. vs. NLRC, 136.SCRA 674.)
>
> In finding that Porciuncula was a regular employee, the Labor Arbiter noted that it was the petitioner's practice to rehire him after the completion of every project and this re-hiring continued throughout Porciuncula's 13 years of employment in the company.

Project contractors, despite their total dependency on contracts, invest substantial amount of capital into their specialized ventures. Investments come in the form of acquiring specialized equipments, research, development, and planning. Likewise, they set aside huge amount of capital for the salaries of their scientific and highly-skilled personnel, and for the acquisition and maintenance of equipment.

They equally compete with other project contractors by organizing their own sales outfit, not necessarily to sell, but to advertise their accomplished projects. However, even if they are affected by competition, the cost reduction of the project is the one affected, and not the net wage of the workers. Besides, the nature of the job, resources capability and the technical skills of the workers are considerations that compel them to maintain that high degree of efficiency.

Since they rely on their ability to secure a contract, the status of their unskilled and semi-skilled workers are visibly affected by labor market demands. For the fact that they operate even in the absence of a contract, the status of the workers is taken into account to the extent that after rendering more than one year of service, whether continuous or intermittent, are nonetheless considered regular employees. For that matter,

the Supreme Court differentiated the "project workers" from the "regular workers", to quote: [126]

> This provision reinforces the Constitutional mandate to protect the interest of labor. Its language evidently manifests the intent to safeguard the tenurial interest of the worker who may be denied the rights and benefits due a regular employee by virtue of lopsided agreements with the economically powerful employer who can maneuver to keep an employee in a casual status for as long as convenient. Thus, contrary to agreements, notwithstanding, an employment is deemed regular when the activities performed by the employee are usually necessary or desirable in the usual business or trade of the employer. Not considered regular are the so-called "project employment" the completion or termination of which is more or less determinable at the time of employment which by its nature is only desirable for a limited period of time. However, any employee has rendered at least one year of service, whether continuous or intermittent, is deemed regular with respect to the activity he performed and while such activity actually exists.

The Supreme Court explained the dilemma that confront project contractors. Since by the nature of their business they operate on contract basis, the utility of the peripheral employee or "project employees", as Policy Instruction No. 20 would refer to them, is thus directly affected. As explained:

> As an electrical contractor, the private respondent depends for its business on the contracts it is able to obtain from real estate developers and builders of buildings. Since its work depends on the availability of such contracts or "projects," necessarily the duration of the employment of its work force is not permanent but co-terminus with the projects to which they are assigned and from whose payrolls they are paid. It would be extremely burdensome for their employer who, like them, depends on the availability of the projects, if it would have to carry them as permanent employees and pay them wages even if there are no projects for them to work. We hold, therefore, ... that the petitioners are only project workers of the private respondent.
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> This case is similar to *Sandoval Shipyards, Inc. v. NLRC*, 136 SCRA 675 (1985), where we held:
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> We feel that there is merit in the contention of the applicant corporation. To our mind, the employment of the employees concerned were fixed for a specific project or undertaking. For the nature of the

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[126]Cartagenas, *et al.* vs. Romago Electric Company, Inc., *et al.*,G.R. No. L-82973, 177 SCRA 642-643 (1989).

> business the corporation is engaged into one which will not allow it to employ workers for an indefinite period.
>
> It is significant to note that the corporation does not construct vessels for sale or otherwise which will demand continuous productions of ships and will need permanent or regular workers. It merely accepts contracts for shipbuilding or for repair of vessels from third parties and, only, on occasion when it has work contract of this nature that it hires workers to do the job which, needless to say, lasts only for less than a year or longer.
>
> The completion of their work or project automatically terminates their employment, in which case, the employer is, under the law, only obliged to render a report on the termination of employment.

In analyzing the dilemma encountered by project contractors, one must begin on the contractual relations with their clients. A closer look at their relationship will reveal that it is not one of employer-employee relations, but of a seller and a buyer, with the latter appropriately called a made-to-order buyer. In the first place, the contract entered into is between two corporations, and the project is on a package deal or turn-key basis. Specifically, it is one where the client secure the services of the project contractor for the building or erection of a plant, factory or business establishment. In fact, every project has its own blueprint or specifications. Moreover, the completion of the project puts an end to their relationship. If there exists a semblance of continuity, the remaining personnel of the project contractor are left behind for the purpose of updating the client's workers on their skills and knowledge of the new equipment or machineries, maintenance, and eventual transfer of operations.

In general, project contractors possess the following distinctions: First, often they are the ones who select the structural specifications, design, requirements and quality of materials to be used, and there is that presumption of scientific and technical reliability. Second, their products are mostly not for public consumption, but something that will be utilized by businessmen and industrialists catering to the needs of the consuming public. They build and construct primary circuits of production. Third, they alone have the option to determine the mode and method on how to accomplish the project. Fourth, their contract is not focused on labor and services, but on the cost of the project itself. Fifth, payment is on a package deal or turn-key, and not on a salary basis. On the contrary, they alone determine the wage scale of their personnel. Sixth, they invest heavily in developing and acquiring specialized machines for their own use. Seventh, although most of their personnel are highly technical and often engaged in research, seldom

can each of them work independently like the job or independent contractors. Eighth, the relationship between the project contractor and the clients is one of a seller and a buyer.

In an undated Policy Instruction issued by the Secretary of Labor and Employment, he categorized into two the types of employees in the construction industry. They are the so-called project employees and non-project employees. However, the Policy Instruction further subdivided the non-project employees into three:[127]

> ...Non-project employees are those employed by a construction company with reference to any particular project.
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> ...
>
> Generally, there are three (3) types of non-project employees: First, probationary employees; second, regular employees; and third, casual employees.
>
> Probationary employees are those who, upon the completion of the probationary period, are entitled to regularization. Regular employees are those who have completed the probationary period or those appointed to fill up regular position vacated as a result of death, retirement, resignation, or termination of the regular holders thereof. On the other hand, casual employees are those employed for a short term duration to perform work not related to the main line of the business of the employer.
>
> The non-project employees of a construction company shall have the right to self-organization and free collective bargaining. They may constitute or form part of the appropriate rank and file collective bargaining unit within the company.

To restate, project contractors continue with their research to upgrade their competitiveness in such highly specialized forms of industrial requirements. Thus, every primary circuit of production or plant undertaken is not only unique, but most essentially a newer and an improved version. The pattern is most noticeable among the factories, industrial plants, and infra-structures built and completed by big construction companies. In addition, they maintain such key personnel as research and design engineers; technical supervisors and foremen; surveyors; industrial architects; expert machine operators and maintenance workers; project

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[127]Policy Instruction No. 20: Stabilizing Employee Relations in the Construction Industry issued by the Secretary of the Department of Labor and Employment.

inspectors; accountants; office workers; purchasers and salemen; and other employees who constitute the regular workforce or non-project work pool of the company.[128] In other words, nothing in the definition fits or at least jibe with the characteristics or nature about the project contracting as what the "job" or "independent contractors" are routinely doing.

Even if project contractors have their own distinguishing features, still many of them are compelled to sub-contract their projects to "job" or "independent contractors." The reasons are as follows: First, since the undertaking involves a project, the need for semi-skilled manpower is gradually reduced as the project is about to be completed or phased-out. Second, to avoid labor problems, particularly in the hiring of workers, project contractors relegate portions of the project to semi-skilled workers who are not needed during lean periods. Third, the "job" or "independent contractors" are actually "contratistas" who are engaged in labor-only contracting. They operate semi-independently because their workers are semi-skilled.

Evidently, the issuance of Policy Instruction No. 20 has something to do with the problems affecting the so-called project employees. The rampant violation, especially on the security of tenure of the workers, stems from the nature of the activity being undertaken by project contractors. The completion of the project or the phasing out of the marginal or semi-skilled workers as the project is about to be completed is focal to the problem itself.

Admittedly, there is a dilemma and there appears to be no solution in sight on how to deal with the laid-off construction workers. The problem is compounded by the presence of paragraph 2 of Article 280 of the Labor Code which specifically deal on broken or intermittent employment services. Although, after one (1) year of service, whether continous or broken, they may be classified as regular or non-project employees, the nature of the undertaking and the human dynamics involved add to complicate the problem. While some may be rehired, others may not even file a case with the Department of Labor and Employment.

Thus, Policy Instruction No. 20 is an attempt to rationalize the situation, but in so doing it openly negates the 2nd paragraph of Article 280 of the Labor Code. The problem is that the Policy attempts to define and explain the rights of the project employees on the assumption that they are

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[128]DOLE Policy Instruction No. 20, *supra.*

all directly hired by the project contractors. This notwithstanding that in its objective sense, the Policy is a mere opinion of the Secretary of Labor. In other words, project contractors who are more familiar with the problem will never take into consideration Policy Instruction No. 20 because they know that what will govern is the 2nd paragraph of Article 280 of the Labor Code, and not what the Secretary of Labor so instructed.

In this respect, it must be noted that the conversion of the project employees into regular employees will entail the granting of benefits due them as regular employees, in addition to the benefits and privileges should they join the union in such firms where there exists a labor union. Financially, it will mean an added burden because their regularization would amount to subsidizing them during such periods when no projects are available.

On the other hand, if the project contractors will apply Article 283 of the Labor Code as a basis for termination due to retrenchment, it would equally invite and require litigation. Nonetheless, if the reason asserted by the project contractors is upheld, chances are, they will be placed in a precarious situation where construction workers would later on avoid them, and that would mean a serious shortage of manpower in their future projects.

Since what will govern is the provision of the Labor Code and not what is provided in Policy Instruction No. 20, many of the so-called construction/engineering firms conveniently sub-contract their projects to the "contratistas" if only to evade the legal complications in dealing with their marginal workers. By relying on the "contratistas" for their manpower requirements, project contractors are in effect solving their problems just as what the employer-beneficiaries have been doing by entering into a contract with labor-only contractors, a situation where they can freely adjust their requirements for manpower under any given situation.

In fact, this is the reality that now pervades in the construction industry. Every project contractor has its list of "contratistas" whom to deal with everytime there is a project to be undertaken.

As defined and explained in Policy Instruction No. 20:[129]

> Project employees are those employed in connection with a particular construction project.

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[129]DOLE Policy Instruction No. 20, *supra*.

> Project Employees are not entitled to termination pay if they are terminated as a result of the completion of the project or any phase thereof in which they are employed, regardless of the number of projects in which they have been employed by a particular construction company. Moreover, *the company is not required to obtain a clearance from the Secretary of Labor in connection with such termination. What is required of the company is a report to the nearest Public Employment Office for statistical purposes.* (Emphasis supplied)
>
> If a construction project or any phase thereof has a duration of more than one year and a project employee is allowed to be employed therein for at least one year, such employee may not be terminated until the completion of the project or of any phase thereof in which he is employed without a previous 'written clearance' from the Secretary of Labor. If such an employee is terminated without a clearance from the Secretary of Labor, he shall be entitled to reinstatement with backwages.
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> The employees of a particular project are not terminated at the same time. Some phases of the project are completed ahead of others. For this reason, the completion of a phase of the Project is the completion of the project for an employee employed in such phase. In other words, employees terminated upon the completion of their phase of the project are not entitled to separation pay and exempt from the clearance requirement.

Unusual about the definition is that, instead of elaborating on the security of tenure, and in protecting their rights and interest, it imposed conditions amounting to depriving the project employees of what is provided in the Labor Code. If strictly applied, it would amount to denying the existence of the project contractors as a fact in our industries.

The marginal employees of the project contractors, as they are referred to, are being taken care of by the "contratistas". Just like the contracted-out workers, their earnings are dependent on the service contract that can be secured by the "contratistas." Consequently, after the completion of the project, project employees are terminated, and are not entitled to a separation pay.[130] The deprivation they suffer is similar to that of the contracted-out workers.

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[130]Sandoval Shipyards, Inc. vs. NLRC, 136 SCRA 674.

Lately, in the case of *De Jesus v. PNCC,* the Supreme Court ruled in favor of the project employee. The period for which the carpenter worked for over ten (10) years was taken into consideration applying Article 280 of the Labor Code. However, if the carpenter was taken in by a "contratista" as has been the practice, probably the ruling would have been different even if the same length of time is raised by him. The issue will be on whether or not the "contratista" is a labor only contractor, and on his joint and solidary liability with the employer-beneficiary towards the complainant.

In this case, the issue is focused on the status of employment even if the need for his services is "contingent upon the progress accomplishment". Article 280 will apply much that no third party was involved. To quote portion's of the Courts ruling:

> Without question,... a carpenter, performs work "necessary, or desirable" in the construction business... The fact however that he had been involved in project works will not alter his status because the law requires a "specific project or undertaking the completion or termination of which has been determined at the time of engagement" in order to make a project employee a true project employee.
>
> We cannot say that [the workers] engagement has been determined because the duration of the work is "contingent upon the progress accomplishment" and secondly, the company, under the contract, is free to "determine the personnel and the number as the work progresses." Clearly, the employment is subject to no term but rather, a condition, that is "progress accomplishment". It cannot therefore be said to be definite that will exempt the respondent company from the effects of Article 280.[131]

Due to the high cost of labor and the consequential benefits that will entail in directly hiring workers, many construction companies, instead of observing Policy Instruction No. 20 have resorted to indirect hiring by availing the services of the "contratistas". Indirect hiring, other than being cheap, is less complicated and legally defensible when it comes to charges involving illegal dismissal and unfair labor practice. And this is the harsh reality that is now going on in the construction industry.

Thus, taking into account the "contratistas", one is prone to get confused about their role often equating them as the the project contractor or

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[131]195 SCRA 468 (1991), at 472.

the engineering firm itself. Likewise, the "contratistas" and "job" or "independent contractors" are often interpreted as synonymous. The confusion is based on several grounds. First, both the "contratistas" and project contractors are not considered constant factors in production. Their assignment is on a case-to-case basis. There is a lack of continuity in their role to production. Second, both possess a degree of autonomy from the productive units where they are attached or transacting business. Third, job or independent contractors have a unique role that otherwise could not be integrated with a given productive unit for reasons either of specialization, skill, security, or capital investment. On the other hand, the contracted-out workers of the contratistas are allowed to work on the basis of a given project. Fourth, while a job or independent contractor is legally accepted and sanctioned by law, labor-only contracting is not, and the same is true with the practice of the "contratistas".

For instance, an engineering firm is a project contractor because it specializes in packaging construction and specialized projects, while a security agency is a job or independent contractor because it specializes in securing the premises of a given productive unit. However, with respect to their continuity of service, a security agency is more or less co-terminus with the existence of the constant productive unit, meaning, as long as the security agency is hired by the company to secure its premises. On the other hand, the contractors, in reference to the project, are short-lived, meaning that their services end upon the completion of the project.

Of course, there are several types of job or independent contractors other than security agencies, and they are engaged in specialized activities as accounting firms, doctors operating small clinics, architects, advertising or public relations firms, law offices, etc. As a form of business, job or independent contractors operate semi-independently from the employer-beneficiary, and their position is sanctioned by law.

XV. THREE-TIER CONTRACTING TECHNIQUE

Modern systems of production have already reached the threshold that practically no industrial and commercial enterprise can operate without an interdependent workforce complementing each other. In concrete terms, modern business operations have secondary or ancillary workforce that supports the main line of production. The secondary or ancillary labor

force contributes to the final realization of the product that without them, business operations would be difficult, if not impossible.

However, other economists and labor experts, instead of viewing the situation as interdependent or complementary, have dichotomized the modern system of production by disconnecting all traces of direct relationship between the principal business operations of the employer with that of his front business entities where the secondary or ancillary workforce is employed. They assume the position that production can be maintained at normal levels even without the support of the secondary or ancillary workforce.

The theoretical supposition to justify labor-only contracting on the basis that the secondary or ancillary workers are performing activities not directly related to the principal business of the employer follows the same insidious scheme of creating two legal personalities for the employer. Under this scheme, the system of production itself is dichotomized to completely cut-off the semblance of relationhip between the two entities, vis-a-vis between the primary and secondary workforce.

The consequence of this absurd theoretical labor equation is to negate the accepted suppositions about the "control test" as the doctrinal mechanism designed to promote, advance and protect the welfare of the workers. The scheme enunciates a formula diametrically opposed to labor and production activities because —— First, it provides a leeway to further circumvent the law. Second, it denies the indubitable fact that as the system of production becomes complicated, work activities become more interdependent and interrelated. Third, it takes its thrust on the personality of the company than on the activities of the workers. Fourth, it creates new avenues in compartmentalizing labor activities to disconnect direct employer-employee relationship. Fifth, it lessens the number of workers in a given unit of work-related activities, thereby lessening further the chance to organize a union in a given establishment or industry. Sixth, it destroys the conventional and accepted mode of personnel hierarchy in production. Finally, it enunciates the most dangerous precedent of contracting out an entire production system, instead of just contracting out human services.

In other words, the technique elevates to a higher level the practice of leasing out human services. Hence, under the three-tier contracting technique, what is being carried out is the leasing out of production itself.

Before the advent of the three-tier contracting technique, many commercial and industrial establishments have been developing their own naive way of segregating the modes of production. Although under the conventional approach these demarcations are simple divisions of labor, they somehow managed to conceive sophisticated methods, and one is the practice of contracting out an entire industry.

What made this form of contracting tenable is based on four factors. One, failure of the Labor Code to squarely prohibit labor-only contracting. Second, absence of a law that will prohibit corporate manipulations, especially when such has the objective of tampering labor relations. Third, failure to understand the relations between labor and production such that when production alone is tampered, the common belief that it will not affect labor. Fourth, the Corporation Code itself provides a conducive atmosphere for allowing the contracting out an entire industry under the guise of what it calls "management contract" by corporations. Section 44 of the Corporation Code provides:

> Sec. 44. Power to enter into management contracts.- No corporation shall conclude a management contract with another corporation unless such contract shall have been approved by the board of directors and by stockholders owning at least the majority of the outstanding capital stock, or by at least a majority of the members in the case of a non-stock corporation, of both the managing and the managed corporation, at a meeting duly called for the purpose: Provided, That (1) where a stockholder or stockholders representing the same interest of both the managing and the managed corporations own or control more than one-third (1/3) of the total outstanding capital stock entitled to vote of the managing corporation; or (2) where a majority of the members of the board of directors of the managing corporation also constitute a majority of the members of the board of directors of the managed corporation, then the management contract must be approved by the stockholders of the managed corporation owning at least two-thirds (2/3) of the total outstanding capital stock entitled to vote, or by at least two-thirds (2/3) of the members in the case of a non-stock corporation. No management contract shall be entered into for a period more than five years for any one term.
>
> The provisions of the next preceding paragraph shall apply to any contract whereby a corporation undertakes to manage or operate all or substantially all of the business of another corporation, whether such contracts are called service contracts, operating agreements or otherwise: Provided, however, That such service contracts or operating agreements which relate to the exploration, development, exploitation

> or utilization of natural resources may be entered into for such periods as may be provided by the pertinent laws or regulations.

Many corporations today either contract out all or substantially their departments or divisions, or create an entirely separate business entity that will exclusively cater to the production requirements of the mother corporation. In which case, it seems that nothing illegal or immoral is being committed because the workers themselves do not appear to be directly affected. As a result, there is today a proliferation of conglomerates, subsidiaries, group or sister companies servicing contracted-out departments or divisions like sales and distribution, service and repair, packaging, manufacturing and processing of certain products, promotion and advertisement, manpower training and personnel, and even in the hiring of consultancy firms. The more notorious ones even contract-out their management services in a bid to erase the remaining vestiges of employer-employee relations, including the identities of the owners or stockholders.

Although they appear to be independent, the operational function of each of the conglomerates or subsidiaries is coordinated, if not orchestrated, by one management body or board of directors. This higher level of contracting out an industry takes full advantage of the three-tier contract technique. The scheme projects the decision of the managing corporation as wholly independent from the managed corporation such that it becomes legally untenable for the workers of the latter corporation to demand from their own board of directors even on such a fundamental issue of just maintaining their status of employment. The decision of the managing corporation, say to cancel the management or production contract with the managed corporation, would appear to be unrelated and have nothing to do with the problems affecting the latter corporation. But for the fact that the existence of the managed corporation is absolutely dependent on the managing corporation, the service contract reveals the umbilical cord upon which its survival is determined.

In other words, the board of directors, officers, consultants, technicians, and other highly paid employees of the managed corporation are in truth contracted out workers glamorized only by the fact that they are accorded a dignified name or position. It is the managed corporation that leases out their services to the managing corporation compounded by the fact that these types of workers are not conscious of their status as contracted-out workers. Neither their profession, talent, expertise, skills, dedication, loyalty and industry to the managed corporation accorded recognition. Rather, the managing corporation looks at the viability of the

managed corporation than of the individual capacity of the contracted-out managers and consultants.

Whereas under the two-tier contract technique the individual workers are the ones directly leased-out to the employer-beneficiaries, the three-tier contract technique takes full advantage of the system of packaging an entire unit of production, and probably reinforced from within by the two-tier contract technique. A candid way of saying, contracted-out workers are themselves employed by a contracted-out company. Using the usual corporate channel of service or management contract, the contracting-out of production is thus blocked of all legal visibility from the most important officer to the lowest employee of the managed corporation who might attempt to contest the contract. Thus, if correlated to the objective of forming a union, it is apparent that such is an impossible endeavor. For that matter, even their security of tenure is placed in serious doubt.

Contracted-out industries can easily fold up when labor unrest take its toll. In effect, while some may not be able to evade liability under the two-tier contract technique, they can under the three-tier technique, and there is no law prohibiting the contracting out of an entire industry.

The judicial approach in piercing the veil of corporate entity will not apply because the practice is not one where a corporation simply folded up and is being resurrected under a new name. Under the concept of piercing the veil of corporate entity, only one corporation at a given time is involved, while in the contracting out an industry, several pre-existing and seemingly separate corporations are involved although rubberized in their functions. The managing corporation can always raise the defense of contractual agreement like expiration of the service or production contract to officially disassociate from the abandoned corporation. For the managed corporation, the cancellation of the contract means an end to its existence much that no law can compel it to operate in view of the loss of the contract. Neither can it maintain an idle workforce.

In the famous case of *Claparols Steel v. CIR*,[132] the Supreme Court, in deciding that Claparols Steel & Nail Plant as one and the same although purportedly succeeded by Claparols Steel Corporation ruled:

> It is very clear that the latter corporation was a continuation and successor of the first entity, an its emergence was skillfully timed to

[132]65 SCRA 613 (1975).

> avoid the financial liability that already attached to its predessessor, the Claparols Steels and Nail Plant. x x x This 'avoiding-the-liability' scheme is very patent.
>
> It is very clear that the second corporation seeks the protective shield of a corporate fiction as it was deliberately and maliciously designed to evade its financial obligation to its employees.

The same legal postulate was adopted in the *Laguna Transportation Co. v. SSS:*[133]

> The concept of corporate personality may also be disregarded if it is used to defeat, rather than promote the ends for which the Social Security Act was enacted. An employer could easily circumvent the statute by simply changing his form of organization every other year, and then claim exemption from contribution to the System as required, on the theory that, as a new entity, it has not been in operation for a period of at least 2 years. The door of fraudulent circumvention of the statute would thereby be opened.

In capsule, where one corporation will succeed the other but whose stockholders are one and the same with the intention of depriving the workers of their backwages, in barring reinstatement, and in avoiding payment of damages for its fraudulent and malicious acts the principle of piercing the veil of corporate entity will apply. Under the three-tier-contracting technique, the practice is absolutely different because both corporations operate simultaneously and managed by different board of directors. The liability affecting each of the corporations is separate, including the payment of backwages and damages to their respective workers. Each of the corporations has its own articles of incorporation and separately registered with the Securities and Exchange Commission. Besides, the production contract between the managing and the managed corporations is designed to operate on a different legal angle, meaning that it is voluntary to the parties, and the laws guiding their relationships wholly different. Succinctly stated, the Court cannot just impose upon the parties the duty to continue the production contract without impairing their respective rights under Articles 1305, 1306 and 1308 of the Civil Code. To quote Article 1306 and 1308:

> Art. 1306. The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem

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[133]L-14606, April 28, 1960.

> convenient, provided they are not contrary to law, morals, good customs, public order, or policy.
>
> Art. 1308. The contract must bind both contracting parties; its validity or compliance cannot be left to the will of one of them.

On the salient aspect that contracts should not be contrary to law, morals, good customs, public order or policy, nothing of that sort will appear in the contract, say for processing or distribution of goods. The gray area granting the managed corporation the right to exclusively service certain aspects of production offered by the managing corporation is not *per se* contrary to law, morals, good customs, policy order or policy. As said, the court cannot compel both to continue their production contract if it is inimical to the interest of one or both of them. In a limited sense, this line has already been taken cognizance and unfortunately upheld in the famous *Mafinco v. Ople* case,[134] to quote:

> We hold that under their peddling contracts Repomante and Moralde were not employees of Macfinco but were independent contractors as found by the NLRC and its fact finding and by the committee appointed by the Secretary of Labor to look into the status of Cosmos and Mafinco peddlers. They were distributors of Cosmos soft drinks with their own capital and employees. Ordinarily, an employee or a mere peddler does not execute a formal contract of employment. He is simply hired and he works under the direction and control of the employer.
>
> Repomanta and Moralde voluntarily executed with Mafinco formal peddling contracts which indicate the manner in which they would sell the Cosmos soft drinks. That circumtance signifies that they were acting as independent businessmen. They were free to sign or not that contract. If they did not want to sell Cosmos products under the conditions defined in that contract, they were free to reject it.
>
> But having signed it, they were bound by its stipulations and the consequences thereof under existing laws. One such stipulation is the right of the parties to terminate the contract upon five day's notice (Par. 9). Whether the termination in this case was an unwarranted dismissal of an employee, as contended by Repomanta and Moralde, it is a point that cannot be resolved without submission of evidence. Using the contract itself as the sole criterion, the termination should perforce be characterized as simply the exercise of a right freely stipulated upon by the parties."

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[134]70 SCRA 139-159 (1976).

Once the managing corporation has concluded that the managed corporation is not viable or the margin of profit is less attractive, all that it will do is to stop the contract of supplying semi-manufactured or manufactured products. Consequently, the managed corporation runs the risk of either to wind-up its operations due to want of a contract or end-up bankrupt. When that situation comes the termination of workers has a legal justification because there is no law that can compel a corporation to dole separation pay in cases arising from bankruptcy. Article 283 of the Labor Code does not provide payment of separation pay to workers laid-off due to cessation of operations by reason of bankruptcy.

Neither can the workers attach the assets of the managed corporation for often the company is a dummy or a front that by premeditation was intentionally made to appear to have no tangible assets of its own. The assets of the managed corporations are mostly acquired through lease or credit of which the lessors and creditors are by law given preferencial claims on its properties.[135] One way of putting it, a managed corporation is an empty shell because at the outset it operated as a labor-only contracting industry whose usefulness was exactly tailored to serve as an adjunct of the managing corporation.

As said, contracted-out corporations are rubberized corporations because their existence are wholly dependent on the contractor-corporation. Their corporate policies are not decided by their dummy board of directors, but by the board of directors of the mother or managing corporation. Because they stand as separate business entities, the so-called Globe doctrine[136] in labor relations is rendered irrelevant. Hence, what is observed

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[135]*See* CIVIL CODE, art. 2241.

[136]According to Pascual, "Under this doctrine, the desires of the employees themselves become decisive in the matter of the designation of their bargaining agents where more than one form of bargaining unit is appropriate, that is to say, when a group of employees might properly be considered as a single-industry wide or plant-wide bargaining unit or as a separate craft units each one appropriate for the purpose of collective bargaining. Thus, separate elections may be held among the groups concerned. The groups choosing to be joining into a single unit will be recognized as such, and the groups which choose to remain as a separate bargaining unit will be recognized as such." C. PASCUAL, LABOR RELATIONS LAW 116 (1986).

This doctrine was enunciated in the famous case of Globe Machine & Stamping Co., 3 NLRB 294 (1937). As aptly described by Teller, "(T)he Globe Doctrine is applicable only in case a craft unit "wishes to retain its separateness as a bargaining unit, or desires to become part of a larger plant or industry unit and has no application whatsoever to cases involving competing unions whose disagreement does not relate to craft-industrial

today are corporations having an array of subsidiaries, conglomerates, holding or sister companies, etc. manufacturing, processing or rendering service exclusively assigned by one and/or by the managing corporation.

XVI. SERVICE AGENCIES AS A THRIVING INDUSTRY

Service agencies and manpower placements constitute today as one of the biggest and thriving business catering to the labor demands of all business and industrial sectors. Practically, almost all of the top 1,000 corporations in the Philippines are availing of the practice of leasing human services. The vicious cycle of inflation and wage rate adjustments, coupled by an stagnating productivity, has pushed many industries and businesses to adopt the system of indirect employment. As the economy continue to deteriorate, the three-tier contracting technique is even becoming more attractive, lucrative, and an accepted mode in our labor relations. In fact, the three-tier contracting is fast replacing the two-tier contracting technique due to legal complications brought about by the practice.

As a unique industry specializing in the contracting-out of the workers, labor-only contractors have coined their own lingo by calling their contracted-out workers "tempo" workers, meaning temporary or working under a limited contract; and "floating", if, in the meantime, they are out of work.

Of the country's total labor force of about 25,246,000 as of 1991,[137] a more or less accurate estimate would reveal that 15 % to 20% are contracted-out workers recruited through the channels of service agencies and manpower placements. Of these figures, it is believed that roughly 30% to 35% are rendering their services in Metro-Manila. These figures do not include the security guards, overseas workers, "entertainers" sent abroad by the so-called promotion industries, seamen hired by manning agencies because technically, they belong to the category of contracted-out workers. Thus, if included, the total number would run to as high as 65% to 70%.

Again, if one will include the corporations resorting to the three-tier labor-only contracting business, the figure will dramatically jack-up. In

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dispute." 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 918 (1940) *cited* in *Id.*, at 117.

[137]NATIONAL MANPOWER AND YOUTH COUNCIL MANPOWER FACTBOOK, 70 (1992).

fact, as one observer would put it, if nothing can be done to stop the trend, the entire country might just end-up having an industry where our contracted-out workers will be performing job orders from other countries. Our economy will be an economy of sub-contractors as what is observed in the so-called free economic zones or duty-free enclaves. It will be a new phase in global economic relations where the first world can just make a phone call on their job orders, and the Philippines a model of a labor-only contracting economy for the world to see.

Topping among the industries availing of the practice are the movie and entertainment business, textile and garments industries, export-oriented manufacturers such as handicrafts, sales and distribution companies, department stores, advertising industry, electronics industry, and consultancy business. Practically banks and hospitals are likewise availing of the practice to sustain their most menial requirements of janitorial services to the hiring of sophisticated and high-tech experts under the clever guise of contractual consultancy. Whereas before, highly skilled professionals were considered priceless human specimens of production capability. Today stiff labor competition has reduced them to ordinary labor commodities who can be contracted-out under the glamorized term called "expert" or "specialized consultants."

Official figures reveal that the country annually produces an additional workforce of about 750,000. On the other hand, in 1991, the country had a very high unemployment rate running to about 9.0%,[138] a figure considered one of the highest in Asia. Not to mention the equally high under-employment rate which as of 1991 was 22.1%,[139] The practice will continue to gain momentum as a more viable mode in hiring workers with less expenses and legal complications.

The factors that favor them are the following:

First, as a device to abort at all costs the formation of a union, more particularly if the organizers and members are showing signs of ideological inclinations and militancy. Second, as an alternative to the continuing erosion in the value of the peso which has corollarily put pressure on the government to constantly legislate wage increases to rationally match the income of the average worker. Third, to plainly avail of the loophole,[140]

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[138] *Id.*
[139] *Id.*, at 71.
[140] *Id.*, at 93.

especially on the truth that existing laws do not impose punishment or fine. Fourth, to maximize profit that will otherwise be drained by complying with the new minimum wage law and in paying the accumulated and incremental benefits that correspondingly increase for every year of service rendered by regular workers. Fifth, to provide flexibility to companies vulnerable to the tantrums of an unstable economy like the Philippines. Sixth, as a device by marginal industries to economically survive. Only by availing of the practice can marginal industries, particularly those engaged in exports, compete with the newly industrialized countries in Southeast Asia through product-cost reduction. Seventh, to make compatible the country's industry as export-oriented and a processing zone of semi-manufactured goods where job-orders are dependent on contracted-out workers. Exporters can readily cushion possible losses if their workforce are mostly contracted-out workers. They will not be bothered by payments of separation pay, retrenchment, losses due to unreasonable rejection of products or sudden cutback on import quotas.

At present, service agencies and manpower placements provide an uncanny high employment rate capacity. They managed to maintain this despite the economic difficulties, high unemployment and underemployment, and the sluggish inflow of foreign investments. They even boast that they are able to place an average of about 100,000 workers to employer-beneficiaries per month. However, a more conservative estimate would place the figure to about 35,000 to 40,000, and most are being reabsorbed on a contract renewal basis. In other words, 80% to 85% of the 35,000 to 40,000 absorbed per month are on a contract renewal basis, while the rest are new recruits.

The misleading figures and contrary economic indicators only prove that service agencies and manpower placements do take advantage of the two-tier contract technique. In fact, this procedure being the only method to legally cut-off the services of the workers explains why, despite claim of high employment absorption, the unemployment rate of 9.0% continue to swell with some even predicting that it could reach to a staggering figure of 16% to 18% by 1995. In other words, seasonal industries and those surviving on contractual production basis are able to operationalize the practice without much hindrance.

With the cited factors favoring the business of contracting out labor, the conventional mode of directly hiring human services will continue to decline, particularly among highly compartmentalized systems of production which have less need for basic skills and services. Coupled by

the luring attraction of contracting out an entire industry, it is possible that in the near future, some corporations will be operating without a single regular or permanent worker. In fact, concerned labor experts foresee that before the end of the century, the total number of contracted-out workers will exceed those directly-hired. More dangerous is the creeping trend to indirectly hire white collar workers undertaking office assignments on the basis of "management" or "office consultancy". Hence, time will come where an entire office will be run by contracted-out manager, executives, lawyers, consultants, secretaries, accountants, computer programmers, human relations advisers, and developmental experts.

All over the country, there are about 2,000 to 3,000 service agencies and manpower placements both operating legally and illegally. Others would like to place the figure at 5,000. Nonetheless, whether the figure is at 2,000 to 3,000, it can be surmised that less than 1,000 are registered or are operating with a license, while the rest are labor-only contractors.

The difficulty in determining the number of service agencies and manpower placements has been attributed to the fact that they are not required by law to register as a special form of business engaged in the leasing of human services for purposes of overseeing that they comply with the provisions of the Labor Code. In fact, those operating with a license and authority are just registered with the Securities and Exchange Commission like any other corporation or partnership.

Service agencies and manpower placements operating with a permit are recognized by the Department of Labor and Employment. They have one nationwide association which was organized in 1987. However, of the total number of the legally operating, only about 40 are members of the association. They have achieved recognition as they claim to be members of such prestigious business and industry organizations.

In this regard, time will come that the concept of "tripartism" in labor relations will loose its meaning and relevance. Supposedly, "tripartism" subscribes to the spirit of unity among the three components of society to achieve industrial peace and progress. With the advent of the Labor Code, or P.D. 442, as amended, the State has declared it as a policy to bring to fore labor, management, and the government to meet regularly to thresh out common problems affecting labor relations and industrial peace acting to resolve conflicts beyond the parameters of existing labor laws. To make sure that this policy will not turn out to be an empty rhetoric or

something intended to soothe the listening ears of the workers, Article 275 of the Labor Code, as amended by R.A. No. 6715, was incorporated, to quote:

> Art. 275. Tripartism and tripartite conferences. - (a) Tripartism in labor relations is hereby declared a State policy. Towards this end, workers and employers shall, as far as practicable, be represented in decision and policy-making bodies of the government.
>
> (b) The Secretary of Labor and Employment or his duly authorized representatives may from time to time call a national, regional, or industrial tripartite conference of representatives of government, workers and employers for the consideration and adoption of voluntary codes of principles designed to promote industrial peace on social justice or to align labor movement relations with established priorities in economic and social development. In calling such conference, the Secretary of Labor and Employment may consult with accredited representatives of workers and employers.

With the entry of labor-only contractors, definitely the mechanism behind the concept of "tripartism" will be placed in grave peril. It must be emphasized that labor-only contractors have their own closely-knit associations, organized and adept in the art of lobbying considering the precarious nature of their business, as explained further:

First, "tripartism in labor" is now a declared policy of the State, and impliedly provided in the Constitution.[141] Second, the entry of labor-only contractors in policy-making decisions will ease out the workers as the true representatives of their own class. There is the probability that they will insist in being treated as an integral component based on their naive notion of protecting their contracted-out workers from "unscrupulous" recruiters, swindlers, and employer-beneficiaries. Third, the entry of organized labor-only contractors' in tripartite labor conferences will destroy the ideal formula of breaking the perennial deadlock between the workers and the employers in "*adopting voluntary codes of principles designed to promote industrial peace on social justice or to align labor movement relations with established priorities in economic and social development.*"[142] Fourth, their entry could distort the spirit of "tripartism" which is meant to advance the welfare of the workers, no less, while acknowledging the rights of the employers to a degree of State protection. Neither of these two objectives can be promoted or safeguarded by labor-only contractors because of their superfluous nature in labor relations. Fifth,

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[141]LABOR CODE, art. XIII, Section 3, pars. 2 & 3.
[142]LABOR CODE, art. 275(b), supra.

as a newly-organized pressure group, they can kill the time-tested free labor market for the individual workers. Time will come when a worker in order to be employed must first secure a contract from a labor-only contractor. The worker as an independent seller of his own labor will be outpaced by the practice of labor-only contracting. Invariably, companies seeing this type of arrangement economically convenient will be depending entirely on such "reliable" and "prestigious" manpower placement agencies. Finally, labor-only contractors will eventually phase out trade federations as the representatives of organized labor. This prediction is not far-fetched because labor-only contractors have great access in marketing the workers to employer-beneficiaries.

While trade unions and federations are required by law to dig from within the establishment by sweating it out in a certification election, and in fighting for a respectable collective bargaining agreement, labor-only contractors need only to sign a service contract to capture and impose discipline on their leased-out workers. Between the federation and the labor-only contractor, the employer-beneficiary can only choose the latter because it has all the advantages and none of the disadvantages. They can offer their clients such attractive inducements as "package-employment" deal and a fulll-proof guaranty against unionism. Desperate workers will have no other choice but to enlist with the labor-only contractor where there is a prospect of finding employment though at the expense of organizing or joining a union for their own protection.

In the end, it will be a competition between the organized labor-only contractors and the trade federations, and employer-beneficiaries gladly saying *"adios"* to that piece of historical relic that constitutionally guaranteed the workers to self-organization, security of tenure, and to a humane conditions of work. In such event, their role in modern labor relations will be institutionalized. As they expand to cater to the most stable employer-beneficiaries, pressure will add up on the government to let loose new policies that will completely justify this new shade of slavery. As the fledgling economy continues to suffer setbacks, the practice will gain popularity. Conclusively, once the parity between the number of directly and indirectly hired workers is achieved, the government will find it difficult to ignore the practice or solve the problem by legislative fiat.

XVII. CONCLUSION

The Labor Code is the only set of rules that grants the Secretary of Labor and Employment the discretion to regulate, restrict, or prohibit the contracting out of labor.[143] This undue delegation of power vested in him is similar to his power to determine whether or not an industry is indispensable to national interest provided for in Article 263 (g), Chapter I, Title VIII of the Labor Code.

By granting him a discretionary power, the Labor Code virtually relinquished the duty to uphold the interests and welfare of the workers. The undue delegation makes the Secretary of Labor susceptible to pressure which might be exerted by big and more influential labor-only contractors and industries availing of the practice like assuming jurisdiction on certain labor disputes in the guise of protecting national interest. In fact, the leeway of discretionary power granted him has been traced as the root of industrial unrest.

Worse, the legal strategy of most corporations affected by labor disputes in securing a return-to-work order on the pretext that the "industry is indispensable to national interest" will, by itself, become outmoded. This time, labor-only contractors will take a pivotal role in imposing discipline by simply reassigning their contracted-out workers to other clients. Should the striking workers refuse, then the two-tier contract-formatting will take its place to ease them out. Thus, the workers who once directly demanded better rights and protection from their constant and stable productive units rightfully called employers will be fighting unstable employers only to discover that they are empty shells.

Instead of observing the law or of imposing strict standards, it is the Secretary of Labor who decides whether or not a given establishment is engaged in labor-only contracting. Compounded by the presence of utterly defective provisions of law, the Labor Code has failed to delineate the fine difference between labor-only contracting and "job" or "independent" contracting. Consequently, decisions have become varied depending on how a respondent can put-up a facade that will favor the continuation of the business of leasing-out human services.

Finally, since both labor-only contracting and the present view of a "job" or "independent" contracting involve the leasing out of human services,

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[143]LABOR CODE, art. 106, par. 3.

the circumvention of the law will naturally pursue the inevitable and tempting course. The fact that there are three parties to a contract, with the workers at the receiving end of the line, all that the lessors and lessees of human services need is to present before the court features in favor of their legality and continued existence. This, the two conduits can easily resort to because the Implementing Rules and Regulations of the Labor Code[144] allow them to present their side so that "the Secretary of Labor shall determine through appropriate orders whether or not the contracting out of labor is permissible in light of the circumstances of each case and after considering the operating needs of the employer and the rights of the workers involved."

Sad to say, the provision made reference to the rights of the workers as if their economic, social, and physical well-being emerged out of the practice. On the contrary, its prohibition is the most logical recourse to protect their rights where the practitioners brazenly violate the law. After all, the leasing out of human services, as a class by itself, is an immoral contract or in Latin, *sui generis contractu turpitudinem.*

[144]Implementing Rules and Regulations of the Labor Code, Section 8[c], Rule VIII.