Worker and trade union rights in BN-ruled Malaysia (Part 1)

Charles Hector is a human rights lawyer based in Temerloh. Part 1 of this article appeared in the previous issue of Aliran Monthly.

'Eight hours labour, Eight hours recreation, Eight hours rest' is a right that many workers in Malaysia have lost. Minimum wages, a norm in most developed and developing countries, is something that is still denied to Malaysian workers.

Existing worker rights in law have been slowly eroded and accesses to justice have not been made effective and simple for the workers. Even obligations as to rights provided in law are still being taken away by the granting of applications by employers whilst denying the fundamental right to be heard or objections before decisions are made. Minister's decisions are held to be final and uncontestable in court. Workers are being weakened when union leaders are now allegedly being dismissed simply because they criticized their employers – not because of work performance or work-related misconduct.

The right to permanent employment until retirement today is being replaced by short-term fixed duration employment relationships, whereby most of these short-term employment contracts are for one year or less, with no guarantee of renewal. Since 2005, with the emergence of the 'outsourcing concept' which started for migrant workers, now expanded to local workers, traditional just employment relationships between those that own and control the workplace, who have work and need workers to do the required work, is also being withered away with the introduction of manpower/labour suppliers who now supply workers whilst continuing to be the employers even after the said workers start working at, and for the workplaces, factories and offices of the principal.

In short, these new 'employment relationship' introduces a third party and allows principals and owners to now just utilize the labour free of employer obligations to the rights and welfare of the workers. We shall be looking briefly at the situation of worker and trade unions in Malaysia, but not all, to determine this current government's performance when it comes to worker rights and welfare.

Right to 'eight hours labour, eight hours recreation, eight hours rest' eroded

Action taken by stonemasons on 21 April 1856, followed by many other worker struggles ultimately led to the establishment and maintenance of the Eight Hour Day, that is now recognized internationally, and this right was also given a high priority by the International Labour Organization (ILO) since its creation in 1919. The slogan 'Eight hours labour, Eight hours recreation, Eight hours rest' captures the essence of this struggle.

Likewise in Malaysia, this right is to be found in our Employment Act 1955. Any work beyond 8 hours would be construed as overtime work, and this required the consent of the worker and also entitled the worker to be paid extra, at a rate usually not less than one and half times his hourly rate of pay (Section 60A 3(a) Employment Act 1955).

In 1989, the government amended the law (Employment (Amendment) Act 1989 Act A716) allowing for the Minister to waive these rights as to required hours of work, on the application of the employer, but retained the condition that no worker is required to work for more than forty-eight hours in one week, which subsequently was removed by yet another amendment in 1998 (Employment (Amendment) Act 1998 Act A1026).

What was obviously missing was the requirement of the prior agreement of the worker and/or the relevant union, let alone the right to be heard, before decision are made that allowed the employer to deny workers this long struggled for right that limits the required hours of work. The law now provides that after that decision is made, '… any person who is dissatisfied with any decision of the Director General … may, within thirty days of such decision being communicated to him, appeal in writing … to the Minister, and any decision or order of the Minister shall be final, thus shutting the door to judicial review – being the court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles and justice.

There is also an absence of clear provisions in law that requires the provision of any notice whatsoever to workers and/or their unions when the said applications are being made by employers to the Director General, and as such decisions are being made by the government without workers being given the right to be heard. At present such 'permissions' are not even publicly and openly disclosed even in the relevant Ministry's website.

No guidelines and/or simple forms are provided for as to how workers can appeal these decisions, and given that the appeal must be in writing, there being no provision of any right to be heard orally, workers and/or unions, with no required language capabilities or knowledge in law are certainly prejudiced by this present procedure of protest and appeal. Remember, there are about 2 million migrant workers in Malaysia, most of whom do not have the capacity to read and write Bahasa Malaysia, let alone write to the Minister.

The employment law provides minimum rights for all workers in Malaysia, but these rights can so easily and 'secretly' be denied to workers as the Director General of Labour permits employers to do so, with no prior notice or right to be heard given to workers. Similar provisions are available all over the Acts providing for various worker rights to be taken away.

As it now stands, workers may be required to work long hours, even more than ten hours per day, and even more than 48 hours per week – so what exactly is the limit? The employers also can require their workers to work on rest days and even on public holidays. Some workers even have to work on May 1st, Workers' Day!

Some companies do not stop operations, and workers are continuously working in their respective shifts and this also prevents workers from meeting and/or organizing unions and/or developing collective demands. Workers on day shifts, some starting at 8.00 am and ending at 8 pm would not even have the opportunity to go to the Labour Department to lodge complaints, and in Malaysia most of the avenues of complaints and justice for workers only operate during the usual working hours. The same is the case with national/regional unions and the MTUC

office, National Human Rights Commission (SUHAKAM) and even the Legal Aid Centres operated by the Malaysian Bar.

Minimum wages

In most developed and in some developing countries, minimum wages for workers have long been fixed by governments and laws. India, for example has had a Minimum Wage Act since 1948. Other examples include Indonesia, Thailand, Vietnam, Philippines, India, Hong Kong, United States of America, Australia, New Zealand, Canada and United Kingdom.

Sub-Industry	Basic Wages (RM)	Fixed Allowances (RM)	Gross Wages (RM)
Electric & Electronic	547.82	202.16	749.98
Furniture	679.12	94.80	773.98
Plastic	636.19	136.55	772.74
Glove	565.14	169.96	735.10
Textile	613.99	116.53	730.52
AVERAGE TOTAL	**626.76**	**135.46**	**762.20**

Source:- Ministry of Human Resources Official Blog (http://www.mohr.gov.my/blog/table1.pdf)

Fast track: Average wages and allowances for local workers

However, the Malaysian government has been avoiding the fixing of minimum wages, despite repeated calls being made by the Malaysian Trade Union Congress(MTUC) and workers for several decades. Even after August 2010, when the government's own Human Resources Ministry's study of 1.3 million Malaysian workers found that a shocking 34 percent earned below the poverty line income of RM750 per month (Malaysiakini, 5 August 2010), the government has failed to recommend a minimum wage.

At the same time, the government continued to implement measures, including reducing subsidies, that resulted in an even higher cost of living. Then suddenly, just before the upcoming 13th General Elections, the prime minister announced on Labour Day 2012, that he would be implementing a minimum wage policy.

The Malaysian government, obviously committed to neo liberalism and free trade is perceived to be pro-employer, inclined to ensure that cost of labour is kept low and workers in Malaysia are 'problem-free' – all this allegedly to keep Malaysia competitive so as to attract foreign direct investments into the country.

Paradoxically, the Malaysian government may have interfered with market forces that might have improved wages, work benefits and conditions of workers by the introduction of migrant workers, temporary and casual workers into the labour market. However, these workers related policies and laws might have had the effect of weakening the bargaining rights of workers and unions.

Stagnation of workers' rights and erosion of justice for workers

The Malaysian government seems to have failed to improve workers' access to justice too. If an employer cheats the worker by non-payment of agreed wages, overtime and/or makes wrongful deductions, the worker who succeeds in the Labour Department or Court at the end of the day only gets the amount that he was deprived of, not even additional interest or cost including the cost of transportation, the cost of taking leave and hence loss of daily wages when he attends court, and the cost of a lawyer and/or union representatives. When workers want to meet and seek advice or help even from MTUC officials, workers allegedly have to pay them a nominal sum of about RM60 per meeting. At the end of the day, for the lowly paid worker, it becomes more practical that they do not claim their rights. Hence the errant employer gets off scot-free.

For employers, the law favors them for even when it is proven that they have violated worker rights, all that is required of them is to pay the worker what they should have originally paid their workers. As an example, section 100(1) of the Employment Act states:

> Any employer who fails to pay any of his employees wages for work done by his employee on a rest day or pays wages less than the rate provided under section 60 commits an offence, and shall also, on conviction, be ordered by the court before which he is convicted to pay to the employee concerned the wages due for work done on every rest day at the rate provided under section 60, and the amount of such wages shall be recoverable as if it were a fine imposed by such court.

This certainly is not just and does not deter employers from breaking the law. It would have been more just and a deterrent if the errant employer is ordered to pay at least 3 times the sum that he cheated the worker.

In the Employment Act, there is also no provision that protects workers who complain or access the avenues of justices, from being terminated and/or discriminated by reason of the fact that he is claiming rights against the employer. It is thus not uncommon that workers who complain or claim rights are summarily terminated; for the migrant worker, it is worse! For a termination will also be the loss of the legal right to remain in the country to claim or to continue pursuing their claims compounded with the fact that migrant worker will also not be allowed to work with any other employer even if he is allowed to stay.

Discrimination based on gender also occurs as when the courts recently affirmed practice of a company that had different retirement ages for men and women workers. Indeed, the Government was silent despite the fact that this certainly goes against our own Federal Constitution which guarantees equality to men and women performing the same job.

Industrial courts – Only court which requires Minister's permission

When it comes to workers claiming wrongful dismissal seeking reinstatement, they have to lodge their complaint at the Industrial Relations Department(IRD), and if the dispute cannot be resolved, it is then referred to the Minister who has the power to decide whether the case be referred to the Industrial Court for trial or not. The issue is: why should the Minister's permission be needed? For when a matter cannot be resolved between employee and employer at

the IRD, it should immediately br referred to the Industrial Court. An additional hurdle in a worker's quest for justice is unnecessary; it may also be discriminatory.

The law also provides that if any party is dissatisfied with the decision of the Minister, they may go to the High Court to challenge that decision. But unlike the Labour Courts and Industrial Courts, the High Court will award cost against the losing party, and this can be high and for the ordinary worker, who has been wrongfully dismissed, this may be an added financial risk which is unaffordable. The pursuit of justice in any court, I believe, requires the removal of all monetary risks.

As of February 2008, workers successful in their claim for wrongful dismissal saw the entitlement to wages and benefits, drastically slashed when in lieu of reinstatement all they could get was limited to a maximum of 24 months wages, based on their last drawn salary, less a percentage of post-dismissal earnings. Prior to this, their entitlement was for wages and benefits from date of dismissal until judgment and other matters. This was certainly an anti-worker amendment to the Employment Act.

There is still no Industrial Courts in Pahang, Trengganu, Kelantan, Kedah, Perlis, Melaka, Negeri Sembilan and Selangor. Why did this government not ensure that there are Industrial Courts in all major and medium sized towns, preferably no further than 50 kilometers from the workplace to ensure easy access to justice for workers. Today, after 50 over years since independence, we see Industrial Courts only in Kuala Lumpur, Penang, Ipoh, Johor Bahru, Kota Kinabalu and Kuching.

Workers' and trade union rights in BN-ruled Malaysia (Part 2)

Under this pro-business BN government, trade unions have been weakened and workers' • bargaining powers eroded, writes Charles Hector.

As of January 2012, the employed labour force in Malaysia was about 12.4m. Out of this, only 798,941 workers (6.44 per cent) are members of trade unions, of which about 53 per cent are private sector workers, 38 per cent public sector workers, and 9 per cent workers of statutory bodies/local authorities, after more than 50 years of independence.

It is obvious that this Malaysian government has not been actively promoting the formation of trade unions. In fact, its more recent policies seem directed towards the weakening of trade unions. Electronic workers, for example, have still not yet been allowed to form a national union. The only concession made after years of struggle was when the BN allowed the formation of four regional unions in the Peninsula in 2010 (The Star, 1 May 2010).

The perception amongst workers is that this government has favoured unions that represent workers in the public sector, statutory bodies and local authorities, who have enjoyed wage increases, cost of living allowances (Cola) and other benefits. The primary motive, however, may not be acknowledgement of the rights and welfare of workers; instead, it is to woo these

workers to support the Umno-led BN coalition. That said, the perks and • 'special treatment' • of these workers just prior to elections does not necessarily translate into blind loyalty to the BN cause. For today, the people, including workers in the public sector, have awakened from their slumber, thanks to the availability of more information via the alternative media and exposure to the global media. Hence, they will vote in the upcoming elections as they please!

Another reason for the declining number of workers involved in the trade unions is the growing use of short-term contract employment, temporary and/or casual employees at the workplace. Such short-term and temporary employment which can be terminated by not renewing the employment contracts have made such workers disinclined to form, let alone join and actively participate in, trade unions. The fact that unions often hold general meetings and elect their leaders once every three years, further discourages short-term contract workers from active participation in the unions.

Trade union membership in Malaysia 2006-2012

Year	No of TUs	Total	Male	Female
2006	631	801,585	484,016	317,569
2007	642	803,212	485,306	317,906
2008	659	805,565	486,978	318,587
2009	680	806,860	487,679	319,181
2010	690	803,289	485,747	317,542
2011	697	800,171	482,653	317,518
March 2012	695	798,941	481,374	317,567

Source: Department of Trade Union Affairs website

Compounded with this is the emergence of a new class of workers commonly known as 'outsourced workers', who are not considered employees of the principal or owner of the workplaces. As such, they are not allowed to join in-house unions or even regional/national unions. As well, they cannot resort to Collective Agreements, since these are agreements between employers and direct worker-employees. With no law limiting the percentage of 'outsourced workers' • working at a particular workplace, they can account for up to 50 per cent of total workers in some factories.

The Trade Union Act also provides that when a worker has been terminated, he/she automatically will cease to be a member of the trade union. At a time like this, when a worker really needs the support and assistance of the trade union, he/she is legally deprived of union membership.

In this regard, there have been an increasing number of cases wherein active union leaders have been dismissed. Often, the reason advanced by their employer is that they have brought disrepute and/or insulted the management of their employer-company – eg, Hata Wahari, the president of the National Union of Journalists, and more recently Chen Ka Fatt and Abdul Jamil Lalaludeen, respectively, honorary treasurer and vice-president of the National Union of Bank Employees

(Nube) were dismissed. In the latter two cases, the Nube leaders apparently had participated in a rally outside the United Nations building in Geneva where they carried a banner declaring "Maybank robs poor Malaysian workers"• (Harakah, 7 Feb 2012). Workers should not be terminated, save by reason of non-performance of their job and/or some infringement/breach at the workplace or related to work. It is wrong to start dismissing workers because they criticise their employers.

Erosion of the right to permanent employment

Permanent employment is a basic right, essential for the well being and welfare of workers and their families. One's employment usually determines where one will settle-down, buy homes and land, where one • fs children will go to school and even where one • fs spouse will find employment. With short-term contracts increasingly the practice, it is stressful for the worker not knowing whether at the end of his contract period, he or she will still be employed at the workplace.

In our employment laws, what was clearly envisaged was permanent employment until retirement. Accordingly, the Employment Act 1955 contains clauses that provide for gradual increases in entitlements to annual leave, sick leave and even the calculation of termination and lay-off benefits. Even when it comes to retrenchment, there was the Last In First Out (LIFO) policy, that protected workers with longer periods of service. Indeed, the law imposed the obligation on employers to first attempt to provide alternative employment within the workplace, before having to let an employee go.

This right to permanent employment has systematically been replaced with short-term or fixed duration contracts of employment, sometimes less than one year, with no guarantee or safeguard of a renewal of employment contract even if the employer still needs workers at the end of the contract period.

For those, who already are permanent employees, employers have used various means to destroy this relationship and to replace it with short-term contracts. One method used is the outsourcing of work to third parties: forcing employees to leave and to enter into a new contract with these new third party employers, or face retrenchment.

Another method employed in Malaysia is the Voluntary Separation Scheme (VSS). Ironically, many workers have lost permanent employment and only to be re-employed by the same employer, this time as short-term contract workers.

Public sector employees also lost permanent employment with pension rights when state entities were privatised and this continues to happen.

Employers now can very easily get rid of workers who are older, 'problematic' (because they are demanding rights or even getting involved in union activities), pregnant or partially disabled following an industrial accident. Or they may just not offer them a new contract of employment. This effectively diminishes significantly the workers' ability to fight for better wages, working conditions and other employment benefits.

The provisions for employing temporary or casual workers also gives the Minister the power to reduce workers • f rights guaranteed by the parent Act for these workers.

Having different classes of workers at the workplace strengthens the ability of employers to • 'divide and rule' • workers – hence greater power to control workers while eroding the workers' • ability to demand better rights.

'Bonded' migrant workers

Initially, the Malaysian government created Free Trade Zones near the bigger towns, and workers from all over the country came to work. As time passed and wages remained low while the cost of living rose and the quality of life declined, workers started moving back to their home towns and new workers were less inclined to come.

The government then allowed these factories to be established all over Malaysia, especially where the workers and their families resided. Today, there are over 200 industrial estates, free commercial zones and free industrial zones spread all over the country.

As time went on, Malaysian workers demanded higher wages and better working conditions. Instead of facilitating these demands, the Malaysian government came to the assistance of employers by bringing in more controllable and cheaper labour, namely, the migrant workers, who were obliged to work for one employer only which, invariably enabled employers to oppress these workers. After all, if the migrant workers were dissatisfied, the only choice they had was to quit and return to their home country. In fact, even this is not a real option – for these workers would have spent a lot of money and incurred debts when they chose to come to Malaysia as migrant workers.

Access to justice is available to migrant workers just like any other worker, but when they complain of rights violations or start using these legal mechanisms, the response of many employers is simply termination of their employment: work passes/visas would be cancelled, disallowing the workers to legally remain in the country. Hence, they would lose any right to pursue their claims in the Labour Courts or via other avenues. If they stay on in the country • 'illegally', they risk being arrested, detained, charged in court, convicted, whipped, and thereafter deported. The fact that they have valid claims or have lodged complaints in relevant avenues for justice is irrelevant.

Hence, migrant workers became a preferred source of labour for many employers – bonded and forced to work for the one employer, so very easily forced to work overtime, denied rest days and even public holidays.

Fortunately, there has emerged some measure of workers' solidarity and Malaysian workers and trade unions, including the MTUC began to accept migrant workers as workers, and started fighting for the rights of migrant workers too. The unions accepted migrant workers as members of trade unions, irrespective of the fact that one of the conditions of these migrant workers' • work passes/visas denies them the freedom of association. The unions, including the MTUC, have been ready and willing to take the matter to court if any employer, or the

Malaysian government, contests the right of migrant workers to join unions or to benefit from Collective Agreements.

Besides migrant workers, the Malaysian government also created other classes of workers – temporary and casual workers. Such different categories of workers kept them divided and prevented them from joining existing unions.

Using labour without entering into employment relationship

In fact, short-term contract workers, migrant workers or the other types of workers are employees of the factory and workplaces they work in. Hence, employers have duties and obligations to ensure that the rights and welfare of these worker-employees, as contained in existing national laws and in collective agreements, are provided for.

Alas, in 2005, the Malaysian government came up with a policy that allowed factories and workplaces to use workers, without having to enter into any employment relationship with these workers. A new entity was created called •'outsourcing agents/companies'•, who would be labour/manpower suppliers, who would be supplying workers to factories and workplaces.

Under the Private Employment Agencies Act 1971, private employment agencies are considered the employers of these workers, and will continue to be the employer of the workers even after they start working in particular factories and workplaces. These workers are commonly known as 'outsourced workers'.

In contrast, the •'outsourcing agencies/companies' are not considered to be the employers of these outsourced workers. Significantly, it was not the Ministry of Human Resources but the Ministry of Home Affairs that issued the licence/permits to these 'outsourcing agents/companies'.

In this regard, I believe that this new Act runs contrary to the spirit of existing laws and principles. In the beginning, this practice applied only to migrant workers. It was later extended to cover local workers too. Consequently, in some factories today, about 50 per cent of the workforce is made up of these •'outsourced workers'• who are not employees of the factory and/or workplace. Accordingly, they cannot join workplace unions and/or benefit from Collective Agreements either.

The 'outsourcing agents/companies' set-up is a very profitable business with little or no risk, even from their •'employees', who even if they were to strike would not affect these labour suppliers ('contractors for labour'). After all, they do not run factories; indeed, there is no work that needs to be performed in order to generate profits. This is a form of what might be called 'rentier capitalism'!

In 2010, the Malaysian government took steps to give statutory recognition to this unjust employment practice and relationship. They wanted to give legal recognition to these 'contractors for labour' – these labour suppliers. They wanted to confirm that the 'contractor for labour' is the employer, and remains the employer of these 'outsourced workers' even after they start working in the workplaces of principals. All this was achieved, despite strong protests

coming from workers, their unions, MTUC, civil society groups not just within Malaysia but also internationally. The amendments proposed was passed and came into effect on 1 April 2012.

The use of • 'outsourced workers' or outside workers at workplaces by principals are growing, and it also happens in government-linked companies. For example, the TNB Junior Officers Union protested in early 2012 against the employment and use of • eoutsourced workers by TNB.

The Minister of Human Resources recently announced an exemption of some (but not all) of the recent amendments concerning 'contractor for labour' to all sectors except the agricultural sector. In fact, it was just a reaffirmation of 'contractors for labour' and the continued use of 'outsourced workers' • by principals who do not consider them as their employees.

There is no doubt that such arrangements run contrary to the sentiments and principles governing employment relationships of the International Labour Organization. Our own Employment Act also clearly states that • 'the person or class of persons employed, engaged or contracted with to carry out the work shall be deemed to be an employee or employees and (a) the principal or owner of the agricultural or industrial undertaking, constructional work, trade, business or place of work; or (b) the statutory body or local government authority, shall be deemed to be the employer'. Rightfully all involved in the business of finding and supplying workers must be private employment agencies, governed by the Private Employment Agencies Act 1971, who for their services will be paid a fixed one-time fee. They will thereafter have no other relationship, let alone employment relationships, with the workers after they are accepted and start working for the principal. The workers will then become the principal • fs employees. Hence this provision for 'contractors for labour' is totally against the spirit of our own Employment Act!

The MTUC and workers have continued to protest against this provision for labour contractors. In 2012, the Malaysian Bar passed a Resolution unanimously calling for the maintenance of a two-party employment relationship between workers and the principal to the exclusion of all thid parties, especially the • 'contractor for labour'. Regardless of whether they are called labour/manpower suppliers or outsourcing companies/agents, there must be just one class of workers – all of whom are employees of the principal – who can join the unions at the workplace and fight as one for better workers' rights and benefits.

The way forward

The BN government seems to have lost its way and abandoned its duties and obligations to improve the rights and welfare of persons, workers and their families. Slowly but surely workers' and trade union rights have been eroded. The government needs to stop being pro-employer and pro-business, concerned only with big profits. It must do what is needed immediately to restore the rights of workers to permanent employment until retirement, to strengthen trade unions, which is an essential tool for the protection and improvement of the livelihood of workers, and most importantly to maintain the two-party employment relationship.

In the upcoming elections, Malaysian workers and their families will again have the opportunity to get rid of this BN government and let a new coalition form a new government in the hope that a new government will reverse this erosion of workers • f and trade union rights. The choice

ultimately rests with the people and the workers. Our concern must not be driven by self-interest based on workplace or sector, ethnicity, nationality, religion, culture or even current political affiliations, but by a concern for the future common good and best interest of all persons and their families – which includes the over 10 million workers in Malaysia.

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