DE-CONFUSING CONTRACTUALIZATION: DEFINING EMPLOYEES ENGAGED IN PRECARIOUS WORK IN THE PHILIPPINES*

NOTE

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ABSTRACT

In the face of laws that are now insufficient to address the growing need to protect the increasing population of precarious workers in the Philippines, there is a need to clarify the coverage of the term "contractual worker" in order to allow the laws to accord them rights and benefits. This paper seeks to allow the law to conform to the social understanding of employment relations. The proposed definition encompasses all employees under contract but not deemed regular, including those with direct contracts with their employers, and clarifies which type of employment regime prevails over each class. It also addresses the ambiguities left by the law on labor-only subcontracting by incorporating into the Labor Code the distinctions found in jurisprudence. It is hoped that, in introducing these definitions, along with proposed benefits in the form of specific labor standards and mechanisms to allow for unionization, the law may help alleviate the precariousness that threatens contractual employees.

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I. INTRODUCTION

In 2013, after three years of uncertainty, Philippine Airlines ("PAL") concluded a labor dispute that arose in 2010, when the management implemented an outsourcing policy which led to the termination of 2,500 regular employees. The settlement provided for the reinstatement of only the remaining 600 employees who have not opted for the company's prior settlement packages.[1] Meanwhile, in the Philippine Long Distance Telephone Company ("PLDT"), terminated workers have alleged that changes in management policies, including the use of contractualization, have reduced the number of regular employees covered by the collective bargaining agreement ("CBA") between PLDT and labor union Manggagawa ng Komunikasyon sa Pilipinas from over 15,000 members in 1994 to about 3,000 members in 2014.[2]

These two examples highlight the current specter of precarious working conditions brought about by contractualization programs in the country.

It is believed that contractualization in the Philippines has been accelerating since the early 1990s. On the employee side, it was reported that, from 14 to 15% between the years 1990 – 1994, the share of contractual workers in enterprise-based employment had jumped to 21.1% as far back as 1997.[3] On the employer side, in 2004, two out of three Filipino firms utilized some form of non-regular employment, such as temporary, casual, probationary, or contractual employment.[4] In 2010, the Department of Labor and Employment (DOLE) reported that 10.4% of firms engaged particularly in contracting-out work.

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[1] Lira Dalangin-Fernandez, *PAL to Rehire Terminated Workers as Regular Employees in Settlement of Contractualization Case,* Interaksyon.com, Nov. 14, 2013, *available at* http://www.interaksyon.com/article/74842/pal-to-rehire-terminated-workers-as-regular-employees-in-settlement-of-contractualization-case (last visited Apr. 29, 2014).

[2] Audio Recording: Interview with Manggagawa ng Komunikasyon sa Pilipinas (Feb. 7 2014).

[3] This estimate excludes other forms of contractual labor arrangements like subcontracting, agency-hiring, job-out, homework and other labor arrangement schemes which deny workers of security of tenure. *See* Center for Women's Resources, *The Life and Struggle of Women Workers under Contractualization*, at 2, Asia Pacific Research Network (Official Website), June 18, 2003, *available at* http://www.aprnet.org/conferences-a-workshop/97-impact-of-globalization-on-women-labor/161-the-life-and-struggle-of-women-workers-under-contractualization (last visited Apr. 29, 2014).

[4] Winfred Villamil & Joel Hernandez, *Globalization, Labor Markets and Human Capital in the Philippines*, at 21, *in* 2 PRODUCTION NETWORKS, TRADE LIBERALIZATION, & INDUSTRIAL ADJUSTMENT IN THE PHILIPPINES: INSTITUTIONS & POLICIES, *available at* http://www.dlsu.edu.ph/research/centers/aki/_pdf/_concludedProjects/_volumeII/VillamilandHernandez.pdf (last visited Apr. 29, 2014).

Contractualization has also had an effect of slowing the formation of unions. It was reported that, in the last decade, the number of trade union members and workers covered by CBAs was cut in half partly because of the practice of hiring contractual employees.[5] In 2000, 3.8 million workers were reported as private sector trade union members, with 484,278 workers covered by CBAs.[6] The Department of Labor and Employment (DOLE) reported that, as of December 2013, only 1,407,712 employees were members of trade unions in the private sector, of which only 225,183 were covered by CBAs.[7] Although the decline in union activity cannot be exclusively attributed to the practice of contractualization, the experiences of PAL and PLDT hint that these policies might have had an effect of reducing union membership.

One manifestation of how contractualization has become prevalent is that words like "Endo" and "5-5-5" have seeped into the vernacular. "Endo" is the shortened version of "end of contract" and is used to refer to the definitive end of contractual employment. It is also used to refer to workers who work under such contracts.

Meanwhile, under "5-5-5," workers can only work for five months at a time, renewable for another two 5-month contracts, after which they can work as open contract workers.[8] The limit is at five months because under the Labor Code, an employee who is allowed to work after the probationary period of six months shall be considered a regular employee and shall be entitled to the rights and benefits accorded such workers.[9] The term "5-5-5" also likens the employment to *555*, a popular brand of sardines, and connotes that the canned food is the only thing a contractual worker can afford to eat.

One of the ways by which companies do this is through agency-hiring. For instance, according to Roque Isidro, Vice President of Pambato Cargo Forwarders Union, there are at least three agencies that provide manpower to

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[5] Ulandssekretariatet LO/FTF Council, *The Philippines – Labour Market Profile 2013,* at 1, *available at* http://www.ulandssekretariatet.dk/sites/default/files/uploads/public/PDF/LMP/philippines_2013_final.pdf (last visited Mar. 9, 2014).

[6] *Id.*

[7] Dep't of Labor and Employment (DOLE), *Existing Labor Organizations, Workers, Associations and Collective Bargaining Agreements as of December 2013, at* http://www.blr.dole.gov.ph/PDFandDownloadables/StatisticalReports/2013_4thQtr_ExistingLOsWAsCBAs.pdf (last visited Apr. 29, 2014).

[8] Abigail Malalis & Bobby Lagsa, *Contractualization: The worker's curse.* PhilStar.com, Apr. 27, 2013, *available at* http://www.sunstar.com.ph/cagayan-de-oro/local-news/2013/04/27/contractualization-workers-curse-279776 (last visited Apr. 29, 2014).

[9] *See* LABOR CODE, art. 287. This paper cites the Labor Code as renumbered pursuant to Rep. Act No. 10151 (2011), § 5.

the company, and so when a worker's five-month contract lapses, he signs a new contract with the other agency with the same set of working conditions.[10]

Faced with these problems, employees have two mechanisms to cope with such working conditions. First, an employee may quit the employment relationship and seek to improve his fortune elsewhere. Second, he may join a union and thereby acquire a collective voice.[11] However, because of the prevalence of abject poverty, the lack of employment opportunities in the country, and the generally ambivalent perception of employees towards joining unions, a third coping mechanism is said to exist in the Philippines, whereby the tendency is for the workers to merely suffer in silence because of the possibility of unemployment.[12]

To address these problems, several bills have been filed since the 13th Congress, ranging from an improved regulation to the abolition of contractualization as an employment regime.[13] However, to date, these amendments to the Labor Code have not been adopted by Congress. Through executive issuances, the DOLE has also attempted to address the issue of contractualization. Nevertheless, these issuances are often subject to changes from one administration to the next.

The Philippine experience of contractualization is further complicated by the problem of definition. While employers, through legal advice, are made aware of distinctions between different types of employment contracts (e.g. fixed term, seasonal, project, casual),[14] employees are not able to easily distinguish these specialized types of contracts allowed by law. The trend has been to dilute the distinctions into only two categories: regular and contractual.

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[10] Ronalyn Olea & Janess Ellao, *Workers Identify Contractualization as their Biggest Enemy.* Bulatlat.com, May 3, 2013, *available at* http://bulatlat.com/main/2013/05/03/workers-identify-contractualization-as-their-biggest-enemy/ (last visited Apr. 29, 2014).

[11] Benedicto Bitonio Jr., *Unions on the Brink: Issues, Challenges and Choices Facing the Philippine Labor Movement in the 21st Century, in* PHILIPPINE INDUSTRIAL RELATIONS FOR THE 21ST CENTURY: EMERGING ISSUES, CHALLENGES & STRATEGIES 128-157 (2002).

[12] *Id. See also*, Fille Cainglet, et al., *A Social Representations Study of Contractualization* (2012) (unpublished thesis, on file with the Ateneo de Manila University Department of Psychology).

[13] *See, e.g.* H. No. 1024, 13th Cong. 1st Sess. (2001), An Act Strengthening the Right to Security of Tenure; H. No. 5110, 15th Cong, 2nd Sess. (2011), An Act Strengthening Workers' Right to Security of Tenure; H. No. 573, 16th Cong. 1st Sess. (2013), An Act Strengthening the Security of Tenure of Workers in the Private Sector.

[14] *See, e.g.* Quisumbing Torres, *Guide to Philippine Employment Law: An Overview of Employment Laws for the Private Sector*, BakerMckenzie.com, *at* http://www.bakermckenzie.com/files/Publication/6e2edcc4-648a-458f-8995-e862e90192f0/Presentation/PublicationAttachment/40c18d0d-1c55-4e07-9a14-4ccfbf9152ed/bk_manila_guideemploymentlawv2_2013.pdf.

In the face of laws that are now insufficient to address the growing necessity for the protection of the increasing population of contractual workers, there is a need to clarify the coverage of the term "contractual worker" in order to allow the laws to accord them their rights and benefits. This paper thus seeks to clarify the definition of contractualization in the Philippines to allow the law to conform to the social understanding of their employment relations. It is hoped that in introducing these definitions, along with the proposed benefits in the form of specific labor standards and mechanisms to allow for their unionization, the law may help alleviate the precariousness that plagues contractual employees.

II. PRECARIOUS EMPLOYMENT AND A GLOBALIZED LABOR MARKET

A. History of Labor Laws in relation to Contractualization in the Philippines

The practice of hiring "contractual employees" in labor-only contracting arrangements emerged with the decline of the *cabo* system.[15] *Cabos* first emerged during the Spanish Regime. A *cabo* is an arrangement between a shipping company and a labor organization whereby the latter, as an independent contractor, engages its members, who are paid through union payrolls, to provide *arrastre* and stevedoring services to the company.[16] At present, the *cabo* system is prohibited under the Implementing Rules of the Labor Code.[17]

In the Philippines, the contemporary trend of contractualization started in the export processing zones in the 1970s. The first export processing zone was created in Bataan in 1969. In 1972, President Ferdinand Marcos enacted Presidential Decree ("P.D.") No. 66, which created the Export Processing Zone Authority. Section 13 allowed the Authority to establish a merit system governing the recruitment, transfer, promotion and dismissal of all personnel, including temporary workers. It also provided that the Civil Service Law and regulations of the Wage and Position Classification Office would not be

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[15] Jonathan Arrojado & Blake Feken, *When Push Comes to Shove: Contracting and Labor-Only Contracting in a Globalized Setting*, 79 PHIL. L.J. 1113, 1117-18 (2005).

[16] *See* Allied Free Workers Union v. Compania Maritima, G.R. No. 22951, 19 SCRA 258, 267 *et seq.*, Jan. 31, 1967.

[17] DOLE Dep't Order No. 18-A (2011), § 6(b).

applicable to the workers, effectively exempting them from the ambit of labor laws.[18]

These export processing zones still exist today as economic zones and technology parks, most of which hire workers on a contractual basis. In Southern Luzon, most of the workers are under different types of contractualization schemes. About half of the workers in companies such as Asia Brewery, NXP, EMI Yazaki, Aichi, Takata, Coca-Cola, Ebara, Moriroku, URC and Hoya Glassdisk are contractuals, with most of them located in special economic zones.[19]

Promulgated in 1974, P.D. No. 442 or the Labor Code of the Philippines defined workers simply as "any member of the labor force, whether employed or unemployed,"[20] and provided for different kinds of special workers: apprentices, learners and probationary employees.[21]

In 1997, DOLE Department Order ("D.O.") No. 10-97 was issued, amending the Implementing Rules of Books III and VI of the Labor Code. It prohibited labor-only contracting but allowed subcontracting, provided that the contractor or subcontractor carried on a distinct and independent business and had substantial capital, and the agreement between them and the principal assured the contractual employees' right and benefits. [22]

Four years later, in 2001, the said department order was modified by D.O. No. 3-01, which added the element of a direct business relation, such that employees recruited, supplied or placed by such contractor or subcontractor must not be performing activities which are directly related to the main business of the principal; otherwise, the scheme would be deemed labor-only contracting, which the same issuance still prohibited.[23]

In 2002, the DOLE again exercised the power granted to it under Article 106[24] of the Labor Code by issuing D.O. No. 18-02[25] which interpreted

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[18] Elizabeth Remedio, *Export Processing Zones in the Philippines: A Review of Employment, Working Conditions and Labour Relations*, International Labour Organization Multinational Enterprises Programme Working Paper No. 77, at 3 (1996).

[19] *Id.*

[20] LABOR CODE, art. 13, ¶ 1.

[21] *See* LABOR CODE, bk. II, title II.

[22] DOLE Dep't Order No. 010-97 (1997).

[23] DOLE Dep't Order No. 003-01 (2001).

[24] The provision reads:

Art. 106. *Contractor or Subcontractor*

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Articles 106 to 109 of the Labor Code. It provided for a trilateral relationship in contracting arrangements, with the principal, contractor or subcontractor, and the workers as parties thereto.

D.O. No. 18-02 declared the practice of contractualization as legal for as long as it did not fall within the category of "labor-only contracting," which is measured by the amount of capital and control of the supposed employer.[26] It also equated security of tenure with having a definite contract, instead of the regular and permanent status previously enjoyed by workers who have worked for more than six months.[27]

D.O. No. 18-A-11, the latest interpretation to Art. 106, superseded D.O. No. 18-02 but did not propose substantial changes. It merely added more prohibitions under labor-only contracting.[28]

B. Precarious Work

The trend towards contractualization in labor markets is not endemic to the Philippines. Internationally, these forms of employment are known as *precarious work*. "Precarious workers are those who fill permanent job needs but are denied permanent employee rights. Globally, these workers are subject to unstable employment, lower wages and more dangerous working conditions. They rarely receive social benefits and are often denied the right to join a union."[29]

> The Secretary of Labor and Employment may, by appropriate regulations, restrict or prohibit the contracting-out of labor to protect the rights of workers established under this Code. In so prohibiting or restricting, he may make appropriate distinctions between labor-only contracting and job contracting as well as differentiations within these types of contracting and determine who among the parties involved shall be considered the employer for purposes of this Code, to prevent any violation or circumvention of any provision of this Code.
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[25] DOLE Dep't Order No. 018-02 (2002).

[26] DOLE Dep't Order No. 018-02 (2002), §§ 1, 5.

[27] Marya Salamat, *Odd Jobs Under the Arroyo Administration*, Bulatlat.com, Apr. 8, 2006, *available at* http://bulatlat.com/main/2006/04/08/odd-jobs-under-the-arroyo-administration/ (last visited Apr. 29, 2014).

[28] DOLE Dep't Order No. 018-A-11 (2011).

[29] International Labor Rights Forum, *Precarious Work*, LaborRights.org, *at* http://www.laborrights.org/issues/precarious-work (last visited Apr. 29, 2014). The International Labor Rights Forum is a coalition established in 1986 to monitor enforcement of these laws and to develop other means to protect workers' rights around the world.

In Europe, among the first to recognize this employment regime was Ulrich Beck in *Risk Society*. There, it was observed that in the post-war period, work relations characterized by standard contracts covered by collective bargaining agreements and full-time regular employment began to shatter, replaced by a new employment regime which relied upon less secure, individualized contracts, organizational fragmentation of the workplace, and a greater flexibility, in both hours worked and the length of the term of employment.[30]

In the United States, the term preferred is *contingent work*. The use of this term emphasizes the "conditional, transitory, and insecure nature of certain kinds of work, including part-time, temporary, employee leasing, self-employment, contracted out and home based employment."[31]

The concept of a *precarious worker,* first coined by Gerry Rodgers in *Precarious Work in Western Europe: the State of the Debate,* was crafted to look beyond the mere form of employment, and into the full range of factors that expose the worker to the employment instability, a lack of legal and union protection, and social and economic vulnerability.[32] The term "precarious," used by nineteenth-century socialist Pierre Joseph Proudhon in his essay *What is Property?*, emphasizes that the waged worker held his job at the condescension of his master, reflecting the modern definition of precarious as "depending upon the will of another, dependent on chance circumstances, unknown conditions or uncertain development, or characterized by lack of security or stability that threatens with danger."[33] In this sense, by its very definition, the precariousness of this work relation prevents workers from entering into contracts that grant them security of tenure.

The effects of the prevalence of precarious work as an employment regime are felt worldwide. In a speech delivered by International Metalworkers' Federation General Secretary Marcello Malentacchi in 2008, it was reported that 90% of their international affiliates have observed an increase in precarious work in their sector in the past five years.[34] The trend has been for employers to use

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[30] John Allen & Nick Henry, *Fragments of Industry and Employment: Contract service work and the shift towards precarious employment, in* CHANGING FORMS OF EMPLOYMENT: ORGANIZATIONS, SKILLS AND GENDER 65 *et seq.* (R. Crompton, et al., eds. 1996).

[31] Judy Fudge, *Beyond Vulnerable Workers: Towards a New Standard Employment Relationship*, 12 CAN. LAB. & EMP. L.J. 151, 157 (2005).

[32] *Id*, at 158.

[33] *Id*, at 158-9.

[34] Marcello Malentacchi, *Precarious work – what needs to be done?* Speech delivered in a forum in the ILO headquarters, Oct. 3, 2008, *available at* http://www.global-unions.org/IMG/pdf/Marcello_s_speech.pdf (last visited Apr. 29, 2014).

these working arrangements to evade granting benefits such as social security pensions, maternity and family leave, overtime pay, vacation and holidays, and health and occupational safety.[35]

Apart from the disparity in benefits between permanent employees and those who are engaged in precarious work, one of the major obstacles encountered worldwide through the use of this employment regime is the inability of precarious workers to form and join unions and participate in collective bargaining. As of 2005 in Tunisia, individual precarious workers who seek to join unions are prevented from doing so by threats of dismissal.[36] In Brazil, the laws in place appear to divide trade union representation, with outsourced employees being eligible to join the non-specialized trade unions of their subcontractors who have less bargaining capacity compared to the unions of their principals.[37] Similarly, in Bangladesh, labor legislation allegedly prohibits organizing precarious workers into the same trade unions as the permanent employees they work with.[38]

In the face of the global prevalence of precarious work regimes, the international community has responded by advocating for addressing precarious work through decent work. The International Labour Organisation (ILO) has called for an observance of Convention 98,[39] which secures the crucial right against anti-union discrimination and other effective trade union rights.[40]

Pockets of progress have also emerged worldwide to address the job insecurity, lack of benefits, and prohibitions against unionization experienced by precarious workers. ILO Committee on Free Association (CFA) Case No. 2602 illustrates a progressive response to anti-union discrimination in the Republic of Korea. The use of "illegal dispatch workers," a form of false subcontracting which functions to disguise what is, in reality, an employment relationship in the metalworking sector, led the CFA to request the South Korean government to develop, in consultation with the social partners concerned, specific mechanisms aimed at strengthening the protection of subcontracted workers' rights to

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[35] *Id.*

[36] *Id.*

[37] *Id.* The speech pertained to workers employed in the Metal Industry.

[38] *Id.*

[39] ILO Convention 98 (Right to Organise and Collective Bargaining Convention), July 1, 1949, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312243 (last visited Apr. 29, 2014). This Convention was ratified by the Philippines on December 29, 1953.

[40] International Labour Organization (ILO), *From Precarious Work to Decent Work, Outcome Document to the Workers' Symposium on Policies and Regulations to Combat Precarious Employment*, 2012, *at* http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_179787.pdf (last visited Apr. 29, 2014).

freedom of association and collective bargaining and preventing any abuse of subcontracting as a way to evade, in practice, the exercise by these workers of their fundamental rights.[41]

In Argentina, where the enactment of flexible labor laws has been found to legitimize precarious working conditions,[42] legislation has also been used to define the responsibility of principal employers to their precarious workers.[43] As the country's laws currently stand, between precarious workers and permanent workers in a user firm, pay is negotiated among unions, the employers' organization, and the government in the sector where temporary agency workers are assigned, with the "principle of equal treatment [as between precarious and permanent workers] being applied."[44] It is hoped that similar benefits for employees can be introduced in the Philippine context.

C. The Effects of Globalization on Contractualization in the Philippines

The trend towards precarious employment is often attributed to the prominence of increasingly globalized labor markets. As recognized by the ILO, the relationship between labor and capital today exists in the context of globalization. This is "characterized by the diffusion of new technologies, the flow of ideas, the exchange of goods and services, the increase of capital and financial flows, the internationalization of business and business processes and dialogue as well as the movement of persons, especially working men and women."[45]

It is reported in various documents by trade unions, non-government organizations and agencies of the United Nations that the effects of globalization have caused sweeping changes in the lives of workers in both the Global North and South.[46] Although globalization promises to promote market

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[41] *Id.*

[42] Clara Olmedo & Martin Murray, *The Formalization of Informal/Precarious Labor in Contemporary Argentina*, 17 INT'L SOCIOLOGY 421 (2002).

[43] Malentacchi, *supra* note 34.

[44] Organisation for Economic Co-operation and Development (OECD), *Argentina: Regulations in Force as of January 1, 2012, available at* http://www.oecd.org/els/emp/Argentina.pdf (last visited Mar. 14, 2014).

[45] International Labor Conference (97th Session), *Declaration on Social Justice for a Fair Globalization*, June 10, 2008, at 5, *available at* http://www.ilo.org/wcmsp5/groups/public/~dgreports/~cabinet/documents/genericdocument/wcms_099766.pdf (last visited Apr. 29, 2014).

[46] Rosalinda Ofreneo, *Globalization, Gender, Employment and Social Policy: Comparing the Philippine and Japanese Experiences*, 15 REV. WOMEN'S STUDIES 90, 91 (2005).

efficiency, causing certain sectors to gain in terms of investments, employment creation and increased wages, it can also lead to job destruction and the deterioration of real wages of other sectors of the economy.[47]

For certain sectors, it is argued, the Philippines had adopted a neoliberal mode of globalization.[48] Under this mode of globalization, a regime of precarious employment through contractualization is implemented, by replacing regular workers with temporary ones who would not be entitled to benefits and seniority rights, and could easily be terminated.[49] This practice is known as the casualization, flexibilization, or informalization of labor.[50]

These trends are verified by studies on how businesses have adopted to an increasingly globalized economy. A study conducted by Winfred Villamil and Joel Hernandez, entitled *Globalization, Labor Markets and Human Capital in the Philippines*, found that globalization had brought to the fore flexible production arrangements, enabling firms to quickly and efficiently respond to changes in their respective product markets.[51] The study found that as of 1999, 31.3% of total establishments surveyed[52] had already developed mechanisms to cope with globalization, while 29.5% establishments were in the process of developing similar measures.[53] The same study found that of the establishments surveyed, 36.8% of firms have employed a certain degree of labor flexibility.[54] Although the study is optimistic that in adapting to globalization, firms may implement policies which could invest in enhancing workforce skills and improving efficiency, it would appear that local firms do have the tendency to use cost-minimizing measures such as hiring temporary labor. As cited in the same study, it was found that, in the Philippines, among the most common modes used by employers for the flexibilization of labor are:

i. *Reduction in the core of permanent workers through the increasing employment of casual/ agency hired or provided workforce;*
ii. Increasing work shifts per day and use of overtime work;
iii. Increasing use of women flexible labor under the government's apprenticeship or student employment programs or the work appreciation program;
iv. *Subcontracting the production of components or products previously manufactured by the firm;*

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[47] Villamil & Hernandez, *supra* note 4.
[48] Center for Women's Resources, *supra* note 3, at 2.
[49] *Id.*
[50] *Id.*
[51] Villamil & Hernandez, *supra* note 4.
[52] *Id.* The survey involved 21, 527 establishments with 20 or more workers nationwide.
[53] *Id.* at 16.
[54] *Id.* at 19.

v. *Subcontracting services like packaging, security, housekeeping, maintenance and the like;*
vi. *Increasing the use of "permanent" casuals, who stay in the firm as casual for years or who work on an "off-on" basis depending on the workload;*
vii. The growing number of multi skilling measures and job rotation;
viii. The rising number of homeworkers;
ix. *The wide use of labor-only subcontracting despite the prohibitions posed by the Labor Code;*
x. Payment by piece rate and the use of performance bonus systems.[55]

Among these flexibilization schemes, contractualization has emerged as one of the most prevalent in the Philippines. In another study conducted in 2012 by students of the Ateneo de Manila University's Department of Psychology, it was found that companies and contracting agencies embrace contractualization to promote cost efficiency and to avoid dealing with labor unions.[56]

As a result, on the part of the employees, the prevalent practice of contractualization has diminished their control over their working conditions and environment, as well as lowered job satisfaction and motivation.[57] Worse, the employees are left confused as to which organization has the responsibility of addressing their employment concerns. In interviews conducted by Cainglet et al., human resources practitioners clearly stated that contractual workers were not their employees; agencies interviewed likewise disclaimed employment relationships with the same, since the agencies supposedly served only as go-betweens between the principals and workers.[58]

Despite the unfortunate preference of such employers to promote it, and contrary to neoliberal doctrine, precarious work is not the inevitable consequence of globalization.[59] Institutional changes through progressive legislation can be adopted to improve the working conditions experienced by workers in precarious work regimes.

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[55] Marie Aganon, *Flexibilization of Female Labor: The Case of Garment and Electronic Firms*, School of Labor and Industrial Relations (1997); *cited in* Villamil & Hernandez, *supra* note 4. (Emphasis supplied.)

[56] Cainglet et al., *supra* note 12.

[57] *Id.*

[58] *Id.*

[59] ILO, *supra* note 40, at 42.

III. CURRENT SOLUTIONS TO THE PRECARIOUS WORK PROBLEM

A. Statutory Protections: Labor Only Contracting is Deemed Illegal

The Labor Code attempts to protect contractual workers by providing for the solidary liability of the principal and the labor-only contractor for the former's unpaid wages.[60] Mere months after its promulgation, and to adopt the public policy suggested by the DOLE, the Labor Code was amended by P.D. No. 570-A, Section 22 of which is the predecessor of what is now Article 106 of the Labor Code.[61] Four decades later, the wording has remained the same, despite the many interpretations and amendments brought by various department orders,[62] and the unresolved confusion as to the meanings of "contractor" and "subcontractor."

Where an entity is declared to be a labor-only contractor, the employees supplied by said contractor to the principal employer become regular employees of the latter.[63] Having gained regular status, the employees are entitled to security of tenure and can only be dismissed for just or authorized causes and after they had been afforded due process.[64]

Despite these gains, there must still be a finding from labor arbiters that labor-only contracting existed before workers can claim reinstatement and backwages. Even then, it is possible that workers would still be unable to claim the benefits granted by the labor tribunals and the courts.

In the 2012 case of *Digital Communications Philippines, Inc.* ("Digitel") *v. Digitel Employees Union*, Digiserv, the call center arm of Digitel, ceased operations and retrenched 100 employees, 42 of whom were union members. The Court held that Digiserv was a labor-only contractor, and thus, the retrenched employees were Digitel employees. The retrenchment was also found to be in bad faith, as another call center arm, I-Tech, was later created to perform the same functions as Digiserv, and that the new call center even rehired some of the retrenched employees.[65]

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[60] LABOR CODE, art. 106, ¶ 2.

[61] Text reproduced, *supra* note 24.

[62] *See supra* notes 22, 23, 25, & 28.

[63] *See* LABOR CODE, art. 106, ¶ 4.

[64] Norkis Trading Corp. v Buenavista, G.R. No. 182018, 683 SCRA 406, 436, Oct. 10, 2012.

[65] Digital Communications Philippines, Inc. v. Digitel Employees Union, G.R. No. 184903, 683 SCRA 466, 466 *et seq.*, Oct. 10, 2012.

Nevertheless, the Court conceded that it "would be hard-pressed to mandate the dismissed employees' reinstatement given the lapse of more than [seven] years" since the retrenchment.[66] They instead ordered payment of moral and exemplary damages, as well as backwages and separation pay to the remaining respondents, which by then numbered only 13, as most had already accepted separation pay.

B. Protection through Collective Bargaining

In consonance with business practices in a globalized world, engaging in contracting-out work continues to be recognized as an exercise of business judgment or management prerogative.[67] In relation to unionization, the Court has held that so long as the exercise of such an employment regime does not threaten the security of tenure of regular employees,[68] or is not proven to be used as a tool to reduce union membership,[69] an employer can validly contract-out work. However, jurisprudence has given light to the fact that the exercise of this management prerogative can be limited by a union duly-recognized as the company's sole and exclusive bargaining agent, specifically through its execution of a collective bargaining agreement with the employer.

As early as 1971, the Supreme Court has ruled in *Shell Oil Workers Union v. Shell Company of the Philippines* that a union may successfully protect employees in its bargaining unit from being outsourced or subcontracted to a third party.[70] *Shell Oil Workers Union* involved a dispute between a workers' union and a company, which arose when the company sought to subcontract its security service to an independent professional security agency. The change in company policy resulted in the transfer and eventual dismissal of 18 security guards who belonged to the collective bargaining unit and were thus protected by the CBA. The Court ruled that the existing collective bargaining agreement between the parties, in which there was a stipulation assuring the continued existence of the security guard division of the company, was a bar to the contractualization of its security department; the employer was bound by the provision, having freely agreed to it[71] The Court thus upheld the ruling of the Court of Industrial Relations that the employer's dissolution of the department constituted an unfair

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[66] *Id.* at 487.

[67] *See* Bankard, Inc. v. Nat'l Lab. Rel. Commission. G.R. No. 171664, 692 SCRA 459, Mar. 6, 2013.

[68] Philcom Employees Union v. Phil. Global Communications, G.R. No. 144315, 495 SCRA 214, 237, July 17, 2006.

[69] *See Bankard, Inc.,* 692 SCRA at 470.

[70] Shell Oil Workers' Union v. Shell Co. of the Philippines, Ltd. G.R. No. 28607, 39 SCRA 276, 288 *et seq.*, May 31, 1971.

[71] *Id.* at 286.

labor practice under the Industrial Peace Act, as it amounted to a refusal to bargain collectively.[72] However, it must be noted that this case, decided over four decades ago, operated under a different statutory,[73] jurisprudential, and social context.

In more recent jurisprudence, *Goya Inc., v. Goya Inc. Employees Union-FFW*, decided in 2013, provided a ruling with a like effect, where the employer, who validly agreed to a stipulation on categories of employees and a union security clause, was held to be limited by the CBA from subcontracting its services in the free exercise of its management prerogative[74] In this case, the company hired contractual employees to perform temporary and occasional services akin to those performed by casual employees in one of the company factories. The union resorted to the grievance machinery, arguing that the subcontracting was in contravention of the CBA between the parties. The CBA contained the following sections, which provided for the categories of employees and a union security clause:

> [ARTICLE I] SECTION 4. *Categories of Employees.* – The parties agree on the following categories of employees:
>
> (a) Probationary Employee. – One hired to occupy a regular rank-and-file position in the Company and is serving a probationary period. If the probationary employee is hired or comes from outside the Company (non-Goya, Inc. employee), he shall be required to undergo a probationary period of six (6) months, which period, in the sole judgment of management, may be shortened if the employee has already acquired the knowledge or skills required of the job. If the employee is hired from the casual pool and has worked in the same position at any time during the past two (2) years, the probationary period shall be three (3) months
>
> (b) Regular Employee. – An employee who has satisfactorily *completed his probationary period and automatically granted regular employment* status in the Company.
>
> (c) Casual Employee, – One hired by the Company to perform *occasional or seasonal work directly connected with the regular operations* of the

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[72] *Id.* at 287.

[73] The law in force at that time was Rep. Act. No. 875 (1953), or the Industrial Peace Act. The said law, which governed labor relations, was superseded by Pres. Dec. No. 442, or the Labor Code of the Philippines.

[74] Goya, Inc. v. Goya Inc. Employees Union-FFW, G.R. No. 170054, 689 SCRA 1, 15, Jan. 21, 2013.

> Company, or one *hired for specific projects of limited duration not connected directly with the regular operations of the Company.*[75]
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> * * *
>
> [ARTICLE III] SECTION 1. *Condition of Employment.* [Union Security Clause] – As a condition of continued employment in the Company, all regular rank-and-file employees shall remain members of the Union in good standing and that [sic] *new employees covered by the appropriate bargaining unit shall automatically become regular employees of the Company and shall remain members of the Union in good standing as a condition of continued employment.*[76]

It was argued that due to these provisions, which had been in place since the 1970s, the company had maintained a pool of casual employees who would become regular employees under the union security clause whenever it became necessary to hire them for a period of more than one year. The union thus argued that under a regime of contractualization, the company would no longer have a pool of probationary and casual employees from which the union could obtain additional members. Ultimately, the Supreme Court, affirming the Court of Appeals and the Voluntary Arbitrator, held that the two provisions in the CBA should be read in conjunction with each other and be given full force and effect. Since the services contracted were described by the company in its position paper as performing "temporary or occasional services," it should have hired directly from its pool of casual employees. The practice of subcontracting these services was thus in contravention of the CBA and prohibited. However, citing the current state of the law and jurisprudence, the Court ruled that, although the company had violated the collective bargaining agreement, it was not engaged in unfair labor practices.[77]

As illustrated by these two cases, the collective bargaining agreement is the law between the employer and employees, and compliance therewith is mandated by the express policy of law.[78] It can thus be used as a potent tool to combat the threat of precarious work in organized establishments. However, for

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[75] *Id.* at 4-5. (Emphasis supplied.)

[76] *Id.* at 5. (Emphasis supplied.)

[77] LABOR CODE, art. 261. *See also* BPI Employees Union Davao City-FUBU v. Bank of the Philippine Islands, G.R. No. 174912, July 24, 2013. In *BPI Employees Union,* the Court held that the employer's act of outsourcing the cashiering, distribution and bookkeeping functions to an independent contractor was *not* an unfair labor practice, since only malicious and flagrant violations of economic provisions of the collective bargaining agreement constitute unfair labor practice. *Id.*

[78] Honda Phils., Inc. v. Samahan ng Malayang Manggagawa sa Honda, G.R. No. 145561, 460 SCRA 186, 190-191, June 15, 2005.

this solution to be effective, it presupposes that the workers belong to an organized establishment, with an employer willing to accept similar stipulations in a CBA. Further, the benefits here are reaped only by employees who are already themselves unionized. Therefore, questions remain as to the solutions available to employees in unorganized establishments. Also not addressed is the difficulty encountered by contractual workers in attempting to organize themselves, given that their precarious short-term employment is threatened by dismissal at the onset of their attempts to unionize.

IV. PROBLEMS WITH CURRENT DEFINITIONS

"Contractual employment" has become the umbrella term for precarious employment, and rightly so, since technically all employees are contractual employees. Employment in the Philippines is secured by a contract which provides for, at the minimum, the nature of work and the corresponding compensation that the worker will receive. The concept of "contractual" employees covering atypical employment, then, is a creation of the current system of laws that address the need for labor flexibility.

The University of the Philippines (UP) published a list of forms of contractualization, compiled by Kilusang Mayo Uno Chairperson Elmer Labog in the UP Forum.[79] The list defined "contractual workers" as fixed-term contract workers who are directly employed through written contract based on a particular period and type of work. Other forms enumerated include casual workers, project-based workers, commission workers, seasonal workers, agency workers, trainees/apprentices, on-the-job trainees, piece-rate workers, task-rated workers, time-rated workers, part-time workers, *pakyawan* workers, quota workers, temporary workers, reliever workers, emergency workers, on-call workers and account-based workers.[80] The definitions accompanying the list show different forms of contractualization under various schemes, depending largely on the need of the industry. An underlying common element, however, is still the lack of security of tenure.

Even laws confuse the terms. Article 106 of the Labor Code is captioned "Contractor *or* Subcontractor," but the provision itself does not distinguish between the two. This is still the case despite the provision being interpreted in various department orders, the latest one being D.O. No. 18-A,

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[79] Elmer Labog, *Forms of Contractualization*, University of the Philippines Forum, July 11, 2012, *available at* http://www.up.edu.ph/forms-of-contractualization/ (last visited Apr. 29, 2014).

[80] *Id.*

which provides for the Rules Implementing Articles 106-109 of the Labor Code.[81]

Section 6 of D.O. No. 18-A[82] provides for the elements of labor-only contracting. The second element—that the contractor "does not exercise the right to control over the performance of the work of the employee"—proves to be more important in our jurisprudence. In *San Miguel Corp. v. Semillano*,[83] the Court held that there was labor-only contracting between AMPCO and the respondent contractual workers, since it was San Miguel which provided the equipment that the workers used and the instructions that they followed in the performance of the "contracted" job. The Court pegged the test to determine the existence of an independent contractor arrangement on whether the independent contractor has contracted to do the work according to his own methods and without being subject to the control of the employer, except only as to the results of the work.[84]

The "Right to Control" is defined in D.O. No. 18-A as the "right reserved to the person for whom the services of the contractual workers are performed, to determine not only the end to be achieved but also the manner and means to be used in reaching that end."[85]

However, the elements prove to be vague, such that they do not cover the current system of contractualization. D.O. No. 18-A attempts to remedy this by including the following provision:

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[81] DOLE Dep't Order No. 018-A-11 (2011).

[82] The provision reads:

SECTION 6. *Prohibition against Labor-only contracting.* Labor-only contracting is hereby declared prohibited. For this purpose, labor only contracting shall refer to an arrangement where:

a) The contractor does not have substantial capital or investments in the form of tools, equipment, machineries, work premises, among others, and the employees recruited and placed are performing activities which are usually necessary or desirable to the operation of the company, or directly related to the main business of the principal 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, or

b) The contractor does not exercise the right to control over the performance of the work of the employee.

[83] San Miguel Corporation v. Semillano, G.R. No. 164257, 623 SCRA 114, July 5, 2010.

[84] *Id.* at 124.

[85] DOLE Dep't Order No. 18-A, § 3(i) (2011).

> SECTION 7. *Other Prohibitions.* – Notwithstanding Section 6 of these Rules, the following are hereby declared prohibited for being contrary to law or public policy:
>
> A. Contracting out of jobs, works or services when not done in good faith and not justified by the exigencies of the business.[86]
>
> * * *

What the law contemplates is the contracting *out* of work through a third party contractor, thus protecting the workers from principal employers escaping liability through agents. The Court has been strict in holding principal employers liable to workers in labor-only contracting, as in the case of *San Miguel*, where the Court deemed the workers as regular employees, and held San Miguel as the principal employer liable for their backwages.[87]

It has been established that the law and jurisprudence are clear on the elements and repercussions of labor-only contracting. It does not contemplate, however, instances where the principal employer itself hires contractual workers, as is among the prevalent practices nowadays. It seems, then, that the crucial element of legitimate labor contracting is that there should be three parties involved: the employee, the contractor or the principal, and the subcontractor, which is usually declared as merely an agent. This is further bolstered by Section 5 of D.O. No. 18-A which provides for the trilateral relationship in contracting agreements.[88] The requirements of the law only make sense if applied to three parties.

Section 7 of the same department order lists prohibited acts, one of which is the "repeated hiring of employees under an employment contract of short duration or under a Service Agreement of short duration with the same or different contractors, which circumvents the Labor Code provisions on Security of Tenure."[89] The current practice of "5-5-5," as earlier discussed, falls squarely under this prohibition.

However, the consequence of violating the department order is very light. Section 27 only renders the principal jointly and severally liable with the

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[86] DOLE Dep't Order No. 18-A, § 7 (2011).

[87] *San Miguel Corporation*, 623 SCRA at 122 *et seq.*

[88] DOLE Dep't Order No. 18-A (2011), § 5. The section is captioned "Trilateral Relationship in Contracting Arrangements."

[89] DOLE Dep't Order No. 18-A (2011), § 7(A)(7).

contractor to the latter's employees should there be a finding by competent authority of labor-only contracting and/or a violation of sections 7, 8 and 9.[90]

Violations and circumventions of the law, therefore, go unpunished, and those who are declared labor-only contractors receive a mere slap on the wrist. Further, the burden of alleging and proving that there was labor-only contracting falls on the terminated employee who will only receive the benefits he deserves months or years after the termination.

Given these problems, there is a pressing need to clarify the coverage of the term "contractual employment." This clarification cannot come in the form of department orders and jurisprudence. As they stand, the past administrative issuances have only served to further add to the confusion in the definition. Supreme Court decisions are no different; they are volatile in that they can be overturned by succeeding cases. Both merely provide interpretations, which change depending on the Administration or Court composition, leading to even further confusion. Neither can department orders or court decisions ensure the granting of benefits currently absent from those given to employees engaged in precarious work.

The definition and coverage of contractualization as an employment regime, as well as the benefits granted to contractual employees, need to be grounded on a more stable form. As amendments to the Labor Code, the definitions proposed in the next section will be part of the cardinal law on labor. It will also benefit from the penal clause in the Code,[91] which provides for a more substantial redress to the victims of such violations.

V. DEFINING CONTRACTUALIZATION

A. Proposed Definitions

To address the problems encountered by employees engaged in precarious work, there have been several attempts by various congressional representatives over the past decade to amend the provisions of the Labor Code which govern contractual or sub-contractual employees. The proposals have ranged from those seeking the complete abolition of contractualization as an

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[90] Section 8 details the rights of the contractor's employees; Section 9 lists the formal contracts required under legitimate contracting arrangements, and the contents thereof. DOLE Dep't Order No. 18-A (2011), §§ 8-9.

[91] LABOR CODE, art. 294.

employment regime,[92] to those which retain the classification of employees as sub-contractual, but seek to legislate into black letter law the progressive interpretations promulgated by the DOLE, as well as the tests established by jurisprudence.[93]

Unfortunately, none of these proposed amendments have mustered enough support to be enacted into law. And though some of the amendments provide for means to better protect some members of the working class, none of the amendments provide for a comprehensive definition which will sufficiently address the needs of employees engaged in the various other forms of precarious work.

For instance, House Bill No. 573, pending in the 16th Congress as of this writing, attempts to provide protection to contractual employees through a provision which defines "project, extra and seasonal employment."[94] However, though this definition grants contractual employees the right to security of tenure, this definition fails to address the difficulties encountered by contractual employees in their attempts to unionize. It also fails to address the inequity created when employers engage their workers in such contracts in order to circumvent the other benefits that would have been accessible to the employees under the law. Finally, the failure to clearly identify contractual employees as a distinct statutory classification contributes to the disconnect between the social understanding of how workers perceive the employment regime that they are engaged in, and the law that governs their relationship with their employers—with the law perplexingly claiming that there is no existing "employer-employee" relationship between the two parties, in some instances. The following proposed amendments have been crafted in order to address these deficiencies.

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[92] *See, e.g.* H. No. 1024, 13th Cong., 1st Sess. (2001). Under these proposed amendments, the provisions which govern the classification of employees as "casual" and "contractual or sub-contractual" are impliedly repealed, while the classification of employees as "learners" and "apprentices" is expressly repealed. The classification of employees as "probationary" is also expressly repealed, and such an employment agreement is deemed illegal. The only classification that remains distinct is that between "regular" and "project" employees.

[93] *See, e.g.* H. No. 573, 16th Cong., 1st Sess. (2013). Under these proposed amendments, the definition of legitimate subcontracting is clarified, and prohibitions against labor-only contracting, as well as other acts of subcontracting which are contrary to public policy, are identified. This policy also provides statutory regulations for contractors, as well as stiffer penalties for violating the allowable employment regimes.

[94] § 10. Under this provision, "project, extra and seasonal employees" shall have the right to security of tenure, being "entitled to resume their employment for the same or similar position at the start of the next project [...] provided that during the time that their services are not availed of, they shall be considered to be on authorized leave without pay." *Id.*

1. Regular Employees and Casual Employees

In improving the definition of regular employment, the authors partially adopt portions of House Bill No. 1024, which was filed in the 13th Congress.[95] Article 286 of the Labor Code[96] will be amended to read as follows:

> ARTICLE 286. *Regular and Casual Employment.* — IN THE ABSENCE OF A WRITTEN AGREEMENT, AN EMPLOYMENT SHALL BE DEEMED REGULAR FROM THE TIME OF ITS COMMENCEMENT. The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking, the completion or termination of which has been determined at the time of the engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season.
>
> An employment shall be deemed to be casual if it is not covered by the preceding paragraph: *Provided*, That any employee who has rendered at least one year of service, IN THE SAME OR SIMILAR POSITION, whether such service is continuous or broken, shall be considered a regular employee with respect

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[95] H. No. 1024, 13th Cong., 1st Sess. (2001).

[96] The provision is presently worded as follows:

ARTICLE 280. *Regular and casual employment.* – The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season.

An employment shall be deemed to be casual if it is not covered by the preceding paragraph: *Provided*, That any employee who has rendered at least one year of service, whether such service is continuous or broken, shall be considered a regular employee with respect to the activity in which he is employed and his employment shall continue while such activity exists.

to the activity in which he is employed and his employment shall continue while such activity exists.[97]

The authors believe that the requirement for a written contract, stipulating precisely the terms and conditions for employment of a company's workers, would help clarify ambiguities with regard to the nature of their employment. This provision will help to ensure that employers who decide to hire employees on a contractual basis will also be required to clearly stipulate in such contracts the particular type of contractual relationship established.

2. Contractual Employees

To address the ambiguity of the nature of precarious work in employer-employee contracts, the authors have crafted a definition for contractual employees that will adequately categorize various precarious work schemes under the same set of rights. The authors have also adopted certain portions of Section 10 of House Bill No. 573[98] to best guarantee the rights of contractual employees. Article 106 of the Labor Code will be rewritten to read as follows:

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[97] Additions to existing provisions are set out in all caps, per Congressional practice; although, following the same, omissions should be indicated by brackets, omissions are no longer identified in order to simplify the presentation of the proposed amendments.

[98] H. No. 573, 16th Cong., 1st Sess., § 10 (2013), *available at* http://www.congress.gov.ph/download/basic_16/HB00573.pdf. Said section in the Bill reads as follows:

> SECTION 10. A new Article 280-A is hereby inserted in the Labor Code to read as follows:
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> "ART. 280-A. PROJECT, EXTRA AND SEASONAL EMPLOYMENT. — PROJECT EMPLOYMENT REFERS TO THAT WHICH HAS BEEN FIXED FOR A SPECIFIC PROJECT OR UNDERTAKING THE COMPLETION OR TERMINATION OF WHICH HAS BEEN DETERMINED AND MADE KNOWN TO THE EMPLOYEE AT THE TIME OF HIS ENGAGEMENT.
>
> "EXTRA EMPLOYMENT REFERS TO ADDITIONAL WORK TO BE PERFORMED IN RESTAURANTS AND HOTEL ESTABLISHMENTS SPECIFICALLY FOR BANQUET FUNCTIONS, SEMINARS AND SIMILAR FUNCTIONS WHERE THE REGULAR EMPLOYEES CANNOT REASONABLY COPE WITH THE INCREASED DEMANDS OF SUCH EVENTS.
>
> "SEASONAL EMPLOYMENT REFERS TO THE PERFORMANCE OF AGRICULTURAL WORK THAT IS SEASONAL IN NATURE AND THE EMPLOYMENT IS FOR THE DURATION OF THE PLANTING OR HARVESTING SEASON.
>
> "PROJECT, EXTRA AND SEASONAL EMPLOYEES SHALL HAVE THE RIGHT TO SECURITY OF TENURE AND ARE ENTITLED TO RESUME THEIR EMPLOYMENT IN THE SAME OR SIMILAR POSITION UPON THE START OF THE NEXT PROJECT OR OCCASION FOR EXTRA OR SEASONAL EMPLOYMENT, AS THE CASE MAY BE: *PROVIDED,* THAT DURING THE TIME THAT

> ARTICLE 106. *Contractual employees.* — Employees under specific contracts allowed by law, including but not limited to fixed-term, project, casual, agency, temporary, emergency, and other employees not deemed regular employees under the provisions of this code, entering into contracts directly with an employer are deemed contractual employees.
>
> Contractual employees have a right to security of tenure and to resume their employment in the same or similar position upon the start of their next project or term, provided that if such right is exercised, during the time that their services are not actually availed of, they shall be considered to be on authorized leave without pay.
>
> Contractual employees shall be entitled to benefits granted under current labor standards including but not limited to rest days, overtime pay, holiday pay, 13th month pay and other such benefits as may be provided in the employment contract or under this code.
>
> In cases of disputes arising from the illegal dismissal of a contractual employee, such employee is presumed to be a regular employee, unless it is proven that such employee is governed by special employment contracts allowed under this code.
>
> Contractual employees hired by an employer are deemed regular employees for purposes of exercising their right to self-organization.[99]

The authors understand that the current legitimate contractual agreements allowed by the Labor Code (e.g. fixed-term, casual, project) have developed to address particular needs of different industries. The use of these types of contracts is understandably within the ambit of management prerogative.

THEIR SERVICES ARE NOT ACTUALLY AVAILED OF, THEY SHALL BE CONSIDERED TO BE ON AUTHORIZED LEAVE WITHOUT PAY."

[99] As the entire provision will be rewritten, the text is in sentence casing for easier reading.

i. Labor Standards

As the definition provides, contractual employees shall, by law, be equitably entitled to the same benefits and protections granted by the Labor Code to regular employees. The presumption created by this definition shifts the burden to employers to prove that they have complied with the strict standards for particular contractual arrangements under the Labor Code.

This presumption is potent given the rule in Article 229 of the Labor Code, which holds that

> [i]n case of a judgment involving a monetary award, an appeal may be perfected only upon the posting of a cash or surety bond[...] in the amount equivalent to the monetary award in the judgment appealed from.
>
> In any event, the decision of the Labor Arbiter reinstating a dismissed or separated employee, insofar as the reinstatement aspect is concerned shall immediately be executory, even pending appeal.[100]

The strength of this provision is further emphasized when read in conjunction with the ruling in *College of the Immaculate Conception v. National Labor Relations Commission*, where it was held that "an employee cannot be compelled to reimburse the salaries and wages he received during the pendency of his appeal, notwithstanding the reversal by the National Labor Relations Commission of the Labor Arbiter's order of reinstatement."[101]

Further, granting the contractual employee a right to security of tenure empowers employees engaged in precarious work by improving their job security. Through this provision, a contractual employee is granted the opportunity to resume work offered by the same employer even after the initial project or contract has terminated provided that such employment involves the same or a similar type of work.

ii. Labor Relations

Granting the contractual employees the same rights as regular employees, as far as collective bargaining is concerned, will help the contractual employees to better protect their rights through peaceful and concerted activities, which help foster industrial peace and harmony. First, this expanded

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[100] LABOR CODE, art. 229, ¶¶ 6-7.

[101] College of the Immaculate Conception v. Nat'l Lab. Rel. Commission, G.R. No. 167563, 616 SCRA 299, 312, Mar. 22, 2010. (Citations omitted.)

definition of contractual employees will curb the practice of employers who terminate the services of contractual employees for attempting to form or join a union. Such act would constitute the unfair labor practice of interfering with, restraining or coercing employees in the exercise of their rights to self-organization.[102] Second, expressly granting contractual employees the right to join unions in their employer's company will allow their concerns to be subject to the grievance machinery established between the employer and the union.[103] Third, it will also allow contractual employees to bargain for the improvement of the economic provisions of their contracts to secure better benefits than the minimum provided by law.

iii. Appropriate Bargaining Unit

Assuming that the proposed statutory amendments shall grant contractual employees equal rights for self-organization as regular employees, opposition to granting contractual workers the right to join rank-and-file unions may be founded on the argument that they do not belong to the same bargaining unit as rank-and-file employees.

The Labor Code does not lay down any direct and express criteria for identifying an appropriate collective bargaining unit. Article 255 of the Labor Code merely states that such a collective bargaining unit must be "appropriate." On the other hand, Section 1(d) of Rule 1, Book V of the Omnibus Rules Implementing the Labor Code provides:

> (d) "Bargaining Unit" refers to a group of employees sharing *mutual interests within a given employer unit*, comprised of all or less than all of the entire body of employees in the employer unit or any specific occupational or geographical grouping within such employer unit.[104]

In this jurisdiction, the tests to determine the proper collective bargaining unit have long been established, as discussed in *University of the Philippines v. Ferrer-Calleja.* Citing the unreported case of *Democratic Labor Association v. Cebu Stevedoring Company, Inc.*, the Court held that the four tests to determine the appropriateness of a collective bargaining unit are:

1. The will of the employees (or the Globe Doctrine);

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[102] LABOR CODE, art. 254(a).

[103] LABOR CODE, art. 266.

[104] OMNIBUS RULES IMPLEMENTING THE LABOR CODE, bk. V, rule 1, § 1(d). (Emphasis supplied.)

2. Affinity and unity of employees' interest, such as substantial similarity of work and duties, *or* similarity of compensation and working conditions;

3. Prior collective bargaining history; and

4. Employment status such as temporary, seasonal and probationary employees.[105]

Of these four tests, the Court identified that it was the second test, known as the "community or mutuality of interests" test, that has emerged as the standard in determining the proper constituency of a collective bargaining unit.[106]

In contemporary application, however, it appears that the Court has interpreted this test to require both a substantial mutuality of interest in terms of employment—often looking at factors such as hours of work and rates of pay[107]—as well as a substantial mutuality of interest in working conditions, as evidenced by the type of work that they perform.[108] Nonetheless, in applying the substantial mutuality of interest test, the Court has often cited the doctrine originally laid down in *Democratic Labor Association v. Cebu Stevedoring Co. Inc.*, that "'the basic test of an asserted bargaining unit' [...] is *whether or not it is fundamentally the combination which will best assure to all employees the exercise of their collective bargaining rights.*"[109]

Although the Court continues to look into factors such as the rate of compensation in determining an appropriate bargaining unit, the authors would like to highlight the Court's emphasis that the stake in concerted activities is the most important factor to be considered.[110] Given the difficulties encountered by individual employees engaged in precarious working arrangements, the authors firmly believe that it is in the best interest of concerted action among contractual

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[105] University of the Philippines v. Ferrer-Calleja, G.R. No. 96189, 211 SCRA 451, 466, July 14, 1992. (Emphasis supplied, citations omitted.)

[106] *Id.* at 467.

[107] *See* Belyca Corp. v. Ferrer-Calleja, G.R. No. 77395, 168 SCRA 184, 193, Nov. 29, 1988.

[108] San Miguel Corp. v. Laguesma G.R. No. 100485, 236 SCRA 595, 599, Sept. 21, 1994.

[109] *Belyca Corp.*, G.R. No. 77395, Nov. 29, 1988, *citing* ROTHENBURG, ON LABOR RELATIONS 490. (Emphasis supplied.)

[110] San Miguel Supervisors and Exempt Union v. Laguesma, G.R. No. 110399, 277 SCRA 370, Aug. 15, 1997. The emphasis on the common stake in concerted activities in determining the mutuality of interest was emphasized by the Court as recently as 2011 in *San Miguel Foods Inc. v. San Miguel Corporation Supervisors and Exempt Union*, G.R. No. 146206, 655 SCRA 1, Aug. 1, 2011.

workers and unions alike that they be allowed to be part of the same bargaining unit, with collective bargaining agreements merely making distinctions for provisions applicable to specific departments.

3. Sub-contractual Employees

The authors generally adopt the clarified definition of the concept and nature of subcontracting arrangements in House Bill No. 573.[111] The authors believe that such a definition adequately reflects the protections granted by the DOLE in its administrative issuances.[112] Under the proposed measure, Article 106-A will be created, and shall read:

> ARTICLE 106-A. *Concept and nature of subcontracting arrangements.* — In legitimate subcontracting, there exists a trilateral relationship under which there is a contract for a specific job, work or service between the principal and the subcontractor, and a contract of employment between the subcontractor and its workers. Hence, there are three parties involved in these arrangements: the principal which decides to farm out a job or service to a subcontractor, the subcontractor which has the capacity to independently undertake and actually undertakes the performance of the job, work or service, and the sub-contracted workers engaged by the sub-contractor to accomplish the job, work or service.
>
> For purposes of this code, "subcontracting" refers to an arrangement whereby:
>
> (A) A principal agrees to put out or farm out with a 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; or
>
> (B) A person, partnership, association or corporation which, not being a principal contracts with a sub-contractor for the performance of any work, task, job or project.[113]

This definition of subcontracting arrangements makes explicit the currently implied requisite of a trilateral relationship between the principal, the subcontractor, and the subcontracted employee. Under this definition, a

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[111] H. No. 573, 16th Cong., 1st Sess. (2013).

[112] *See supra* notes 22, 23, 25, & 28.

[113] H. No. 573, 16th Cong., 1st Sess. § 1 (2013). As the entire provision has been rewritten, the text is in sentence casing for easier reading.

subcontracted employee is clearly established to be a regular employee of his/her subcontracting agency.[114] They are thus subject to the same rights and benefits as regular employees, including but not limited to the right to security of tenure, the right form and join unions, and other benefits provided by the Labor Code.

4. Labor-Only Subcontracting

The authors also generally adopt the definition of labor-only subcontracting in House Bill No. 573, to reflect the protections granted by the DOLE in its administrative issuances, as well as the tests established in jurisprudence.[115] Article 106-B of the Labor Code shall be created and shall state:

> ARTICLE 106-B. *Prohibition against labor-only subcontracting.* — Engaging in labor-only subcontracting, or contracting with a labor-only subcontractor is strictly prohibited. For this purpose, labor-only contracting refers to an arrangement where the subcontractor merely recruits, supplies, or places workers to perform a job, work or service for a principal, including instances where any of the following is present:
>
> (A) The subcontractor does not have substantial capital and investment which relates to the job, work or service to be performed;
>
> (B) The employees recruited, supplied or placed by such subcontractor are performing activities usually necessary or desirable or directly related to the usual business of the principal; or
>
> (C) The principal has the right to control, whether exercised or not, not only the end to be achieved but also the manner and means to be used in reaching that end.
>
> In cases of labor-only contracting, the subcontracted employees are deemed regular employees of the principal.[116]

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[114] Also known as an independent contractor.

[115] *See generally* Industrial Timber Corp. v. Nat'l Labor Rel. Commission, G.R. No. 83616, 202 SCRA 465, Jan. 20, 1989; Nat'l Power Corp. v. Court of Appeals, G.R. No. 119121, 294 SCRA 209, Aug. 14, 1998.

[116] H. No. 573, 16th Cong., 1st Sess. § 3 (2013). As the entire provision has been rewritten, the text is in sentence casing for easier reading.

As previously discussed, this definition clarifies the existence of an employer-employee relationship between a principal and its subcontracted employees in instances where labor-only contracting is found. This means that, in cases of labor-only contracting, the employees shall share the same benefits as regular employees, and may also join unions based in the principal's company.[117]

B. Effects of Proposed Definitions

First, the proposed definitions clarify to all parties, by virtue of a clear written contract of employment, precisely what type of employment regime exists between the employer and the employee. Under these amendments, an employee is either a regular employee, a contractual employee, or a subcontracted employee. In all instances, however, employees engaged under any of the three classifications are entitled to the same benefits granted by the Labor Code, as well as a right to security of tenure, and the right to engage in collective bargaining. Because of these amendments, it is also established that there is an employer-employee relationship between the two parties engaged in an employment contract. By establishing employment relationships between the *employer* and the *regular employee*, the *direct employer* and the *contractual employee,* and the *subcontractor* and the *subcontracted employee*, the lines of accountability are determined, making it easier for employees to pursue their claims for benefits against the appropriate party.

Second, the prohibitions on labor-only contracting are retained, and its definitions concretized to ensure the protection of subcontracted employees from exploitative employment regimes, which are utilized by principals to circumvent laws on the granting of benefits, the formation of unions, and the acquisition of security of tenure. Under these proposed amendments, the doctrine laid out in jurisprudence that labor-only contractors are mere agents of the principal is wholly retained. What is made express is that, once a labor-only contracting arrangement is found, the subcontracted employees are automatically deemed to be regular employees of the principal.

Third, as far as contractual employees are concerned, granting them a right to security of tenure is a definite improvement to help alleviate the precarious nature of their employment. Whereas, in the past, contractual employees constantly faced the insecurity of always having to find new employment upon the expiration of their previous contract, under the proposed amendments, the employees will be given priority for re-employment under the

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[117] *See* Caurdanetaan Piece Workers Union v. Laguesma, G.R. No. 113542, 286 SCRA 401, 423-424, Feb. 24, 1998. *See generally* Arrojado & Feken, *supra* note 15, at 1140.

same or similar positions. This will prove especially beneficial for employees in sectors with recurring projects, such as construction companies; in the hotel and restaurant and manufacturing industries, where "relievers" are sought during certain periods to address sudden spikes in demand; and the agricultural and retail sectors, where "seasonal" employees are sought at periodic intervals, specifically whenever demand for work is in season.

Furthermore, the increasing number of employees who experience precariousness in their working conditions might be tempered by reading the proposed amendments to Article 106, in conjunction with a proviso in the proposed amendments to Article 286, which states "[t]hat *any employee* who has rendered at least one year of service, IN THE SAME OR SIMILAR POSITION, whether such service is continuous or broken, shall be considered a regular employee with respect to the activity in which he is employed and his employment shall continue while such activity exists."[118] This establishes a mechanism for contractual employees to attain regular status.

Fourth, further granting contractual employees a right to collectively bargain within the same bargaining unit of the rank-and-file employees is a novel approach which seeks to empower contractual employees with a voice in collectively negotiating the terms of their employment. The goals of this approach are not new. Internationally, the countries of South Africa, Mauritius, Japan, Namibia, as well as many of the European Union Member states[119] have attempted to address the concerns of those engaged in precarious work by creating mechanisms to "engage negotiated outcomes [through collective bargaining agreements] to non-negotiating parties [such as those engaged in precarious work, who are found outside the collective bargaining unit]."[120] As an example, in 2008, a trade union at Japan Post Holdings Co. Ltd. decided to defer its demands for pay increases to its regular employees and instead sought for a JPY 2,000 salary increase for its fixed-term precarious workers.[121]

At first glance, our labor relations laws seem capable of accommodating these extensions, since our laws allow a collective bargaining agreement to be applicable to all rank-and-file employees in the collective bargaining unit, whether or not they are members of the union which negotiated for the agreement. However, looking closely at our laws as they currently stand, these negotiated gains can only be made applicable to regular employees who are part

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[118] (Emphasis supplied.) The proposed amendments are in all caps.

[119] Excluding Cyprus, Denmark, Italy, Malta, Sweden and the United Kingdom.

[120] Minawa Ebisui, *Non-Standard Workers: Good Practices of Social Dialogue in Collective Bargaining*, 1 E-J. INT'L & COMP. LAB. STUD. 211, 224, (2012).

[121] *Id* at 225-226.

of the same bargaining unit. With the proposed amendments to Article 106, expressly providing that "CONTRACTUAL EMPLOYEES HIRED BY AN EMPLOYER ARE DEEMED REGULAR EMPLOYEES FOR PURPOSES OF EXERCISING THEIR RIGHT TO SELF-ORGANIZATION," as well as the foregoing discussion of the inclusion of rank-and-file level contractual workers in the same collective bargaining unit as rank-and-file regular workers, we can even further improve on the gains experienced by Japan and other countries, by ensuring that precarious workers gain the right not only to passively reap the benefits of a collective bargaining agreement, but also to actively join in the collective bargaining process.

VI. CONCLUSIONS AND RECOMMENDATIONS FOR FURTHER STUDY

With the program for ASEAN Economic Integration set to be operationalized in 2015, and the Aquino administration's keen interest in joining the Trans-Pacific Partnership, the Philippines' foray into more globalized markets will not be tempered. It is high time to put into question if our country's labor laws are keeping in step to ensure that as some sectors reap the gains of globalization, our more vulnerable sectors, particularly those in the working class engaged in precarious work, will be protected. As globalized markets bring in more competition, we must put in place mechanisms to curb the tendency of local firms to favor flexibilization programs that throw otherwise-secure employees into precarious situations.

Under Section 3 of Article XIII of the constitution, it is stated that "the state shall afford full protection to labor [...] and promote full employment and equality of employment opportunities for all."[122] The full protection of labor

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[122] CONST. art. XIII, § 3. The provision reads:

SECTION 3. 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.

demanded by the Constitution is intended to be broad enough to cover those who are left unprotected by the precarious nature of their employment. With the proposed legislation to clarify the definitions between regular employees, contractual employees, and subcontracted employees, as well as to specifically grant benefits to contractual employees engaged in precarious work, the authors believe that the plight of workers engaged in precarious working arrangements would begin to be relieved. However this is merely the first step of institutional reforms to meet the demands of a commitment to providing all workers with decent work in the context of an increasingly globalized local market.

As far as proposed legislation is concerned, studies may be made to impose harsher penalties for employers found to be violating the rights granted to all kinds of employees. Studies may also be made to examine the different paradigms for labor relations employed by different countries all over the world, in order to assess the means by which collective bargaining in the Philippines might be optimized.

However, it must be noted that legislation is not always inadequate—often, the problem lies with lack of enforcement. Vigilance in the implementation of labor laws is particularly important in a country where many firms see that running the risk of getting caught and paying a fine (or a bribe) for violating labor laws is a cheaper alternative to paying workers the proper wages and benefits as provided by law.[123] As we develop labor laws that do offer protection to precarious workers, it must be remembered that "it is only through effective labor inspection that abusive use of precarious employment can be eliminated."[124] It is only upon the synergy of progressive social policy through legislation and the full brunt of State enforcement that the specter of contractualization can be subdued for the benefit of all.

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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 to investments, and to expansion and growth.

[123] Villamil & Hernandez, *supra* note 4, at 24.

[124] Malentacchi, *supra* note 34.