RECONSTRUCTING LABOUR & BUSINESS THROUGH THE HUMAN RIGHTS LENS

LABOUR FLEXIBILITY IN THE PHILIPPINES AND THE CHALLENGES TO CSR COMPLIANCE

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This article describes the emerging labour flexibility devices practiced in the Philippines, commonly in the form of casualisation or informalisation of workers, and how these adversely impact on the realisation of workers' rights and in turn challenge the Protect, Respect, and Remedy Framework on business and human rights. It features the case of Nouvelle Industries, with an articulated corporate social responsibility system, to illustrate the point. It contextualizes the problem as underpinned by the global movement of capital that drives the atomization of labour relations and the commodification of labour.

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1. Introduction

Labour protection in the Philippines, which has been dismal to begin with, is further hampered by the continued and increasing flexibility of labour. This practice is likewise becoming widespread in Southeast Asia where most suppliers are located. In Indonesia while Regulation 19 (2012) clarified that only non-core or supplemental work can be subcontracted[1], unions claim that almost 16 million Indonesians or 40 percent of the country's formal workforce are outsourced workers.[2] In Thailand, a labour law amendment in 1998 allowed the hiring of contract workers. In Malaysia, the 2011 amendment to the Employment Act expressly recognizes labour contracting and, less expressly, allows labour contractors to be the employers on record, thereby diluting any possible employment relationship between a facility and the workers that are producing its products. It is important to note that labour outsourcing is the preferred employment arrangement for migrant workers to Malaysia creating layers of vulnerability since migrant workers' rights remain stubbornly vague. In the Philippines, there are no available statistics on what percent of the workforce are employed in flexible work arrangement because the government only registers whether a person is employed or not but it does not indicate the workers' employment status. In March 2012, the Philippine Association of Labour Service Contractors claimed that at least 1 million workers are employed in subcontracting arrangement but the DOLE Secretary said that the number is around 200,000.[3] However, the data does not say how many workers are working for labour-only contractors.

This demand for flexibility in the production process is said to have increased global competitiveness where companies compete on the basis of price, quality and on-time delivery. Invariably, "this competitiveness has led to the fragmentation and relocation of production processes, through outsourcing and subcontracting, the deregulation of the labour markets, and the informalisation of economic activities."[4] Dae-Oup Chang relates the informalisation of labour to the growing mobility of transnational capital and describes how informality becomes the essence of restructuring Asian labour in order to support the spatial movement of capital, resulting in the lack of legal, institutional and union protection for *informalised* workers.[5]

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1 The law likewise clarifies that labour may be outsourced only to a limited type of work, namely, cleaning, catering, security, support services in mining and oil and transportation services.

2 Emmerson, R and Yuriutomo, I., 2013. Controversy over Outsourcing Regulations in Indonesia: Third-Party Contracting Arrangements. *SSEK*, [online] May. Available at: http://blog.ssek.com/index.php/2013/05/controversy-over-indonesias-outsourcing-regulation-third-party-contracting-arrangements/ (accessed on 9 June 2013).

3 Torres, E., 2012. PHL no 'global sweatshop,' DOLE's Baldoz says. *Business* Mirror, [online] 29 March. Available at: http://businessmirror.com.ph/home/economy/25215-phl-no-global-sweatshop-doles-baldoz-says (accessed on 30 April 2012).

4 Tomei, M. undated. *Freedom of Association, Collective Bargaining and Informalization of Employment: Some Issues.* Geneva: International Labour Office. Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.35.2856&rep=rep1&type=pdf (accessed on 10 March 2011).

5 Chang, D., 2009, Informalising Labour in Asia's Global Factory. *Journal of Contemporary Asia*, vol. 39, no. 2, pp. 161-179.

Labour flexibility has brought forth new employment arrangements that are not contemplated under the antiquated Philippine Labour Code and, at least in the Philippines, this is turning out to be the biggest threat to labour rights protection. The International Labour Organization (ILO) identifies four workplace rights as core labour rights – freedom of association and right to collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour, and elimination of discrimination in respect to employment and occupation.[6] The ILO declared that all members, regardless of the ratification status vis-à-vis relevant Conventions, have an obligation by the very fact of membership to respect, promote and realize these rights in good faith and in accordance with the ILO Constitution. These core rights, including the right to security of tenure, are what the outsourcing arrangement subverts. I aim to (a) describe the different labour flexibility devices that Philippine manufacturers currently practice using the case study of Nouvelle Industries as concrete example, (b) identify the key labour rights adversely affected by labour flexibility manifesting in the form of casualization or informalization of workers, and (c) show how this new labour configuration that decouples workers from the workplace poses a challenge to the Protect, Respect and Remedy Framework on business and human rights.

In this paper, I used the term *labour flexibility* to refer to the employer's strategies with regard to the form in which labour is contracted, where the emphasis is on the attempts of employers to vary labour inputs according to fluctuations in the state of external demand.[7] In practice, it involves classifying the workforce into core regular staff and a periphery of casualized labour. One strategy to keep labour flexible is to outsource work and labour, which is taken up in this paper.[8] The terms *flexibilization* and *casualization* of labour are used interchangeably.

An export-oriented garments factory in the Philippines was chosen as the topic of study as it has an articulated corporate social responsibility system and it features labour conditions that this paper sought to describe. Data gathering was done through a two-day factory audit[9] that involved management and worker interviews, ocular inspection and documents

6 *International Labour Organization Declaration/ILO 18 June 1998 on the Fundamental Principles and Rights at Work and its Follow up.*

7 Kugler, A., 2004. *The Effect of Job Security Regulations on Labour Market Flexibility: Evidence from the Colombian Labour Market Reform.* Available at: http://www.nber.org/chapters/c10070.pdf (accessed on 30 May 2012). *See* also Brodsky, M., 1994. Labour market flexibility: a changing international perspective. *Monthly Labour Review*, November 1994; Wilthagen, T. and Tros, F., 2004. The concept of 'flexicurity': a new approach to regulating employment and labour markets. *Transfer* 2/04. For an illuminating discussion on how global capital drives the creation of informal labour in formal economies, *see* Chang, D (note 5).

8 One other strategy is to feminize labour. *See*, e.g., Villamin W and J. Hernandez (undated). *Globalization, Labour Markets and Human Capital in the Philippines*. Available at: http://www.dlsu.edu.ph/research/centers/aki/_pdf/_concludedProjects/_volumeII/VillamilandHernandez.pdf (accessed on 30 May 2012).

9 The audit was covered by a non-disclosure agreement so it was necessary to change the names of the factory, the multinational brand to which the latter was supplying and the workers' cooperatives that are supplying manpower to the factory.

review. The UN Protect, Respect and Remedy (PRR) Framework for Business and Human Rights was used as lens to analyse the issue of labour flexibility in terms of (1) the state duty to protect against human rights abuses by third parties, including corporate actors, (2) the corporate responsibility to respect human rights, and (3) the need for greater access by victims to effective remedy, both judicial and non-judicial.

2. Manifestations of Labour Flexibilisation

The earlier model of casualization or flexibilization of labour saw the practice of assigning core production work to seasonal, contractual, casual, part-time and home-workers, who the facilities hire or contract with directly. While Philippine law clearly defines these terms, these are being used interchangeably to refer to casualized workers. *Seasonal workers* are those that have been previously employed under short-term contracts by the factory. These workers are hired by factories to work for a maximum of 5 months per contract and many have been intermittently employed for over 5 seasonal cycles, with a few months' gap in between cycles, but without any guarantee that they will be hired for more permanent positions or be absorbed into regular employment. As seasonal employees, the workers perform the same tasks as regular workers and they are subject to the same targets and quotas. They also receive all legally mandated benefits, except that they cannot be members of the union and they are not entitled to separation pay.

Subsequently, instead of directly hiring workers for a short-term period, Philippine garments factories started to source workers from labour outsourcing agencies. This arrangement is known as trilateral labour employment—with the principal company that places the order for workers and pays based on a service contract fee, the labour outsourcing agent who serves as the direct employers, and the workers who have no formal relationship with the principal company and who have minimum protection under the law. This leads to a "de-coupling" of workers from the formal site of production.[10]

Most export-oriented garments factories in the Philippines maintain a core regular staff of at most 40 percent and at least 60 percent of non-regular workers who move fluidly from one employment type to another. In audits of 8 garments export-oriented facilities, conducted between October 2011 and March 2012, the following numbers are indicative:

10 Barrientos, S., 2011. *'Labour chains': analysing the role of labour contractors in global production networks.* Brooks World Poverty Institute: University of Manchester. Available at: http://www.capturingthegains.org/pdf/bwpi-wp-15311.pdf (accessed on 30 April 2012).

Company	Reported as Regular Workers	Subcontracting Agency Workers/ Coop Workers	Casual	Probationary	Juvenile
A	2017			387	
B	59				
C	2160				540
D	18	844			
E	191	260			
F	300		256		
G	22			400	
H	110	1000	160		
Total	4877	2104	416	787	540

Out of the total number of workers, it appears that around 80 percent of workers directly involved in producing goods for the factories are not regular workers.

Philippine labour law is founded on a bilateral employment relationship in which an employer is charged with the obligation to protect the rights of his/her workers, with the government ensuring the enforcement of laws. In regular employment, the employer is directly responsible for the promotion, protection and realization of workers' rights during the whole employment cycle, i.e. selection, recruitment and hiring, on-site management (e.g., provision of work premises, supervision, payment of regular and overtime pay, observance of legal requirements concerning labour standards and labour relations, etc.), discipline and termination of employment. Although all kinds of workers have a right to minimum conditions of employment, it is only those who are regularized and therefore enjoy security of tenure who earn all the benefits accruing to regular workers (hours of work, holidays, leaves, benefits, right to associate and collectively bargain and to be terminated only for just causes,[11] among others).

Article 280 of the Philippine Labour Code states that:

11 Just causes include installation of labour-saving devices, redundancy and retrenchment to prevent losses or the closing or cessation of operation of the establishment or undertaking. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.

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

A worker engaged to perform tasks necessary to the business automatically becomes regular after 6 months' probationary period. To be sure, the factory has the right to regularize workers or not on the basis of their capacity to perform the work. The fact that the workers are not regularized prior to the lapse of the probationary period is still within the right of management. But when same workers are referred to a subcontracting agency or workers' cooperative after the cessation of contract and they are then deployed to the factory to perform the same, exact work that they were doing as contractual workers in the facility, it stands to reason that these workers are doing work that is necessary or desirable in the usual business or trade of the employer. The issue is obviously not about the workers' abilities to do the job. They are, in fact, capable of doing the job and should have been regularized to perform duties necessary and desirable to the business after the probationary period. It has long been settled in case law[12] that the primary standard of determining regular employment is the reasonable connection between the particular activity performed by the employee and its relation to the usual trade or business of the employer.

It needs to be emphasized that the law creates legal fiction to ultimately protect the rights of workers. The courts would not hesitate to declare the existence of an employer-employee relationship if that would eventually benefit the workers. When work rendered by non-regular workers are proved to be critical, necessary and desirable to the usual business of the employer, the practice of hiring them as contractual workers—only to hire them again but only on a different employment status and arrangement—clearly circumvents the regularization requirement under the law.

In the last three decades, the flexibility of the Philippine labour force has been observed as employers become hard-pressed to find creative ways to keep the business afloat even if it meant contracting out manpower needs to labour contractors. Although independent job and service contracting (i.e., most commonly, janitorial services for maintenance and upkeep or engaging a security agency to secure the premises of the company) is allowed under the law, labour-only contracting is not.

Labour-only contracting, as defined, is an arrangement with third-party agencies where only workers—as opposed to jobs or services, which would comprise legitimate contracting—are provided to the company, and where the subcontracted work is critical to the company's

12 *De Leon v NLRC*, G.R. No 70705, 21 August 1989; *Chavez vs. NLRC* (2005).

operations. It essentially means providing warm bodies to a company to do work essential to the company's business and this is what the law absolutely prohibits. Unfortunately, we are increasingly finding more workers employed under this precarious situation.

Article 106 of the Labour Code and Department Order 18-A (2011) (*herein* DO 18-A) allows job contracting or subcontracting, where a company sources out part of or the entire job or work to a contractor. Under DO 18-A, there is legitimate contracting or subcontracting if **all** the following circumstances concur:[13] (a) the contractor is duly registered, (b) there is substantial capitalization, in stocks and/or tools and equipment equivalent to 3 million pesos, and (c) the service agreement ensures compliance with all the rights and benefits under labour law, which includes among others, safe and healthful working conditions; labour standards such as service incentive leave, rest days, overtime pay, holiday pay, 13-th month pay and separation pay; social security and welfare benefits; self-organization, collective bargaining and peaceful concerted activities; and security of tenure. These three standards should be present in policy and practice and absent one the arrangement becomes vulnerable to a charge of labour-only contracting. As consequence, where 'labour-only' contracting exists, the law establishes an employer-employee relationship between the employer and the employees of the 'labour-only' contractor, and the contractor is considered merely an agent of the principal employer with whom s/he will be jointly liable.[14]

DO 18-A also clarified some concepts and labour standards for subcontracted workers sourced from manpower agencies or cooperatives. In an effort to address the current changes in employment arrangement and the legislative gap, in section 5 it is stated that in legitimate contracting or subcontracting arrangement, there exists an employer-employee relationship between the contractor and the employees it engaged to perform the specific job, work or service being contracted; and in the event of any violation of any provision of the Labour Code, including the failure to pay wages, there exists a solidary liability on the part of the principal and the contractor for purposes of enforcing the provisions of the Labour Code and other social legislation, to the extent of the work performed under the employment contract. In addition, the principal shall be deemed the direct employer

13 Consistent with a long line of jurisprudence on this matter, the Supreme Court reiterated the doctrine in the case of *Joeb M. Aliviado, et al. vs. Procter and Gamble Phils., Inc., et al.*, [G.R. No. 160506, 6 June 2011]:

> The law allows contracting arrangements for the performance of specific jobs, works or services, regardless of whether such activity is peripheral or core in nature. However, in order for such outsourcing to be valid, it must be made to an independent contractor because the current labour rules expressly prohibit labour-only contracting. There is labour-only contracting when the contractor or sub-contractor merely recruits, supplies or places workers to perform a job, work or service for a principal and any of the following elements are present: (i) The contractor or subcontractor does not have substantial capital or investment which relates to the job, work or service to be performed and the employees recruited, supplied or placed by such contractor or subcontractor are performing activities which are directly related to the main business of the principal; or (ii) The contractor does not exercise the right of control on the performance of the work of the contractual employee."

14 As the Philippine Supreme Court ruled in the case of *Joeb M. Aliviado, et al. vs. Procter and Gamble Phils., Inc., et al.*, [G.R. No. 160506, 6 June 2011].

of the contractor's employees in cases where there is a finding by a competent authority of labour-only contracting. Further, in section 8, it mandates that all the contractors' employees shall be entitled to all the rights and privileges provided for in the Labour Code, to include the following:

- Safe and healthful working conditions
- Labour standards, such as but not limited to service incentive leaves, rest days, overtime pay, holiday pay, 13th month pay and separation pay, as may be provided in the Service Agreement or under the Labour Code
- Retirement benefits under the SSS or retirement plans of the contractor, if there is any
- Social security and welfare benefits
- Self-organization, collective bargaining and peaceful concerted activities; and,
- Security of tenure

There is a separate provision on security of tenure in section 11, in which it is stated that: "It is understood that all contractor's employees enjoy security of tenure regardless of whether the contract of employment is co-terminus with the service agreement or for a specific job, work or service, or phase thereof."

From 2010, the prevalence of outsourcing production to cooperatives rather than to subcontracting agencies has been observed and through this, cooperatives introduce a new labour flexibility device. A workers' cooperative is described as one organized by workers, including the self-employed, who are at the same time members and owners of the enterprise. Its principal purpose is to provide employment and business opportunities to its members and manage it in accordance with cooperative principles. One of the ways by which they generate business for the coop is by entering into subcontracting arrangements with the factories. The following case study describes this arrangement in detail.

3. Case Study: Nouvelle Industries, Inc.

The company was founded in the 1970s as a steam laundry enterprise and under the name Steaming Laundry.[15] Two years after, it ventured into the washing of denim garments with a top denim brand as one of its first customers. In 1989, Steaming Laundry expanded its washing operations to include dry finishing and as a result of this expansion, Nouvelle Industries, Incorporated (*herein* Nouvelle) was established. In 1991, sandblasting was introduced and in 1996, it established its cut-and-sew operations to become a fully integrated garments company, with services that included warehousing, cutting, sewing, washing, finishing and packing. From 1989 to 2000, the company was servicing top multinational garments brands like Levi's, Jones Apparel and American Eagle Outfitters, among others.

15 Not the real name of the enterprise. In this paper, all the proper names are changed as the facts were gathered during audits. The conduct of the audit was covered by a non-disclosure agreement.

In 2000, the company decided to focus on cutting, laundry and quality assurance, and it contracted out the manufacturing end to another company. In 2007, the company decided to subcontract part of its core production processes to two in-house workers' cooperatives – Handsewing Cooperative to do the sewing and Fancy Pants Cooperative for detailing. By 2011, Nouvelle is getting the orders from customers, supplying all the raw materials, cut goods and accessories pertaining to specific job orders, outsourcing production to the cooperatives, and finally delivering the finished and labelled goods to the customers.

The cooperatives are required to follow the manufacturing specifications as indicated in the instruction sheet that Nouvelle issues. Prior to mass production, two counter samples by the cooperatives are submitted for the written evaluation of Nouvelle's quality assurance department. Once the counter-samples are approved, two sets of final samples would then be submitted. Once the samples are finalized, work is turned over to Handsewing Coop. After passing inspection, sewn materials are then endorsed to Fancy Pants Coop for detailing, which includes handsewing, scraping, lining and pocketing, grinding, pigmenting, PP spraying and finally staging. The materials are then endorsed back to Nouvelle for washing, curing, finishing and final quality check before delivery. Every endorsement is covered by an invoice.

Handsewing Multi-Purpose Cooperative (*herein* Handsewing Coop) and Fancy Pants Multi-Purpose Cooperative (*herein* Fancy Pants Coop) are worker cooperatives set up by some of the former workers of Nouvelle. During the audit, unverified reports were received that around the time Nouvelle's sewing and dry processes were dissolved, Nouvelle suggested to the employees and workers who were about to lose their jobs to set up the coops to which Nouvelle can subcontractor some of the work. The coops were established in 2007 and, by 2011, Nouvelle is subcontracting sewing to Handsewing Coop, while Fancy Pants Coop does the dry processing or detailing processes. Embroidery works is subcontracted by Nouvelle to an independent contractor. On paper, these three entities appear to conduct business independently and autonomously from each other.

Both coops entered into an exclusive subcontractor-ship agreement with Nouvelle, the terms of which are identical. The agreement is valid for one year and renewed every year thereafter, subject to the decision of Nouvelle. It binds Nouvelle to pay for service rendered by the coops, but the contract price is not indicated in the agreement. With regard to the liability to coop employees/workers, the agreement stated that the subcontractors are solely answerable and responsible for the payment of wages, benefits, and allowances among others. It likewise included a non-liability clause that practically exempts Nouvelle from any labour-related claim or indemnification for damages. The sub-contractor coops are required to post a performance bond in the amount of PHP50,000 (USD1,150), either in cash or surety, to ensure their faithful compliance with the agreement's terms, although it was not clear whether the coops have actually posted this bond.

Further, both coops entered into a lease agreement for the consideration of PHP 30,000 (around USD700) per year and the lease agreement covers "space at the factory, equipped with necessary machineries and tools," which they cannot assign or transfer. When asked, the management of both coops admitted that they actually do not pay rent and are instead responsible for the payment of utilities and the expense of the repairs and maintenance of the premises, machines, and tools. The coops do not have their own plant facilities or equipment. While both coops seem to be validly registered with the Cooperative Development Authority (CDA), their subcontractor licenses from the Department of Labour and Employment (DOLE) have expired at the time of the audit.

At the time of the research, Nouvelle maintains a workforce of about 230 employees. About 160 workers are directly involved in production and the rest are composed of management, supervisors and office staff. About 25 percent of production workers are probationary. Handsewing Coop has a total workforce of about 180 workers and about 160 of them are directly involved in production, from sewing, trimming, marking, packing, finishing, packing and quality control. 20 percent of the workers are identified as probationary workers. Although it does more varied work for Nouvelle, Fancy Pants only has about 80 workers, with around 60 operators.

Most workers in Nouvelle receive daily and monthly wages, but around 30 are piece-rate workers[16] mostly in the finishing and trimming sections. During the first quarter of last year, Nouvelle was granted a wage order deferment for three months, which allowed it to delay the minimum wage rate adjustment. While most coop workers are identified as regular, most of them receive wages on a piece-rate basis. Out of 80 workers in Fancy Pants, 56 are regular piece-rate workers. In Handsewing, almost 80 percent of its production workers are paid by piece. Under the Barangay Micro-Business Enterprise (BMBE) Program[17], a waiver from the local government was granted to both coops and Nouvelle, exempting them from paying the legal minimum wage. The minimum wage rate in the factory's location is PHP280 (USD6.5) per day but with the BMBE grant, workers are getting a gross income of PHP263 (USD6) per day.

Its workers are either regular or probationary and they are further divided on the basis of how their wages are computed – monthly, daily or piece-rate. The management of the coops said that workers are on single shift (8 AM to 5 PM) during the regular season and on two shifts (6 AM to 2 PM; 2 PM to 10 PM) during peak season. Similarly, Nouvelle workers are on 8AM to 5PM shift, with 2 hours overtime per day. Workers interviewed said that they are regularized after the legally-mandated probationary period of 6 months. All workers in these three organizations enjoy legally-mandated benefits (social security, Phil-health, housing fund) including 13th month pay, service incentive leaves of 7 days per year, holiday pay, legally-mandated leaves and entitlement to separation pay.

16 Piece rate workers are paid based on the number of pieces they finish on a given day.

17 The Barangay Micro- Business Enterprise (BMBE) certificate grants small businesses tax incentive and an exemption from payment of legal minimum wage. The facility and coops complies with the BMBE-allowed basic rate.

In Handsewing Coop, the work for piece-rate worker is classified as *multi-tasking*, which means workers are expected to be moved to sections, lines or departments where s/he is needed. Work is from Monday to Saturday at 8 hours per day, with ½ hour of lunch-break, which will be scheduled by the supervisor. Workers are expected to render 2 hours of overtime everyday "if necessary or if the Coop mandated it."[18] Workers are required to obey the Coop Workers' Manual. Termination of workers is based on grounds provided under the Philippine Labour Code. In Fancy Pants, the conditions of employment are almost identical, except that workers enjoy a 1-hour lunch break and the contract contains a provision on a possible mandatory medical examination when the management deems it necessary. Grounds for termination from service are based on the Philippine Labour Code and performance evaluation.

The *cooperative workers* are under the full control and management of the cooperative. These workers are not considered as the factory's employees, not entitled to the company benefits, but are required by the cooperative to adhere to the client-factory's policies, rules and regulations. These are all skilled and experienced workers, integrated well into the production processes in Nouvelle, and are subjected to the same, if not more stringent, performance evaluation standards.

The Cooperative Code of 2008[19] is not instructive about the labour standards applicable to coop owner-members-workers and it is not clear what labour rights they enjoy. The Philippine Supreme Court had occasion to rule on the question of whether or not an employment relationship can exist between a cooperative and its members. It said: "a cooperative through registration acquires juridical personality separate and distinct from its owners, akin to a corporation. Consequently, an owner-member of a cooperative can be an employee of the latter and an employer-employee relationship can exist between them."[20] However, the decision in this case was promulgated before the enactment of the 2008 Cooperative Code and it remains to be seen whether the doctrine would hold. While

18 The employment contract is in Filipino, as translated by the author.

19 The Cooperative Code was enacted in 2008 (Republic Act 9520) and it defines a cooperative as "an autonomous and duly registered association of persons, with a common bond of interest, who have voluntarily joined together to achieve their social, economic and cultural needs and aspirations by making equitable contributions to the capital required, patronizing their products and services and accepting a fair share of the risks and benefits of the undertaking in accordance with universally accepted cooperative principles (Art. 3, Republic Act 9520)." The Cooperative Development Authority (CDA) is the government agency in charge of the registration and regulation of cooperatives. As of December 2011, there are 14,406 multi-purpose cooperatives and 21 workers cooperatives registered with the CDA. Cooperatives are classified into different types: credit, consumers, producers, marketing, service, multi-purpose, advocacy, agrarian reform, cooperative bank, daily, education, electric, financial service, fishermen, health services, housing, insurance, transport, water service and workers' coop. What concerns us here are the multi-purpose cooperatives, which are required to combine 2 or more of the business activities of these different types and it may include provision of labour, and the workers' cooperatives.

20 Republic of the Philippines, represented by the Social Security Commission (SSC) and Social Security System (SSS) v Asiapro Cooperative (GR 172101, 23 November 2007).

the Cooperative Code is silent, I argue that once a cooperative engages in subcontracting work, the non-member workers of the coop should enjoy the same rights and protection as any other subcontracted worker and the subcontracting arrangement should be subject to standards of legitimate subcontracting as any other entity. If it were deemed engaged in labour-only contracting, it should suffer the same penalty as any other labour-only contractor.

4. Key Issues Impacting Labour Rights

The key labour issues involved in labour flexibilization have to do with (a) the circumvention of the regularization requirement, (b) precariousness of employment status, (c) threat to Constitutionally guaranteed rights to security of tenure, freedom of association and right to collectively bargain, (d) subminimum wages and benefits scheme that reflects discriminatory practice against non-regular workers, and (e) the absence of clear labour rights of cooperative owners-members. Currently, in general workers are classified in the following categories and the extent or limitation of legal protection can be illustrated as follows:[21]

Categories of Workers	Description	Employment Relationship	Legal Protection under the Philippine Labour Code
Regular	Rigid	Bilateral	Full protection in terms of labour standards and labour relations
Project			Adequate legal protection in the duration of the project or the season
Seasonal			
Labour contracting	Flexible	Trilateral: principal, labour contractor, worker	Generally, precarious employment status, with no security of tenure; subminimum wages and benefits scheme; restricted right to associate and collectively bargain
Jobs and service contracting			
Commission-paid		Bilateral	Most inadequately protected under the law
Contractual			
Boundary-based			
Home workers			
Casual			
Cooperative		Bilateral but workers are considered member-owners of the cooperative	

21 Adapted and updated from Macaraya, Bach M (undated). *The Philippines: Workers' Protection in a New Employment Relationship*. Available at: http://www.ilo.org/public/english/dialogue/ifpdial/downloads/wpnr/philippines.pdf. (accessed on 16 August 2010).

Outsourcing work to subcontractors, including cooperatives, allows factories to abscond from their obligations to workers who are actually producing the goods for them. They do not have to keep them as regular workers or pay for social security and insurance since they are not the employers on paper. This way, factories can keep labour costs down and still meet buyers' orders on time. By subcontracting work, factories are also able to outsource their human resource functions. They only need to pay the subcontractors a fixed service fee and it will be up to the subcontractors to pay his/her workers based on time and work rendered, without regard to whether the fee is enough to meet the minimum wage. They can easily demand to have a worker replaced without having to go through the termination process, which in the Philippines requires notice and hearing. Factories get all the benefits of having the work done without being involved in any stage of the employment cycle.

What complicates the issue is how the scheme is abused so that most arrangements are labour-only contracting, which is absolutely prohibited. Since the coops and subcontractors are duly registered and licensed by the Department of Labour and Employment, this arrangement enjoys a presumption of legality and workers are left to suffer under subminimum labour conditions. The amended law on subcontracting that identified the applicable labour standards only took effect in December 2011 and how it will lend more protection to workers in this situation still remains to be tested. In the law, subcontracted workers from manpower agencies should be entitled to most of the legally mandated benefits—like minimum wage, hours of work, benefits, payment of overtime work and service incentive leaves, among others. Although the law says that they enjoy security of tenure, the provision is too vaguely phrased to determine if they have security in the duration of their employment with the subcontractor or if their situation is similar to that of fixed-term workers who are secure only during the term.

The position of coop workers in subcontracting scheme is more untenable. The cooperative workers are under the full control and management of the cooperative. These workers are not considered as the factory's employees and not entitled to the company benefits, but are required by the cooperative to adhere to the client-factory's policies, rules and regulations. It can be argued that for non-members who are workers of the coop, labour protection under DO 18-A applies to them. But coop members are considered owner-members of the business and they straddle the roles of being both the subcontractors and workers. Their situation is akin to the self-employed. If the work conditions are subminimum, who can they claim against? If this happens, they will essentially be claiming against themselves.

By subcontracting work, factories skirts around the issue of freedom of association and collective bargaining outside their regular workers, whose numbers are kept to a minimum? Even if the factory is unionized, the subcontracted workers are not qualified to join it. The law grants them the right to form their own union and enter into a collective bargaining agreement but the bargaining agent will be the subcontractor and not the factory. The subcontractor, who is more often a labour-only contractor, usually has nothing worth bargaining over. For coop owners-members, while they have freedom to associate—and it

can be pedantically argued that a cooperative is one of the higher forms of association—they will not be able to exercise the right to collectively bargain as they cannot bargain with themselves.

The most pressing problem is that in these subcontracted labour arrangement everything is kept to a minimum because the agencies have no interest or incentive to give more. For workers, there is no upward mobility and there is no opportunity to develop more skills. Length of service does not translate to higher pay. Also, there are government incentives that are used to exempt the subcontractors from paying the minimum wage rate. Most casualized workers earn on piece-rate basis and while the law orders that the daily quota should enable workers to earn the daily minimum wage rate, most factories do not bother to ensure this.

5. Interrogating CSR Compliance in the Nouvelle Supply Chain

In 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights that serves to implement the Protect, Respect and Remedy (PRR) Framework. In summary, the Framework rests on three pillars: (a) the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication; (b) the corporate responsibility to respect human rights, which means avoiding infringing on the human rights of others and addressing adverse human rights impacts with which they are involved; and (c) the responsibility of both State and corporations to ensure that those affected have access to effective remedy, through judicial, administrative, legislative or other appropriate means, including operational-level grievance mechanisms. In the sections below I examine how this Framework plays out in the Nouvelle CSR system and point out the gaps and challenges that labour flexibility poses to the PRR Framework.

5.1 Corporate Responsibility to Respect Rights and Ensure Access to Remedy

As described by Barrientos,[22] "global production is expanding through outsourcing to developing countries, via interlinked networks of producers and agents coordinated by large global and regional buyers." This requires instituting a quasi-legal regime of compliance across its supply chain, one that exists in parallel to country efforts, to ensure observance of laws and protection of workers' rights, and the applied corporate standards are more often higher than what is required under national laws.

Referring back to the case study, Nouvelle Industries contracts with multiple multinational garments companies and some domestic brands and one buyer, Executive Company[23], has a Code of Conduct for Vendors and Contractors that it expects its suppliers to comply

22 *See* note 9.

23 While the name of the international customer is changed in respect of the non-disclosure agreement signed by the author, the Code of Conduct quoted here is as originally written.

with.[24] Executive Company's articulated social responsibility has to do with ensuring that its products are produced under legal, humane, safe and sustainable working conditions and it seeks to guarantee that workers' rights are respected. The buyer company does this by instituting an audit mechanism throughout its supply chain across the globe. This corresponds with the minimum expectations of corporations under the UN Protect, Respect and Remedy (PRR) Framework to respect laws and workers' rights both in policy and practice with due diligence. However, given that the most critical problem in Nouvelle is the condition of the subcontracted workers and the precarious situation of the coop workers, it is notable that the customer's code of conduct does not have a specific standard on precarious employment or the use of temporary, contingent or contract workers. Assumedly, this will be covered by the general requirement to comply with applicable local laws and regulations, but it will be problematic if the applicable laws do not provide sufficient protection.

In this supply chain, it is easy enough to evade responsibility. Since the buyer's concern is on the condition of workers producing its goods, Nouvelle can declare that all the production for Executive Company is done in-house and that none is outsourced. Even if the buyer insisted on auditing the whole production process, if it is not sufficiently informed on or not attuned to the vagaries of the domestic labour market, it is easy to miss out on the implications of work subcontracting or outsourcing to workers' cooperatives. Most buyers are happy enough to see legal permits and they do not inquire too deeply into the nature and consequence of this arrangement. Further, if for instance, part of production of Executive Company's goods is indeed outsourced to Handsewing or Fancy Pants, the customer may still choose to not do anything about the situation if its leverage over Nouvelle is not considerable, for example, if the sourcing makes up a small portion of Nouvelle's business. Following up on what Executive Company did to respond to the findings in Nouvelle I was informed that its sourcing has decided to stop working with Nouvelle so whatever leverage the buyer has over it disappeared, leaving the situation of workers unchanged.

24 The following are the code of conduct standards:
   a. Child labour as defined by local law
   b. Forced or involuntary labour, which includes prisoner, bonded or indentured labour
   c. Disciplinary actions and harassment, including physical, psychological or sexual harassment or abuse
   d. Non-discrimination on the basis of race, religion, age, nationality, social or ethnic origin, sexual orientation, gender or political opinion, in hiring or employment practices
   e. Freedom of association, which gives emphasis on the absence of unlawful interference
   f. Compensation and benefits according to local law
   g. Safe and healthy work environment compliant to applicable laws and regulations, which includes access to potable water and sanitary facilities.
   h. Applicable environmental laws and regulations

5.2 State Duty to Protect and Ensure Access to Remedy

While the protective legislation is in place, the gaps have to do with uncovering labour flexibility devices at the plant-level and enforcing the law against those who do not meet the standards. As mentioned, duly licensed subcontracting arrangements enjoy the presumption of regularity and unless someone complains or the government inspectors themselves discover it, labour-only contracting can subsist year in and year out. Licenses are issued once the subcontractor proves that it has substantial capitalization and that it is a duly registered company. However, two of the standards mentioned above are about company practices with regard to labour standards compliance and gaps will not be discovered unless inquired into or complained about. Once a complaint is filed, it triggers a mechanism that will ultimately decide whether the arrangement is labour-only and whether the subcontractor is merely an agent of the principal. While the procedural mechanisms are in place, it then becomes an issue of substantive access. For workers who are in precarious employment situation, they would have to achieve a high level of awareness of rights before they become brave enough to put a complaint in motion. Once they do, they should be prepared to lose their jobs while the case is pending, or else bear other forms of reprisal like withholding of privileges or benefits.

On CSR in particular, the Philippine Labour Department launched the Incentivizing Compliance Program (ICP) in 2011, indicating a major policy change in the government's labour monitoring framework. The program aims to raise compliance by enterprises to core labour laws and other social and labour standards. The regulatory/inspection track remains the primary strategy in ensuring compliance with labour laws, but it does strongly indicate within the government a strong receptiveness to other approaches to labour inspection that include effectiveness and performance enhancement and not simply regulation. One standard that will be checked is whether the factory has a workplace grievance mechanism that has worker representative in the committee and one that affords confidentiality and assures against reprisal. Hopefully, this will augment the existing protective mechanisms at the national level.

Global corporate social responsibility (CSR) trends have changed in recent years. From asking how a company uses its profits, where the focus is on philanthropy, community relations, environment etc., the question now is on how a company makes its profits. Stakeholders—consumers, media NGOs, trade unions, students, investors and international organizations, among others—are now looking at a company's internal business practices and ethical business relationships. In addition to price, quality and on-time delivery, new requirements on labour standards, health and safety, ethical conduct and environmental sustainability are developed. The preferred method of checking compliance to these performance indicators is auditing, during which information on potential non-compliance issues is gathered. After which, violations to legal requirement and what buyers' have identified as zero tolerance standards are likely to be remediated.

As observed, CSR in the Philippines is customer driven and remains inorganic. When the customer leaves, companies tend to drop the ball. While the PRR Framework talks about the responsibility to exercise leverage over affiliates, this only works if the brands or international customers have adequate leverage or a special interest to make things right. If the supplier is too important the gravitas of the brands will waver like what we saw in the Apple-Foxconn partnership, or if the business of the buyer is not that big then it will not have enough leverage on the factory-supplier to improve its practices. Hence, as corporate social responsibility is fickle and contingent, State monitoring and enforcement of laws remains necessary. It means ensuring that laws and effective enforcement mechanisms are in place. It requires uncovering illegal labour flexibility schemes at the plant level. It also means guaranteeing effective access to remedy, which includes **access** to the process—in terms of physical, geographical, financial, linguistic and formal access—and **effectiveness** of the process that underlines timeliness, responsiveness and legitimacy of results.

For CSR to achieve its noble purpose—and what the PRR critically misses out on—it requires an informed and rights-literate workforce. Workers have to understand what their rights are and what can be demanded of corporations and governments. At the factory level, workers need to be oriented on their rights under national laws, their responsibilities and what can be expected from the companies based on their codes of conduct. It includes informing them of how to engage the companies on minimum work conditions and the State when these minimum conditions are not met. No matter the laws and mechanisms that are implemented, if workers are not and do not feel empowered then a sophisticated CSR framework will be useless.

In articulating CSR standards, more intense focus would have to be on who is producing their products. Corporations have done well in checking and screening out child labour, which is straightforward enough. More dynamism is needed to look at the body of standards as a whole and see how a particular labour configuration affects compliance to forced labour or freedom of association, to name but a few. Further, companies have an obligation to mitigate the vulnerabilities of workers who produce for them. They can insist on a remediation program and as part of that, they can demand that labour standards be extended to all workers in the facility, their employment status notwithstanding. It can require their direct suppliers to conduct due diligence on the latter's suppliers and subcontractors to ensure that all parties are complying with the buyer's code, enhanced by the suppliers' own codes, throughout the supply chain. Likewise, both have a responsibility to warrant that all workers, regardless of who their employer is on paper, have effective access to grievance procedure and remedy both at the national and factory levels that entails (a) informing workers what their rights are and how they can demand respect for them, (b) setting the system in place, which at the minimum should ensure confidentiality, responsiveness and that workers are protected against possible reprisals, and (c) guaranteeing that there is no interference to the exercise of this right. Finally, and for multinational companies involved in global production in particular, they should warrant that their global buying practices are not driving illegal and unfair labour practices in sourcing countries or that

their practices are not weakening government enforcement of labour rights. It requires closely examining their sourcing policies and protocols and ensuring that compliance to laws and standards are fully embedded in their processes.

6. Conclusion

Currently, labour flexibilization or casualization poses the biggest threat to labour rights' realization and protection as workers are decoupled from their worksites through a separation of productive and contractual engagement between the principal and the workers, resulting to workers' inability to access and exercise most of their rights that are traditionally linked with a regular employment arrangement. A more negative result is that it commodifies labour to the extent that it is not about employment relations any longer, but all about feeding the machine with contingent and provisional workforce. The casualization of labour makes the worker invisible within the regulatory framework that is rendered outmoded by globalization. Within this atomized labour relations, only regular workers, and they are becoming fewer, can access employment protection and benefit. Irregular workers, those who are in casual, contractual and flexible labour arrangement, are unable to access employer-based protection, and because of their precarious employment situation, their ability to participate in workplace-based association, like unions or management-worker committees, that can potentially advocate for improving conditions in the workplace is effectively erased. The challenge lies on how we can wrest control back so that workers in irregular employment relationships are better protected. Should we aim to go back to the classic bilateral rigid employment relationship or should we begin looking at alternative arrangements like perhaps considering the portability of labour rights in order to realize worker protection? More research will have to be done to reveal more labour flexibility devices in other countries and a focused deliberation will have to be made if States were to meet their obligation to protect workers' rights in a less reactive manner.

This paper has shown how easy it is for corporations to evade its social responsibilities to workers who are producing their products, even for a company like Nouvelle that has its corporate social responsibility mechanism down pat. When placed in a larger context of how globalization drives the casualization or informalization of workers, the PRR Framework is shown to have a superficial understanding of this process. It merely allows corporations to skim the surface of the issue and to tinker with the problem lending an illusion of action, without ensuring the necessary agents to enable lasting change.

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