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Precarious Employment in a Globalized World: Case of Non-Regular Employees in the Philippines[1]

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ABSTRACT

Mindful of the competitive global environment under which labor law operates, the core function of labor law to protect labor rights and job security is challenged in the face of post-Fordist and Lean Production models of manufacture. Regular employment is being eroded as companies take to hiring non-regular workers. Using the Philippine example, the paper examines the threat that precarious employment poses to the worker's security of tenure and self-organization in the era of globalization. The characteristics and attributes of non-regular employment, and a critique of law and jurisprudence that facilitates the flexibility and precarity in the labor market are discussed, followed by suggested areas of reform to strengthen workers' protection against abuse.

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Introduction

Security of tenure is a highly coveted right by workers. For most, it may even be the highest valued right as it results in the attainment of other rights – better wages and working conditions and the capacity to effectively participate in trade unionism. Sadly, in a globalized world, it has increasingly become illusive. Under globalization, precarious employment has been on the rise, threatening what was once certain and predictable work security for employees.

According to George Ritzer (2010), globalization is progressively characterized by a multidirectional flow of people, objects, places decisions, and information. It involves global interconnectedness in the economic, social, and political fields and the diminishing role of the State in its welfare function.

Seen in this light, globalization in the job market entails a rising mobility of labor. While people, cargo, and newspapers continue to exist, a wide range of technological developments in transportation, communication, the Internet, and the like have made it possible for workers to move across the globe more readily (Ritzer, 2010).

In its simplest economic form, globalization could be understood to mean the internationalization of the economy. One of its dimensions is the development of precarious forms of production and employment, such as "atypical work" or non-regular work, although globalization also has an impact on 'full-time core work', particularly through global restructuring. One aspect of restructuring is the emergence of transnational negotiations with multinational or transnational companies (TNCs) (da Costa & Rehfeldt, 2010).

Lest it be missed, globalization has intensified not only economic inequality, but gender inequality as well. Issues such as the increasing burden and invisibility of women in fisheries, women and children in globalized ecotourism, neo-liberal policies in agriculture and its impact on rural women, the feminization of labor migration, and the rise of informal and unprotected female labor (Taguiwalo, 2005) require special attention for these vulnerable

groups in society.

Given the rise of precarious employment under globalization, this paper will seek to examine precarious employment, *i. e.* unsecured employment focusing on the work arrangement involving non-regular employees. It will discuss how existing concepts are being used to redefine the goal of social justice to legitimize precarious employment. It will then proceed to give a general overview of non-regular and other similar work arrangements in the labor market and evaluate current regulations on fixed-term contracts. It will be argued, here, that that the current state of policy and regulation on non-regular employment leads to 'precarity' and insecurity for workers. Given this situation, the paper will identify possible areas of reforms to strengthen workers' protection against abuse, present employment opportunities, and yet meet the needs of business in order to survive in a globalized world.

Social Justice as a Societal Goal

It is generally agreed that social justice is the rationale behind Philippine labor law. Social justice is, in the words of Justice Jose P. Laurel, " the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated" (*Calalang v. Williams*, 1940). The eminent constitutionalist, Joaquin Bernas, has stated that it is principally the embodiment of the often quoted principle that those who have less in life should have more in law. Social justice therefore commands a legal bias in favor of those who are underprivileged (Bernas, 2009). To this, Cesario Azucena (2016), a noted labor expert, has added that more than just a juridical principle that prescribes equality of people before the law, social justice is a societal goal that means the attainment of a decent quality of life for the people through humane productive efforts. To underscore the importance of this social goal, Article II, Section 10, of 1987 Constitution mandates the State " to promote social justice in all phases of national development."

Unlike the previous Philippine constitutions, the 1987 Constitution seeks not only

economic social justice but also political social justice (Bernas, 2009). In particular, Article II, Section 18 declares that "[t]he State affirms labor as a "primary social economic force" and thus is mandated to protect the rights of workers and promote their welfare. And one route to achieving social justice is provided under Article XIII, Section 2, directing Congress to create economic opportunities based on freedom of initiative and self-reliance. The ideas of freedom of initiative and self-reliance are placed here to convey that these should not be allowed to impede the creation of a just social structure through regulation (Bernas, 2009). The affirmation of labor as the "primary social economic force" is a declaration of the primacy of human labor over capital, the primacy of human dignity over profit. As Commissioner Bishop Bacani expressed during the deliberations of the 1986 Constitutional Commission:

> "It is the assertion of the supremacy of human dignity over things. In the process of prohibition, labor is always a primary and efficient cost [*sic*], while capital remains a mere instrumental cost." (Bernas, 2009, p. 1237)

Labor protection is further elaborated in Article XIII, Section 3 of the 1987 Constitution, building on previous similar provisions of the 1935 and 1973 Constitutions. It emphasizes "full protection to labor, local and overseas, organized and unorganized," and promotion of "full employment and equality of employment opportunities for all" (1987 Const. art. XIII, §. 3, par. 1). The constitutional mandate to give full protection to labor finds resonance in Article 4 of the Labor Code of the Philippines (for brevity, Labor Code Renumbered [2015]), making it a State policy "to afford protection to labor, promote full employment, and ensure equal work opportunities regardless of sex, race, or creed and to regulate the relations between workers and employers."

The social justice and labor protection in the 1987 Constitution and in Constitutions past, gives impetus to the Philippines' human rights treaty obligation, particularly its obligation to protect one party against another in a situation of an unequal relationship. In the language

of human rights, labor is regarded as the weaker, less dominant party vis-à-vis the employer and management, who are considered the more dominant, assertive party. For this reason, labor is afforded special protection under the Philippine Constitution (1987 Const., art. XIII, § 3). It presupposes that the labor force is weak. The law therefore serves to equalize the unequal (*Fuji Television Network, Inc. v. Espiritu,* 2014). Necessarily, Philippine labor laws bend over backward in favor of workers.

Legitimization of Precarious Employment

Coffey and Thornley (2010), writing on precarious employment, discuss two major arguments — the "Post-Fordist model", with the classic example of the Ford Model T motor car manufacture, and the Lean Production model, developed for Japanese car makers, led by Toyota — that have been put forward to legitimize it, thereby putting a strain on the core function of labor law, which is to protect labor rights and welfare.

Agata Ludera-Ruszel (2016) explains that for adherents of the post-Fordist model, the core function of labor law in providing protection to employees is redefined and reinterpreted along the line of "mass production" vis-à-vis "flexible production" or "specialization". She advances the view that the establishment of labor law in the nineteenth century was related to the struggle for better working conditions at a time of intensification of industrial production. Counteracting the imbalance in bargaining power of employees, thus, determines the paradigm of labor law. She posits that this core function of labor law was rooted in the Fordist model, which resulted in a workforce that was homogenous, mostly blue-collar workers employed with full-time indefinite-term employment contracts.

The post-Fordist model paved the way for the legitimization of precarious employment in the age of globalization, ushering in the new thinking that mass production had shifted to specialization. Flexibility — defined as an ability to adjust to dynamically changing reality — became increasingly important for both the employer and the employee, resulting in greater popularity of the atypical forms of employment. Even with the changes in

work arrangements, however, the aim of labor law has not changed, which is still the protection of the employee. Notwithstanding this, protection of the employee's interest in labor law provisions, is no longer homogeneous (solid) as the employment that used to be considered typical, now consists of various forms of work. The diversity of interests, represented by the workforce within particular groups, now has to be taken into account by the law, as part of the struggle to find the right balance with the 'economic' interest of the employer (Ludera-Ruszel, 2016).

The other legitimizing argument for the rise of precarious employment is "lean production", also known as the Toyota Production System. According to a study, *lean production* seems to be a reasonably consistent concept comprising 'just in time' (JIT) practices, resource reduction, improvement strategies, defects control, standardization, and scientific management techniques (Pettersen, 2009). A common opinion is that the purpose of lean production is waste elimination, although this is not supported by the review of literature on the subject (Pettersen, 2009).

To be sure, the post-Fordist model and the lean production concepts have been the subject of severe scrutiny with regard to their role in the ideological legitimization of production and employment regimes. In the case of the post-Fordist model, it associates the very real fact that large corporations in the 1970s and 1980s sought to avoid unions and to lower wage costs via processes of outsourcing and competitive subcontracting (Coffey & Thornley, 2010). As to the lean production movement of the 1990s, it has served as a legitimizing force of growing range and application, licensing existing corporate trajectories. In this light, one major critique of the lean production concept is that it is generally weak concerning the employees' perspective and has a strong instrumental and managerial perspective that discusses employees in terms of components in the production system (Pettersen, 2009).

Whatever the validity of the arguments advanced under the post-Fordist model or the

lean production movement to legitimize precarious work, the fact remains that with globalization, the rise of precarious or unsecured employment undermines the core function of labor law. Protecting labor against the imbalance of bargaining power between the employer and employees remains important and relevant not only for regular employees but more so for the non-regular employees.

Indefinite Security: regular employment as the rule

Without doubt, most, if not all, workers desire to gain regular employment, and rightly so, as the 1987 Constitution (1987 Const. art. XIII, §. 3, par. 2) and Article 294 of the Labor Code Renumbered (2015) provide security of tenure to regular employees in its fullest sense, with the appurtenant rights and benefits that are not generally provided if one were to be a non-regular employee. Thus, regular employees enjoy preferred status in the employment relationship. The first paragraph of Article 295 of the Labor Code Renumbered (2015) provides that contracts of regular employment of an indefinite duration are the general form of employment relationships and the non-regular relationship is the exception.

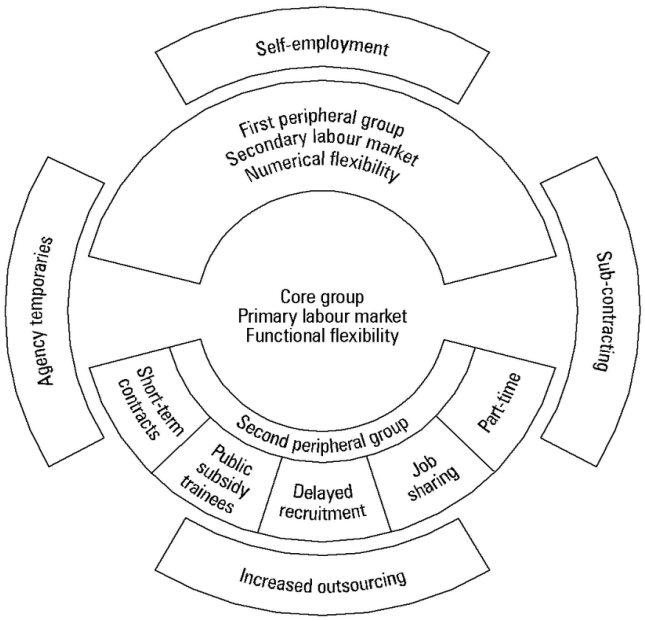
Flexible Workforce: non-regular employment

Many industries now adopt strategies and mechanisms for doing business — such as downsizing their operations and utilizing a flexible workforce — to reduce the cost of providing permanent employment under a competitive global environment.

A flexible workforce entails forms of employment that invariably come under the rubric "non-standard employment" (NSE) or "non-regular" employment (NRE). Broadly defined, it is work that falls outside the scope of a standard employment relationship — understood as being work that is full-time indefinite employment. In contrast to regular employment, non-standard or non-regular employment is temporary, whereby workers are engaged for a specific period. It includes project or task-based contracts, as well as seasonal, casual, or fixed-term work (International Labor Organization, 2015). Because of its temporariness, it is a form of subordinate employment relationship.

A flexible workforce takes off from the concept of "the flexible firm," originated by J. Atkinson (1984). He averred that there is a growing trend for firms to seek various forms of structural and operational flexibility in three areas, namely: 1) functional flexibility, 2) numerical flexibility; and 3) financial flexibility. As shown in Figure I, the flexible firm model has a core workforce enjoying employment security, while others such as part-timers, temporary workers, and trainees experience numerical flexibility and "peripheralization". For economists, searching for flexibility is above all seeking ways to avoid fixed costs and adjusting employment to the variability of production (Appay, 2010).

Figure I



Source: Atkinson (1984), The Flexible Firm

On this score, the Labor Code lends itself easily to the use of a flexible workforce. Under Article 295 of the Labor Code Renumbered (2015), non-regular employees are the project employee and the seasonal employee. To qualify as a project employee two requisites must be present in a contract of employment: (1) the employee is assigned to carry out a specific project or undertaking; and (2) the duration and scope of such project are specified or made known to the employee at the time of the engagement (*Gadia v. Sykes Asia*, 2015).

A seasonal employee works in much the same way as the project employee, albeit the work or service is seasonal in nature (*Universal Robina Sugar Milling Corp. v. Acibo,* 2014). Both have a definite termination — the project terminates at a pre-determined period, while the seasonal work terminates at the end of the season (*Universal Robina v. Acibo, et al.*, 2014).

The last in the classification, are casual employees. In a study made by the International Labor Organization (ILO), casual work is defined as the engagement of workers on an occasional and intermittent basis, for a specific number of hours, days, or weeks, in return for a wage dictated by the terms of a daily or periodic work agreement. Under Article 295 of the Labor Code Renumbered (2015) casual employees are "neither regular, nor project, nor seasonal employees" and their work is not merely incidental to the business. To be exempted from regular employment, " the services must not merely be irregular, temporary, or intermittent, but also must not be in connection with the business or occupation of the employer" (Alcantara, 2011 as cited in *Hacienda Cataywa v. Lorezo*, 2015).

Added to the foregoing classification of employees under the Labor Code (2015), jurisprudence has recognized another kind of non-regular employee, broadly referred to as a "term employee" or fixed period employee. This type of employee finds legal basis in Article 1306 of the Philippine Civil Code (1949), which provides in part: "The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy."

Like the non-regular employees under the Labor Code (2015), term or fixed period employees are similarly employed for a stipulated period or a day certain. In the landmark case of *Brent School v. Zamora (*1990*)*, the Court ruled in favor of the validity and propriety of contracts and obligations with a fixed or definite period so long as:

> " the fixed period of employment was agreed upon knowingly and voluntarily by the parties, without any force, duress, or improper pressure being brought to bear upon the employee and absent any

> other circumstances vitiating his consent, or where it satisfactorily appeared that the employer and employee dealt with each other on more or less equal terms with no moral dominance whatever being exercised by the former over the latter." (p. 716)

The Table summarizes Non-Regular Employees under the Labor Code (2015) and the Civil Code (1949), with their period of employment and legal basis.

Table of Non-Regular Employees

Types of Non-Regular Employees	**Period/Term**	**Legal Basis**
Contractual/ Project-based	Specific duration or date/phase of work	Article 295*; D.O. 19-1993
Seasonal	End of the season	Article 295*
Casual	Existence of activity	Article 295*
Term or Fixed period employment	Fixed period or a day certain	Article 1306, Civil Code of the Philippines
* Labor Code Renumbered (2015)		

By the very nature of a temporary arrangement, the non- regular employment is deemed to automatically terminate once it has reached the " end of the contract" (pejoratively referred to as *"endo"*), unless there is contract renewal or rehiring of the employee. It is the bane of every non-regular employee during the period following *"endo"* when the uncertainty of being re-hired hovers as a sword of Damocles threatening the workers' security of tenure.

To be sure, non-regular employees also enjoy security of tenure although holding a subordinate position *vis-à-vis* regular employees; they remain secure in their employment at least during the period of their contract of employment (*Labajo and San Andres High School of Maramag, Inc. v. Alejandro,* 1988; *A.M. Oreta & Co., v. NLRC*, 1989).

Although limited security of tenure assures protection against arbitrary dismissal, it provides little comfort to non-regular employees in ensuring better working conditions and benefits, or meaningful participation in trade unionism. A graver concern to the non-regular employee is the specter of unemployment, loss of income, benefits, and social protection at the end of the contract. The insecurity looms even larger as workers advance in years. In the interval between change in employment (or long-term unemployment), the collective loss of skills and experience of temporary employees, also takes a toll on the development of the country. Additionally, the long-term unemployment leads to an "informalization" of workers, leaving them without social protection.

Piercing the Efficacy of Law and Jurisprudence: gaps and leaky provisions

In light of the changes in work arrangements and consequential employment relations, the role of labor law in providing basic protection for workers has now become a serious concern for policy-makers and all the stakeholders. As a general proposition, there is the need to converge the interests of labor and capital. Indeed, the State needs to guarantee the right of enterprise to returns on investment and to expansion and growth. Balancing the employer's need for flexibility (or less rigidity) and the workers' need for protection is a tough challenge. In harmonizing the interests of both parties, however, the State must ensure that rights of workers are not unduly sacrificed in the name of profit for employers. Based on initial study, it can be said that there are gaps and permeable provisions in the law and in jurisprudence that are open to abuse. This reinforces "precarization" brought about by globalization. The following observations are noted:

1. *Fluid notion of what is "necessary or desirable in the usual business or trade of the employer"*

The threat of losing one's regular status (because of flexibility) brings with it precarity that is not only psychological but economic insecurity as well. Jurisprudence is replete with long-drawn-out court battles seeking it, without any assurance of success. Whichever way the employee goes, the quest for regularization somehow leads to employment insecurity facilitated by a fluid notion of what is " necessary or desirable in the usual business or trade of employer."

(a) Necessary but not desirable

Jurisprudence holds that under Article 295 of the Labor Code Renumbered (2015), there are two types of regular employment, differentiated on the basis of the nature of work and years of service:

(1) *Nature of work* or activity in relation to the particular business considering all circumstances, and
(2) *Years of service* in the performance of the job and to its continued existence, such as the repeated renewal of contract or re-hiring (*Basan, et al. v. Coca- Cola Bottlers Philippines*, 2015; *Vicmar Development Corporation v. Elarcosa*, et al., 2015; *De Leon v. NLRC*, 1989).

In the first type of regular employment (nature of work) an employee is engaged in work considered necessary or desirable in the usual course of business or trade. The regularization is not contingent on the repeated renewal of the contract or the continued existence of the activity. Once the employee has successfully hurdled the probationary period, he or she becomes a regular employee.

In *UST v. Samahang Manggagawa ng UST (*2017*)*, the Court stated that the primary standard for determining regular employment is the reasonable connection between the

particular activity performed by the employee in relation to the usual trade or business of the employer. The test is whether the activity is commonly necessary or desirable in the usual business or trade of the employer. The connection can be determined by considering the nature of the work performed and its relation to the scheme of the particular business or trade in its entirety.

In the case of *Fuji Telephone Network, Inc. v. Espiritu (*2014*)*, however, the Court stated that there may be a situation where an employee's work is *necessary* but is *not* always *desirable* in the usual course of business of the employer. In such a situation, there is no regular employment. In so stating, the Court cited a case involving a furnace repairer in the glass manufacturing plant of San Miguel Corporation. The glass manufacturing plant was an integral component of the packaging and manufacturing business of the company. Although repair of the furnace was necessary at the manufacturing glass plant, it was a function not regularly performed, being undertaken only when the furnace required emergency repair. Moreover, the company was in the business of manufacturing alcoholic drinks, and not in the business of manufacturing glass (*San Miguel Corp. v. NLRC*, 1989).

In the second type of regular employment (years of service), the worker is hired only as a non-regular employee. He or she is considered a regular employee only after having rendered at least a year of service through repeated rehiring by the employer or renewal of contract. The repeated rehiring or renewal of contract is, therefore, a condition *sine qua non* for the regularization of the employee. It implies that, because of the years of service, the activity is, after all, shown to be necessary or desirable for the usual business or trade of the employer. In *D.M. Consunji v. Jamin (*2012*)* for instance, the carpenter in a construction firm was declared a regular employee, not a project employee, by sheer length of service because of repeated hiring. He was hired for the same tasks, which were indisputably necessary and desirable for the business or trade of the company. Stated another way, the tasks were "indispensable" in relation to the business operation. The question of what is "necessary or desirable," however, is equally unsettling in the situation of non-regular employees. The

insecurity brought about by flexibility in employment, may easily be understood in the context of a bilateral relationship where the employer directly relates to the employee.

(b) Necessary or desirable but separate and distinct and identifiable

In *GMA Network Inc. v. Pabriga (*2013*),* which involved television technicians the Court explained that the activities of project employees *may* or *may not* be necessary or desirable in the usual business or trade of the employer. In so explaining, it cited *ALU-TUCP v. NLRC (*1994*)*, and reiterated in *Leyte Geothermal Power Progressive Employees Union-ALU-TUCP v. PNOC-Energy Development Corporation (*2011*)*, where the Court noted that a "project" could refer to one or the other of at least two distinguishable types of activity namely:

(1) a particular job or undertaking that is *within the regular or usual business* of the employer company, but which is distinct and separate, and identifiable as such, from the other undertakings of the company, and begins and ends at determined or determinable times; or
(2) a particular job or undertaking that is not within the regular business of the corporation, and also begins and ends at determined or determinable times (*E. Ganzon, Inc. v. Ando, Jr.*, 2017).

In the first type of job the phrase "within the regular or usual business" suggests that the job or undertaking means one that is " necessary or desirable" or at the very least has a "reasonable connection" to the operation of the business. Yet, while such job or undertaking is within the regular business of the employer, jurisprudence has delimited it by the phrase "distinct and separate, and identifiable" as such. In the *GMA Network* case (2013), the Court cited a typical example of a particular job or project of a construction company. Such a company ordinarily carries out two or more distinct, identifiable construction projects: e.g., a twenty-five-storey hotel in Makati; a residential condominium building in Baguio City; and a domestic air terminal in Iloilo City. Employees who are hired to carry out any one of these separate projects — the scope and duration of which have been determined and made known

to the workers at the time of employment — are properly treated as "project employees," and their services may be lawfully terminated upon completion of the project. Given this, in *Bajaro v. Metro Stonerich, Corp. (*2018*)*, the Court recognized the right of the employer to hire a construction worker whose work is coterminous with the specific project. The Court also recognized that although an employee' s performance of work is *necessary and desirable* to the construction business, such performance, and repeated rehiring, do *not bestow* upon the worker *regular employment* status (*Basan, et al. v. Coca-Cola Bottlers Philippines*, 2015; *Vicmar Development Corporation v. Elarcosa*, et al., 2015; *De Leon v. NLRC*, 1989).

This type of project employment is unsettling as it erodes the definition of who is a regular employee under Article 295 of the Labor Code Renumbered (2015). It leads to an unjust situation for employees since it lends itself easily to abuse by employers who would raise the pretext that while the job or undertaking is "necessary or desirable" or "within the regular or usual business of the employer company," it is nevertheless "distinct and separate, and identifiable as such, from the other undertakings of the company." In such a situation of precarity — where there is threat of unemployment and diminishing employability due to age and other status — the employee is actually left with no choice but to agree to project employment. For this consideration, such employment agreements, if permitted, should be strictly restricted to specific types of work or business, and be identified and approved solely by a national tripartite body.

It is notable, however, that a project employee may be a part of a work pool from which an employer may draw its workers for its various projects. In such case, a project employee or member of a work pool may acquire the status of a regular employee provided the following concur:

(1) there is a continuous rehiring of project employees even after cessation of a project; and
(2) the tasks performed by the alleged project employee are vital, necessary,

and indispensable to the usual business or trade of the employer (*Maraguinot v. NLRC, et al.*, 1998; *Integrated Contractor and Plumbing Works, Inc. v. Court of Appeals*, 2005).

In a work pool, the workers do not receive salaries and are free to seek other employment during temporary breaks in the business, provided that the worker is available when called to report for a project. Such arrangement is beneficial to both the employer and employee for it prevents the unjust situation of coddling labor at the expense of capital and at the same time enables the workers to attain the status of regular employees (*Integrated Contractor and Plumbing Works, Inc. v. Court of Appeals*, 2005).

(c) Regular work if performed for same phase of work

The situation of seasonal employees is basically similar to that of a project employee. Farm workers generally fall under the definition of seasonal employees (*Gapayao v. Fulo,* 2013). Where the employees are called to work from time to time and are only temporarily laid off during the off-season, the law does not consider them separated from the service during the off-season period. It simply considers the workers on leave until re-employment (*Universal Robina Sugar Milling Corp. v. Acibo, et al.*, 2014). Hence, much like the project employee, the seasonal worker may also gain regular status by the nature of the work, or through length of service brought about by repeated renewal of contract or rehiring of services for the same phase of work. On this score, they are considered regular seasonal employees.

Still, even if the seasonal workers are hired from year to year, they are not considered regular seasonal employees if:

(1) the employees performed different phases of work in a given year (*Mercado v. NLRC*, 1991; *Bino v. Cuenca*, 2005);
(2) during the period, they were free to work for other farm owners, and in fact they did (*Bino v. Cuenca*, 2005; *Mercado v. NLRC*, 1991 as cited in *Abasalo*

v. NLRC, 2000 and *Philippine Tobacco Flue-Curing & Redrying Corp. v. NLRC*, 1998);

(3) if they only worked for the duration of one season (*Hacienda Fatima v. National Federation*, 2003, as cited in *Hacienda Cataywa v. Lorezo*, 2015).

It is reasonable not to grant regular status to a seasonal worker who has worked for only one season. Yet, where the worker has been repeatedly hired from time to time, albeit in *different* phases of work, would this not fall within the ambit of regular work in the context of the entirety of the business operation? It, then, returns to the question of whether or not the work is "necessary or desirable in the usual business or trade". This restrictive requisite has rendered it more difficult than is necessary for seasonal workers to obtain regular status. Again it lends itself easily to abuse because all that the employer needs to deny the employee regular status, is to re-hire the worker in different phases of the work, even if all the work performed in these phases is necessary and desirable to the usual business of the employer in its entirety. As with project employment, such agreements if allowed, should be limited only to specific types of work or industry, and identified and approved by a national tripartite body.

(d) Regular, subject to the continued existence of the activity for which employee is hired

Casual employees are no less disadvantaged. In spite of the general provision pertaining to casual employment, Article 295 of the Labor Code Renumbered (2015) explicitly directs that the casual employee may acquire regular status, provided the three requisites are present:

(1) the employee has rendered at least one year of service, whether continuous or broken;

(2) regular status is only with respect to the activity in which he or she is employed, and

(3) employment continues while such activity exists.

Under ordinary circumstances, the continuance of regular employment does not depend on the existence of the activity being performed by an employee. A regular employee who enjoys indefinite security of tenure may be reassigned or re-deployed to another position or workplace in the company. The employee is protected against arbitrary termination; for instance, in case of authorized causes for termination (such as redundancy or retrenchment) the necessary criteria have to be observed. It is suggested, here, that in the same manner, *regular casuals* could benefit from the same treatment as any other regular employee instead of their continued regular employment hinging on the existence of the activity to which they were hired.

2. No way out of abuse in absence of requirements for hiring non-regular employees

In its current state, law and jurisprudence do not place a maximum limit on the duration of a non-regular contract. Such contract of employment is allowed to be renewed any number of times without the hired worker being considered a regular employee, provided it can be shown that it is not a circumvention of the worker's security of tenure. Hence, employees' contracts have been repeatedly renewed without the benefit of regular employment. Only when an employee musters enough courage to challenge the contract and is willing to absorb the cost of legal action is there a final determination of his or her status. However, in a number of instances, as soon as the employee files for regularization, he or she gets terminated (See *Chavez v. NLRC*, 2005; *Begino v. ABS-CBN Corp.,* 2015). Rather than face the prospect of unemployment, it would seem the better part of valor to just bear the limited security of tenure.

An alternative may be considered. In the European Directive 1999, for instance, Member States may introduce certain measures to prevent abuse of successive fixed-term employment contracts or relationships. It requires one or more of the following to be used: a) objective reasons justifying the renewal of such contracts or relationships; b) a maximum

total duration of successive fixed-term employment contracts or arrangements; and c) the number of renewals of such contracts and relationships. In addition, the number of hired non-regulars vis-à-vis the total number of employees in an establishment must be limited. While these options may not guarantee the curbing of abuse, they are worth studying.

The other alternative is an outright prohibition of non-regular or definite period employment, save for a very few exceptions, namely, overseas employees and relievers to substitute for the temporary absence of regular employees. To curtail possible cases of relievers, however, the engagement should not exceed six (6) months, whether continuous or broken.

3. Anachronism of Brent school v. Zamora

The *Brent School* case (1990) provides yet another avenue for employers to resort to the flexible workforce, through use of the fixed period employment. This leading case involved the validity of the fixed-term contract of 18 July 1971, between an athletic director and the school. In 1990, the Court upheld the validity of the fixed period employment, anchoring its justification on the *General Provisions on Contracts*, in particular Article 1306 of the Philippine Civil Code (1949). The Court reasoned that

> "[u]nder the Civil Code, therefore, and as a general proposition, fixed-term employment contracts are not limited, as they are under the present Labor Code, to those by nature seasonal or for specific projects with pre-determined dates of completion; they also include those to which the parties by free choice have assigned a specific date of termination." (p. 714)

The Court, thus, laid down the guidelines for stipulations in employment contracts providing for term or fixed period employment are valid:

(1) when agreed upon knowingly and voluntarily by the parties without force, duress or improper pressure, being brought to bear upon the employee and absent any other circumstances vitiating his consent, or

(2) where it satisfactorily appears that the employer and employee dealt with each other on more or less equal terms with no moral dominance whatever being exercised by the former over the latter**. (**p**.** 71**)**

In relying on Article 1306 of the Philippine Civil Code (1949), the Court declared that "[no] prohibition against term — or fixed period employment — is contained in any of its articles or is otherwise deducible therefrom" (p. 708). What the Court, however, failed to consider is that, under the section on *Contract of Labor*, Article 1700 of the Philippine Civil Code (1949) states that labor contracts "are subject to the special law" on matters such as wages, working conditions, and hours of work.

The *Brent School* case allows fixed period employment even in work that is considered "necessary or desirable in the usual business or trade of the employer." This again erodes the definition of what is deemed regular employment *i.e.* "where the employee has been employed to perform activities that are necessary or desirable in the usual business or trade of the employer" (p. 710). Be that as it may, the affirmation of the *Brent School* case should have been abandoned with the promulgation of the Labor Code in 1974. But long after the effectivity of the Labor Code, time and again, the *Brent School* ruling has been affirmed in subsequent Court decisions. (*Pangilinan et al. v. General Milling Corporation,* 2004; *OKS Designtech, Inc. v. Caccam*, 2015; *Fuji Television Network, Inc. v Espiritu*. 2014). Here, again, not only is there employment insecurity, but also the question of inequality of bargaining between the parties, for how can there be a dealing "with each other on more or less equal terms with no moral dominance" when clearly, the employer is in a dominant economic position?

This clear inequality of position was reiterated in the *Fuji Television Network* case **(**2014**)** when the Court, speaking through Justice Leonen, said**:**

> "In contracts of employment, the employer and the employee are not on equal footing. Thus, it is subject to regulatory review by the labor tribunals and courts of law. The law serves to equalize the unequal. The labor force is a special class that is constitutionally protected because of the inequality between capital and labor. This pre-supposes that the labor force is weak. (p. 78)
>
> xxx
>
> The level of protection to labor must be determined on the basis of the nature of the work, qualifications of the employee, and other relevant circumstances. (p. 79)
>
> xxx
>
> For example, a prospective employee with a bachelor's degree cannot be said to be on equal footing with a grocery bagger with a high school diploma. Employees who qualify for jobs requiring special qualifications such as "[having] a Master's degree" or "[having] passed the licensure exam" are different from employees who qualify for jobs that require "[being a] high school graduate; with pleasing personality." In these situations, it is clear that those with special qualifications can bargain with the employer on equal footing. Thus, the level of protection afforded to these employees should be different." (p. 79)

While the *Fuji* case has delimited the applicability of the *Brent* guidelines to jobs requiring so-called "special qualifications", these merely reduce the incidence of abuse. The reality is that there could be no real equality in an employer-employee relationship. This

cannot be truer than in a condition of high unemployment, or where there is loss of employability as workers advance in age.

4. Shifting notion of "necessary or desirable in the usual business or trade" as facilitating contracting and subcontracting

Beatrice Appay (2010) postulates that precarity in employment is intrinsically linked to the development of flexibility. *Flexibility* refers to the management strategies of transferring risks to workers, while *precarity* refers to the resulting situation for workers. It "entails insecurity for workers, uncertainty, expropriation of time, a hindrance to accumulating wealth, and an obstacle to valorizing other forms of capital (cultural, social)." (Appay, 2010, p. 27)

The concept of precarization has gained relevance in understanding the social consequences of flexibility in employment conditions. It has come to mean "increased job insecurity, unemployment, and jeopardized social protection" (Appay, 2010, p. 23). Among the many dimensions contributing to precarity is the "divide and rule" syndrome. "Externalize and outsource" has become the *mantra* of leading employers who use precarization to impose their law as exemplified in the model of the 'flexible firm' adverted to earlier. It entails the use of a stable core with a periphery of casual workers (Appay, 2010). In other words, employers use both regular and non-regular employees to run their business.

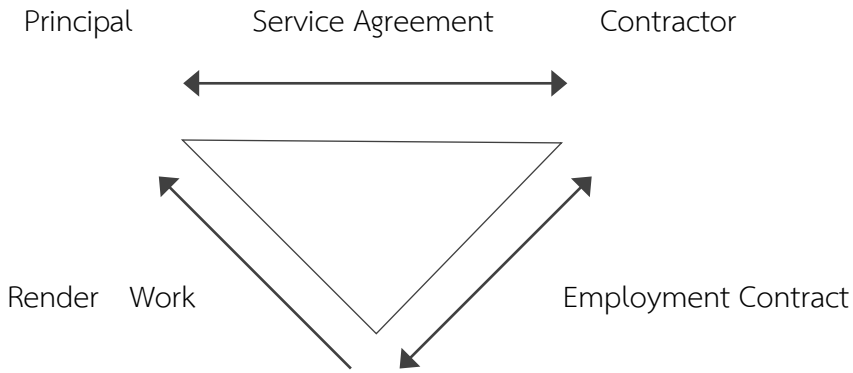
Usually, the employer relates with the employees in a bilateral relationship, each with concomitant rights, duties, and liabilities. However, non-regular employment is now being utilized not only in the traditional bilateral relationship, but increasingly, in a trilateral (sometimes even in a quadrilateral) arrangement between the employee, the subcontractor, and the main contractor (Appay, 2010). Under existing Philippine law and regulations, such arrangement is referred to as the "trilateral relationship."

In a trilateral relationship (Figure II), the principal — whether an employer or not — farms out a job to a contractor under a Service Agreement (SA). (Department Order No. 174 - 17 § 3(i), 2017). In turn, the contractor hires employees under a contract of employment (COE)

to perform and complete the job farmed out by the principal pursuant to such Service Agreement (Department Order No. 174 -17 § 3(e), 2017).

Figure II

Trilateral Relationship



In a bilateral relationship, what is " necessary and desirable in the usual business or trade" is often relevant in determining whether or not an employee is on a regular or non-regular track of employment. In a trilateral work relationship, the phrase " necessary or desirable" becomes all the more relevant and important to what may be validly outsourced. For instance, in the car-making industry, the overall operation includes the product design, manufacturing process, and quality control. More particularly, in the manufacturing process, the assembly line consists of the chassis, body, paint, interior assembly, and mate (stage of production where the chassis assembly and the body shell meet) ("How Products Are Made," n.d.). In such a process, may the product design section or interior assembly be outsourced? Should not the product design or the interior assembly be considered an integral part of the car manufacturing operation? Certainly, these particular activities are vital, necessary, and indispensable to the usual business or trade of the employer, or have reasonable connection in relation to the usual business or trade of the employer (*Vicmar Development Corporation v. Elarcosa*, 2015; *Maraguinot v. NLRC*, 1998).

As it is, the lack of limitations on what may be validly outsourced has facilitated and legitimized the proliferation of the trilateral work relationship. Thus, outsourcing of an entire section or division of a business operation is being resorted to (e.g. in manufacturing), and is taking place with greater ease. This results in an increasing number of establishments engaging contractors and subcontractors. It is noteworthy, however, that since mid- 2016, the Department of Labor and Employment (DOLE) has suspended the registration of new applicants as contractors or subcontractors, (Department Order No. 162-15, 2016), thereby curtailing the incidence of contractualization.

5. Invisibility of the "sub-contract" worker

Work relations become even more complex with the utilization of quadrangular relationships, characterized by several layers of subcontracting workers performing on the same premises (Appay, 2010). In trying to understand these layers of subcontracting, an analysis of precarization uses the "labile model". This model focuses on flexibility not only inside the firms, but also among them, characterized by the development of a small core and an extended periphery through the development of "cascading subcontracting." (Appay, 2010) With the new organization of the workforce, precarization means the development of unsecured employment within the core as well as the subcontractors' workforce. This cascading subcontracting work arrangement facilitates the exploitation and abuse of subcontracted workers.

To be sure, under the existing regulations that govern contracting and subcontracting arrangements in the Philippines, there is (1) a prohibition against non-permissible forms of contracting and subcontracting, (2) solidary liability of the principal in the event of violation of any provision of the Labor Code (2015), including the non-payment of wages, and (3) entitlement of security of tenure and all the rights and privileges under the Labor Code (Department Order No 174-17 § 1, 9-10, 2017). However, all these measures are not enough for security of employment for, at the end of the day security of tenure is only for a limited

period since it is tied to the continued existence or renewal of a Service Agreement, or to re-employment under a new Service Agreement. (Department Order No 174-17 § 13, 2017). With limited security of tenure, the recognition and entitlement of all other rights and privileges, including the right to self-organization becomes ineffectual. The instability of such employment arrangement leaves the workforce powerless to bargain for better benefits and working conditions.

The question, then, arises: should subcontracting be allowed at all? For instance, where paper Company A subcontracts its distribution section to company B, and Company B subcontracts part of the services to Company C, is Company A liable for the unpaid wages and benefits of Company C? In such hypothetical case, it is advanced that Company A is solidarily liable with the subcontractor in case of non-payment of wages and benefits. Still, some posit the counter-argument that Company A cannot be held solidarily liable because there is no privity of contract between Companies A and C.

The argument of "no privity of contract", militates against the protective provisions of the Labor Code (2015), particularly Article 106 which clearly provides that

> "in the event that the contractor or subcontractor fails to pay the wages of his employees xxx, 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."

Under Article 107, an indirect employer is defined as " any person, partnership, association or corporation, which, not being an employer, contracts with an independent contractor for the performance of any work, task job, or project."

The import of Article 109 of the Labor Code Renumbered (2015) is clear in that:

> "xxx every employer or indirect employer shall be held responsible with

> this contractor or subcontractor for any violations of any provisions of this Code". For purposes of determining the extent of their civil liability under this Chapter, they shall be considered as direct employers."

Despite such protective provisions the Labor Code proves inadequate to counter the abuses brought about by contracting and subcontracting employment.

As with project and seasonal employment, job-contracting arrangements should be strictly regulated. Should it be allowed at all, it must be the exception, and be so restrictive as to limit it solely to specific types of business, as determined and approved by a tripartite body. As for subcontracting, it should be totally prohibited to remove the subcontracted worker from the pale of unprotected labor. In any case, the determination to restrict job-contracting or the prohibition of subcontracting must not be left to the sole discretion of the Secretary of Labor and Employment (SOLE).

6. *No outright prohibition on labor-only contracting under the law*

Labor-only contracting is a deleterious practice that needs to be prohibited by law. Article 106 of the Labor Code Renumbered (2015), on the contractor or subcontractor, does not categorically prohibit labor-only contracting. The power to prohibit or restrict the contracting out of labor rests solely with the SOLE. Pursuant to such power, the SOLE issued D.O. No. 174-17, reiterating the prohibition of labor-only contracting under earlier department orders. D.O. No. 174-17 simply extended the list of illicit forms of work arrangement, such as contracting out of a job or piece of work through in-house cooperatives merely supplying workers to the principal. Yet another illicit practice is the repeated hiring by the contractor/subcontractor of employees under an employment contract of short duration. While the SOLE has reiterated in the recent department order the prohibition against labor-only contracting, the delegation of such power to the SOLE opens up the possibility of undue pressure and influence from powerful blocks that would compromise the labor administrative function of DOLE. It opens the floodgates to corrupt practices. A way forward would be to

give the power and authority to a tripartite body (such as the National Tripartite Industrial Peace Council) thereby strengthening the principle of tripartism and ensuring the participation of workers in such a body.

Strengthening institutional monitoring, inspection, and enforcement mechanism

Policy changes and law reform will bring about favorable change only if there is effective monitoring, inspection, and an enforcement mechanism in place. Labor administrations — in this case DOLE — and labor inspectors have the opportunity to resolve the laborious questions of atypical work, with the special aim of enhancing the protection of all vulnerable workers. Regardless of the multiple aspects of globalization, labor administration is expected to vigorously engage in providing society with the best standards for labor market governance through the enforcement of labor regulation (Bignami, Casale & Fasani, 2013). One such engagement could be determined with relentless exercise of the SOLE's visitorial and enforcement power under Article 128 of the Labor Code Renumbered (2015). The power is broad enough to cover any fact, condition, or matter related to the enforcement not only of the Labor Code but any labor law. It is also unlimited in the amount of monetary liability involved (Azucena, 2016). However, the administration and enforcement responsibility of DOLE suffers from a shortage of labor inspectors tasked with inspecting 937,554 small, medium, and big business establishments across the country.

To address the shortage of labor inspectors, DOLE could look to strengthening its network with labor organizations and labor unions at the local and national level. A system of registration and accreditation of labor organizations as well as professional and non-governmental organizations could be adopted towards this end (Administrative Order No. 164-17, 2017). A move of the SOLE to deputize a complement of 126 inspectors drawn from labor organizations, employer representatives, and professional groups to participate in the inspection of enterprises for compliance with labor standards was a step in the right direction (Administrative Order No. 36-18, 2018).

The above observations are by no means exhaustive. Neither are they without flaws. Still, they serve as reflection in the quest for an equitable solution to the twin problems of 'flexiblization' and contractualization in the work environment, even in the public sector. In this respect, the government has no moral high ground to demand compliance with labor laws from the private sector if it cannot address its own problem of contractualization.

Reinforcing the collective agency

With the 'flexible firm' as a major feature of globalization, the challenge is to broaden labor's organizing to include both the formal and informal sectors, using creative strategies to help organize workers in small to medium enterprises, as well as those of subcontractors. The overriding objective would be to address the representational and protective needs of non-standard or non-regular workers.

Labor organizations could seek a bigger role in the monitoring, inspection, and enforcement functions within the plant or at enterprise level. They could optimize possible opportunities under the strengthened tripartite mechanism at the local, regional, and national levels. Moreover, it is essential that the trade unions continue to engage in active policy and legislative advocacy in order to attain necessary labor legislation. In such endeavor it is requisite that trade unions unify their ranks.

Contractualization under ASEAN Integration

On a final note, a passing look at labor contractualization within the ASEAN is in order. Challenges concerning labor migration and job creation require major consideration.

Michael G. Plummer (2009) argues a strong case for greater liberalization of skilled labor flow, which is one of the goals in the ASEAN Economic Community (AEC) Blueprint. He advances the view, however, that any analysis of the economics of skilled labor flows would have to consider the potentially negative consequences of a "brain drain." (Plummer, 2009, p. 69) Although the goal of the AEC Blueprint includes only the flow of skilled labor, it is

inevitable to confront one emerging problem of integration — the rapid increase in labor mobility of migrant workers due to a combination of economic, demographic, and political forces particularly in labor-sending countries like the Philippines (Firdausy, 2005). However, Firdausy notes that temporary labor migration, rather than permanent migration has become a feature of increasing import within the ASEAN because of government regulations such as those of Malaysia and Singapore, which limit immigration (Firdausy, 2005). Labor migration within the region will certainly have an impact on labor law, particularly on contractualization, and labor administration. Toward this end, the harmonization of ASEAN labor laws and regulations, along with immigration laws, among others, is in order.

Taking note of the necessity to level the playing field, Maragtas Amante has proposed a regional framework for labor relations that will provide ground rules for fair competition and prevent a race to the bottom through lowering wages and ignoring internationally agreed labor standards that define decent work (Amante, n.d.). Without a regional framework social marginalization, unrest, and related problems are expected to worsen. However, given ASEAN's emphasis on consensus building such a regional framework will have to take the arduous road of lengthy discussions and sharing of best practices (Amante, n.d.).

In particular, ASEAN countries can draw lessons from the experience of European Union in dealing with the problem of fixed-term employment. Whatever be the changes in the region's labor laws, the principle of reciprocity will have to be observed in the protection of labor rights and welfare. A start towards greater consensus on workers' rights in the region, is the signing of the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, which lays down the rights of migrant workers and their family members and corresponding obligations of sending and receiving States.

The role of trade unions within the ASEAN framework cannot be discounted. They could marshal the informal sectors, people's organizations, and civil society, toward building a strong and unified social movement; one that is able to mount sustained pressure upon

ASEAN leaders to address the pressing issue of illegal contractualization practices in the ASEAN region.

Conclusion

In sum, security of tenure in employment is a prized possession for workers. The core function of labor law, which is to protect rights of workers and job security, however, is being challenged as the post-Fordist and lean production models are advanced to legitimize precarious employment. In the context of globalization, regular employment is being eroded as companies take to hiring dispensable employees, *i.e.* non-regular employees.

In this light, there is need to address the gaps and loose provisions in policy, law, and jurisprudence that would meet the challenge of flexibilization in the workplace; maximize the SOLE's visitorial and enforcement power with the active participation of Unions; and mobilize a strong labor sector, with the unions marshaling a social movement that advances workers' rights in society.

As for the ASEAN, there is need to engage Member States in order to develop a regional framework that governs industrial relations and labor standards for decent work, particularly for non-regular employees. However, this will require the united voice of a strong and organized social movement in impelling ASEAN leaders to heed the call to action.

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