Balancing Corporate and Labor Interests: A Comparative Study on Temporary Employment Arrangements in the Broadcasting Industry

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I. INTRODUCTION

Temporary employment arrangements are fast becoming the norm.[1] They grant flexibility to companies in terms of manpower requirements, which, in turn, enable them to remain competitive.[2] However, it can also be seen as a means for employers to skirt compliance with labor standards, especially in the areas of security of tenure, wages, employee benefits, and retirement.[3]

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1. *See* Pascale Charhon & Dearbhal Murphy, The Future of Work in the Media, Arts & Entertainment Sector at 16, *available at* https://www.fim-musicians.org/wp-content/uploads/atypical-work-handbook-en.pdf (last accessed Feb. 1, 2019). This handbook was a result of a two-year European Union-funded project and was made possible through the joint engagement and efforts of the International Federation of Actors, the International Federation of Musicians, UNI MEI (Global Union for the Media and Entertainment Sector), and the European Federation of Journalists. *Id.* at 1.
2. *See* Labayog v. M.Y. San Biscuits, Inc., 494 SCRA 486, 492 (2006).
3. *See* International Labour Organization, Sectoral Activities Department, Employment relationships in the media and culture industries (An Issues Paper Published by the International Labour Office for the May 2014 Global Dialogue Forum on Employment Relationships in the Media and Culture Sector) ¶ 33, *available at* https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---

One of the industries heavily reliant on temporary employment arrangements is the broadcasting industry. Broadcasting companies undergo constant programming changes to cater to the changing preferences of their viewers.[4] This, in turn, leads to a high turnover of programs and, as a result, employees who render services to these programs are engaged by the broadcasting companies on a temporary basis only.[5]

According to broadcasting companies, granting permanent status to all employees involved in program production would result to the company employing hundreds of employees in excess of what it actually needs each time a program is cancelled.[6] Further, considering the different genres of the programs that a company broadcasts, there might be a mismatch between the skills of the employee and the technical requirements of the new program, which may adversely affect the quality of the programs and decrease its viewership.[7] This may eventually affect the profitability and threaten the financial stability of the company and the industry.[8]

On the part of the labor sector, it questions the validity of temporary employment arrangements because they deprive employees of tenurial security.[9] Majority of employees in the industry have been continuously engaged through successive contracts for more than a decade and yet, they are still not considered as permanent employees.[10] Some employees are not re-engaged due to various reasons. Oftentimes, the renewal of their contract for the same program or engagement for a new program largely depends on the discretion of the directors and producers, which may be risky because discretions may be exercised arbitrarily.[11]

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sector/documents/publication/wcms_240701.pdf (last accessed Feb. 1, 2019). The International Labour Office is the permanent secretariat of the International Labour Organization. International Labour Organization, International Labour Office, *available at* https://www.ilo.org/global/about-the-ilo/who-we-are/international-labour-office/lang--en/index.htm (last accessed Feb. 1, 2019).

4. *See* International Labour Organization, *supra* note 3, ¶ 6.

5. *Id.* ¶ 32.

6. *Id.* ¶¶ 24-26.

7. *Id.*

8. *Id.*

9. *See* GMA Network, Inc. v. Pabriga, 710 SCRA 690, 711-12 (2013).

10. *Id.*

11. *See* Dumpit-Murillo v. Court of Appeals, 524 SCRA 290, 304 (2007).

Both the broadcasting industry and the labor sector raise valid arguments. The companies have the right to returns in investments, expansion, and growth, but this should not be exercised in such a way that the primordial right of the workers to tenurial security is disregarded.

II. A CLOSER LOOK AT THE BROADCASTING INDUSTRY

Workers in the broadcasting industry are constantly facing uncertainty.[12] This is a result of the industry's peculiar nature, specifically in its programming demands.[13]

A. Different Arrangements of Broadcasted Programs

To better understand the nature of a broadcasting company, it is important to discuss the various arrangements of the programs that are aired. Generally, they are as follows:

1. Block-time

This refers to the arrangement of selling entire airtime slots to external producers who have the sole discretion on what program to air.[14] The only qualification is that the program must comply with regulatory requirements set by the government,[15] and, in some instances, the ethical and media standards of the broadcasting company.

2. Line Production

In this set-up, an external producer conceptualizes and produces a program and is thus solely responsible for all aspects of the production of the program,

12. Mark Thompson, *Digital Media and the Future of Quality Broadcasting*, AM. PHILOSOPHICAL SOC., Volume No. 153, Issue No. 2, at 144.

13. International Labour Organization, *supra* note 3, at 3. *See also* Thompson, *supra* note 12, at 144.

14. Center for Media Freedom and Responsibility, Blocktime Practice in the Philippines, *available at* https://cmfr-phil.org/blocktime-practice-in-the-philippines (last accessed Feb. 1, 2019).

15. *See* Kapisanan ng mga Broadkaster ng Pilipinas, Broadcast Code of the Philippines 2007 (as amended 2011) at 32-33, *available at* http://www.kbp.org.ph/wp-content/uploads/2008/04/KBP_Broadcast_Code_2011.pdf (last accessed Feb. 1, 2019); Creating the Movie and Television Review and Classification Board, Presidential Decree No. 1986, §§ 3 & 12 (1985); & Movie and Television Review and Classification Board, Rules and Regulations Implementing Creating the Movie and Television Review and Classification Board, Presidential Decree No. 1985, § 8 (2004).

including hiring all the talents and personnel.[16] The finished program is then sold to the broadcasting company.

3. Self-Production

In this arrangement, the company produces a program on its own and thus, handles all the aspects of production.[17] This is often resorted to for primetime slots because the primetime hours usually command the highest broadcasting rate,[18] and there is rarely any external producer who can afford the cost and is willing to take the risk.

4. Co-Production

Co-production is an arrangement whereby the company partners with an external producer in producing a show.[19]

5. Foreign Canned Shows

Foreign canned shows are basically foreign produced programs, which a company acquired license to broadcast.[20] Usually, all the company does in terms of foreign canned shows is the dubbing of the program to its preferred broadcast language.[21]

6. Live Coverages

Similar to canned shows, live coverages are usually big international or major events, which are non-regular in nature. All the aspects of the production are handled by the event's producer, and the broadcasting company merely

16. *See* Film Connection, The Importance of a Line Producer, *available at* https://www.filmconnection.com/reference-library/film-entrepreneurs/importance-of-a-line-producer (last accessed Feb. 1, 2019).

17. *See* John Greiner-Ferris, Self-Production, *available at* https://howlround.com/self-production (last accessed Feb. 1, 2019).

18. *See* Josefina M.C. Santos, *Reformatting the Format: Philippines in the global Television format business*, *in* TELEVISION ACROSS ASIA: TV INDUSTRIES, PROGRAMME FORMATS AND GLOBALISATION 163 (Michael Keane & Albert Moran eds., 2004).

19. *See, e.g.*, *Kahit Isang Saglit* (ABS-CBN & Double Vision television broadcast Sep. 15, 2008). This television series was co-produced by ABS-CBN Broadcasting Corporation and a Malaysian media company, Double Vision.

20. *See* Santos, *supra* note 18, at 163-64.

21. *Id.*

acquires the license to air the program live.[22] Examples of live coverages are the Miss Universe pageant and sports events such as basketball leagues, boxing bouts, football leagues, and other similar events that have a high viewer-demand.[23]

7. Licensed Programs

Under this category are materials that the company obtains license for broadcasting, such as movies and documentaries.

B. Development of Various Program Formats

One of the factors influencing programming is the continuously expanding format of programs.

To illustrate, in the 1980s, scripted series dominated primetime programming.[24] However, advances in broadcasting technologies facilitated the entrance of new players, and, consequently, the number of publicly available channels increased significantly.[25] This intensified the competition in programming and television show format development. [26] The broadcasters were all competing for the attention of the viewers and had to innovate the program formats to keep the viewers glued to their channels.

From the usual scripted programs, formats were expanded to game shows, reality television, and factual entertainment.[27] In the 1990s, the hit programs that gained international popularity were reality formats such as *Who Wants to be a Millionaire*, *Survivor*, *Big Brother*, and the *Idols* franchise.[28]

Currently, the industry offers a wide variety of program formats and has expanded its programming to include news, drama, fantasy, action, comedy, musical variety, game shows, reality entertainment, television situational comedies or sitcoms, variety, documentary, *telenovelas*, hoax, and factual

22. *See* World Intellectual Property Organization, Broadcasting & Media Rights in Sport, *available at* https://www.wipo.int/ip-sport/en/broadcasting.html (last accessed Feb. 1, 2019).

23. *Id.*

24. Daniel Fox, *Harsh Realities: Substantial Similarity in the Reality Television Context*, 13 UCLA ENT. L. REV. 223, 224 (2005).

25. Stefan Bechtold, *The Fashion of TV Show Formats*, 2013 MICH. ST. L. REV. 451, 457 (2013).

26. *Id.* (citing Jean Chalaby, *At the Origin of Global Industry: The TV Format Trade as an Anglo-American Invention*, 34 MEDIA, CULTURE & SOC'Y 36, 45 (2012)).

27. Bechtold, *supra* note 25, at 457

28. *Id.* at 458.

show formats, among others.[29] Due to intense competition from competitors using non-conventional platforms such as Netflix, Facebook, and other similar platforms, broadcasting companies strive to continue developing fresh program formats to keep the interest of viewers.[30]

C. Viewer Preference as Driving Force of Sources and Formats of Programs

The format and source of programs to be broadcasted heavily depend on the preference of viewers.[31] This is because the number of viewers drives the revenue-earning potential of the company and largely determines the success and viability of the company.[32]

As has been established earlier, viewer preference is very volatile and unpredictable.[33] It is heavily influenced by trends, which constantly change and is usually difficult to predict.[34]

To cite an example, in the Philippines, during the 1990s, locally produced situational comedies were very popular, and broadcasting companies aired this format on their daily primetime slots.[35] As such, the employment of production crews was necessary to produce these shows.

However, towards the end of the decade, drama programs from Mexico, also known as *telenovelas*, soared in popularity.[36] As a result, locally produced

29. *Id.* at 459-60.

30. *See* Neeraj Aggrawal, et al., The Digital Revolution is Disrupting the TV Industry, *available at* https://www.bcg.com/publications/2016/media-entertainment-digital-revolution-disrupting-tv-industry.aspx (last accessed Feb. 1, 2019) & Denali Tietgen, Content Wars: How Television Networks Are Fighting the Netflix Threat, *available at* https://www.forbes.com/sites/denalitietjen/2015/06/09/content-wars-how-television-networks-are-fighting-the-netflix-threat/#24793cff46f6 (last accessed Feb. 1, 2019).

31. *See* Victor F. Araman & Ioana Popescu, *Media Revenue Management with Audience Uncertainty: Balancing Upfront and Spot Market Sales*, 12 MANUFACTURING & SERVICE OPERATIONS MANAGEMENT 190 (2010).

32. *Id.*

33. John McCoskey, Viewer Preferences Straddle Generations, *available at* https://www.tvtechnology.com/news/viewer-preferences-straddle-generations (last accessed Feb. 1, 2019).

34. *Id.*

35. *See* Santos, *supra* note 18, at 161.

36. *See* O. Hugo Benavidas, Mexican Telenovelas, *available at* http://oxfordre.com/latinamericanhistory/view/10.1093/acrefore/9780199366439.001.0001/acrefore-9780199366439-e-458 (last accessed Feb. 1, 2019).

situational comedy programs were replaced with *telenovelas* licensed from Mexican broadcasting companies.[37] In fact, most of the programs in the primetime slots across all television channels were occupied by Mexican *telenovelas*.[38] The 1990s also saw a trend of canned programs from the United States (U.S.), such as *Friends*, *Murphy Brown*, *Seinfeld*, *Will and Grace*, and other iconic shows.[39] For this type of shows, the manpower requirement was limited to dubbers and editors who synchronize the dubbing to the video.[40]

After the *telenovela* trend waned, local programs again took center stage. These programs were either self-produced, line produced, or co-produced. Thus, there was once again a need to employ technical and creative crews.

Recently, the invasion of foreign programs was again apparent with the high popularity of Korean dramas among Filipino viewers.[41] Similar to the Mexican *telenovelas*, the manpower requirement was limited to the talents and crews necessary to dub the program to the local language.[42]

Additionally, even the types of locally produced programs aired are influenced and dictated by volatile viewer preferences. In the late 1990s, the heavy drama genre was in rotation.[43] Each program would run for at least five years.[44] However, towards the end of the decade, the viewers showed

37. *Id.*

38. *See* Santos, *supra* note 18, at 162.

39. *See* Sabienna Bowman, 21 Great TV Shows From The '90s That Everyone Should See, *available at* https://www.bustle.com/articles/111734-21-great-tv-shows-from-the-90s-that-everyone-should-see (last accessed Feb. 1, 2019).

40. *See* Santos, *supra* note 18, at 163.

41. *See* Grace Libero-Cruz, The K-Drama Addiction In The Philippines Shows No Signs Of Stopping — Have You Caught The Fever Yet?, *available at* https://metro.style/culture/entertainment/1705/the-k-drama-addiction-in-the-philippines-shows-no (last accessed Feb. 1, 2019).

42. *See* Ria E. Roldan & Tobiel W. Dave, Dubbing diorama, *available at* http://www.theguidon.com/1112/main/2017/10/dubbing-diorama (last accessed Feb. 1, 2019).

43. *See* Nerisa Almo, Afternoon TV dramas in the '90s, *available at* https://www.pep.ph/lifestyle/15979/afternoon-tv-dramas-in-the-90s (last accessed Feb. 1, 2019).

44. *See, e.g.*, *Mara Clara* (ABS-CBN television broadcast Aug. 17, 1992). This television series aired from 1992 to 1997. IMDB, Mara Clara, *available at* https://www.imdb.com/title/tt0437730 (last accessed Feb. 1, 2019).

more interest in programs that run for shorter periods.[45] Thus, the locally produced programs — which usually ran for at least five years — were replaced by short-running programs.

Due to intense competition in the industry and the emergence of new technologies that allowed viewers easy access to foreign programs,[46] the companies had to continuously revitalize their programming in order to keep the interest of the viewers. Thus, aside from the sources of programs, the formats of television programs regardless of source also had to adapt to changes in viewer preferences. Specifically, in the early 2000s, the companies ventured into other genres such as fantasy[47] and action programs,[48] and the onslaught of reality programs[49] in the latter part of the 2000s.

These factors led to the instability of the programs that a broadcasting company sources and/or produces. Consequently, the company has to ensure flexibility in program production to respond to these changes in viewer preference.

D. Temporary Employment as an Implication of Unstable Viewer Preference

The frequent changes in programming, as discussed above, have a direct impact on the employment requirements of the company.[50] This has led to a practice in the broadcasting industry of engaging workers on a project basis in order to adapt to the changes in programming.[51]

To illustrate, let us assume that the company airs a self-produced program, and thus, engages workers to produce the program. After a few

45. *See* Rob Cave, Why TV Seasons Should be Shorter, Not Longer, *available at* https://www.cbr.com/shorter-tv-seasons-netflix-amc-hbo (last accessed Feb. 1, 2019).

46. Xianne Arcangel, TV still preferred by Filipinos, says survey, *available at* http://cnnphilippines.com/news/2017/03/02/TV-filipino-survey-Internet-social-media.html (last accessed Feb. 1, 2019). A 2016 survey reveals that digital media is "fast catching up as a preferred platform for accessing content." Thirty percent of Filipinos also stream videos online. *Id.*

47. *See, e.g.*, *Marina* (ABS-CBN television broadcast Feb. 23, 2004) & *Encantadia* (GMA Network television broadcast May 10, 2005).

48. *See, e.g.*, *Darna* (GMA Network television broadcast Apr. 4, 2005).

49. *See, e.g.*, *Pinoy Dream Academy* (ABS-CBN television broadcast Aug. 27, 2006) & *Pinoy Big Brother Teen Edition* (ABS-CBN television broadcast Apr. 23, 2006).

50. International Labour Organization, *supra* note 3, ¶ 32.

51. *Id.*

months, the program ends and is replaced with a drama series from South Korea due to the popularity of foreign canned shows. In this case, the manpower requirements of the company will change such that the services of the production crew who produced the previous program are no longer necessary and the requirements will be limited to translators and voice talents who will dub the show to the local language and a few editors who will synchronize the dubbing. This ensues each time the company changes its source of programs. For some foreign canned shows, there is no longer any need for either a production crew or dubbers because the company airs the show as is.

Another illustration would be in cases when there is a change in program format, such as shifting from a drama program to a reality program. It should be noted that the personnel required for each of the programs are different. Further, even if the type of personnel is the same, the skills required by each program are different. To cite an example, a gaffer who is tasked to design and execute the light plan of a news program shot inside a studio might not be technically skilled to be a gaffer for a drama series shot entirely in an outside location.

Clearly, any change in the source and format of programs will definitely result to a corresponding change in manpower requirements. Due to this, companies engage workers on a temporary basis, usually co-terminus with the program.

E. Current Attitude Towards Temporary Employment

Some workers, on the one hand, prefer the current set-up because of the independence that comes with the contractual relationship. Instead of being employees, these individuals consider themselves as entrepreneurs who render services and can even hire their own employees.[52] It also allows them to manage their lives, take vacations whenever they want to, and, basically, make their own plans freely.[53]

On the other hand, some individuals disagree with the set-up because they have no security of tenure.[54] Due to changes in demand, they may be

52. Andrew Bibby, Employment relationships in the media industry (Working Paper No. 295 Published by the International Labour Office) at viii, *available at* http://www.andrewbibby.com/pdf/wcms_249912.pdf (last accessed Feb. 1, 2019).

53. Juan Piñon, *Complex Labor Relations in Latin American Television Industries*, *in* PRECARIOUS CREATIVITY 141 (Michael Curtin & Kevin Sanson eds., 2016).

54. Shirley Dex, et al., *Freelance Workers and Contract Uncertainty: The Effects of Contractual Changes in the Television Industry*, 14 WORK, EMP. & SOC'Y 283, 304 (2000).

swayed to accept less than desirable assignments just to maintain a constant stream of income. Moreover, the continuous grant of employment contracts depends on the social network of the worker. The larger his or her network, the higher probability of gaining higher paid jobs and more opportunities.[55] Likewise, in order to maintain regular employment and enhance job prospects, the individual must have access to contacts with high positions in the organization structure.[56]

III. IN FOCUS: TEMPORARY EMPLOYMENT ARRANGEMENTS IN THE BROADCASTING INDUSTRIES OF THE PHILIPPINES AND SELECTED COUNTRIES

It bears emphasis that there is a growing trend in broadcasting industries worldwide to shift from the traditional employment relationships to "atypical" employment, which includes temporary, part-time, freelance, and/or self-employment.[57] According to a working paper published by the International Labour Organization (ILO), conceivably half of the membership of the sectoral unit of the global union for the media industry are freelancers and/or self-employed.[58]

A. Philippines

Broadcasting companies in the Philippines classify personnel engaged in the creation of programs either as project employees or as talents.

Project employees are those who occupy positions that are considered highly technical and whose skills must match the type of program to which they are assigned.[59] This is the reason why they are engaged on a program basis.

55. Helen Blair, *Active Networking: Action, Social Structure and the Process of Networking*, *in* CREATIVE LABOUR: WORKING IN THE CREATIVE INDUSTRIES 119 (Alan McKinlay & Chris Smith, eds., 2009) (citing Nan Dirk De Graaf & Hendrik Derk Flap, *"With a Little Help from My Friends": Social Resources as an Explanation of Occupational Status and Income in West Germany, Netherlands, and the United States*, 67 SOCIAL FORCES 452, 453 (1988)).

56. Blair, *supra* note 55, at 125.

57. International Labour Organization, *supra* note 3, ¶ 32.

58. Bibby, *supra* note 52, at vii.

59. *See* International Labour Organization, *supra* note 3, at 11.

Project employees have the same rights and benefits as permanent employees for the duration of their contract.[60] They also have security of tenure for the duration of their contract[61] and can only be removed for just causes under the Labor Code.[62]

Project employees can be engaged for numerous programs under different contracts and with separate pays.[63] As such, their salaries may increase or decrease depending on the number of programs in which they are engaged. In fact, employees under this category have the potential to earn more than a permanent employee whose salaries are fixed.

However, there seems to be a problem with the implementation of the project employment, such that the duration of the contracts is usually less than the duration of the project. Considering that the duration of the program could not be determined at the onset due to the fact that its duration will depend on program viewership, the terms of the contracts are usually set at six months to one year.

The practice of setting the term of the contract to be less than the actual duration of the program, on the one hand, runs counter to the nature of project employment and the justification on why they are engaged on a temporary basis.[64] This raises issues on the validity of the project employment.

Talents, on the other hand, are independent contractors who create intellectual property for the company.[65] They perform highly creative functions, such as acting, hosting, writing scripts, directing, designing and creating costumes, props, and sets, conceptualizing the look and feel of the programs, and other similar functions that require creative skills.[66] In a sense, it is similar to a work-for-hire set-up. They are paid by output, usually by program episodes.[67]

60. CESARIO A. AZUCENA, JR., THE LABOR CODE WITH COMMENTS AND CASES VOLUME II-A: LABOR RELATIONS & VOLUME II-B: EMPLOYMENT TERMINATION 769 (2016).

61. Bordeos v. National Labor Relations Commission, 262 SCRA 424, 444 (1996).

62. Archbuild Masters and Construction, Inc. v. National Labor Relations Commission 251 SCRA 483, 491 (1995).

63. Palomares v. NLRC (5th Division), 277 SCRA 439, 448-49 (1997).

64. *See* Pasos v. Philippine National Construction Corporation, 700 SCRA 608, 626 (2013) & AZUCENA, JR., *supra* note 60, at 769.

65. *See* Sonza v. ABS-CBN Broadcasting Corporation, 431 SCRA 583, 602 (2004).

66. *Id.* at 607-08.

67. *See, e.g.*, Miguel Camus, Voice it out, *available at* https://www.entrepreneur.com.ph/startup-tips/voice-it-out (last accessed Feb.

Talents are engaged through Talent Agreements with a fixed period and talent fees. These contracts usually indicate that there is no employee-employer relationship between the parties and that the talent is not entitled to any rights and benefits granted to regular employees.[68] Talents are not required to render a minimum number of hours per day, unlike permanent employees.[69]

Unlike the previous category, since talents are considered as independent contractors, their contracts are governed not by the Labor Code but by the law on contracts.[70] Consequently, they do not enjoy security of tenure, and either party may terminate the contract for any reason.[71]

While this arrangement is seemingly valid and should be considered beyond the ambit of labor law, it may be used by employers to skirt the labor laws. It must be emphasized that most positions involved in the creation of programs entail some elements of creativity and contribute intellectual property. Consequently, the company can classify a wide range of positions under this category to escape coverage of the labor laws.

While both the project employees and the talents may create unions, the companies have no duty to recognize and negotiate with the unions.[72]

B. Canada

The Canadian Broadcasting Corporation, one of the largest broadcasting networks in Canada, hires freelancers in almost all the programs it produces.[73] The term of the contracts varies from one episode to one year,

1, 2019). Voice-over talents for anime and soap opera dubbings are paid about ₱500-1000 per episode. *Id.*

68. *See Sonza*, 431 SCRA at 596.

69. *Id.* at 600.

70. *Id.* at 596.

71. *Id.* at 597.

72. *See* Department of Labor and Employment, Further Amending Department Order No. 40, Series of 2003, Amending the Implementing Rules and Regulations of Book V of the Labor Code of the Philippines, as Amended, DOLE Department Order No. 040-I-15, § 3 (Sep. 7, 2015). DOLE Department Order No. 040-I-15 repealed the system of voluntary recognition. Labor organizations must request for a Sole and Exclusive Bargaining Agent (SEBA) Certification, subject to the approval of the DOLE Regional Director. *Id.* § 3.

73. U.A. v. Société Radio-Canada/Canadian Broadcasting Corp., [1982] 1 CLBR 129 (Can.).

but the majority of the contracts are tied with the projected duration of the programs and the production season.[74] Some of the freelancers have worked for the company on a regular basis for more than ten years — some of which even more than twenty five years, and were merely re-engaged through the signing of a new contract for each program.[75]

Despite this set-up, the industry has numerous unions and guilds that negotiate in behalf of the various classifications of individuals engaged in the production of television programs, which have been effective in protecting the rights of these workers. These include The Alliance of Canadian Cinema, Television, and Radio Artists,[76] and The Directors' Guild of Canada.[77]

C. United States of America

The broadcasting industry of the U.S. is probably the most unionized broadcasting industry in the world, with numerous unions for all types of workers — from technical personnel to creative groups and primary talents.[78]

Thus, while most of the workers who are involved in the production of programs are on a freelance basis, they stand on a better footing compared to the other countries because of strong unionization.[79] The unions in the U.S. are some of the most internationally known unions. These include the Screen Actors Guild,[80] Writers Guild of America,[81] and the Directors Guild

74. *Id.*

75. *Id.*

76. Alliance of Canadian Cinema, Television, and Radio Artists, Our Union, *available at* https://www.actra.ca/our-union (last accessed Feb. 1, 2019).

77. The Directors' Guild of Canada, About the Guild, *available at* https://www.dgc.ca/en/national/the-guild/about/# (last accessed Feb. 1, 2019).

78. *See* Alan Paul & Archie Kleingartner, *Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry*, 47 ILR REV. 663, 666 (1994).

79. *See* W. Harry Fortuna, The gig economy is a disaster for workers. Hollywood's unions can help them learn to fight back, *available at* https://qz.com/1052310/hollywood-unions-offer-the-perfect-model-for-the-beaten-down-workers-of-todays-gig-economy (last accessed Feb. 1, 2019).

80. Screen Actors Guild - American Federation of Television and Radio Artists, About, *available at* https://www.sagaftra.org/about (last accessed Feb. 1, 2019).

81. Writers Guild of America, West, Guide to the Guild at 1, *available at* https://www.wga.org/uploadedFiles/who_we_are/fyi15.pdf#page=2 (last accessed Feb. 1, 2019) & Writers Guild of America, East, What is the Guild?,

of America.[82] These unions and/or guilds negotiate with the companies regarding the rights of its members, who are generally and exclusively freelancers, through collective agreements.[83]

Due to the strong presence of unions in the U.S. television industry, most jobs are filled by union members.[84] Thus, continuous employment is usually dependent on union membership because the workers usually move between projects that are covered by union contracts.[85]

D. United Kingdom

Prior to the 1980s, majority of those employed by broadcasters were permanent in nature.[86] However, by the 1990s, majority of television workers were engaged through fixed-term contracts with varying terms — some as short as one month.[87] This shift was brought about by the reorganization of the broadcasting companies, which declared certain permanent positions as redundant.[88] Further, companies were forced to cut production costs, and considering that program production is labor intensive, cutting production costs means reducing labor costs.[89] Some individuals who had greater bargaining power, such as well-known writers, directors, and

available at https://www.wgaeast.org/what-is-the-guild (last accessed Feb. 1, 2019).

82. Directors Guild of America, About the DGA, *available at* https://www.dga.org/The-Guild/History.aspx (last accessed Feb. 1, 2019).

83. International Labour Organization, *supra* note 3, ¶ 60.

84. David Ng, *Hollywood guilds flex their muscle as union influence declines nationwide*, L.A. TIMES, May 9, 2017, *available at* https://www.latimes.com/business/hollywood/la-fi-ct-hollywood-unions-20170509-story.html (last accessed Feb. 1, 2019). *But see* Department of Professional Employees, Television and Radio Broadcasting and Cable Professionals and Technicians, *available at* https://dpeaflcio.org/programs-publications/professionals-in-the-workplace/radio-television-and-cable-broadcasting-professionals-and-technicians (last accessed Feb. 1, 2019) & Bureau of Labor Statistics, Union Members – 2017 at 7, *available at* https://www.bls.gov/news.release/pdf/union2.pdf (last accessed Feb. 1, 2019).

85. *See* Paul & Kleingartner, *supra* note 78, at 677.

86. Dex, et al., *supra* note 54, at 285.

87. *Id.*

88. *Id.*

89. *Id.*

relatively famous talents, were able to negotiate for high fees.[90] On the contrary, weaker workers or those in the lower ranks had no choice but to accept the terms of the contracts as dictated by the company.[91]

As a result, freelance workers continuously face the uncertainty of being given a new contract after their current contract expires.[92] Further, they also have to negotiate their fees, which will depend on their status and negotiating power.[93] Some of the workers work for the company for more than 25 years only through separate successive contracts.[94]

E. European Union

In the European Union (E.U.), self-employment and freelancing are prevalent in the media, arts, and entertainment sector. These kinds of employment are seen to be more prevalent over the last decade due to technological developments, which strongly affected the sector's work organization.[95] Freelancers or self-employed employees have no protection against unfair dismissal and have no right to statutory benefits such as maternity leaves, redundancy pay, and other labor standards.[96]

In order to protect the rights of these workers, several unions represent them in collective bargaining with employers on a range of employment issues.[97]

In Germany, freelancing is the trend in the media industry, and it is increasingly used to replace, instead of complementing, regular employment.[98] Similar to the U.S., the existence of unions facilitate the protection of the rights of freelancers and self-employed employees who negotiate with producers regarding the rights of the workers through collective agreements.[99] In fact, there is a specialized entity, *Mediafon*, established to cater specifically to freelancers with their wide variety of

90. *Id.*

91. *Id.*

92. Dex, et al., *supra* note 54, at 285.

93. *Id.*

94. *Id.* at 286.

95. Charhon & Murphy, *supra* note 1.

96. *Id.* at 21.

97. *Id.* at 20.

98. *Id.* at 39.

99. *Id.* at 22.

services, which include "*information, networking*[,] *and knowledge-based platform, covering the full range of employment status and job-related issues*."[100]

F. Latin America

Unlike in the U.S., the creative professionals in Latin American countries are non-unionized and their only leverage is the fact that there is a "growing demand for content and fierce competition for talent."[101]

The outsourcing of content creation to independent houses have also been largely resorted to by television networks.[102] As for the staffing patterns, these independent houses share a similar staffing pattern.[103] They usually hire permanent employees to take care of administrative matters such as accountants, secretaries, administrators, and office assistants.[104] The personnel who create the programs are usually engaged through "temporary contracts at higher wages but with no legal benefits."[105] This is to ensure flexibility of the production houses to scale down their workforce in accordance with the genre and format of the programs requested by the television networks, which, as previously stated, are usually dictated by changing viewer preference.[106] Independent houses need to bring in the right creative people to a project to ensure delivery of a good project to the television networks. This is because success in the delivery determines the level of continuity of these houses and failure of which may lead to their closure.[107]

IV. CASE STUDY: THE PHILIPPINE LEGAL BACKDROP AND ITS IMPLICATIONS ON TEMPORARY EMPLOYMENT ARRANGEMENTS IN THE BROADCASTING INDUSTRY

A quick look at the legal framework of the Philippines will show that the current temporary employment arrangement in the production of programs is not valid. It will also show that the law leans in favor of the interest of

100. *Id.* at 39 (emphasis supplied).

101. Piñon, *supra* note 53, at 140.

102. *Id.* at 137.

103. *Id.* at 140.

104. *Id.*

105. *Id.*

106. *Id.* at 142.

107. Piñon, *supra* note 53, at 142.

labor despite the fact that the Constitution states that there should be a balance between the interests of labor and business owners.

A. Applicable Philippine Laws

1. Constitution of the Philippines

The Philippine Constitution considers protection of labor as both a constitutional principle and a state policy.[108] Section 3 of Article XIII mandates that the State shall afford full protection to labor and its right to security of tenure.[109] However, this must be balanced with the right of enterprises to reasonable returns to investments, expansion, and growth.[110]

Clearly, while the Constitution mandates the protection of the rights of labor, it does not authorize the oppression or self-destruction of the employer.[111] Social justice should not be interpreted to mean that the State must automatically side with labor. The Constitutional and legal protection equally recognizes the right of the employers to manage their operations as long as it is in accordance with "reasonable standards and norms of fair play."[112]

2. Labor Code of the Philippines

There are five types of employment arrangements under the Philippine Labor Code, namely: (1) regular employment;[113] (2) project employment;[114]

108. PHIL. CONST. art. II, § 9 ("The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all."); PHIL. CONST. art. II, § 10 ("The State shall promote social justice in all phases of national development."); PHIL. CONST. art. II, § 18 ("The State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare."); & PHIL. CONST. art. II, § 20 ("The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.").

109. PHIL. CONST. art. XIII, § 3.

110. PHIL. CONST. art. XIII, § 3.

111. Mercury Drug Corporation v. NLRC, 177 SCRA 580, 586 (1989) (citing Manila Trading & Supply Co. v. Zulueta et al., 69 Phil. 485, 487 (1940)).

112. Imasen Philippine Manufacturing Corporation v. Alcon, et al., 739 SCRA 186, 195 (2014).

113. A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Insure Industrial Peace Based on Social

(3) fixed term employment;[115] (4) seasonal employment;[116] and (5) casual employment.[117]

Among the five categories, only regular employment is of a permanent nature. Regular employment is further divided into two categories: (1) those who are permanent by the very nature of their work or those who perform activities that are usually necessary or desirable in the usual business or trade of the employer;[118] and (2) those who have rendered at least one year of service, whether continuous or broken, with respect to the activity in which they are employed.[119]

Project employment is largely relied on by broadcasting companies in fulfilling its manpower requirements due to reasons discussed in the previous chapter. In the Philippine context, project employees are those who are employed for a specific project or undertaking, the completion of which has been determined at the time of the engagement of the employee.[120] Briefly, their engagement is coterminous with a project or a phase of a project. Unlike permanent employees, project employees are not entitled to separation pay upon the termination of their services.[121]

Closely related to project employment is the concept of fixed-term employment. In this classification, the engagement does not have to be related to a particular project or undertaking. Employment contracts with a fixed period[122] are not prohibited as long as they are not intended to circumvent the right of the employees to security of tenure. The Supreme

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Justice [LABOR CODE], Presidential Decree No. 442, art. 295, para. 1 (1974) (as amended).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* para. 2.

118. *Id.* para. 1.

119. LABOR CODE, art. 295, para. 2.

120. *Id.* para. 1.

121. De Ocampo, Jr. v. National Labor Relations Commission, 186 SCRA 360, 366-367 (1990) (citing Department of Labor and Employment, Stabilizing Employer-Employee Relations in the Construction Industry, Policy Instruction No. 20 (February 7, 1977)) & AZUCENA, JR., *supra* note 60, at 776 (citing Policy Instruction No. 20, s. 1977 & Salazar v. National Labor Relations Commission, 256 SCRA 273, 290-91)).

122. LABOR CODE, art. 295, para. 1.

Court has laid down the criteria for determining the validity of a contract of employment with a fixed period, to wit:

> (1) the fixed period of employment was knowingly and voluntarily agreed upon by the parties without any force, duress[,] or improper pressure being brought to bear on the employee and without any circumstances vitiating consent or, (2) 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 on the latter.[123]

If a project or fixed-term employment exceeds one year, it is most likely that the employment will be declared as permanent.

For purposes of this Note, the seasonal and casual employment are not relevant. Seasonal employees are those whose work or services to be performed are seasonal in nature[124] and the employer has no similar manpower requirements throughout the year. On the other hand, casual employment actually does not have any definition under the Labor Code. According to case law, casual employment is not permanent but "occasional, unpredictable, sporadic, and brief in nature."[125] Additionally, the activities they perform are "not usually necessary or desirable in the employer's business or trade."[126] However, if their engagement reaches at least one year, they will be considered as permanent employees.[127]

3. Case Law

Most of the cases decided by the Supreme Court involving project employees and talents of Philippine broadcasting companies were decided in favor of the employees.

One of the cases decided by the Supreme Court involving project employees was the case of *ABS-CBN Corporation v. Nazareno*.[128] The case involved production assistants who were assigned to programs and were tasked to assist anchors or talents of the programs.[129] As their engagements were tied to a program, their engagement is coterminous with their assigned

123. *Labayog*, 494 SCRA at 491 (citing Philippine National Oil Co.-Energy Dev't. Corp v. NLRC, 220 SCRA 695, 699 (1993)).

124. LABOR CODE, art. 295, para. 1.

125. Chua v. Civil Service Commission, 206 SCRA 65, 73 (1992) (citing Caro v. Rilloraza and Workmen's Compensation Com., 102 Phil. 61, 70 (1957) & Mansal v. P. P. Gocheco Lumber Co., 96 Phil. 941, 945 (1955)).

126. *Pabriga*, 710 SCRA at 700 (2013).

127. LABOR CODE, art. 295, para. 2.

128. ABS-CBN Broadcasting Corporation v. Nazareno, 503 SCRA 204 (2006).

129. *Id.* at 210.

programs.[130] Ruling on the matter, the Supreme Court ruled that once an individual renders work for a company for exceeds one year, he or she shall be considered as a permanent employee "regardless of the nature of the activity performed," or whether the "work is continuous or intermittent ... as long as the activity exists."[131] The Court further stated that they cannot be considered as "talents" because they do not appear on camera such as actors or hosts.[132] They were considered as permanent employees who perform duties necessary and desirable to the company and are under the company's control and supervision.[133]

This notwithstanding, the Court, in the *Nazareno* case, made a pronouncement that their employment is permanent "*but only with respect to such activity and while such activity exists*."[134] This may viewed as contrary to the basis of the Court's ruling that working for more than one year made the employees already permanent. By stating that "*their employment is permanent but only with respect to such activity and while such activity exists*,"[135] their employment is still coterminous with the program and, thus, impermanent. Considering that the employees are tied to a program, the activity to which they are employed ceased to exist once the program has ended. From the foregoing, it seems that the Court has interpreted it to mean that if the activity — regardless of the program to which it is tied — still exists, then the position is permanent.

To illustrate the view of the Court, let us assume that a drama program has ended and was to be replaced by talk show program. While the positions in producing shows are somewhat the same, the technical requirements for these positions may change. Thus, applying the view of the Court, the company is bound to retain the employees from the drama program for the talk show program even though they do not have the skills required for the new program. As discussed in the previous Chapters, this might disrupt the production and affect the quality of the programs.

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130. *Id.* at 215.

131. *Id.* at 225.

132. *Id.* at 227.

133. *Id.* at 227 & 229.

134. Nazareno, 503 SCRA at 226 (citing Universal Robina Corporation v. Catapang, 473 SCRA 189, 204 (2005)) (emphasis supplied).

135. *Id.* (emphasis supplied).

Another case involving project employees is the case of *GMA Network, Inc. v. Pabriga*,[136] about television technicians. In this case, the technicians were not assigned to any programs and were performing core functions necessary in broadcasting operations such as the manning of the operations center to air commercials, equipment maintenance, and acting as transmitter/VTR men.[137] As held by the Court, the technicians were permanent employees.[138] To the Author, the pronouncement of the Court in this case is correct. The project or fixed-term arrangements should not be used by the companies to prevent the acquisition of tenurial security by the employee. A line must be drawn between those who are attached to a program and those who are not. The former may be considered as project employees, but the latter should be considered as permanent employees or another employment arrangement, as the case may be.[139]

As regards talents, the case of *Sonza v. ABS-CBN Broadcasting Corporation*[140] is instructive. The Supreme Court stated that Mr. Jose "Jay" Y. Sonza, a television and radio show host, was not an employee of the company because the elements of an employer-employee relationship were lacking.[141]

First, Mr. Sonza was hired as an independent contractor due to his "unique skills, talent[,] and celebrity status not possessed by ordinary employees."[142] Second, he did not receive a salary but talent fees, which he negotiated with the company.[143] His fees were very high and out of the ordinary, which shows that the relationship was more of an independent contractual relationship rather than employer-employee relationship.[144] Moreover, the company was agreeable to the huge fees precisely because of Mr. Sonza's unique skills, talent, and celebrity status.[145] Third, the company had no power to dismiss Mr. Sonza and could only terminate his Talent Agreement for any breach committed by him.[146] In fact, even if the programs he hosted already went off-air, the company continued to pay him

136. GMA Network, Inc. v. Pabriga, 710 SCRA 690 (2013).

137. *Id.* at 704-05.

138. *Id.* at 712.

139. *Id.*

140. Sonza v. ABS-CBN Broadcasting Corporation, 431 SCRA 583 (2004).

141. *Id.* at 599.

142. *Id.* at 595.

143. *Id.* at 596.

144. *Id.*

145. *Id.*

146. *Sonza*, 431 SCRA at 597.

his fees until the end of the term of his Talent Agreement.[147] Lastly, the company did not exercise any control over Mr. Sonza.[148] How he delivered his lines, appeared on television, and sounded on the radio were beyond the company's control.[149] He also did not have to render the usual eight hours of work per day despite his huge talent fees.[150] While he is required to attend pre-production staff meetings, rehearsals, and tapings of the shows, the company did not dictate the specific contents of his script, and Mr. Sonza had the discretion on what to say or discuss in his shows, provided that it was not contrary to the media ethics and standards of the Company, which adopted the ethical standards of the *Television and Radio Code of the Kapisanan ng Mga Brodkaster ng Pilipinas*, a code of ethics that applies to all broadcasters.[151]

The Supreme Court further held that the existence of an "exclusivity clause" in the Talent Agreement does not amount to control, and "even an independent contractor can validly provide his [or her] services exclusively to a party."[152] In the case of talents, engaging them exclusively is a widespread and accepted practice in the broadcasting industry because the company usually spends substantial amounts of money, time, and effort to build up the reputation of its talents as well as the programs they appear in and, consequently, it was reasonable to require the talents to render their services exclusively to their companies for a reasonable period of time.[153] The higher fees paid to talents also compensate for the exclusivity.[154]

In contrast, the Supreme Court did not apply its ruling in the *Sonza* case to the case of *Begino v. ABS-CBN Corporation*.[155] The case involved reporters and cameramen/editors for specific programs who, similar to Mr. Sonza, were engaged by the company under Talent Agreements.[156] However, in contrast with the decision of the Supreme Court in the *Sonza* case, it was

147. *Id.*

148. *Id.* at 600–03.

149. *Id.*

150. *Id.* at 600.

151. *Id.* at 600 & 603.

152. *Sonza*, 431 SCRA at 604.

153. *Id.*

154. *Id.* at 605.

155. Begino v. ABS-CBN Corporation (formerly ABS-CBN Broadcasting Corporation), 756 SCRA 236 (2015).

156. *Id.* at 240.

ruled that despite the nomenclature of the Talent Agreement, the workers were permanent employees because the nature of their work as reporters and cameramen/editors were necessary and desirable in the business of the company. [157] Moreover, the Supreme Court stated that they were continuously and repeatedly rehired over the years for the same programs, and, pursuant to the provision of the Labor Code on continuous hiring for more than a year, they were already considered as permanent employees.[158] The Court further stated that the contractually stipulated periods were merely created to preclude the acquisition of tenurial security by the individuals.[159]

The Court also held that the company exercised control and supervision over the work of the individuals. [160] The equipment essential for the discharge of their functions were provided by the company, and the Talent Agreement specifically stated that the company retained "*all creative, administrative, financial, and legal control*"[161] of the programs to which the individuals were assigned. Further, the company required the individuals "*to attend and participate in all promotional or merchandising campaigns, activities, or events for the Program*"[162] and required them to render services at locations determined by the company.[163] The Court also noted that the individuals were required by the company to give notice to the company in case they will be unable to comply with the schedule set by the company and that this was subject to approval by the company.[164] All these terms and conditions were considered as control exercised by the company over the means employed by the individuals to achieve the desired results.[165] It bears noting that these exact provisions were also present in the Talent Agreement of Mr. Sonza, but his case was decided differently.

The Court refused to apply their ruling on the *Sonza* case, saying that parallels cannot be drawn between both cases.[166] It stated that the *Sonza* case involved a popular television and radio personality who was legitimately considered a talent and amply compensated as such, while the individuals in

157. *Id.* at 250.

158. *Id.* at 250–51.

159. *Id.*

160. *Id.* at 252.

161. *Begino*, 756 SCRA at 252 (emphasis supplied).

162. *Id.* (emphasis supplied).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 252–53.

the *Begino* case were modestly compensated and do not claim fame or have unique talents for which actors and other on camera personalities were hired and generally compensated in the broadcast industry.[167]

The Supreme Court likewise refused to apply the ruling in the *Sonza* case in a similar complaint filed by a news anchor against Associated Broadcasting Company, another broadcasting company in the Philippines, despite having almost identical factual circumstances such as being an on-cam talent.[168] In *Dumpit-Murillo v. Court of Appeals*,[169] the news anchor was repeatedly engaged for four years through renewed contracts.[170] However, unlike the *Sonza* case, the news anchor was declared as a permanent employee.[171] In refusing to apply the *Sonza* ruling, the Court stated that the news anchor and the company were not in equal footing, such that the news anchor could not negotiate the terms of the contract and being just one of the many news anchors of the company, she had no choice but to sign the contract. [172] Consequently, the fixed-term employment was not valid because it circumvented the employee's acquisition of tenure.[173]

Comparing the above two cases of *Begino* and *Dumpit-Murillo* with the *Sonza* case, it seems that the Court will only consider an individual as an independent contractor if the individual and the company are on equal footing, which can be established by showing that the remuneration is significantly higher, as in the case of *Dumpit-Murillo* where it said that the pay of ₱28,000 (around US$560) is nothing compared to the pay received by Sonza, which amounted to ₱300,000 (around US$6,000), or that the individual has a high popularity such as in the case of *Sonza*.[174]

The standard set by the Court — that the remuneration should be higher to show that there is equal footing — has no basis and is purely arbitrary. The amount to be paid to an independent contractor should not be used as a yardstick to determine whether the individual and the company are in equal footing and whether there is a valid independent contractual relationship. To rule otherwise would result to an absurd situation where all

167. *Begino*, 756 SCRA at 253.

168. *See* Dumpit-Murillo v. Court of Appeals, 534 SCRA 290 (2007).

169. Dumpit-Murillo v. Court of Appeals, 534 SCRA 290 (2007).

170. *Id.* at 294.

171. *Id.* at 303-04.

172. *Id.* at 300 & 304.

173. *Id.* at 304.

174. *Id.* at 300 (citing *Sonza*, 431 SCRA at 596).

the independent contractors can claim permanent employment because they are getting a smaller fee compared to other contractors. Likewise, the popularity of the individual should also not be used to determine equal footing, because an absurd situation can also arise wherein two individuals performing exactly the same functions can be considered as an independent contractor and a permanent employee depending on their popularity.

Another interesting case decided by the Supreme Court involves a Japanese broadcasting company, Fuji Television Network, Inc., which had a media bureau in the Philippines.[175] In *Fuji Television Network, Inc. v. Arlene Espiritu*, [176] the complainant, Ms. Espiritu, was a news correspondent/producer who appeared on air similar to the *Sonza* and *Dumpit-Murillo* cases.[177] Similar to the *Begino* and *Dumpit-Murillo* cases, Ms. Espiritu was declared a permanent employee because her contract was successively renewed, which indicated the necessity and desirability of her work in the usual course of Fuji's business.[178] However, unlike the *Begino* case, the Court made a short discussion on recognizing fixed-term employment as long as the contract has a "definite date of termination," freely entered into by both parties, and it is not a mere subterfuge to avoid vesting on the employee a permanent employment status.[179]

These notwithstanding, it is not to say that all independent contractual relationships and all project employment should be regarded as valid. There should still be determination whether there is a valid project in case of project employment and whether the position can be validly contracted out in case of independent contractors.

B. Implications on the Current Employment Relationship Structure

From the foregoing discussions, the Supreme Court decisions are unanimous in one thing: an individual is considered as a permanent employee if he or she has been performing work for the company for more than one year regardless of the employment arrangement agreed upon by the parties at the start of his or her employment, provided that they are not on equal footing. These include project employees and independent contractors.

If the interpretation of the Court is to be applied to the current employment arrangements in broadcasting companies, then all of these individuals become permanent employees of the company if they continue

175. *See* Fuji Television Network, Inc. v. Espiritu, 744 SCRA 31 (2014).

176. Fuji Television Network, Inc. v. Espiritu, 744 SCRA 31 (2014).

177. *Id.* at 40.

178. *Id.* at 85-91.

179. *Id.*

to work for the company for more than one year. In this case, the broadcasting companies will be laden with hundreds of employees, which it does not necessarily need every time they undergo programming changes. This will unduly restrict the flexibility of the broadcasting companies to adapt to changes in viewer preferences and ultimately curtail their competitiveness. Likewise, this might adversely affect the broadcasting companies, more so that they are faced with numerous competitors that deliver content through newer platforms such as Netflix, Hulu, and other online video-on-demand providers.

Ultimately, this might function as a disincentive for broadcasting companies to continue with their business, especially the smaller companies, which cannot afford to have excessive employees in their payroll. This may also drive broadcasting companies to shift from traditional broadcasting to online platforms. Considering that the Philippines is lagging in terms of online accessibility by the public, [180] this may diminish information dissemination because there will be fewer television and radio broadcasters to service the wider general public.

To reiterate the problem as discussed in the previous Chapters, there is a need to revisit the current stance towards non-permanent employment arrangements, such as independent work, project employment, and fixed-term employment.

V. COMPARATIVE STUDY ON NON-PERMANENT EMPLOYMENT RELATIONSHIPS IN OTHER COUNTRIES

There is an increasing labor market segmentation worldwide wherein the labor market is further subdivided into segments with distinguishable characteristics due to the emergence of new forms of employment.[181] One of the market segments that continue to rise is the non-permanent

180. C.J.V. Dela Paz, *Internet penetration rate in the PHL still low – UN report*, BUSINESSWORLD, Sep. 23, 2014, *available at* http://www.bworldonline.com/content.php?section=Economy&title=internet-penetration-rate-in-the-phl-still-low----un-report&id=94882 (last accessed Feb. 1, 2019) (citing United Nations Broadband Commission, The State of Broadband 2014: broadband for all (a Report by the Broadband Commission) at 97, *available at* https://www.broadbandcommission.org/documents/reports/bb-annualreport2014.pdf (last accessed Feb. 1, 2019)).

181. Juan Menéndez-Valdés, Current changes to the labour market may well define the future of Europe, *available at* https://www.eurofound.europa.eu/publications/blog/current-changes-to-the-labour-market-may-well-define-the-future-of-europe (last accessed Feb. 1, 2019).

employment, which is currently a significant issue in labor law and labor market policy across the world.[182]

In the international context, all types of non-permanent employment arrangements that terminate automatically at the expiry of an agreed period are encompassed by the term "fixed-term employment."[183] This characterization is different from the Philippine legal framework, which has a narrower meaning for "fixed-term employment [or] contract" and is considered separate from project employment, which is also non-permanent in nature.[184] In the international context, fixed-term employment is a more general term and encompasses both the fixed-term and project employment classifications under the Philippine legal framework discussed previously. For purposes of discussion in this Chapter, "fixed-term contract" shall follow the definition of the international community and shall refer to any employment contract that is non-permanent in nature.

As in any jurisdiction, fixed-term contracts are beyond the coverage of the legal requirements on termination of employment, provided that the periods stipulated are observed.[185] For employers and the general labor market, these arrangements provide numerical flexibility but in contrast, these arrangements give rise to worker concerns over employment stability and inferior working conditions compared to permanent employment.[186]

Due to the spike in the non-permanent employment arrangements, several countries have introduced rules to curb the abuse of fixed-term contracts[187] as well as prevent the discrimination between fixed-term

182. Hiroya Nakakubo & Takashi Araki, *Introduction* to REGULATION OF FIXED-TERM EMPLOYMENT CONTRACTS A COMPARATIVE OVERVIEW xvii-iii (Roger Blanpain et al. eds., 2010).

183. *Id.* at xviii.

184. *Pabriga*, 710 SCRA at 709.

185. *See* AZUCENA, JR., *supra* note 60, at 789; Eric M. Tucker & Alec Stromdahl, Fixed-Term Contracts and Principle of Equal Treatment in Canada at 119 & 124, *available at* https://digitalcommons.osgoode.yorku.ca/scholarly_works/2601 (last accessed Feb. 1, 2019); Aristea Koukiadaki, The Regulation of Fixed-term Work in Britain (A Book Chapter Listed in the Website of University of Cambridge Judge Business School) at 19, *available at* https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.9_u.k..pdf (last accessed Feb. 1, 2019); & Chih-Pouh Liou, *Laws and Practice of Fixed-Term Labour Contracts in Taiwan*, *in* REGULATION OF FIXED-TERM EMPLOYMENT CONTRACTS: A COMPARATIVE OVERVIEW, *supra* note 182, at 191.

186. Nakakubo & Araki, *supra* note 182, at xviii.

187. Eurofound (2017), Fraudulent Contracting of Work: Abusing Fixed- Term Contracts (Belgium, Estonia and Spain) (A Report by the European Foundation

workers and permanent workers. However, the manner of regulating fixed-term contracts still varies depending on the jurisdiction.

This Chapter focuses on a comparative study of three jurisdictions: (1) the U.S., where most of the laws and case law of the Philippines are largely based; (2) Japan; and (3) the E.U., with specific discussions on the laws of Germany and the United Kingdom (U.K.), which are among the world's most advanced labor markets. While the U.K. has recently exited from the E.U, there has been no changes in its labor laws and thus, for purposes of this Note, the U.K. shall be discussed under the heading of E.U.

A. United States of America

In most states in the U.S., employment may generally be terminated at the election of either the employee or the employer,[188] unless the right to terminate is restricted by statutory requirements of proven cause in the case of government employees,[189] or if the right is restricted by a contract (usually an employment contract or a collective bargaining agreement) in the case of private employees.[190] Due to its nature, employment in the U.S. is regarded as employment "at will" of both parties.[191]

2017) at 9 & 11, *available at* https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1717en2_1.pdf (last accessed Feb. 1, 2019).

188. Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., January 2001, at 3 & L&E Global, Employment Law Overview 2017 USA at 4, *available at* https://knowledge.leglobal.org/wp-content/uploads/sites/2/Employment-Law-Overview-2017_US.pdf (last accessed Feb. 1, 2019).

189. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 567 & 577 (1972). A public employee's property interest in his or her employment arises from state law. For instance, a statutory law in Wisconsin provides that tenured public teachers cannot be terminated without cause upon written charges. *Id*. at 567.

190. Alvin Goldman, *Regulating Temporary Work in the United States*, *in* TEMPORARY AGENCY WORK IN THE EUROPEAN UNION AND THE UNITED STATES 51 (Roger Blanpain ed. 2013); Muhl, *supra* note 188, at 3; & Jackson Lewis & Benjamin Krief, A Comparative Guide: Terminating the Employment Relationship in the U.S. and France (A Newsletter by Labor Law Firms: Jackson Lewis, L&E Global, & Flichy Grangé Avocats) at 1, *available at* https://www.jacksonlewis.com/media/pnc/9/media.2089.pdf (last accessed Feb. 1, 2019).

191. L&E Global, *supra* note 188, at 4.

As to non-permanent work, no specific form is required under the law. Non-permanent employment arrangements are varied and include project employees, fixed-term employees, part-time workers, those under temporary agency, and even independent contractors.[192] There are only a few exceptions to this, which include migrant farm labor obtained through a contracting agent,[193] and the engagement of seafarers[194] and apprentices,[195] among others.

While non-permanent work is usually seen as undesirable, it was found that 35.5% of all non-permanent workers prefer non-permanent work arrangements according to a survey conducted in 2005.[196] Meanwhile, 79% of independent contractors, 44% of on-call workers, and 39% of temporary help workers respectively prefer non-permanent work arrangements, according to a survey conducted in 2017 by the Bureau of Labor and Statistics.[197] The workers view non-permanent employment arrangements as a means to obtain new training and skills and an opportunity to determine if the work is suitable to their preferences.[198] They also enjoy the independence in this type of arrangement that allows them to adjust to the other demands and participating in commitments of life such as volunteer activities, pursuing hobbies and interests, spending more time with family, doing activities for recreation, and obtaining further education.[199]

On the federal level, there is no legal provision that governs fixed contracts.[200] Unlike many countries, there is no limit as to the duration of a

192. Goldman, *supra* note 190, at 52 & Abel Valenzuela Jr., *Non-Regular Employment in the United States: a Profile*, *in* NON-REGULAR EMPLOYMENT – ISSUES AND CHALLENGES COMMON TO THE MAJOR DEVELOPED COUNTRIES 89-91 (2011).

193. *See* Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. 97-470, § 1801 (1983) (U.S.).

194. *See* Fair Labor Standards Act of 1938, 29 U.S.C. 201, § 13 (a) (3) (1983) (U.S.).

195. *See* Promotion of Labor Standards of Apprenticeship, 29 U.S.C. 50 (1983) (U.S.).

196. Goldman, *supra* note 190, at 55 & Jay Shambaugh, et al., Independent workers and the modern labor market, *available at* https://www.brookings.edu/blog/up-front/2018/06/07/independent-workers-and-the-modern-labor-market (last accessed Feb. 1, 2019) (citing Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements News Release, *available at* https://www.bls.gov/news.release/conemp.htm (last accessed Feb. 1, 2019)).

197. *Id.*

198. *Id.*

199. *Id.*

200. L&E Global, *supra* note 188, at 4.

fixed-term employment, provided that there is no law stating otherwise in the state where the employment contract was executed.[201] Likewise, unlike the E.U., which requires objective grounds to justify fixed-term employment, the U.S. does not have the same requirement. [202] Consequently, fixed-term employment may be resorted to by companies for any reason. From the foregoing, the U.S. legal framework easily facilitates the utilization of non-permanent employment arrangements in the broadcasting industry.

The U.S. also has a Federal-State Unemployment Insurance Program which provides unemployment benefits to unemployed workers who pass the eligibility requirements set forth in the program.[203] It is an integral part of the social security system of the U.S. and functions as a significant automatic stabilizer in the economy.[204] The program may be availed of by non-permanent employees whose contracts have expired and were not renewed, subject to completion of the requirements.[205]

B. Japan

Similar to the concerns on non-permanent employment arrangements worldwide, non-permanent employment, or "atypical employment" as it is called in Japan, is currently one of the more important issues of Japanese labor and employment law.[206] The high importance of this issue is due to the fact that more than one-third of Japanese labor market are under non-permanent employment arrangements.[207]

According to surveys conducted in 2005 and 2009, non-permanent employment arrangements are resorted to by employers for three main

201. *Id.*

202. *Id.*

203. U.S. Department of Labor, Unemployment Insurance, *available at* https://www.dol.gov/general/topic/unemployment-insurance (last accessed Feb. 1, 2019).

204. George Rejda, *Unemployment Insurance as an Automatic Stabilizer*, 33 J. RISK & INS. 195, 195 (1966).

205. Debbie A. Duran, Can Contract Employees Collect Unemployment?, *available at* https://bizfluent.com/info-8111212-can-contract-employees-collect-unemployment.html (last accessed Feb. 1, 2019).

206. Hisashi Takeuchi-Okuno, *The Regulation of Fixed-Term Employment in Japan*, *in* REGULATION OF FIXED-TERM EMPLOYMENT CONTRACTS A COMPARATIVE OVERVIEW, *supra* note 182, at 109.

207. *Id.*

reasons.[208] First and most dominantly, non-permanent employment allows the employers to reduce labor costs.[209] Second, it also allows the companies to hire experienced elderly employees.[210] Third and finally, it allows the companies to ensure workforce flexibility and respond to mid- to long-term business fluctuations. [211] Through fixed-term contracts, long-term employment is preserved because the former serve as shock-absorbers, such that — when a need to terminate employees arise — those under fixed-term contracts are first effected through non-renewal before the permanent employees are dismissed.[212]

The Labor Standards Act[213] (LSA) was enacted shortly after the World War II to protect Japanese workers. Under the LSA, non-permanent or "temporary workers" are employed under a contract for a definite period while the contract for permanent employees or "regular employees" are silent on the duration and termination of the contract.[214] The law does not require any ground for fixed-term employment. Often, the work of a temporary employee is exactly the same as the work of a regular employee and the only difference is the means of employment.

Prior to its amendment, the LSA did not impose any limit on the total duration of the temporary employment, provided that each contract must not be for a duration of longer than one year. A single contract may be longer than one year if it requires a definite period longer than one year for completion. [215] Consequently, until recently, there has been almost no statutory regulations with regard to fixed-term employment, except for the maximum allowable period for a single contract.[216]

The provision on fixed-term employment underwent numerous revisions — the most recent of which took effect on 1 April 2013.[217] Under

208. *Id.* at 114.

209. *Id.*

210. *Id.*

211. *Id.*

212. Časlav Pejović, *Japanese Labor Law: Challenges Ahead*, 4 AOYAMA L. F. 51, 71 (2016).

213. Labor Standards Act, Act No. 49 of April 7, 1947 (1947) (Jap.) (as amended).

214. *See* Labor Standards Act, art. 14. & W. Albeda, et. al., TEMPORARY WORK IN MODERN SOCIETY 246 (1978).

215. *Id.* at 246.

216. Takeuchi-Okuno, *supra* note 206, at 115.

217. Nick Wood, The Renewal of Fixed-term Contracts: The Law at 4, *available at* http://nugw.org/utu/downloads/FixedTermContractRenewal.pdf (last accessed Feb. 1, 2019) (citing Labor Standards Act, art. 18).

the revised law, fixed-term workers who are continuously engaged by the same employer and had their contracts repeatedly renewed for five years or more are entitled to request for a permanent status.[218] The application of the law was not retroactive and the five-year period commenced on 1 April 2013.[219] Nonetheless, the fixed-term employment still did not require any ground for its use, and the employer can still resort to fixed-contracts even for work done by regular employees subject to the immediately preceding amendment.

Due to the new restrictions brought about by the amendment, some employers devised ways to ensure that fixed-term workers only work for less than five years to prevent them from gaining permanent status.[220] One such way was to include provisions in their contracts that limit renewal to a maximum of three years or fixing the term of the initial contract to less than five years with no renewal possible afterward.[221]

Considering that the eligibility started on 1 April 2018, many employers no longer renewed the contracts of those engaged after the effectivity of the revised law.[222] The non-renewals have been a problem because they are being used by companies to avoid the risk of having to employ fixed-term workers on a permanent basis.[223]

The Japanese government has also proposed a new arrangement called "*limited regular employment*" or the "*gentei seiki kouyu*."[224] Under this new category, employees are engaged through open-ended contracts, but compared to regular employees, their job location, functions, and working

218. *Id.*

219. *Id.*

220. Hifumi Okunuki, *'Five-year rule' triggers 'Tohoku college massacre' of jobs*, JAP. TIMES, Nov. 27, 2016, *available at* https://www.japantimes.co.jp/community/2016/11/27/issues/five-year-rule-triggers-tohoku-college-massacre-jobs/#.XCKCSqeB2b9 (last accessed Feb. 1, 2019)

221. *Id.*

222. Kyodo News, *Japanese temp worker fights for labor rights as companies avoid hiring full-time staff*, JAP. TIMES, Feb. 7, 2018, *available at* https://www.japantimes.co.jp/news/2018/02/07/national/socialissues/japanese-temp-worker-fights-labor-rights-companies-avoid-hiring-full-time-staff/#.XBom689LiTd (last accessed Feb. 1, 2019).

223. Pejović, *supra* note 212, at 76.

224. Scott North, *Limited Regular Employment and the Reform of Japan's Division of Labor*, ASIA-PACIFIC J., Volume No. 12, Issue No. 15, No. 1, at 1.

hours are limited.[225] Consequently, they receive slightly lower wages compared to the regular employees.[226]

The Japan labor market also boasts of a strong union culture.[227] However, these labor unions often limit their membership to permanent employees because of the possible existence of conflicting interests of permanent and non-permanent employees.[228]

Japan also has an unemployment insurance system that entitles temporary workers, who are no longer employed but are capable and willing to work, to receive certain benefits.[229] The only problem is that determining whether a worker is willing to work is difficult, as well as determining whether the employer is merely taking advantage of the insurance fund by not providing employees continuous work.[230]

C. European Union

Despite the fact that a vast majority of workers in the E.U. are still under permanent employment contracts, the emergence of non-permanent employment is still very noticeable.[231] The continuing need for non-permanent employment in the E.U. is necessary to achieve economic growth by making business strategies and productivity that adapt to globalized markets and economies.[232]

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225. *Id.* at 6.

226. *See* North, *supra* note 224, at 7.

227. Pejović, *supra* note 212, at 56.

228. *Id.*

229. Albeda, *supra* note 214, at 245; Fumio Ohtake, *Structural Unemployment Measures in Japan*, JAP. LAB. REV. Volume No. 1, Issue No. 2, Spring 2004, at 28-30; & Edud Harari, *Unemployment in Japan: Policy and Politics*, 18 ASIAN SURVEY 1013, 1015, 1019 (1978). *See also* OECD Secretariat Team, The Public Employment Service in Japan, Norway, Spain, and the United Kingdom (A Report Published Online by the Organisation for Economic Co-operation and Development) at 130, *available at* https://www.oecd.org/els/emp/2485484.pdf (last accessed Feb. 1, 2019).

230. *Id.*

231. Andrea Broughton, et al., Flexible Forms of Work: 'Very Atypical' Contractual Agreements, *available at* https://www.eurofound.europa.eu/publications/report/2010/flexible-forms-of-work-very-atypical-contractual-arrangements (last accessed Feb. 1, 2019)

232. *Id.*

In the E.U., employment which is non-permanent is referred to as "atypical employment."[233] It is further subdivided into: (1) non-permanent employment; (2) temporary agency work; (3) part-time employment; and (4) self-employment.[234]

In response to the increasing use of atypical employment in the 1980s and the 1990s, E.U. legislation has provided for a legal framework for atypical workers in recognition of the fact that such workers experience lower quality working conditions compared to permanent workers.[235]

Among the many legislations passed by the E.U. concerning atypical workers include the framework agreement on the rights of fixed-term workers under Council Directive 1999/70/EC.[236] The Council Directive recognized the need to "*take measures with a view to 'increasing the employment-intensiveness of growth, in particular by a more flexible organization of work in a way which fulfills both the wishes of employees and the requirements of competition.'*"[237] Among its aims was also to make "*undertakings productive and competitive and achieving the required balance between flexibility and security*."[238] Thus, it is clear that the E.U. has recognized the need for fixed-term employment, provided

233. European Foundation for the Improvement of Living and Working Conditions, Atypical Work, *available at* https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/atypical-work (last accessed Feb. 1, 2019).

234. European Foundation for the Improvement of Living and Working Conditions, Working Conditions in Atypical Work (A Leaflet Published Online on the Forms of Atypical Work) at 1, *available at* https://www.eurofound.europa.eu/ef/sites/default/files/ef_files/pubdocs/2001/59/en/1/ef0159en.pdf (last accessed Feb. 1, 2019).

235. Sara Riso, Very atypical work: Exploratory analysis of fourth European Working Conditions Survey (A Background Paper Published Online by the European Foundation for the Improvement of Living and Working Conditions) at 1, *available at* https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1010en.pdf (last accessed Feb. 1, 2019).

236. Council Directive 1999/70/EC, Concerning the Framework Agreement on Fixed-term Work Concluded by ETUC, UNICE and CEEP, 1999 O.J. (L. 175) 43. The Council Directive was concluded by the European Trade Union Confederation, the Union of Industrial and Employers' Confederations of Europe, and the European Centre of Enterprise with Public Participation on 28 June 1999. *Id.*

237. *Id.* whereas cl. ¶ 5 (emphasis supplied).

238. *Id.* whereas cl. ¶ 6 (emphasis supplied).

that it is not abused by employers who resort to it in order to discriminate among workers and avoid vesting of security of tenure.

Under the Council Directive, fixed-term employment was defined as an agreement to enter into an employer-employee relationship the term of which is "*determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.*"[239] Under this definition, the workers of the broadcasting industry, as discussed in the previous chapters, are considered as fixed-term employees.

The Council Directive mandated member countries to introduce measures that will provide the objective reasons to justify renewal of contracts, set the maximum total duration of successive fixed term employment, and limit the number of renewals.[240] This being said, there is no uniform rule across the E.U.

1. Germany

There has been a considerable decline in permanent employment in Germany throughout the years.[241] Thus, in order to prevent the abuse of non-permanent employment arrangements and in compliance with the Council Directive, Germany passed the Part-Time and Fixed Term Employment Act, which took effect on 1 January 2001.[242] It was also the intention of the law to emphasize that fixed-term employment is the exception rather than the general rule.[243]

Under the Act, fixed-term employment is defined as any work wherein the duration is limited either by being fixed according to the calendar or

239. *Id.* annex, cl. 6, ¶ 1 (emphasis supplied).

240. *Id.* annex, cl. 5, ¶ 1.

241. Paolo Barbieri, *Flexible Employment and Inequality in Europe*, 25 EUR. SOC. REV. 621, 624 (2009) (citing Organisation for Economic Co-operation and Development, Employment Outlook 2003, *available at* http://www.oecd.org/employment/emp/oecdemploymentoutlook2003-towardsmoreandbetterjobs.htm (last accessed Feb. 1, 2019)).

242. Alexandra Scheele, New Law Passed on Part-Time Work and Fixed-Term Employment Contracts, *available at* https://www.eurofound.europa.eu/publications/article/2000/new-law-passed-on-part-time-work-and-fixed-term-employment-contracts (last accessed Feb. 1, 2019) (citing Council Directive 1999/70/EC, whereas cl. ¶ 6).

243. Bernd Waas, *Labour Policy and Fixed-Term Employment Contracts in Germany*, *in* REGULATION OF FIXED-TERM EMPLOYMENT CONTRACTS: A COMPARATIVE OVERVIEW, *supra* note 182, at 89 (citing German Parliament, Printing Matter 14/4374, 1 and 12 & 7 AZR 855/06, TzBfG No. 41 Arbeitsrechtliche Praxis, § 14. (BAG 2007) (Ger.)).

being dependent on the nature, purpose or quality of the work to be provided.[244] The classifications are similar to the definitions of fixed-term employment and project employment, respectively, under the Philippine legal framework. It is also worth noting that under Section 21 of the Act, "an employment contract can be concluded under a condition subsequent" or when the contract is dependent on an uncertain event, in which case, the restrictions on fixed-term employment shall apply.[245]

Under German law, there are two kinds of fixed-term employment: (1) those which are based on objective grounds (*Befristung mit Sachgrund*); or (2) those which do not rest on objective grounds (*Befristung ohne Sachgrund*).[246]

Under the first classification, the objective grounds enumerated under Section 14 of the Act are:

> (1) the need for certain manpower is only temporary[;]
>
> (2) the term is fixed to make it easier for an apprentice or post-graduate to get subsequent employment[;]
>
> (3) a worker is employed in order to substitute for another worker[;]
>
> (4) the nature of work justifies the fixing of the term[;]
>
> (5) the fixing of the term serves the purpose of testing the worker[;]
>
> (6) grounds [...] related to the person of the worker justify the fixing of the term[;]
>
> (7) worker is remunerated from budget finds, and these funds are earmarked for fixed-term employment only under according budget rules and the worker is employed accordingly[;] and
>
> (8) fixing of the term is based on an amicable settlement before a court [ ].[247]

However, the grounds listed in Section 14 are not exhaustive, and other grounds may be used as long as they have the same weight as the grounds

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244. Part-Time and Fixed-Term Employment Act, § 3 (1) (Ger.).

245. Waas, *supra* note 243, at 89.

246. Bredin Prat, et al., Fixed-Term Employment Contracts in France, Germany and the UK (A Newsletter Published Online by German Law Firm, Hengeler Mueller) at 3, *available at* https://www.hengeler.com/fileadmin/news/BF_Letter/07_FixedTermEmploymentContracts_2013-07.PDF (last accessed Feb. 1, 2019).

247. Waas, *supra* note 243, at 93 (citing Part-time and Fixed-Term Employment Act, § 14 (1)). The block quotation is an English translation of the law.

expressly mentioned in the Act.[248] For purposes of this Note, the focus shall be on the fourth objective ground for being the applicable ground.

Under the second classification, a fixed-term contract may also be entered into even if no objective grounds exists, provided that the number of renewals does not exceed three, that the total duration should not be longer than two years, and that the employee has not had a previous employment relationship with the employer.[249] If these requisites have not been met, then the employment is converted into a permanent contract of employment.[250] German law also allows successive renewals of fixed-term contracts for a longer period of five years for older workers who are aged 52 and above and have been unemployed for at least four months immediately before the conclusion of the contract.[251]

For fixed-term contracts under the first classification, which are supported by objective grounds, it seems that there are no maximum number of successive renewals as long as the objective ground exists at the time of the conclusion of each contract. In the case of *Kucuk v. Land Nordrhein-Westfalen*,[252] the Court of Justice of the E.U. impliedly ruled that the objective grounds are "*precise and concrete circumstances* [*characterizing*] *a given activity which are ... capable ... of justifying the use of successive fixed-term contracts*"[253] under the framework of the Council Directive. The Court further stated that those "*circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social policy objective of a Member State*."[254] Thus, as long as the successive renewals of contracts are supported by objective grounds, then the same does not automatically result to an abuse of the fixed-term employment arrangement. The determination of whether the successive renewals are justified by objective grounds is left to the discretion

248. *Id.*

249. *Id.* at 33.

250. Prat, et al., *supra* note 246, at 15.

251. *Id.* at 36.

252. Bianca Kücük v. Land Nordrhein-Westfalen, Judgment, Case C-586/10, EU:C:2012:39 (CJEU Jan. 26, 2012) (emphasis supplied).

253. *Id.* ¶ 27 (emphasis supplied).

254. *Id.* (citing Angelidaki and Others, Judgment, Cases C-378/07 to C-380/07, EU:C:2009:250, ¶ 96 (CJEU Apr. 23, 2009); Adeneler and Others, Judgment, Case C-212/04, EU:C:2006:443, ¶¶ 69-70 (CJEU July 4, 2006); Del Cerro Alonso, Judgment, Case C-307/05, EU:C:2007:509, ¶ 53 (CJEU Sep. 13, 2007); & Vassilakis and Others, Order, Case C-364/07, EU:C:2008:346, ¶¶ 88-89 (CJEU June 12, 2008) (emphasis supplied).

of the domestic courts, which shall decide the matter based on the factual circumstances of each case.

What the European Court of Justice declared as invalid are national legislations that merely authorize recourse to successive fixed-term contracts in a general sense without any qualifications.[255] This is understandable because without any basis for the successive renewals of the contracts, it will open the floodgates of abuse by employers to skirt vesting of tenurial security.

Likewise, there seems to be no maximum duration for the fixed-term contract with an objective purpose. As long as the period is justified by the grounds for which the employee was engaged, there is no limit as to the length of the contract.[256]

In a recent case decided by the German Federal Labor Court on 30 August 2017,[257] the fixed-term contracts between an actor and a film-production company — wherein the former was engaged over many years for the same role of inspector in a crime series — were successively renewed.[258] The entire duration of the successive contracts totaled almost 18 years.[259] The Court held that the successive renewals was justified by the "*nature of work*" within the meaning of the fourth objective ground under Section 14 (1) of the Part-Time and Fixed-Term Contracts Act.[260]

Indeed, employment contracts between television productions and artists fall under the fourth objective ground of Section 14 (1).[261] Due to the fact that changing preference of viewers particularly in wanting to see "fresh faces" on television every now and then, and the corresponding need of the

255. *Id.* ¶ 28 (citing *Angelidaki*, EU:C:2009:250, ¶ 97; *Del Cerro Alonso*, EU:C:2007:509, ¶ 54; & *Vassilakis and Others*, EU:C:2008:346, ¶ 90).

256. John T. Addison, et al., Worker Representation and Temporary Employment in Germany: The Deployment and Extent of Fixed-Term Contracts and Temporary Agency Work (A Discussion Paper Published Online by the IZA – Institute of Labor Economics) at 26, *available at* http://ftp.iza.org/dp11378.pdf (last accessed Feb. 1, 2019).

257. 7 AZR 864/15, Aug. 30, 2017, *available at* https://juris.bundesarbeitsgericht.de/zweitesformat/bag/2018/2018-01-31/7_AZR_864-15.pdf (last accessed Feb. 1, 2019) (Ger.).

258. *Id.* ¶ 2.

259. *Id.*

260. *Id.* ¶ 38.

261. Waas, *supra* note 243, at 31.

employer to enjoy flexibility, the need to give room for fixing the term of contracts with artists has been recognized.[262]

In order to be valid, the fixed-term nature and duration of the employment must be agreed in writing by the employee and the employer.[263] If there is no written agreement, the employee is deemed to be a permanent employee.[264] The reason for the fixed-term does not necessarily have to be stated in the written contract.[265]

Similar to the U.S. and Japan, Germany also has an unemployment insurance program wherein certain benefits are mandated to be paid to an unemployed worker who has worked and paid contributions for at least 12 months in the last two years.[266] Just like the unemployment insurance programs of Japan and the U.S., Germany's version likewise provides temporary assistance and eases the difficulties experienced by non-permanent employees who are in between jobs.

2. United Kingdom

In the U.K., the relevant law is the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (Regulations).[267] Under the Regulations, fixed-term employment is defined as any contract of employment that ends either on (1) the expiry of a specific term; (2) completion of a particular task; or (3) on the occurrence or non-occurrence of any other specific event, other than on reaching the normal retiring age for that position.[268]

The maximum duration of successive fixed-term contracts, which the employer can enter into with an employee, is four years, unless objectively

262. *Id.* & The European Centre of Expertise, Flash Reports on Labor Law August 2017 (Summary and Country Reports Published on the European Commission Website) at 23, *available at* http://ec.europa.eu/social/BlobServlet?docId=18346&langId=en (last accessed Feb. 1, 2019).

263. Waas, *supra* note 243, at 36.

264. *Id.* at 37.

265. Prat, et al., *supra* note 246, at 5.

266. European Commission, Germany-Unemployment Benefits (Webpage on the European Commission Website), *available at* https://ec.europa.eu/social/main.jsp?catId=1111&int PageId=4557&langId=en (last accessed Feb. 1, 2019).

267. The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, 2002 No. 2034 (2002) (U.K.).

268. *Id.* part 1, ¶ 1 (2).

justified.[269] If the contracts are extended beyond four years, the objective grounds for justifying the use of fixed-contracts should be specified.[270]

An example of the justified renewal was the recent case of the U.K. Supreme Court, which followed a reference to the European Commission.[271] It allowed the Department for Children, Schools, and Families to employ teachers on three successive fixed-term contracts, which had a total duration of nine years and without them reaching the status of permanent employee.[272] The objective justification was that it would not have been possible for the teachers to remain in those roles beyond the nine year limit.[273]

Unlike the German law, there is no need for the fixed-term contract to be reduced to writing under U.K. law.[274]

The U.K. is among the first countries that enacted an unemployment benefit program — dating back to 1911.[275] The most recent legislation on the matter is the called Jobseekers Act of 1995.[276] Its main objectives were to help people who are in search of work, ensuring value for money of the taxpayers by effectively helping people get back to work, and improve the service to unemployed people.[277] In order to receive the benefits under the Act, the worker must comply with certain requisites and sign an agreement with the government.[278]

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269. *Id.* part 2, ¶ 8 (2).

270. Prat, et al., *supra* note 246, at 6 (citing Duncombe and others v. Secretary of State for Children, Schools and Families, Judgment, [2011] UKSC 14, Mar. 30, 2011, ¶¶ 25 & 39, *available at* https://www.supremecourt.uk/cases/docs/uksc-2010-0025-judgment.pdf (last accessed Feb. 1, 2019) (U.K.)).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 5-6.

275. Jackie Wu, Unemployment-Related Benefits System in the United Kingdom, ¶ 4.1, *available at* https://www.legco.gov.hk/yr99-00/english/sec/library /e15.pdf (last accessed Feb. 1, 2019).

276. Jobseekers Act 1995, 1995 c. 18 (1995) (U.K.).

277. Pat Strickland, Jobseeker's Allowance (A Paper Published by the House of Commons Library for the Members of the Parliament and Their Staff) at 6, *available at* http://researchbriefings.files.parliament.uk/documents/RP96-5/RP96-5.pdf (last accessed Feb. 1, 2019).

278. Jobseekers Act 1995, part 1, ¶ 1 (2).

D. International Labour Organization

The ILO has recognized that developments in information and communications technology have significantly influenced the media and culture industries' occupations and work organizations by decreasing the importance of some occupations while creating new ones.[279]

Due to the rapid emergence of new technologies, there is an increase in insecure work in these industries which is characterized by unclear contractual arrangements and ambiguous employment status of its workforce.[280] The ILO likewise noted a trend in outsourcing programming to independent production houses.[281]

During an ILO tripartite meeting, the ILO noted the need to discuss ways for the employment arrangements in the media and culture industries to adapt to the rapid technological changes and the nuances of the industry, *viz* —

> There is a trend towards freelance, self-employed[,] or informal economy work. This can mean that such [media and culture] workers can no longer depend on legislative provisions on social security, even in countries where social security has good coverage. The impact of globalization, ICTs, multimedia convergence[,] and increased international [labor] mobility should encourage greater efforts by the social partners to bring together workers and employers from a wider variety of countries and industries in social dialogue in various forms.[282]

While the ILO noted the increasing non-permanent or atypical employment arrangements in the media and culture industries, it nonetheless stated that the same is unsurprising compared to manufacturing sectors or finance, for example. [283] These industries have employed atypical employment arrangements for a long time due to the nature of the work, and success and commercial rewards usually depend on talent, specialized and highly skilled work, and creativity of its workers.[284]

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279. International Labour Organization, *supra* note 3, at 12.

280. *Id.* at 1.

281. *Id.* at 8.

282. Tripartite Meeting on the Future of Work and Quality in the Information Society: The Media, Culture, Graphical Sector, Geneva, Oct. 18-22, 2004, *Conclusions on the future of work and quality in the information society*, ¶ 24, TMMCGS/2004/6 (Oct. 22, 2004).

283. International Labour Organization, *supra* note 3, at 32.

284. *Id.* This was also one of the points of consensus which was adopted by the ILO in its Global Dialogue Forum. Global Dialogue Forum on Employment

The ILO also highlighted the importance of collective bargaining in fixing the terms and conditions of employment and fostering peaceful, cooperative, and efficient labor markets but noted that it might be challenging when it comes to atypical employees due to limited attachment to single workplaces and employers.[285] Nonetheless, it cited the U.S. and some E.U. countries as examples of successful collective bargaining for atypical employees.[286] In the U.S., various guilds have actively negotiated with companies for the healthcare and pension schemes for their members.[287] In Germany, a social security fund has been developed by guilds for their members.[288] In France, an unemployment benefit has been established for intermittent entertainment workers.[289]

However, according to the ILO, efforts by freelancers to organize and bargain collectively have been declared as illegal under competition law in several countries.[290] In some countries, the illegality is avoided by allowing employee unions to recruit freelancers. However, this might pose certain challenges because the employees and the freelancers might have conflicting interests, which the employee union has to deal with.[291] This was the reason why employee unions in Japan are largely composed of permanent employees to the exclusion of atypical employees.[292]

Relationships in the Media and Culture Sector, Geneva, May 14-15, 2014, *Points of Consensus*, ¶ 2, GDFMCS/2014/7 (May 15, 2014).

285. International Labour Organization, *supra* note 3, at 20.

286. *Id.* at 21 & 24.

287. *Id.* at 24.

288. *Id.* (citing Künstlersozialkasse, Social Security Insurance for Artists and Writers, *available at* http://www.kuenstlersozialkasse.de/wDeutsch/download/daten/Versicherte/Aufsatz_zur_KSVG-VP_-_englische_Version.pdf (last accessed Feb. 1, 2019)).

289. International Labour Organization, *supra* note 3, at 24 (citing Direction de l'information légale et administrative (Premier minister), Ministére chargé du travail, Indemnisation chômage des intermittents du spectacle: conditions à remplir (Webpage on the Public Service Website of France on the Requirements for Unemployment Compensation for Entertainment Workers), *available at* https://www.service-public.fr/professionnels-entreprises/vosdroits/F14098 (last accessed Feb. 1, 2019)).

290. International Labour Organization, *supra* note 3, at 22.

291. *See* Pejović, *supra* note 212, at 56.

292. *Id.*

The ILO called for further social dialogues between all the stakeholders to have a "*better understanding of the different employment relationships and other working arrangements in the media and culture sector*" to improve social protection coverage.[293]

VI. WHAT NOW? RECOMMENDATIONS FROM THE COMPARATIVE STUDY

Non-permanent work has long existed, and millions of individuals prefer to put together their own income streams rather than rely solely on traditional jobs. However, it does not fit in the current labor framework of most countries, such as the Philippines. The rapid advances in technology and the developments in the business models of the broadcasting industry call for a reconsideration of the traditional employment arrangements in the current legal framework of most countries, which include the Philippines.

As previously discussed, the current employment arrangements are outdated and may be too rigid. Not all industries are the same and certain industries have a peculiar nature, such that its manpower requirements are not constant and may change drastically in response to advancements in technology and consumer demands. The broadcasting industry falls under this category and is not alone. Certain service industries, such as the call center industry, whereby manpower requirements are dependent on the continued existence of a contract with a client, also fall under this category. Other industries include film, music, and other creative industries.

While it is true that non-permanent employment arrangements involve some trade-offs and may be seen as insecure work, introducing measures that bridge the gap between non-permanent and permanent employment may be granted. Examples are benefits and security measures that make non-permanent work a more feasible option for individuals and, at the same time, grant flexibility to companies.

Based on the comparative study, the following suggested directions may be taken into consideration by the Philippines — as well as other countries — in dealing with non-permanent employment arrangements in the broadcasting industry.

A. Identification of Positions that Validly Fall Under Project Employment

The manner of producing programs is standard, and, thus, it should be possible for companies to identify which positions in the manpower complement of program production may be engaged on a non-permanent basis. The listing should be discussed with the representatives from the

293. Global Dialogue Forum on Employment Relationships in the Media and Culture Sector, Geneva, Switzerland, May 14-15, 2014, *Final report of the discussion*, ¶ 6, GDFMCS/2014/10 (emphasis supplied).

worker's sector and approved by the government labor agency. Any engagement of additional project employee positions not mentioned in the listing shall require the approval of the government labor agency.

Ultimately, this will facilitate the effective and efficient use of non-permanent employment arrangements in the industry and clarify the current ambiguities with regard to its validity. This will also lessen any opportunities for abuse by employers who tend to classify as temporary those positions that should be classified as permanent.

B. Setting the Limits on the Duration of Fixed-Term Contracts

As discussed earlier, under Philippine laws and jurisprudence, even if there is a valid project or despite an agreement between the employee and the employer, an employee may be considered a permanent employee if he or she renders work for the company for more than one year. This is problematic because there are actual projects that last more than a year, not just in the broadcasting industry, but across all industries as well. However, the Author clarifies that the problem only persists in case of project employment. In case of "fixed-term employment" in the context of Philippine laws, there is no issue as to the one-year term limit.[294] On the other hand, the unlimited duration under U.S. laws is likewise unreasonable, because it is prone to abuse and does not advance the rights of the workers to tenurial security.

A combination of the laws of Japan and E.U. can create a balance with this issue. The standards under E.U. laws, which declare non-permanent employment as valid and renewable, provided that it is based on objective grounds, can be adopted. If there is a valid ground for the non-permanent arrangement such as the existence of a valid project, then the non-permanent employment should be allowed. In the case of the broadcasting

294. It must be remembered that "fixed-term employment" in the context of Philippine laws is not synonymous to "fixed-term employment" generally used in the international context. As discussed under Chapter IV, "fixed-term" employment under Philippine laws is an employment arrangement whereby both the employee and the employer agree on a fixed period which does not have to be based on a valid project or any other justifiable circumstances as in the case of European Union. This is in contrast to the meaning of "fixed-term employment" in the international context which is more general and includes project employment and other temporary employment arrangements. This being the case, the one-year limitation on "fixed-term employment" in the context of Philippine laws is reasonable.

industry, the valid justification is the existence of the program to which the employee is assigned to.

This rule is best complemented by the rule in Japan on the maximum duration of renewals, which is five years. A five-year lifespan of a project (or program, in the case of the broadcasting industry) shows a slight permanency with regard to the work. Further, the loyalty and efforts of the worker, who has rendered a quite significant length of service to the company, should be rewarded. However, this is not to say that the worker shall be considered as a permanent employee. If there is a valid project but it exceeds more than five years, then certain benefits similar to those enjoyed by permanent employees should be vested upon the employee. Anent to this is the creation of an alternative employment arrangement discussed in the subsequent subchapter.

C. Creation of Alternative Employment Arrangements

As it stands, the limited classification of employees as either permanent or non-permanent is too outdated and does not consider the many developments in technology and ever-changing manner of doing business. There is nothing in the law that prohibits countries from introducing another type of employment arrangement, which may have qualities and characteristics taken from both permanent and non-permanent employment.

As discussed in the immediately preceding subchapter, putting a limit of five years on the total duration of project employment is a viable option and a good compromise between the very restrictive one-year limitation (current rule in the Philippines) and the unlimited duration (current rule in the U.S.), which is also very prone to abuse. The five-year limitation is a reasonable period to show loyalty on the part of the employee, which should be incentivized and rewarded.

In this light, if an employee has rendered work for more than five years continuously for a company under a fixed-term contract/s, the worker can be considered as falling under a new category between non-permanent and permanent employee similar to the limited regular employment under the Japanese labor market system.[295]

The proposed new rights to this new classification may include the limited right to security of tenure. This means that an employee under this classification has the right to be assigned to another project after the termination of his or her originally assigned project or the company pays him or her a sum of money similar to a separation pay given to permanent employees. This shall be further discussed in the next subchapter.

295. Pejović, *supra* note 212, at 79.

Other proposals for this new classification is to grant the worker higher pay than permanent employees in exchange for the limited protection. Ideally, the employees falling under this classification should be able to enjoy the rights or if not feasible, at least similar rights, available to permanent employees.

By creating a new classification, the disadvantages of the traditional non-permanent employment may be lessened and the employers may reduce costs and gain greater flexibility in manpower management.[296]

D. Establishing a Monetary Compensation System

In most jurisdictions, a permanent employee may be terminated by a company by reason that the position he or she occupies has been rendered redundant. In such cases, the terminated employee is entitled to receive a separation or severance pay.

It can be argued that when a non-permanent employee was not given a new contract after his or her assigned program has ended on the ground that his or her skills are not suitable for the new program, it is similar to having said employee being terminated for being redundant to the company. The establishment of a monetary compensation similar to the concept of separation or severance pay may be devised as part of the benefits of the alternative employment arrangement to be created as discussed above.

To make a distinction, the amount to be given does not have to be the same as the amount mandated as separation pay in case of permanent employees. What is important is that the amount must not be too high that medium and small companies would not be able to afford it nor should it be too low that it would not serve its purpose for the workers.[297] The length of service may be the basis for determining the amount because not only is it clear; it also eliminates any arbitrariness and further bridges the gap between permanent and temporary workers.[298] With this in mind, the pay may be pegged at the amount of his or her pay for one day multiplied by a base number of five days per year of service (considering that the worker can only qualify after rendering at least five years of service as discussed in the

296. *Id.* at 80.

297. Shinya Ouchi, Dismissal Regulations in Japan, ¶ 4.4, *available at* http://www2.kobe-u.ac.jp/~souchi/pdf/Dismissal2016.pdf (last accessed Feb. 1, 2019).

298. *Id.*

immediately preceding subchapter). The base number of days per year may be increased depending on the years of service rendered.

To illustrate, assuming the employee receives a daily pay of US$100 or a monthly pay of US$2,000 and he or she has rendered five years of service, one can compute the amount he or she shall be entitled in case he or she will not be re-engaged in another contract by multiplying his or her daily pay with the base of five days and multiplying it again with the number of years of service, which in this case, is also five. From this computation, the separated employee shall be entitled to an amount of US$2,500. The amount will increase depending on the length of service of the employee.

In this manner, the employee receives an amount that he or she can use while looking for another work, which is the main purpose of the separation or severance pay given to permanent employees. This somehow eases the issues on job security. Likewise, it also functions similarly to a retirement pay in instances when the worker devotes a significant amount of years serving the company.

E. Strengthening the Role of Unions and/or Guilds

The importance of unions and guilds should also be highlighted. While generally, unions are only allowed for permanent employees, legislation should also pave way to the establishment of unions and/or guilds that represent non-permanent workers and mandatory recognition by companies.

As can be seen in the case of the U.S. and some E.U. countries, the existence of unions and guilds are beneficial to the interests of non-permanent workers. Through these unions and guilds, the imbalance in the negotiating powers between the employers and the non-permanent workers is somewhat diminished, if not eliminated.

F. Standardizing the Intellectual Property-Creating Independent Contractor

The concept of independent contractors who create intellectual property discussed in Chapter III is also a good starting point for the creation of another valid work arrangement in the broadcasting industry. As shown in the *Sonza* case, individuals who fall under this category contribute intellectual property and more often than not, have the power to negotiate with the companies regarding their fees.[299] The next action to take now is to identify which positions fit this classification in order to prevent the companies from taking advantage of it by classifying a large number of positions under it in the guise of evading employer-employee relationships. Possible positions that may fall under this classification are writers who create

299. *Sonza*, 431 SCRA at 596.

scripts, musical scorers who create music for the program, and highly creative positions such as director and set designer, to name a few. This may be the subject of further discussions among all the stakeholders.

G. Institutionalizing a Standard Unemployment Insurance System

The existence of an unemployment insurance system is a huge support to the workers who are out of work and grants a sense of security to those who are currently employed.[300]

As can be seen in the previous Chapter, all of the countries subject of the comparative study have an established unemployment system. While it did not remove the apprehensions towards non-permanent employment, it served as a good buffer for workers who are in between contracts. Considering the relatively high probability of not being given new contracts due to volatility of viewer preferences, the workers will definitely benefit from this program.

If the creation of a nationwide unemployment insurance system is too expensive for a country, specifically developing countries such as the Philippines, the feasibility of creating an industry specific unemployment insurance program may be further studied.

VII. CONCLUSION

It can no longer be denied that non-permanent employment arrangements play a crucial role in ensuring the flexibility of businesses to adapt to rapid changes in technology, society, and other external forces. Thus, to insist on the application of outdated laws, which limit the classifications of employee relationships to either permanent or non-permanent, is counterproductive.

It must be noted that the social justice concept of protecting labor does not mean that everything should be decided in favor of the labor sector with no regard to the welfare of the business sector. In fact, it is contrary to the very concept of social justice. In the context of labor, social justice may be understood to signify the "*fair and compassionate distribution*" of the fruits of

300. Martin Feldstein, *Unemployment Insurance: Time for Reform*, HARV. BUS. REV., March 1975, *available at* https://hbr.org/1975/03/unemployment-insurance-time-for-reform (last accessed Feb. 1, 2019).

sustainable economic growth.[301] Consequently, the ultimate aim should be achieving a balance between the interests of labor and businesses.

The temporary employment arrangements in the broadcasting industry has long been a source of disagreements between employees and employers. It bears emphasis that the manner of how the broadcasting industry operates has changed massively overtime. The insistence of forcing the application of old laws that no longer satisfy the needs of the current labor market situation in the industry is not only contrary to social justice, but also further contributes to the magnification of the disagreement over temporary employment arrangements.

Despite the seemingly polarizing interests of both parties, a viable solution is available as demonstrated in this thesis, one that recognizes and strikes a balance between the workers' right to tenurial security and the employers' ability to adapt to changes in the business environment. All it takes is to make the laws adapt to the changes in the business model of the industry. Indeed, laws should not be static but instead, should strive for continuous development to bridge the divide between employees and employers and bring about industrial peace in the labor sector.

301. United Nations Department of Economic and Social Affairs, *Social Justice in an Open World The Role of the United Nations*, at 7, U.N. Doc. ST/ESA/305 (2006) (emphasis supplied).