Meralco v. Quisumbing: Re-drawing the Metes and Bounds of Management Prerogative

Rodrigo G. Moreno[*]

INTRODUCTION

Industrial peace is a term that is often quickly mouthed by all and sundry in the field of labor law but whose concept often eludes employers, employees, and many times, the courts. More often than not, laymen and labor practitioners alike associate disruptions of employer-employee relations with strikes, lockouts, and other concerted activities, what with the vociferous passion, politically colored utterances, and sometimes violent clashes that mark such events. Hence, what many fail to see is the daily struggle between

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* '05 J.D. Cand., Ateneo de Manila University School of Law. Member, Board of Editors, Ateneo Law Journal. He is the Lead Editor for this Issue. His previous works published by the Journal include *Judicial Orwellianism: Do We Still Have the Freedom to Contract?*, 49 ATENEO L.J. 531 (2004). He likewise co-authored *The Applicability of Upjohn v. United States in the Philippine Setting and Establishing the Parameter of the Attorney-Client Privilege*, 48 ATENEO L.J. 806 (2004). The Author wishes to express his profound gratitude to Ms. Ma. Cristina E. Villarroya, the Assistant Lead Editor for this Issue, for her research and technical assistance in writing this Note, as well as for her technical assistance in the production of this Issue.

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management and labor; oftentimes arising from the all-embracing penumbra known as management prerogative. No less than the Supreme Court has, on more than one occasion, passed upon the various facets of the exercise of management prerogative, and its decisions on the matter may sometimes lead to the conclusion that the High Court has yet to take into consideration the fact that industrial peace is a process to be adhered to as much as it is a goal to be achieved.

The Court's ruling in *Manila Electric Company v. Quisumbing,*[1] and its resolution of the Motion for Reconsideration of the case,[2] bring to fore the reality that there can never be a successful attempt to achieve the perfect judicial stasis between the inherently conflicting interests of management and labor. Indeed, like the ebb and flow of the ocean's tides, the push and pull between the employer's interests and the rights of the employee can only be prepared for and responded to by the courts, and never controlled, much less suppressed.

The *Meralco* case laid down the doctrine that the decision to contract out work if such contracting will last for six months or more, being part and parcel of management prerogative, should not be subject to any prior consultation requirement with the union.[3] This is due to the fact that previously established jurisprudential limitations on management prerogative, such as the requirements of good faith and proscriptions on employers acting maliciously or arbitrarily,[4] *already* give rise to the necessary balance in the relationship of management and labor, at least insofar as the issue of contracting out of the employer's business is concerned. Hence, any requirement regarding consultation with labor before contracting out would, in the words of the Court, "only introduce an imbalance in the parties' collective bargaining relationship on a matter that the law already sufficiently regulates."[5] Justice Martinez' *ponencia* went so far as to characterize then Labor Secretary, now Associate Justice of the Supreme Court, Leonardo Quisumbing's prior consultation requirement as "unreasonable, restrictive and potentially disruptive."[6]

Even a cursory reading of the case will show that the Court's ruling is hinged entirely on the presumption that there in fact exists a balance in the

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1. Manila Electric Company v. Quisumbing, 302 SCRA 173 (1999).
2. Manila Electric Company v. Quisumbing, 326 SCRA 172 (2000).
3. *Id.* at 184-85.
4. De Ocampo v. National Labor Relations Commission, 213 SCRA 652, 662 (1992).
5. *Meralco,* 302 SCRA at 212.
6. *Id.*

relationship between management and labor; hence the soundness of dispensing with any additional prior consultation requirements. This in turn leads to the following questions that must be addressed:

1. Is it in fact possible to achieve the ideal stasis between the rights of labor and management prerogative insofar as contracting out is concerned?

2. Does the confluence of laws, rules, and jurisprudence on contracting out offer such an ideal balance?

3. Can it be said that the issue of what, when, how long, and to whom there can be contracting out is exclusively within the domain of the employer?

4. Is it part of management prerogative and thus beyond the right of the employees to be consulted and to participate in the decision making processes that affect their rights?

5. Assuming that the answers to the first three questions are in the negative, and the answer to the final question is in the affirmative, what then should be the extent and parameters of the employees' participation, if any, in the decision of whether to contract out the various aspects of the business?

This Note consists of six parts. Part I is a brief restatement of the constitutional provisions on labor relations and the general precepts of Labor Law as a tool for industrial peace. Part II is an exposition on the concept, definition, scope, limitations, and jurisprudential application of management prerogative. Part III examines the pertinent laws, department orders, and jurisprudence on contracting out, particularly those connected with the participation of employees in the decision to contract out, and the corresponding limits on the employer. Part IV is a discussion of the factual antecedents of the *Mercalco* ruling and an analysis of the doctrine therein, including a discourse on the jurisprudential underpinnings of the Court's decision. Part V will test the soundness of the *Meralco* doctrine *vis-à-vis* the other pertinent rulings of the Court on subcontracting as well as management prerogatives. Finally, Part VI will propose solutions to address the legal dilemma brought about by the *Meralco* ruling, while at the same time preserving the basic concept of management prerogative.

This Note shall examine the issue of contracting out from the perspective of the rights of employees who are already members of the enterprise at the time the decision to contract out is arrived at by management. It shall not delve into the issues pertaining to those who are

hired under a contracting/subcontracting arrangement, but shall be limited to the employees of the enterprise who stand to be possibly prejudiced by the diminution of their bargaining unit, weakening of their bargaining position, retrenchment, and analogous instances brought about by the contracting out of the employer.

I. A RESTATEMENT OF THE FUNDAMENTAL BASIS OF LABOR RELATIONS

Labor relations have always been an emotional issue in society, which began with the Age of Industrialization in Europe and the slave-labor conditions in the latter's factories. The Philippines is no exception to this, and discussions of labor related issues have always been intertwined with deep undercurrents of fiery nationalism.[7] It should thus be no surprise that the Constitution reflects the desire to further the cause of the workingman, a need that is as visceral as it is rational. Thus, the fundamental precepts on the matter laid down by the present constitution are:

1. The State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare.[8]

2. The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all. It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law. The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace. The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of

7. This can be seen in, among others, the deliberations of the 1987 Constitutional Commission, with the expositions of delegates such as Eulogio R. Lerum and Jaime S.L. Tadeo replete with deep Pilipino phrases reminiscent of the era of anti-imperialism and the search for the Filipino identity.

8. PHIL. CONST. art II, § 18.

> production and the right of enterprises to reasonable returns on investments, and to expansion and growth. [9]
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> 3. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.[10]

Two basic ideals can be gleaned from these provisions. First, the State seeks to protect laborers. Second, industrial peace is a prime goal of the state, hence the use of the phrase "to foster." The ideal of protection to labor finds its foremost legislative expression in the Labor Code, to wit:

> *Construction in favor of Labor* – All doubts in the implementation and interpretation of the provisions of this Code, including its implementing rules and regulations, shall be resolved in favor of labor. [11]

The Supreme Court has consistently reiterated this principle in countless decisions,[12] and best captured the essence of the provision when it stated that

> It is a basic and irrefragable rule that in carrying out and interpreting the provisions of the Labor Code and its implementing regulations, the workingman's welfare should be the primordial and paramount consideration. The interpretation herein made gives meaning and substance to the liberal and compassionate spirit of the law enunciated in Article 4 of the Labor Code that 'all doubts in the implementation and interpretation of the provisions of the Labor Code including its implementing rules and regulations shall be resolved in favor of labor.'[13]

The ideal of industrial peace, on the other hand, is reflected in the emphasis placed by various statutory rules and administrative issuances pertaining to labor relations on the need for the State to *regulate* the relations between management and labor. Foremost among these is Article Three of the Labor Code, which states:

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9. PHIL. CONST. art XIII, § 3.

10. PHIL. CONST. art III, § 8.

11. A Decree Instituting a Labor Code, thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Ensure Industrial Peace Based on Social Justice, P.D. No. 442, as amended, art. 4 [LABOR CODE].

12. Salinas v. National Labor Relations Commission, 319 SCRA 54 (1999); International Travel Services v. Minister of Labor, 188 SCRA 456 (1990); Cadalin v. POEA Administrator, 238 SCRA 721 (1994).

13. *Salinas*, 319 SCRA 54, 63 (1999).

> The State shall afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race, or creed, and *regulate* the relations between worker(s) and employees. The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just (and) humane conditions of work.[14]

The imperative for the maintenance of industrial peace is further highlighted by the statutory requirements for a prior notice of strike to be filed with the Department of Labor and Employment (DOLE) before workers stage as strike,[15] and for the DOLE to "exert all efforts at mediation and conciliation to effect a voluntary settlement"[16] during the so-called "cooling off period" when the latter is applicable, as well as the Labor Code provision which states:

> When, in his opinion, there exists a labor dispute causing or likely to cause a strike or lockout in an industry indispensable to the national interest, the Secretary of Labor and Employment may assume jurisdiction over the dispute and decide it or certify the same to the Commission for compulsory arbitration. Such assumption or certification shall have the effect of *automatically enjoining* the intended or impending strike or lockout as specified in the assumption or certification order. If one has already taken place at the time of assumption or certification, all striking or locked out employees shall *immediately* return to work and the employer shall immediately resume operations and readmit all workers under the same terms and conditions prevailing before the strike or lockout. The Secretary of Labor and Employment or the Commission may seek the assistance of law enforcement agencies to ensure the compliance with this provision as well as with such orders as he may issue to enforce the same.[17]

The Court has declared that a willful refusal by the striking employees to comply with the assumption of jurisdiction or return to work order of the Secretary makes the strike *illegal*,[18] with all the consequences attached to an illegal strike to be borne by the union officers and, in some cases, the individual workers, including possible loss of employment.[19] The urgency which underlies these precepts stems from the fact that a strike, or lockout for the matter, is an abnormal situation, and like any other abnormal circumstance, must be dealt with in the swiftest and most effective manner possible, in order to reestablish the *status quo ante-bellum*.

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14. LABOR CODE, art. 3 (emphasis supplied).
15. *Id.* art. 263, ¶ c.
16. *Id.* ¶ e.
17. *Id.* ¶ g (emphasis supplied).
18. Union of Filipro Employees v. Nestle Philippines, Inc., 192 SCRA 396, 411 (1990).
19. LABOR CODE, art. 264, ¶ 2.

II. THE RIGHTS OF THE EMPLOYER AND MANAGEMENT PREROGATIVES

A. The Inherent Right of the Employer

Based on the aforementioned precepts, it may be discerned that in the pursuit of industrial peace, the law favors labor due to the latter's inherently weak position *vis-à-vis* management.[20] However, the resolution of labor disputes must always be based on the facts of the case and the law applicable thereto, and not simply on motherhood statements spun off from left-leaning socio-political ideologies. The Court captured this principle when it stated:

> In the resolution of labor cases, this Court has always been guided by the State policy enshrined in the Constitution that the rights of workers and the promotion of their welfare shall be protected. *The Court is likewise guided by the goal of attaining industrial peace by the proper application of the law. It cannot favor one party, be it labor or management, in arriving at a just solution to a controversy if the party has no valid support to its claims*. It is not within this Court's power to rule beyond the ambit of the law.[21]

This doctrine calls for a recognition of certain rights that are inherent in management. Constitutional and legislative enactments, as well as judicial rulings, decree the necessity of allowing management no small amount of leeway in running its business. Indeed, the dictates of any modern economy, the rules of common sense, and the laws of natural justice place a limit on the participation of labor as well as the State in business decisions. Certain constitutional provisions offer the ideal starting point for mapping out the metes and bounds of the areas where management holds sway, to wit:

1. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.[22]

2. The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organization, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote

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20. Producers Bank of the Philippines v. National Labor Relations Commission, 298 SCRA 517 (1998).

21. Samahang Manggagawa sa Top Form Manufacturing-United Workers of the Philippines v. National Labor Relations Commission, 295 SCRA 171, 189 (1998).

22. PHIL. CONST. art II, § 20.

> distributive justice and to intervene when the common good so demands.[23]
>
> 3. The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth.[24]

Four major ideas may be deduced from the aforementioned precepts. *First*, the establishment and operation of business enterprises by private entities is a constitutional, if not natural, right, private business being indispensable to society. *Second*, like any other right, private enterprise is subject to State regulation and, when necessary, intervention. *Third*, part and parcel of such State regulation is the control of labor relations. *Fourth*, in regulating such relationships, the State must balance two often conflicting rights – the right of labor to a just share in the profits of the enterprise, and the right of business owners to make reasonable profits, as well as to advance their businesses.

The right of an employer to earn reasonable profits, as well as to expand its business, would be rendered nugatory without the first precept. This applies to the right not only to establish but also to operate a business. The second doctrine in turn provides an essential qualification of the right to conduct business; the establishment and operation of a business can be *regulated,* but not *prohibited,* unless of course the business in question is one that is blatantly illegal, immoral, or against public policy, in which case the police power of the State comes into play. Such regulation, in turn, must necessarily be reasonable, if meaning is to be given to the right to earn profits and to expand.

Reasonable regulation connotes giving an enterprise sufficient room for the exercise of business judgment. The classic jurisprudential concept of the latter in relation to labor relations was provided by the Supreme Court in *Bonita v. National Labor Relations Commission,*[25] wherein the Court decreed:

> The rule is well settled that labor laws discourage interference with an employer's judgment in the conduct of his business. Even as the law is solicitous of the welfare of employees, is must also protect the right of an employer to exercise what are clearly management prerogatives. As long as the company's exercise of the same is in good faith in order to advance its

23. PHIL. CONST. art XII, § 6.

24. PHIL. CONST. art XIII, § 3, ¶ 4.

25. Bonita v. National Labor Relations Commission, 255 SCRA 167 (1996).

> interests and not for the purpose of defeating or circumventing the rights of the employees under the law or valid agreements, such exercise will be upheld.[26]

Further elucidation on the concept of business judgment in labor relations can be found in *National Federation of Labor Unions v. National Labor Relations Commission*.[27] In this case, the Court defined the business judgment rule to mean that "[t]he employer is free to determine, *using his own discretion and business judgment, all elements of employment,* 'from hiring to firing,' except in cases of unlawful discrimination or those which may be provided by law."[28] The *National Federation* definition, in turn, was further clarified in the case of *Maya Farms Employees Organization v. National Labor Relations Commission*,[29] which cited *Abbot Laboratories (Phils.) Inc. v. National Labor Relations Commission*.[30] The Court re-stated the rule as follows:

> The hiring, firing, transfer, demotion, and promotion of employees has been traditionally identified as a management prerogative subject to limitations found in law, a collective bargaining agreement or general principles of fair play and justice. This is a function associated with the employer's inherent right to control and manage effectively its enterprise. Even as the law is solicitous of the welfare of the employees, it must also protect the right of an employer to exercise what are clearly management prerogatives.[31]

Thus, to summarize the rule on business judgment, an employer is entirely free to decide for himself, in order to advance his business interests, on all aspects of his professional relationship with his employees, since such freedom is part and parcel of the employer's inherent right to manage and control his business. The only limits on the exercise of the employer's business judgment are that such exercise must not be in bad faith, or in order to circumvent the law or rights of the employees, or in contravention of collective bargaining agreements or the tenets of basic fair play and justice.

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26. *Id.* at 173-74.

27. National Federation of Labor Unions v. National Labor Relations Commission, 202 SCRA 346 (1991).

28. *Id.* at 353.

29. Maya Farms Employees Organization v. National Labor Relations Commission, 239 SCRA 508 (1994).

30. Abbot Laboratories (Phils.) Inc. v. National Labor Relations Commission, 154 SCRA 713 (1987).

31. *Maya Farms Employees Organization*, 239 SCRA at 514.

B. Management Prerogative: Its Concept, Scope, and Application to Labor Relations

One phrase reappears consistently in the cases that define business judgment, so much so that it constitutes an integral element of the latter concept: management prerogative. The case of *Baybay Water District v. Commission on Audit*[32] provides a comprehensive definition of the term:

> Management prerogative refers to the right of an employer to regulate all aspects of employment, such as the freedom to prescribe work assignments, working methods, processes to be followed, regulation regarding transfer of employees, supervision of their work, lay-off and discipline, and dismissal and recall of work.[33]

In short, an employer is free to lay down and execute, free from external dictates, the rules and policies that shall govern its employees from the time the latter are hired, as they carry out their tasks, and until they are dismissed or are otherwise separated from employment. The application of this concept is exemplified by the Court's rulings which upheld as a valid exercise of management prerogative the following acts of employers:

1. Reorganization of the company, and the ensuing abolition of positions, since such was deemed incidental to the employer's power to conduct its own business affairs in achieving its purposes;[34]
2. The dismissal of an employee, since the right to dismiss was held to be a measure of self-protection on the part of management;[35]
3. The selection by an employer of which department or section of its business to close, since management was deemed to possess the prerogative to choose which parts of its business had to be closed for economic reasons;[36] and
4. The reassignment/transfer of an employee from one work station to another, since the employer was held to possess the right to evaluate the qualifications, aptitudes, and competence of his employees, in order to enable them to function with maximum benefit for the company.[37]

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32. Baybay Water District v. Commission on Audit, 374 SCRA 482 (2002).
33. *Id.* at 495-96 citing Tierra International Construction Corporation v. National Labor Relations Commission, 256 SCRA 36 (1996).
34. Arrieta v. National Labor Relations Commission, 279 SCRA 326 (1997).
35. Philippine-Singapore Transport Services, Inc. v. National Labor Relations Commission, 277 SCRA 506 (1997).
36. Chua v. National Labor Relations Commission, 267 SCRA 196 (1997).
37. Castillo v. National Labor Relations Commission, 308 SCRA 326 (1999).

However, just like the concept of business judgment within which it operates, management prerogative is subject to certain limitations. The case of *Blue Dairy Corporation v. National Labor Relations Commission*[38] sums up the limits of management prerogative. There, the Court stated that:

> [The] managerial prerogative…must be exercised without grave abuse of discretion, bearing in mind the basic elements of justice and fair play. Having the right should not be confused with the manner in which that right is exercised. Thus, it cannot be used as a subterfuge by the employer to rid himself of an undesirable worker. In particular, the employer must be able to show that his act is…not unreasonable, inconvenient, or prejudicial to the employee; nor does it involve a demotion in rank or a diminution of his salaries, privileges, and other benefits.[39]

Hence, just like the exercise of business judgment, management prerogative is limited by law, collective bargaining agreements, and good faith. The jurisprudential application of these limits can be seen in:

1. In the case of reorganization of an office, and the abolition of positions resulting therein, the abolition must not be motivated by malice or to ease the worker concerned out of employment.[40]

2. If management prerogative is used to dismiss an employee, such dismissal is subject to State regulation; hence the dismissal must be carried out pursuant to substantive as well as procedural law, and should likewise adhere to the basic tenets of equity, justice, and fair play.[41]

3. The abolition of sections or departments of a business due to economic reasons must be done in good faith in order to advance the employer's interests.[42]

4. Reassignments of employees from one work station or part of the business to another should not result in either diminution in pay or other privileges or demotion in rank.[43]

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38. Blue Dairy Corporation v. National Labor Relations Commission, 314 SCRA 401 (1999).

39. *Id.* at 408 citing Philippine Telegraph and Telephone Corporation v. Laplana, 199 SCRA 485 (1991); Philippine Japan Active Carbon Corporation v. National Labor Relations Commission, 171 SCRA 164 (1989).

40. Arrieta v. National Labor Relations Commission, 279 SCRA 326 (1997).

41. Philippine-Singapore Transport Services, Inc. v. National Labor Relations Commission, 277 SCRA 506 (1997).

42. Chua v. National Labor Relations Commission, 267 SCRA 196 (1997).

III. CONTRACTING OUT: DEGREES AND OPTIONS

Since the penumbra of management prerogative, as mentioned in the preceding part, encompasses the performance of work, the decision to contract out work, and the circumstances surrounding such contracting out, is a necessary component of the exercise of such a right. The Court affirmed the latter in the case of *De Ocampo v. National Labor Relations Commission*.[44] In upholding the right of the management of Baliwag Mahogany Corporation to contract the services of an independent contractor as part of the company's cost-saving program, Justice Medialdea held that "the company merely exercised its business judgment or management prerogative. And in the absence of any proof that the management abused its discretion or acted in a malicious or arbitrary manner, the court will not interfere with the exercise of such prerogative."[45] Likewise, in *San Miguel Employees Union-PTGWO v. Bersamira*,[46] the Court deemed the right to contract out work as a proprietary right of the employer, since such constitutes the exercise of an inherent management prerogative.[47]

Contracting is expressly allowed by the Labor Code.[48] It likewise authorizes the Secretary of Labor, through the issuance of the appropriate regulations, to restrict or even prohibit the contracting out of Labor in order to protect workers' rights.[49] Pursuant to this, DOLE Department Order No. 18-02, Series of 2002 offers the following definition of contracting:

> 'Contracting' or 'subcontracting' refers to an arrangement whereby a principal agrees to put out or farm out with a contractor or subcontractor the performance or completion of a specific job, work or service within a definite or predetermined period, regardless of whether such job, work, or service is to be performed or completed within or outside the premises of the principal.[50]

Contracting out being part and parcel of management prerogative, the limits on its exercise are well defined by Department Order No.18, hence:

> *Prohibitions*. Notwithstanding Section 5 of these rules, the following are hereby declared prohibited for being contrary to law or public policy:

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43. Castillo v. National Labor Relations Commission, 308 SCRA 326 (1999).

44. De Ocampo v. National Labor Relations Commission, 213 SCRA 652 (1992).

45. *Id.* at 662.

46. San Miguel Employees Union-PTGWO v. Bersamira, 186 SCRA 496 (1990).

47. *Id.* at 505.

48. LABOR CODE, art. 106.

49. *Id.* ¶ 3.

50. Department of Labor and Employment, Department Order No. 18-02, ¶ a, § 4 (2002).

> Contracting out of a job, work, or service when not done in good faith and not justified by the exigencies of the business and the same results in the termination of regular employees and reduction of work hours or reduction or splitting of the bargaining unit;....
>
> (e) Contracting out of a job, work or service directly related to the business or operation of the principal by reason of a strike or lockout whether actual or imminent;
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> (f) Contracting out of a job, work or service being performed by union members when such will interfere with, restrain or coerce employees in the exercise of their rights to self-organization as provided in Art. 248 (c) of the Labor Code, as amended.[51]

Thus, an employer is entirely within his rights when he chooses to contract out his business, with the circumstances and extent of such contracting subject only to the dictates of business needs. Nonetheless, such contracting should not be in bad faith and must be justified by the exigencies of the business. It should not result in the termination of regular employees, reduction of work hours, the weakening of the bargaining unit, or interfere with the right to self-organization.

IV. A CASE STUDY OF THE PITFALLS OF CONTRACTING

Manila Electric Company v. Quisumbing[52] best exemplifies the almost absolute autonomy management enjoys in the area of contracting out, the latter being as it is an aspect of management prerogative.

The factual antecedents of the case arose from the collective bargaining agreement (CBA) negotiations between Manila Electric Company (MERALCO) and the Meralco Workers Association (MEWA). After negotiations reached a deadlock, MEWA filed a Notice of Strike, and then Secretary of Labor Leonardo Quisumbing assumed jurisdiction over the labor dispute. His order resolving the dispute contained, among others, a stipulation on contracting out, which provided that MERALCO had the prerogative to contract out services provided that this move was based on valid business reasons in accordance with law, was made in good faith, was reasonably exercised and "*if the contracting out involves more than six months, the union must be consulted before its implementation.*"[53]

Aggrieved, MERALCO assailed Secretary Quisumbing's ruling by way of a special civil action for certiorari. In striking down the Secretary's prior consultation requirement, the Court first identified the issue for resolution:

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51. *Id.* § 6.

52. Manila Electric Company v. Quisumbing, 302 SCRA 173 (1999).

53. *Id.* at 187.

Could the Secretary's consultation requirement be deemed reasonable, or was it an undue restriction of MERALCO's management prerogative?[54] The Court held that the latter was the case, and cited the fact the Secretary himself, as reflected in his disputed Order, acknowledged that management should not be hampered in its business operations. Thus, the Court ruled that:

> We feel that the limitations imposed by the union advocates are too specific and may not be applicable to the situations that the company and the union may face in the future. To our mind, the greater risk with this type of limitation is that it will tend to curtail rather than allow the business growth that the company and the union must aspire for. Hence, we are for the general limitations we have stated above because they will allow a calibrated response to specific future situations the company and the union may face.[55]

The Court likewise reiterated the established principle that contracting out, being a management prerogative, is not unlimited, but is subject to "well defined limitations."[56] The Court then cited the *De Ocampo* case in ruling that for as long as the contracting out was done in good faith, and was not a circumvention of the law or the result of malice or arbitrariness, such is a valid exercise of business judgment/management prerogative. The *ponencia* likewise cited the existence of specific rules which govern contracting out.[57]

The Supreme Court decreed that a balance already exists in the parties' relationship with respect to contracting out. On one hand, MERALCO had its legally defined and protected management prerogatives. On the other hand, the workers were guaranteed their own protection through specific labor provisions and the recognition of limits to the exercise of management prerogatives. From these premises, the Court concluded that "the Secretary's added requirement only introduces an imbalance in the parties' collective bargaining relationship on a matter that the law already sufficiently regulates. …[T]he Secretary's added requirement, being unreasonable, restrictive and potentially disruptive should be struck down."[58]

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54. *Id.* at 211.

55. *Id.*

56. *Id.*

57. When this case was decided, the applicable implementing rules were Sec. 1-25 of Department Order No. 10, Series of 1997, which has since been replaced by Department Order No. 18-02, Series of 2002.

58. Manila Electric Company v. Quisumbing, 302 SCRA 173, 212 (1999).

In resolving the Motion for Reconsideration filed by the Union,[59] the Court upheld its previous decision striking down the Secretary of Labor's prior consultation requirement. The Court said that:

> Suffice it to say that the employer is allowed to contract out services for six months or more. However, a line must be drawn between management prerogatives regarding business operations *per se* and those which affect the rights of employees, and in treating the latter, the employer should see to it that its employees are at least properly informed of its decision or modes of action in order to attain a harmonious labor-management relationship and enlighten the workers concerning their rights. Hiring of workers is within the employer's inherent freedom to regulate and is a valid exercise of its management prerogative subject only to special laws and agreements on the matter and the fair standards of justice. The management cannot be denied the faculty of promoting efficiency and attaining economy by a study of what units are essential for its operation. It has the ultimate determination of whether services should be performed by its personnel or contracted to outside agencies. While there should be mutual consultation, eventually deference is to be paid to what management decides. Contracting out of services is an exercise of business judgment or management prerogative. Absent proof that management acted in a malicious or arbitrary manner, the Court will not interfere with the exercise of judgment by an employer. As mentioned in the January 27, 1999 Decision, the law already sufficiently regulates this matter. Jurisprudence also provides adequate limitations, such that the employer must be motivated by good faith and the contracting out should not be resorted to circumvent the law or must not have been the result of malicious or arbitrary actions.[60]

At first glance, the Court's resolution of the Motion for Reconsideration leads to the conclusion that it in fact upholds the prior consultation requirement imposed by the Secretary of Labor. This can be seen in its statement that "while there should be mutual consultation, eventually deference is to be paid to what management decides."[61] However, this declaration should be read in conjunction with the rest of the Court's ruling. It expressly stated that "the employer is allowed to contract out services for six months or more."[62] Thus, the Court gave its imprimatur to MERALCO's decision to contract out without requiring prior consultation with the employees of the company, thereby impliedly affirming its 1999 ruling that prior consultation is not a requirement. Any doubts as to the continuing validity of the doctrine in the original *Meralco* decision were put

59. Manila Electric Company v. Quisumbing, 326 SCRA 172 (2000).

60. *Id.* at 184-86.

61. *Id.*

62. *Id.*

to rest by the remainder of the resolution of the Motion for Reconsideration, hence:

> Absent proof that management acted in a malicious and arbitrary manner, the Court will not interfere with the exercise of judgment by an employer. As mentioned in the January 27, 1999 Decision, the law already sufficiently regulates this matter. Jurisprudence also provides adequate limitations.[63]

These statements reflect the doctrine that contracting out of the business, as a species of management prerogative, is subject solely and exclusively to the limitations on the latter, and as such, no further requirements for its exercise should be imposed.

Such has been the rule since then. An employer may contract out its business as it deems fit, regardless of the length of time, with no legal requirement to consult its employees prior to implementing such a program. The only limits on such exercise are the generic principles applicable to management prerogative, namely that there should be no bad faith, malice, or arbitrariness. Subsequent jurisprudence on the matter has steadfastly adhered to the *Meralco* doctrine, most notably *Dole Philippines, Inc. v. National Labor Relations Commission*.[64] Here, the Court brushed aside the claims of the employees of Dole Philippines that the hiring of casual employees to replace regular workers who had been dismissed or retired under a reorganization and streamlining program implemented by management was an indicator of bad faith on the part of the latter. This due to the fact that the Court took into consideration the company's explanation that it had always hired casuals to augment the company's manpower requirements in accordance with the demands of the industry, and the number of casuals remained relatively constant after the implementation of the redundancy program.[65]

In the aforementioned case, no consultation was carried out by Dole Philippines before either the retirements/dismissal or the hiring of the casual employees. Hence, the Supreme Court, by upholding the legality of Dole Philippines's acts, impliedly affirmed the principle enunciated in *Meralco*.

V. TESTING THE SOUNDNESS OF THE *MERALCO* RULING

On its face, the *Meralco* doctrine is in line with jurisprudence. In fact, it may not seem to give rise to any controversy. First, business judgment, and consequently, management prerogative are inherent in employers. Second,

63. *Id.*

64. Dole Philippines, Inc. v. National Labor Relations Commission, 365 SCRA 124 (2001).

65. *Id.* at 135.

contracting out has been established to be a necessary incident of the exercise of management prerogative.[66] Third, being part and parcel of the exercise of management prerogative, contracting out must necessarily be subject to the same limits as management prerogative. The ruling in *Meralco* and the resolution of the Motion for Reconsideration arising from the case simply reiterated the firmly established rule that contracting out, as part of management prerogative, must be done in good faith and not be prompted by malice or arbitrariness.

However, a digression from a rigid linear analysis of management prerogative jurisprudence offers a glimpse into the concealed flaws of the *Meralco* ruling. It is true that contracting out is a management prerogative, being an incident of employment and/or running of the business and as such, much leeway must be granted to employers in exercising such an option. However, there does not seem to be any express or even implied statutory, administrative, or jurisprudential basis for characterizing the Secretary of Labor's requirement of consultation prior to the implementation of contracting out as "unreasonable, restrictive, and potentially disruptive."[67] What jurisprudence on management prerogative frowns on is undue *interference* with an employer's judgment in the running of its judgment. The common thread that binds the decisions on management prerogative is that the Court lays emphasis on the importance of not *substituting* any other party's judgment for that of the employer when it comes to the various details and aspects of employment, such as work assignments, abolition and creation of departments or sections of the company, dismissal of employees, and the like. In other words, for as long as management does not use its prerogative to mask bad faith or arbitrariness, the Court will not decide, or allow any other party for that matter, to decide that the employer's act was not correct, wise, proper, or that some other action should have been carried out instead.

The doctrines on management prerogative can be likened to the difference in political law between supervision and control. The former limits the power of the reviewing authority to the determination of whether or not the acts of the subordinate entity are within the bounds of law,[68] while the latter grants the reviewing authority practically absolute discretion to affirm, modify, or overturn the decision or act of a subordinate, or even substitute its judgment or act for that of the latter.[69] It may be said that by

66. De Ocampo v. National Labor Relations Commission, 213 SCRA 652 (1992); San Miguel Employees Union-PTGWO v. Bersamira, 186 SCRA 496 (1990).

67. Manila Electric Company v. Quisumbing, 302 SCRA 173, 212 (1999).

68. *See* Joson v. Torres, 290 SCRA 279 (1998).

69. *Id.*

analogy, jurisprudence grants only supervision and not control, to the Department of Labor and the courts, as the case may be, over employers in the exercise of management prerogative and control by such bodies will never be countenanced. Hence, for as long as the acts or decisions of the Secretary of Labor or the judiciary do not amount to control over the management prerogative of the employer, then such acts cannot be said to be unduly restrictive of business judgment.

Applying these precepts to the *Meralco* case, it is submitted that the Secretary of Labor's prior consultation requirement was not an act of control; hence it is not prohibited. His ruling neither prevented MERALCO from contracting out nor decided which aspects of MERALCO's business it should contract out; it did not even place any limits on the time which such contracting out was to last. All that it required was that MERALCO must consult with its union before any contracting out which was to last longer than six months be implemented. Only *consultation,* and *not consent,* would be the extent of the employees' participation in the decision to contract out. Hence, management's freedom to decide for itself when contracting would take place, with whom it would contract with, and what aspects of the business it would contract out, remained untrammeled by the Secretary's requirement. Hence, prior consultation, if such had been enforced, would not have gone against established jurisprudence on management prerogative. It would have involved no overturning, substitution, or undue limitation on the employer's decision to contract out. The prior consultation requirement was not equivalent to control; it would amount to what jurisprudence, by implication, *not only allows but requires—supervision.*

This due to the fact that the Labor Code specifically mandates that workers be *consulted* regarding matters which affect their rights and interests.[70] Certainly, the act of the employer in contracting out could easily prejudice employees in a particular enterprise, and thus undeniably has an adverse effect on the employees. One example of this is the practice of some companies of offering early retirement packages to union members and leaders, then simply filling up the resulting vacant positions through job contracting. This is perfectly legal, since under D.O. 18-02, the contracting is justified by the exigencies of the business, since there are vacant positions which need to be filled. Moreover, under the management prerogative doctrine, the decision to hire contractual workers instead of promoting those already within the enterprise is a valid option available to the employer. This practice was in fact sanctioned by the Court in the *Dole Philippines* case.[71]

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70. LABOR CODE, art. 255, ¶ 2.

71. Dole Philippines, Inc. v. National Labor Relations Commission, 365 SCRA 124 (2001).

An illustrative case concerning the evils brought about by the untrammeled exercise of management's prerogative to contract out its business is the case of *Master Iron Labor Union v. National Labor Relations Commission*.[72] In this case, Master Iron Works, a company engaged in steel fabrication, entered into a subcontracting arrangement with outside workers to carry out the work of its regular employees, including work that was to be performed outside the premises of the company's factory. As a result, the working days of the regular employees were reduced to 10 per month. Management justified this by invoking its right to protect the company from financial losses through its exercise of management prerogative. In response, the Master Iron Labor Union (MILU), the duly certified collective bargaining agent of the rank and file employees of Master Iron Works, staged a strike. The Labor Arbiter as well as the National Labor Relations Commission (NLRC) declared the strike illegal. MILU then raised the issue in a Petition for Certiorari to the Supreme Court, seeking to annul and set aside the decision of the NLRC.

The Supreme Court ruled that the company's act of contracting out the business to outside workers was contrary to law, as well as a violation of the CBA between management and labor. In his *ponencia*, Justice Melo held that "the Corporation's insistence that the hiring of casual employees is a management prerogative betrays its attempt to coat with legality the illicit curtailment of its employees' rights to work under the terms of the contract of employment and to a fair implementation of the CBA."[73] The ruling then went on to recognize the well-established doctrine that management prerogative is inherent in business owners, as well as the general limitations on its exercise. The Court then placed in proper perspective the company's outsourcing of its business. Since the contract of employment of the MILU members, when read in conjunction with the CBA, stated their expected wages, particularly the service allowances for those who would be performing work outside the company premises, the contracting out which resulted in the diminution of the service allowances of the regular employees, would materially prejudice the latter.

It may be argued that the principle in *Master Iron* would only apply if the contracting out violates either law or a valid CBA between the parties. While this may be the case, the value lies in the Court's implicit recognition of the perils brought about by contracting out. This is especially true when one considers that Master Iron's act of contracting out was not preceded with any kind of consultation with, or even notice to, MILU.

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72. Master Iron Labor Union v. National Labor Relations Commission, 219 SCRA 47 (1993).

73. *Id.* at 57.

It is also difficult to see how, contrary to the Court's decree in *Meralco*, the confluence of laws, regulations, and jurisprudence provides balance between management and labor. Indeed, jurisprudence has been consistent in stating that labor occupies an *inherently* weak position *vis-à-vis* management.[74] The Court captured the essence of this when it said that:

> It bears repeating that apart from the non-impairment clause, what is also well-settled, to the point of being trite, is the principle that when the conflicting interests of labor and capital are weighed on the scales of social justice, *the dominant influence of the latter* must be counter-balanced by the sympathy and compassion the law must accord the underprivileged worker.[75]

Thus, any attempt to correct this imbalance, provided that it is within established legal principles, should be welcomed instead of being shot down. Certainly, it is at best difficult to reconcile the principle—hence the Court's characterization of it as being almost "trite"[76]—that labor is at an inherently disadvantaged position in relation to management with the declaration in *Merlaco* that the applicable laws, rules, and jurisprudence on contracting out provide the needed balance between management and labor. After all, how can an inherent imbalance ever be perfectly rectified, especially by something as susceptible to change as a combination of laws, administrative regulations, and judicial decisions?

Furthermore, not only is there no prohibition in substantive law or jurisprudence on a prior consultation requirement, such is encouraged, if not in fact required, by both statutes and jurisprudence. Foremost among these is the provision in the Labor Code, which states:

> Any provision of law to the contrary notwithstanding, workers shall have the right, subject to such rules and regulations as the Secretary of Labor and Employment may promulgate, to participate in policy and decision-making processes of the establishment where they are employed insofar as said processes will directly affect their rights, benefits, and welfare.[77]

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74. Almira v. B.F. Goodrich Philippines, Inc., 58 SCRA 120 (1974); City Fair Corporation v. National Labor Relations Commission, 243 SCRA 572 (1995); Philippine Telegraph and Telephone Corporation v. National Labor Relations Commission, 183 SCRA 451 (1990).

75. Producers Bank of the Philippines v. National Labor Relations Commission, 298 SCRA 517 (1998).

76. *Id.* at 523.

77. LABOR CODE, art. 255 ¶ 2.

This has found jurisprudential expression in various cases,[78] all of which are consistent in reinforcing the State's policy in allowing meaningful participation of labor in decision-making processes that affect their rights. It is beyond cavil that contracting out may be, as it often is, prejudicial to the legitimate interests of workers of a company, as acknowledged by the Court in *Master Iron*. Hence, the *Meralco* ruling is in clear contravention of the settled principles pertaining to consultation between management and labor.

VI. PROPOSALS—ADJUSTING THE SCALES TIPPED BY *MERALCO*

What then is the solution, if any, to the judicial quagmire brought by the *Meralco* ruling? Certainly, the juridical concept of management prerogative is too deeply entrenched—and is actually ideal, particularly in light of the fast changing economic realities of our time—for it to be abrogated. On the other hand, the doctrine enunciated in *Meralco* tends to sanction unilateralism on the part of management. While there may not be anything inherently undesirable in allowing management a large degree of autonomy in running its business, *Meralco* renders the rights of workers to be consulted and to participate in decision-making process, insofar as their rights and welfare are concerned, illusory.

It is thus submitted that should an opportune case be decided in the future, the Court should abrogate its ruling in *Meralco* which struck down a mandatory consultation requirement with employees prior to contracting out. In other words, such a requirement should be permitted, if not mandated by means of a proper judicial ruling, if not an administrative fiat. It must be emphasized that what is proposed is not the acquisition of the union's and/or employee's *consent*-indeed, the final say, as stated by the Court in its resolution of MERALCO's Motion for Reconsideration, must still lie with management.[79] Rather, the emphasis of the proposal is solely on *prior consultation*. This in turn leads to the next question: Should all contracting out, without distinction as to the time and extent thereof, require prior consultation? An affirmative answer to this would doubtless result in an unwarranted constriction of management prerogative. One can imagine the inconvenience and corresponding loss of productivity and profit if every single act of contracting out required prior consultation, not to mention the fact that such a situation would allow unscrupulous and extremist labor organizations to lead businesses down the path to economic ruin. What then should be the standard for prior consultation?

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78. Trade Unions of the Philippines and Allied Services v. National Housing Corporation, 173 SCRA 33 (1989); Arizala v. Court of Appeals, 189 SCRA 584 (1990).

79. *See* Manila Electric Company v. Quisumbing, 326 SCRA 172, 184 (2000).

The Secretary of Labor's requirement in the *Meralco* case that any contracting out lasting longer than six months be subject to prior consultation with the union offers is an ideal middle ground. Greater than six months is a rational figure, since the Labor Code is clear that an employee who is allowed to work for a period exceeding six months is deemed a regular employee,[80] unless of course the latter falls under one of the exceptions to the general rule, as in the case, for example, of a project employee.[81] The requirement of prior consultation, if the contracting out will last exactly or less than six months, may tend to hamper the freedom of employers to introduce various cost-saving and efficiency enhancing devices. On the other hand, not requiring it in the case of longer periods of contracting out tends to unduly diminish the rights and interests of workers. Such a requirement, for example, could forestall, or at the very least minimize, one of the common practices of employers, namely enticing employees who in many cases are union officers or members into early retirement, then replacing them with contract employees—this practice was in fact sanctioned by the Court in the *Dole Philippines* case—since at least the employees will have the opportunity to negotiate and bargain with the employer on this matter, instead of having the contracting out rammed down their throats, so to speak.

In implementing such a requirement, there should be no distinction as to what aspects of the business or enterprise should be contracted out. All contracting arrangements that last longer than six months must be subject to prior consultation with the company's union and/or its employees. To allow for exemptions based on, say, the core business of the employer *vis-à-vis* its so-called peripheral areas of work will be to sanction a "creeping invasion" by management, with the very real possibility that one day regular employees/union members may awake to find their bargaining unit reduced to an insignificant minority within the employee unit, with the majority composed of contractual workers.

CONCLUSION

There can be no doubt that, particularly in the age of globalization where the words "permanent" and "job" are antonyms, contracting out is not only here to stay; it is actually a desirable response to the economic realities of our time. Hence, it is but fair, in line with the constitutional precepts on the right to labor, to maintain as part of management's prerogative the right to contract out. However, it is precisely because of such economic realities that,

80. LABOR CODE, art. 281.

81. *Id.*

as stated by the Supreme Court in several cases,[82] the law should be more felicitous to the plight of the workingman. As such, it is imperative that the *Meralco* doctrine be revisited, in order to ensure that management's prerogative, ideal as it may be, remain just a prerogative, and not metamorphose into management prejudice.

82. Salinas v. National Labor Relations Commission, 319 SCRA 54 (1999); International Travel Services v. Minister of Labor, 188 SCRA 456 (1990); Cadalin v. POEA Administrator, 238 SCRA 721 (1994).