The relationship between state law, collective agreement and individual contract: Japan's decentralized industrial relations with internal market oriented flexicurity*

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1 Introduction

Traditionally, the most important purpose of state law has been to provide minimum labor standards for all workers across the state. State law is the norm established at the most centralized level. However, in many European countries, state laws started to allow derogation or deviation from their mandatory norms under certain conditions. For instance, if a collective bargaining agreement (hereinafter 'CBA') concluded by social partners (labor unions and employers' associations) allows derogation from the minimum labor standards, working conditions lower than the statutory norms are permissible. Such derogatory power used to be conceded only to the sector level labor unions and employers' organizations. However, in some countries, derogatory power can be given to further decentralized parties like works councils and individual employers. This is the flexibilization of labor protective norms by the decentralized parties.

In Europe, collective agreements between labor unions and employers' organizations have traditionally been concluded at the national or sector level. However, again, the decentralization of negotiation is conspicuous. More labor unions and more employers' organizations give their regulatory power to decentralized parties, such as works councils and individual companies.[1]

Flexibilization of statutory norms and decentralization of negotiation are required to make universal norms more adaptable in the workplace, and accommodate the grass-roots needs of individual companies and workers' interests in a fluctuating market. However, flexibilization and decentralization entail the risk of a decrease in social protection, and the weakening of negotiative power.

Given these situations in Europe, the Japanese system provides an

* This paper was prepared for the conference organized by the MTA-PTE Research Group of Comparative and European Employment Policy and Labour Law held on 25-26, October 2012 in Pécs, Hungary.
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[1] See Shinya Ouchi & Takashi Araki (eds.), Decentralizing Industrial Relations and the Role of Labour Unions and Employee Representatives, Bulletin of Comparative Labour Relations, No. 61 (Kluwer Law International, 2007).

interesting example to demonstrate the merits and demerits of flexibilization of labor protective norms in decentralized industrial relations. Japan's unique 'flexicurity' model, combining flexible regulation of working conditions and employment security in the internal labor market, also provides an interesting case for comparative study.

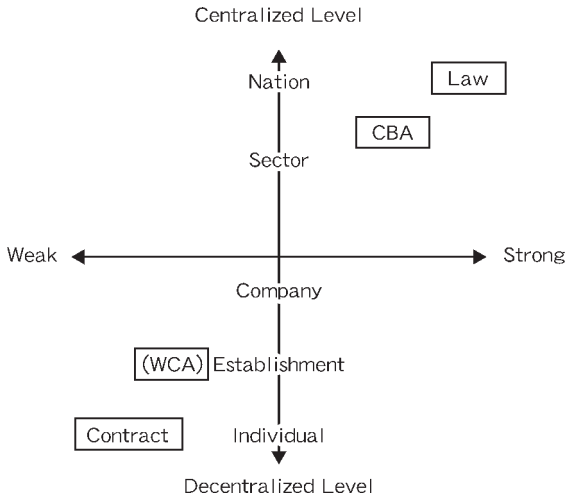
This paper first clarifies the Japanese system of regulating working conditions with the European system. Second, it deals with statutory minimum labor standards and their flexibilization. Third, it gives an overview of Japan's enterprise unionism that represents decentralized industrial relations. Fourth, Japan's unique flexicurity model utilizing reasonable modification in work rules will be examined. Finally, after summarizing the discussion, the paper will propose a reconsideration of the nature and methods of the statutory regulations applicable to current employment relations that comprise a small number of union members and a diversified workforce.

2 Legal tools regulating working conditions and their relationship

2.1 European model

In order to clarify the Japanese system, let me first confirm the European model for regulating working conditions. In almost all countries with a collective bargaining system, there are three legal tools: state law, CBA, and an individual labor contract. In countries with works councils, works council agreements might be added as the fourth legal tool, as is typical in Germany (*Betriebsvereinbarung*). When we analyze these tools according to their effects and regulation level, the European model can be described as presented in Figure 1.

Figure 1: European Model



The distinctive feature of the European model is that labor unions are organized at the national or sector level, and thus collective bargaining also takes place at the national or sector level. In order to adapt to changing economic situations and to respond swiftly to the specific needs of the workplace, many European countries must debate whether to shift bargaining levels to a more decentralized level, such as the company level, establishment level, or individual level.

The traditional understanding of the legal effect order of the said four tools is as follows: (from strong to weak) Law＞CBA＞WCA＞Contract. Derogation or deviation from the statutory norms is the exception to this order. For instance, a weaker legal tool such as CBA can violate or alter the statutory minimum labor standard unfavorably to workers.[2] The controversial issue for some European countries is whether, according to the decentralization of bargaining levels, such derogatory power can be delegated to parties at the more decentralized level, such as labor unions at the company level, works councils at the establishment level or even to individual employees.[3]

2.2 Japanese model

In Japan, there are four legal tools regulating working conditions. Three of them are common with the European model: law, CBA, and individual labor contract. But the fourth tool in Japan is different: not a works council agreement but work rules or rules of employment (*shugo kisoku*). Work rules (rules of employment) comprise a document drawn up by an employer to regulate working conditions and discipline in the workplace. In drawing up the work rules, employers are required to seek opinions from a majority representative[4] of workers in the establishment, however this representative's consent is not required. In this sense, Japanese employers can unilaterally establish and modify work rules. For the past four decades, case law has created and maintained a unique rule giving reasonably modified work rules a binding effect even on those workers opposing the modification. By this rule, work rules have played a very important role in adjusting working conditions in Japanese employment relations, and this importance was even enhanced by the enactment of the Labor Contract Act in 2007 that incorporated the case law rules. The unique regulation on

[2] It is known that much of Swedish labor legislation allows for deviation, both to the advantage and detriment of employees, from the statutory provisions by means of CBAs. See, Mia Rönmmar, "Labour Policy on Fixed-Term Employment Contracts in Sweden", Bulletin of Comparative Labour Relations No. 76 p. 159 (2010).

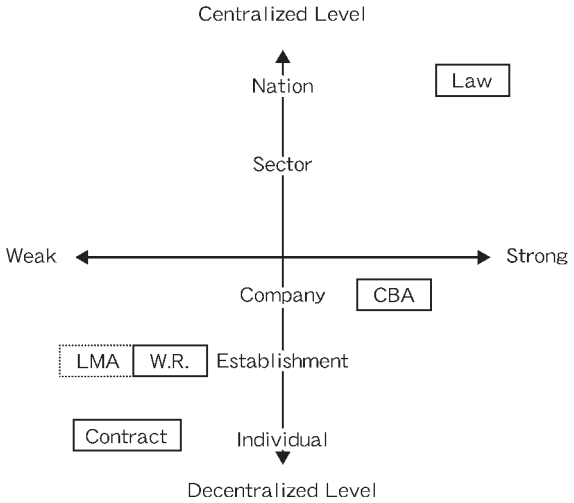
[3] The UK law that allows derogation from the EC Working Hours directive by individual employee's consent is one such example. See Simon Deakin & Gillian Morris, Labour Law, 347 (6th ed., 2012).

[4] 'A majority representative' is a union that organizes the majority of workers in the establishment or, if such a union does not exist, an individual who represents the majority of workers in the establishment.

work rules modification represents the Japanese version of flexicurity, which will be described later.

The legal effect order of these four legal tools is as follows: (from strong to weak) Law＞CBA＞Work Rules＞Contract. A labor contract cannot violate norms established in work rules. Therefore, any portions of a labor contract that violate work rules are deemed invalid, and are subject to be governed by the standards stipulated in the work rules.[5] Work rules violating a CBA are also considered to be invalid, and working conditions established by the CBA will prevail. As a principle, CBAs, work rules and labor contracts cannot violate labor standards established by mandatory labor protective laws such as the Labor Standards Act and the Minimum Wages Act. However, derogation of the statutory minimum labor standards is also allowed in Japan. The characteristic feature of Japanese derogation is that it is widely permitted by the decentralized parties' agreement, known as the 'labor-management agreement (LMA)' (*Roshi Kyotei*), between the individual employer and the majority representative of workers in the establishment.

Figure 2: Japanese Model



Thus, the Japanese model can be described as in Figure 2. Compared with the European model, the features of the Japanese model are as follows: (1) Derogation of minimum labor standards is allowed by the decentralized parties' agreement; (2) CBAs are concluded not at the sector level but at the company level, between individual companies and enterprise-based unions, since most Japanese labor unions are

[5] Article 12, LCA: 'A labor contract that stipulates any working conditions that do not meet the standards established by the rules of employment shall be invalid with regard to such portions. In this case, the portions which have become invalid shall be governed by the standards established by the rules of employment'.

organized at the enterprise level; (3) Japan does not have a works council system, and work rules established by the employer play an important role in regulating working conditions. The following parts of this paper deal with these three features of the Japanese labor law system.

3 Statutory minimum labor standards and their flexibilization

3.1 Worker protective laws

In Japan, the individual employment relationship between an employer and a worker is regulated by labor protective laws such as the Labor Standards Act, the Minimum Wages Act, the Security of Wage Payment Act, the Industrial Safety and Health Act, the Workers' Accident Compensation Insurance Act, the Equal Employment Opportunity Act, the Worker Dispatching Act, and so forth.

The most fundamental and important law is the Labor Standards Act which establishes minimum working standards, including employers' duties to ensure full payment of wages (Art. 24), abide by maximum working hours (8 hours a day, 40 hours a week, Art. 32), provide paid leave (10 to 20 days a year, Art. 39), give special protection to young workers (Art. 56-64) and pregnant women (art. 64-2 to 68), compensate workers for work-related accidents (Art. 75 to 88), and establish work rules (Art. 89 to 93). The Act also establishes the government's enforcement machinery such as supervision (Art. 97-105), and penalties against any violations (Art. 117 to 121).

The Labor Standards Act applies to all establishments who employ a workforce, irrespective of the number of workers. The exceptions include family businesses that employ family members only (Art. 116 Para. 2), domestic workers (Art. 116 Para. 2) and other employment relations for which special regulations apply, namely seamen (Art. 116 Para. 1) and some civil servants. From a comparative perspective, the Labor Standards Act is very broad in its coverage.

Working conditions set forth by labor contracts, work rules and collective agreements that are inferior to the standards set by the Labor Standards Act, are rendered void and replaced by the Act's mandatory legal norms (LSA Art. 13[6]). Minimum standards prescribed in worker protection laws are enforced by Labor Standards Inspection Offices, as well as by sanctions imposed by criminal penalties.

[6] Article 13, LSA: 'A labor contract which provides for working conditions which do not meet the standards of this Act shall be invalid with respect to such portions. In such a case the portions which have become invalid shall be governed by the standards set forth in this Act'.

Thus, as a principle, statutory minimum labor standards constitute mandatory norms, and lowering them by agreements between private parties is not allowed.

3.2 Flexibilization of minimum labor standards: derogation through labor-management agreements

Along with diversification of the workforce and employment relations, statutory minimum labor standards fixed by the national level do not necessarily fit into actual employment relations in a particular industry or company. Therefore, adaptation of statutory norms to the workplace needs is required. This is why in many countries a certain degree of derogation or deviation from statutory norms is admitted. Japan also employs such a mechanism of flexibilization.

However, this Japanese mechanism is very different from those found in European countries. In Europe, derogation from the mandatory norms has been allowed in exceptions when sector level labor unions have agreed to it. However, Japan gives such derogatory power even to the individual who is chosen to represent all workers in the establishment. This mechanism certainly makes the adaptation of mandatory norms to the workplace easier, but at the same time it entails the risk of abusive derogation and the deprivation of workers' rights.

The LSA allows derogation from the minimum labor standards based upon a 'labor-management agreement' when the Act explicitly prescribes such derogation. For instance, the LSA requires a labor-management agreement for the deduction of wages, hours-averaging schemes, or overtime work.

A labor-management agreement is a written agreement between an employer and the majority representative of workers at an establishment.[7] The majority of workers are represented by a union that organizes the majority of workers in the establishment, or by an individual who represents the majority of workers in the absence of a majority union. Where a majority union exists, fewer problems arise because the

[7] A labor-management agreement concluded between an employer and a majority representative is completely different from a collective agreement concluded between an employer and a labor union. A labor-management agreement is a written agreement that simply allows derogation from the minimum legal standards and has no normative effect on the labor contracts of individual workers in the establishment. In other words, when a labor-management agreement allows, for instance, overtime, it merely provides the employer with immunity from criminal sanctions when the employer orders his/her workers to work overtime. It does not create any obligation for workers to work overtime. Since a majority representative who concludes a labor-management agreement has no mandate to establish terms and conditions of employment of workers, the agreement has no normative effect on workers' labor contracts. Therefore, in order to be in a position to compel workers to work overtime, an employer is required to establish contractual grounds through an individual contract, work rules or a collective agreement.

majority union is strong enough to negotiate with the employer. However, where no such union exists, an individual worker chosen to represent the majority of workers bears the important responsibility of deciding whether to sign labor-management agreements, such as agreements on overtime. In spite of such a significant responsibility, for years the LSA and bylaws did not provide any provisions concerning the qualifications of any person who stood to represent the majority of workers, or the procedures to select such a person.

3.3 Abuse of derogation

Criticism has been launched against this process of appointing individuals controlled by the management to be majority representatives, and the fact of employers' derogation proposals being rubber stamped in practice. Faced with such criticism, the Ministry of Labor issued administrative guidance concerning the proper selection of the majority representative in 1988. Ten years later, the 1998 revision of the LSA explicitly incorporated the contents of the guidance into the Ordinance for Enforcement of the LSA (Art. 6-2). The revised Ordinance requires that the majority representative cannot be a person in a position of supervision or management and such person must be elected by voting, a show of hands, and other procedures, only after all participants have been clearly informed of the election's purpose to choose a representative who will conclude agreements provided by the Act.

Despite these provisions in the Ordinance, it is still highly questionable that such an elected individual has equal power in negotiations with their employer. Many cases are reported in which majority representatives have signed labor-management agreements without fully comprehending the meaning of the agreement. Even if the representative knows the effect of a derogatory agreement, he/she cannot afford to reject to sign the documents because he/she is a single individual without any organizational support for their decision.

The case in Japanese tells us that although derogation and flexibilization is necessary to make statutory labor protective norms adaptable to diversified employment relations, derogatory powers should not be given to a party that the employer can easily manipulate. In order for the derogation scheme to function properly, it is important to establish a legitimate mechanism that can fairly represent workers opinions, and that is strong enough to resist control and intervention by employers.

3.4 Introduction of works councils ?

In order to improve the current situation, therefore, Japanese scholars have proposed to introduce genuine employee representation systems, like the works councils adopted in Europe. However, this proposal has not been welcomed by Japanese labor unions. Why? The answer lies in

Japanese enterprise unionism.

In Europe, where labor unions are organized at the sector or industry level, the introduction of employee representatives at the establishment does not necessarily cause rivalry issues between unions and employee representatives.

In Japan, by contrast, most labor unions are organized at the enterprise or plant level. Consequently, establishing a new employee representation system like works councils at the same level means intruding onto the labor unions' territory. Labor unions fear that the new system could erode and replace their own existence. Whereas labor unions are financially supported by the collected union dues from their members, employee representation systems are required by law to run on financial support from employers, and workers do not have to pay dues. Thus, labor unions see employee representation systems, such as works councils, as rival organizations, and oppose their introduction by law.

The question then arises, why is enterprise unionism predominant in Japan?

4 Enterprise unionism and decentralized industrial relations in Japan

4.1 Enterprise unionism

Enterprise unionism is a system in which unions are established within an individual company. It organizes employees in the same company irrespective of their jobs, bargains collectively with a single employer, and concludes collective agreements at the company level. Currently, more than 90% of Japanese labor unions are enterprise-based.[8] However, enterprise unionism in Japan is not the creation of the Labor Union Act. The Act allows any forms of labor unions. Not only enterprise unions, but also industrial unions, craft unions and local unions that organize workers across companies, are all legitimate unions under the Act.

The main reason that enterprise unionism has taken root and continued to dominate this far lies in its functional excellence within Japan's highly developed internal labor market. Under the lifetime employment system, Japanese employees tend to stay at a particular company, develop their working careers, and be subject to flexible adjustments of working conditions in accordance with the company's economic performance. In such a labor market, industrial-level or national-level collec-

[8] According to the Basic Survey on Labor Unions in 2007, 93.4% of labor unions in private sector are enterprise-based unions and they organize 85.5% of union members. See Takashi Araki, *Rōdō-hō* (Labor Law), 469 (Yuhikaku, 2009).

tive bargaining has made little sense. Enterprise-based unions and enterprise-level collective bargaining have been the most efficient mechanisms to respond to the demands of such employees who develop their working careers in a particular company.

4.2 The unique nature of Japanese collective bargaining agreements

Consequently, the nature of collective bargaining and collective agreements in Japan are very different from those in European countries. Collective agreements in Europe are traditionally concluded at the sector level and thus establish minimum standards that are applied across companies. Therefore, more favorable working conditions agreed between individual employees and employers remain valid (*Günstigkeitsprinzip* or 'favorability principle'). By contrast, Japanese collective agreements are concluded between a single employer and an enterprise union. Therefore, working conditions prescribed in the CBA are usually interpreted at not only the minimum but also the maximum conditions to be held. Individual labor contracts that stipulate not only less favorable conditions but also more favorable conditions than those prescribed in the collective agreement are construed as null and void unless the collective agreement explicitly allows more favorable contracts.[9]

Decentralized industrial relations also affect the extension system of CBAs. The LUA has two types of extension systems: plant level and regional level extension. The regional extension system, which was modeled on the German 'general binding effect' (*Allgemeinverbindlichkeit*) system, is rarely used in Japan because it relies on the unusual condition in which a majority of the employees of the same kind, in a particular locality, are covered by a particular collective agreement. In this sense, collective agreements in Japan cannot create a social norm.

4.3 Plural unionism

Although Japan introduced the unfair labor practice system modeled after the American Wagner Act of 1935, Japan did not adopt the exclusive representation system adopted in the US. As a result, more than one union can exist in one company in the same manner as in Europe. Under the Constitutional guarantee of the right to organize and to bargain collectively, it is construed that a minority union in a company that organizes very few numbers of employees, can enjoy an equal right to bargain collectively and go on strike in the same manner as a majority union. Under these circumstances, Japanese case law has developed a unique notion of the duty of employers to maintain neutrality toward all unions.[10] Discriminatory attitudes towards a

[9] See Kazuo Sugeno, *supra* note 37, 589; Takashi Araki, Labor and Employment Law in Japan, 175 (Japan Institute of Labor, 2002).
[10] The Nissan Motor Co. case, Supreme Court (April 23, 1985) 39 Minshu 730.

minority union, especially in the course of collective bargaining, are prohibited as one form of unfair labor practices.

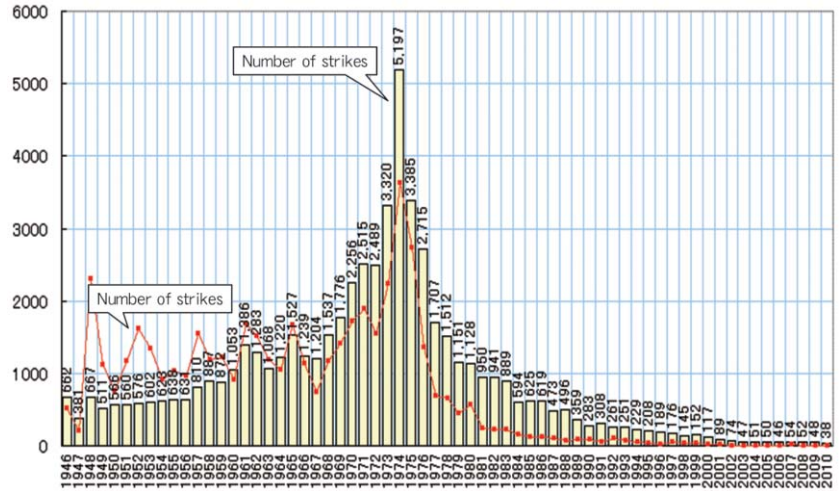
In practice, the majority union that bears responsibilities for the majority of workers usually takes a pragmatic attitude over an ideological stance in order to reach an agreement with the employer. By contrast, the minority union that needs to demonstrate its *raison d'etre* tends to require what the management cannot afford to accept, and they cannot reach an agreement. For instance, the majority union agreed to demands for overtime work with paid overtime premiums. By contrast, the minority union refused to agree to overtime, thus minority union members did not engage in overtime and received no overtime premiums. It should not be reprehensible for such a differences arise between the treatment of majority union members and minority union members as a result of truly free bargaining. However, if such different treatments created through collective bargaining are caused by the employer's discriminatory intention against the minority union, then that may well constitute unfair labor practice. Given the blurred nature of this demarcation, the Labor Relations Commission, an administrative organ in charge of adjudicating unfair labor practice cases, faces a number of difficult interpretative questions.

4.4 Japan's cooperative industrial relations developed under enterprise unionism

Currently, Japan is famous for its peaceful industrial relations. The number of strikes in 2011 was only 57, a record low.[11] However, this is not because the Japanese people are characteristically peaceful, or Japanese culture favors harmonization. Until 1960 in the private sector and 1975 in the public sector, Japan experienced a very harsh period of friction between labor and management in the same manner as elsewhere (See Figure 3).

[11] Ministry of Health, Labor and Welfare, "Heisei 23-nen Rodo Sogi Tokei Chosa (Survey on Industrial Actions in 2011)" http://www.mhlw.go.jp/toukei/list/dl/14-23-07.pdf

Figure 3: Number of strikes lasting more than half a day



Ministry of Health, Labor and Welfare, *Rōdō Sōgi Tōkei Chōsa* (Survey on Industrial Actions) (annual)

Severe confrontations between labor and management ensued from the end of World War Two until the 1950s.[12] During this period, labor movement was closely tied with political, especially communist movements amid the Cold War. From the mid-1950s to the mid-1960s, when Japan embarked upon its rapid economic growth, Japan's industrial relations experienced a gradual but significant transformation. Adversarial labor relations subsided, making way for cooperative relations to emerge in accordance with the spread of joint labor-management consultation practices.

Joint labor-management consultation was not required by law. It was voluntarily established by both labor and management who were disappointed with the adversarial labor relations led by radical leftists. In order to promote the Productivity Increase Movement, the Japan Productivity Center, an organ established by business circles under the auspices of the Ministry of International Trade and Industry (MITI) and the US Government, together with the SODOMEI, the national confederation of moderate unions, confirmed the movement's three basic principles. These included promoting joint labor-management consultation, and encouraging the spread of such consultation practices.

In joint labor-management consultation, employers provided various sets of information to their unions, and unions cooperated with management in order to increase productivity. Employers kept their promise not to dismiss employees who were made redundant through

[12] See Takashi Araki, note 9, 206ff.

company restructuring or rationalization. Redundant employees were instead transferred to other sections and retrained to settle in new positions. Through labor-management cooperation during the period of rapid economic growth in the 1950s and 60s, Japanese corporations increased their profits and distributed this increased profit fairly among their employees. This led the labor side to confirm the merits of cooperative labor relations based upon long-term relations with mutual trust. In this manner, Japanese labor and management gradually changed the nature of labor relations from a zero-sum game into a win-win situation.

In this context, Japanese enterprise unions developed two unique roles in collective labor relations: first, they engaged in collective bargaining as a traditional labor union, and second, they consulted with employers in the process of joint labor-management consultation. Compared with the European practice whereby consultation is carried out by a single employer and a works council at the decentralized level, Japanese enterprise unions played *de facto* the role of works councils as well. Japan's cooperative industrial relations that have developed since the early 1960s might, therefore, be seen as an outgrowth of the works council aspect of enterprise unions.

This explains why proposals to introduce a works council system have generated opposition from the side of labor unions. For the enterprise-base unions, works councils appear to be nothing but rival organizations that deprive them of their function on the same level by the financial support from the employers.

Thus a practical solution would be to introduce works council systems where enterprise-based unions do not exist yet. However, labor unions are still skeptical of even such proposals.

5 Japanese model of flexicurity: employment security and flexible adjustment of working conditions in the internal labor market

Since CBAs are established at the company level in Japan, they cannot be extended to workers employed by another company. The rate of unionization in Japan has continuously decreased since 1975 and standing at 18.5% in 2011. As a result, more than four out of five Japanese workers are not covered by CBAs. Their working conditions are mainly governed by labor contracts and work rules.

5.1 Labor contracts

The LSA requires the employer to clarify the working conditions to the worker when concluding a labor contract (LSA Art.15). Article 5 of the Enforcement Order of the LSA enumerates those matters to be clarified.

In particular, the clarification of conditions pertaining to the place of work, content of work, working hours, payment of wages, and retirement, must be made in writing (EOLSA Art. 5, Para. 2).

It is, however, rather rare for an employer and a worker to make a written contract and prescribe concrete working conditions in detail. Workers merely agree orally that they will work for the company. To satisfy the requirement to clarify working conditions, the employer usually presents the worker with the work rules, which cover most of the items to be clarified. As long as the worker raises no objection to the content of the work rules, he is regarded as having agreed to the conditions. Thus, the conditions stipulated in the work rules become the substantive content of labor contracts.

5.2 Work rules

Work rules are the most important legal tools to regulate terms and conditions of employment in Japan.

5.2.1 The duty to draw up work rules

Work rules are a set of regulations drawn up by an employer for the purpose of establishing uniform rules and conditions of employment at the workplace. Article 89 of the LSA prescribes that an employer that continuously employs ten or more workers[13] must draw up work rules on the following matters (LSA Art. 89):

1) the time at which work begins and ends, rest periods, rest days, leave, and work shifts,
2) the method for determination, computation and payment of wages, the date of wage payments, and wage increases,
3) retirement including dismissals reasons,
3-2) retirement allowances,
4) interim wages and minimum wages,
5) cost of food or supplies for work,
6) safety and health,
7) vocational training,
8) accident compensation,
9) commendations and sanctions, and
10) other items applicable to all workers at the workplace.

Items 1 to 3 are absolutely mandatory matters which must be included in the work rules. Items 3-2 to 10 are conditionally mandatory matters that must be included in the work rules when the employer wants to

[13] Though it is not clear from the provision, it is generally interpreted that 'ten or more workers' should be calculated not in the enterprise but in the establishment, on the rationale that work rules apply in each establishment and procedures for drawing up work rules presuppose each establishment as a unit (LSA Art. 90).

introduce regulations concerning these matters.

When an employer institutes the work rules for the first time, or when the work rules are altered, the employer must submit those new rules to the competent Labor Standards Inspection Office. Workers must also be informed of the new rules by means of conspicuous posting, distribution of printed documents or setting up accessible computer terminals (LSA Art. 106, EOLSA Art. 52-2). The duties for drawing up, submitting and displaying work rules are sanctioned by criminal provisions (LSA Art. 120).

In drawing up or modifying the work rules, the employer is required to ask the opinion of a labor union organized by a majority of the workers at the workplace or, where no such union exists, the opinion of a person representing a majority of the workers. However, a *consensus* is not required. Even when the majority representative opposes the content of the work rules, the employer may submit the work rules to the Labor Standards Inspection Office with the document citing the opposition's opinion, and the submission will still be accepted. In this sense, the employer can unilaterally establish and modify work rules.

5.2.2 The legal effect of work rules and their unfavorable modification

The work rules apply to all workers in a given workplace or establishment. Work rules cannot violate enacted laws or collective agreements applicable to the establishment (LSA Art. 92, Para. 1). The Labor Contract Act endows work rules with an imperative and direct effect on individual labor contracts. Namely, the Act states that labor contracts that stipulate working conditions inferior to those provided in the work rules shall be invalid and that such conditions are to be replaced by the standards in the work rules (LCA Art. 12).

However, until 2007, the enacted law remained silent regarding the effect of work rules when they set inferior standards to those in individual labor contracts. This led to a difficult legal question when an employer facing economic difficulties modified work rules unfavorably vis-à-vis its workers. The binding effect of such modified work rules was challenged in courts.

The majority of scholars at the time argued that such unilaterally modified work rules without obtaining workers' consent could not have a binding effect on individual labor contracts. This was the natural interpretation according to the contract theory.

5.2.3 Case law on a 'reasonable modification' of work rules

However, in 1968, the Supreme Court Grand bench took a different position and established a unique rule governing the effect of unfavor-

able modifications in the work rules. According to the Supreme Court, when the modification is reasonable, the modified work rules have a binding effect on all workers, including those opposed to the modification.[14] In spite of severe criticism asserting that there was no legal ground for recognizing such a binding effect, the Supreme Court has adhered to this rule and repeatedly reconfirmed its position.[15] This rule has accordingly become the established case law.

Underlying this ruling is a consideration for employment security and the need for flexible adjustment of working conditions. Traditional contract theory dictates that a worker who opposes any modifications made to the future terms of employment be discharged. However, according to the strict restriction on dismissals by the prohibition of abusive dismissals in Japan,[16] such a dismissal may well be regarded as an abuse of the right to dismiss, and thus, rendered null and void. However, since the employment relationship is a continuous contractual relationship, modification and adjustment of the working conditions is inevitable.

In light of these circumstances, Japanese courts have struck the balance between employment security and the need for flexible adjustment of working conditions by allowing unilateral work rules modifications, on the condition that the desired modification can be regarded as reasonable.[17] This is one manifestation of the Japanese version of 'flexicurity' that combines employment security and flexibility in adapting working conditions to fit with economic fluctuations. In 2007, the Labor Contract Act incorporated this case law into its provisions (LCA Art. 9 and 10[18]) and it became the statutory rule.

[14] The *Shuhoku Bus* case, 22 *Minshu* 3459 (Supreme Court, December 25, 1968).
[15] The *Takeda System* case, 1101 *Hanrei Jiho* 114 (Supreme Court, November 25, 1983); The *Omagari-shi Nokyo* case, 42 *Minshu* 60 (Supreme Court, February 16, 1988); The *Dai-ichi Kogata Haiya* case, 1434 *Hanrei Jiho* 133 (July 13, 1992); The *Asahi Kasai Kaijo Hoken* case, 50 *Minshu* 1008 (March 26, 1996); The *Daishi Ginko* case, 51 *Minshu* 705 (Supreme Court, February 28, 1997); The *Michinoku Ginko* case, 54 *Minshu* 2075 (Supreme Court, September 7, 2000).
[16] LCA Article 16 'A dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of right and be invalid'. The prohibition of abusive dismissals was established by case law and the rule was incorporated in the Labor Standard Act in 2003 (Art. 18-2, LSA). When the Labor Contract Act was enacted in 2007, the provision (Art. 18-2, LSA) was transferred to the Labor Contract Act as Article 16.
[17] Takashi Araki, "Accommodating Terms and Conditions of Employment to Changing Circumstances: A Comparative Analysis of Quantitative and Qualitative Flexibility in the United States, Germany and Japan", in C. Engels & M. Weiss (Ed.), *Labour Law and Industrial Relations at the Turn of the Century, Liber Amicorum in Honour of Prof. Dr. Roger Blanpain*, 509 (Kluwer Law International, 1998).
[18] LCA Article 9 'An employer may not, unless an agreement has been reached with a worker, change any of the working conditions that constitute the contents of a labor contract in a manner disadvantageous to the worker by changing the rules of employment; provided, however, that this shall not apply to the cases set forth in the following Article'.

Flexicurity in Japan is different from the Danish type of flexicurity, which is best known worldwide. Danish flexicurity combines flexibility in the external labor market created by relaxing dismissal regulations, with state-provided security for the unemployed and retraining programs. If we can term the Danish model 'external market oriented flexicurity', the Japanese model might be defined as 'internal market oriented flexicurity', since flexibility and security are balanced in the internal labor market, or within a particular firm, without resorting to dismissals.

Japan has long been known for its lifetime or long-term employment system that holds employment security in high esteem. The practice of lifetime employment has been eroded gradually in recent years, yet it still remains the cornerstone of the Japanese employment system. Therefore many Japanese labor law rules have been devised with employment security in mind. The 'reasonable work rules modification rule', unique to Japan, is one such example.

5.2.4 Criteria for 'reasonableness'

The principal test for 'reasonableness' is to weigh the disadvantage to the worker by the modification against the business's need to change the working conditions. Simultaneously, courts take other matters surrounding the modification into consideration, such as whether compensatory measures to mitigate the disadvantages to the workers were or are being taken, whether similar treatment is common in other companies in the same industry, or whether the majority union or the majority of the workers are in agreement with the modification.

Some Supreme Court cases[19] suggest that the consent of the majority union weighs heavily in a court's decision over whether or not a work rules modification should be regarded as reasonable. This position respecting the consent of the majority workers is supported by commentators for the following reasons.[20] First, the nature of the issue of work rules modification is more a dispute of interests than it is a dispute of

LCA Article 10: 'In cases where an employer changes the working conditions by changing the rules of employment, if the employer informs the worker of the changed rules of employment, and if the change to the rules of employment is reasonable in light of the extent of the disadvantage to be incurred by the worker, the need for changing the working conditions, the appropriateness of the contents of the changed rules of employment, the status of negotiations with a labor union or the like, or any other circumstances pertaining to the change to the rules of employment, the working conditions that constitute the contents of a labor contract shall be in accordance with such changed rules of employment; provided, however, that this shall not apply to any portion of the labor contract which the worker and the employer had agreed on as being the working conditions that are not to be changed by any change to the rules of employment, except in cases that fall under Article 12'.

[19] The *Dai-ichi Kogata Haiya* case, July 13, 1992, *Hanrei Jiho* no. 1434 p. 133; The *Daishi Ginko* case, Supreme Court, February 28, 1997, *Minshu* vol. 51 no. 2 p. 705.

rights, since the modified work rules establish new terms and conditions of employment for the future. Thus, it is more appropriate to respect the negotiating parties' attitude than for the court to intervene and review the reasonableness of the substantive content of newly established working conditions from the judges' standpoint. Second, the most significant defect of the case law rule is its lack of predictability of reasonableness. A position that presumes reasonableness when a majority union agrees on the modification is an attempt to enhance the predictability of the reasonableness test. Simultaneously, such a position respecting the majority union's attitude gives the parties an incentive to negotiate in good faith and reach an agreement.[21]

However, several Supreme Court decisions[22] issued in 2000 suggest that the Supreme Court does not necessarily respect the majority unions' attitude towards a work rules modification and it actively reviews the reasonableness of the modification on the basis of its own criteria.

Following these case law situations, the rule of reasonable modification in work rules was incorporated into the newly enacted Labor Contract Act in 2007. After the debate, the legislature did not explicitly adopt the said commentators' position[23] respecting the majority unions' consent but simply lists factors taken into consideration for deciding reasonableness.[24]

6 Conclusion: decentralized industrial relations with internal market oriented flexicurity

6.1 Decentralized industrial relations

The first feature of the Japanese labor law system is decentralized industrial relations. Most labor unions are enterprise-based unions. Collective bargaining takes place between an individual company and its enterprise union. CBAs are thus concluded by those parties at the company level, and their application is confined within the company.

[20] Kazuo Sugeno, "Shugyo Kisoku Henko to Roshi Kosho (Work Rules Modification and Labor-Management Negotiation)", 718 *Rodo Hanrei* 6 (1997); Takashi Araki, *Koyo Sisutemu to Rodojoken Henko Hori (Employment systems and Variation of Terms and Conditions of Employment)*, 265 (Yuhikaku Publishing, 2001).
[21] Yasuo Suwa, "Shugyo Kisoku no Kozo to Kino (Structure and Function of Work Rules)" 71 Nihon Rodoho Gakkai-shi 19 (1988); Araki, supra note 8, 267.
[22] The *Michinoku Ginko* case, supre note 3; the *Ugo (Hokuto) Ginko* case, 788 Rodo Hanrei 23 (Supreme Court, September 12, 2000); The *Hakodate Shinyo Kinko* case, 788 Rodo Hanrei 17 (Supreme Court, September 22, 2000).
[23] Quoted note 20.
[24] Article 10, LCA lists the following factors: 'the change to the rules of employment is reasonable in light of the extent of the disadvantage to be incurred by the worker, the need for changing the working conditions, the appropriateness of the contents of the changed rules of employment, the status of negotiations with a labor union or the like, or any other circumstances pertaining to the change to the rules of employment'.

The practice of decentralized bargaining can meet the grassroots needs of workers swiftly and flexibly. The keenest request made by workers employed by a company in bad shape in particular, is not a wage hike but a guarantee of their sustained employment. If their employment can be secured, such workers tend to agree to a lowering of their working conditions. In fact, many Japanese enterprise unions agreed to lower their wages across-the-board in order not to avoid the dismissal of any workers.

German centralized industrial relations in the 1990s witnessed a so-called 'escape from the CBA' (*Fluch aus dem Tarifvertrag*). In such cases, companies found it impossible to lower wages in order to avoid economic dismissals even if this was desired by both the company and its workers, because the sector level collective agreement had set minimum wages that were too high for the ailing company. To make what the decentralized parties wanted possible, they had to be freed from the binding effect of the sector-level CBA. Thus, some employers seceded from their employers' organizations.

In Japanese decentralized industrial relations, such a scenario is unlikely to arise, because decentralized parties can do whatever they want and need. This is a merit of the decentralized system.

However, there are also disadvantages to the decentralized system, since the negotiating power of the decentralized parties is weak compared to that of centralized parties. In Japan, this problem typically surfaces in the derogation scheme that allows deviation from the statutory minimum standards by means of an agreement between an employer and a worker elected to represent all in the establishment. Since the statutory norms are fixed at the most centralized level, some degree of adaptation to grassroots needs is necessary. However, such adaptation or flexibilization must not be unjust and unfair. In order to secure sound and fair flexibilization, the labor side party must be sufficiently resistant to pressure from the employer. On this point, there are great issues in current Japanese law and there is much need for legislative improvement.

6.2 Internal market oriented flexicurity

The second feature of the Japanese labor law system is internal market model flexicurity that balances employment security with flexible adjustment of working conditions. Japanese law has typically prioritized employment security; hence, to compensate for the lack of numerical flexibility adjusting the size of workforces, Japan has introduced quantitative or internal flexibility to adjust working conditions.

When we analyze traditional American, European and Japanese

employment systems from the perspective of external and internal flexibility and security in employment and working conditions, they might be described as in Figure 4.

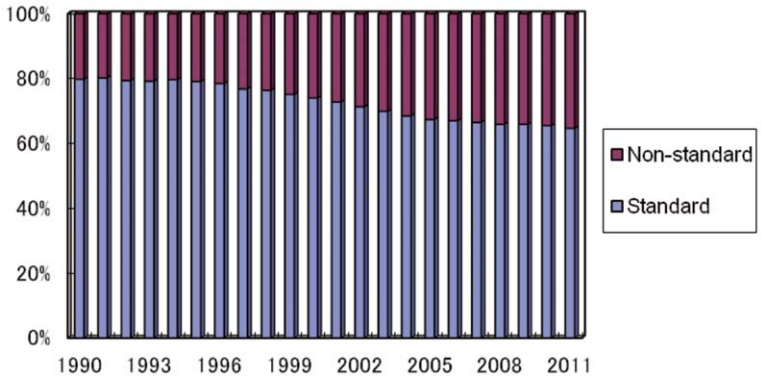
Figure 4: Flexibility vs. Security

	Flexibility	Security
USA External Flexibility Model	At will employment	
	Flexible adjustment by obtaining consent under at-will employment	
Japan Internal Flexibility Model		Security in employment
	Reasonable work rules modification	
Europe Security-Oriented Model	Relaxing dismissal regulations? ⬅	Security in employment
		Security in working conditions

Japanese flexicurity strikes a balance between employment security and flexibility in the adjustment of working conditions in a given company. Therefore, this is a better-balanced system compared to the American flexibility-oriented model and the traditional European security-oriented model.

However, this Japanese brand of flexicurity applies only to regular or standard workers. In 1990, the ratio of standard workers in Japan was 80% of the total workforce and by 2010, this had dropped to 65%. In other words, 35% or one third of the current Japanese workforce are non-standard workers. Most of them are employed on a fixed-term basis and do not enjoy employment security like standard workers. For those unstable non-standard workers, the Japanese system is not at all well-balanced.

Figure 5: Ratio of Standard/Non-standard Workers in Japan

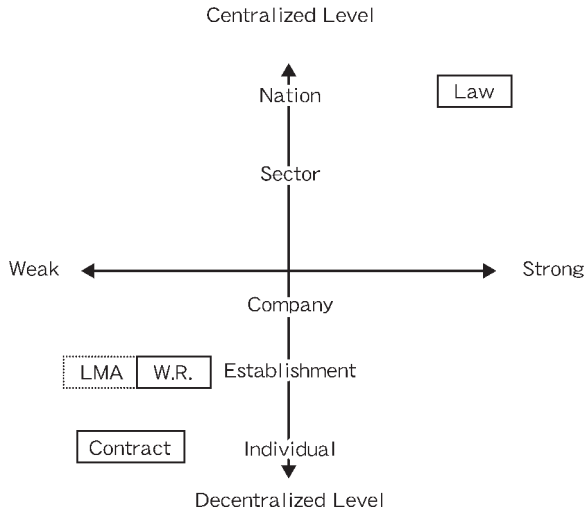


To address this problem, Japan started to develop new measures to protect non-standard workers. The 2007 revision of the Part-Time Workers Act prohibits discrimination against part-timers, the 2012 revision of the Dispatched Workers Act strengthened protection for temporary workers, and the 2012 revision of the Labor Contract Act introduced new protections for fixed-term contract workers.

6.3 A reconsideration of statutory regulations

Japan has four legal tools regulating working conditions: state law, CBA, work rules and labor contract. However, currently more than 80% of Japanese workers are non-organized[25] and they are outside of the application of CBAs because collective agreements at the company level in Japan cannot have *erga omnes*, or an extension effect like in France. Nor is there any alternative practice to the CBA to refer to as a model of labor contract, like in Germany (*Bezugnamenklausel*). Therefore, in these unorganized sectors, the picture appears as shown in Figure 6. There is no CBA. Consequently the role of state law becomes more important in Japan than in other countries. However, in the contemporary diversified work environment with diversified workers with different interests, applying universal regulation by state law is very difficult and sometimes inappropriate.

Figure 6: Unorganized Japanese workers



To cope with this challenge, first, we must reconsider the nature of state law. Traditionally, statutory norms are mandatory and imperative. However, we know that statutory norms that can be altered by the collective agreement (*Tarifdispositivesrecht*), and we may think of permissible statute that can be changed by individual agreement where a lack of norms might trigger conflict (e.g. rights and obligations in the

[25] Union density in 2012 is 17.9% in Japan.

triangular relationship). In this context, soft law can also be a useful approach to establish new social norms. In the past, Japan has made much use of a 'duty to endeavor' clause that has no direct legal effect, but is effective in practice to introduce new but necessary norms in society.[26] Such diversification of statutory norms should be considered.

Second, we must reconsider the method of regulation: 'From substantive to procedural regulation'. Traditional labor law has been constituted of substantive regulations such as those for setting minimum wages and maximum work hours. However, in accordance with the decentralization and diversification of statutory norms, substantive regulations are entrusted to decentralized parties. The role of statutory regulation is to regulate proper and fair procedures of such derogation from the statutory norms. Of course, some norms related to fundamental human rights should be neither derogable nor diminishable. Therefore, the final result should be a hybrid form of regulation that incorporates both substantive and procedural regulation.

As already mentioned, in order to properly operate procedural regulations, it is vitally important to establish competent actors who can bear responsibility and make derogatory procedures function fairly. On this point, Japan needs to improve its current system to deal with the situation in which four fifths of the workforce are left non-organized, and alternate machineries to convey workers collective voices have yet to be put in place.

In this sense, the Japanese decentralized system is still seeking for a better, more sustainable balance between protection and efficiency.

[26] See Takashi Araki, "Equal Employment and Harmonization of Work and Family Life: Japan's Soft-law Approach", 21 Comparative Labor Law & Policy Journal 451-466 (Spring 2000); Takashi Araki, "The impact of fundamental social rights on Japanese law", in Bob Hepple (ed), *Social and Labour Rights in a Global Context—International and Comparative Perspectives*, pp.215-237 (2002).