The widening gap between standard and non-standard employees and the role of labor law in Japan

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1. Introduction: Features of the Japanese Employment System

The Japanese employment system is often characterized by three traits: 1) lifetime, or more precisely long-term, employment, 2) seniority-based wages, and 3) enterprise unionism.

Lifetime or long-term employment is key to understanding Japan's approach to employment. Typically, an employee enters a company immediately following graduation and enjoys secure and stable employment until he or she reaches the mandatory retirement age, which is usually sixty. He or she receives systematic in-house education and training (so-called On-the-Job Training) and experiences various types of work under a program of periodic transfers.

Market economics determine wages according to supply and demand in the external labor market. However, under the long-term employment model, under which employees stay at a particular company for many years, wages are not determined by such external labor market theory. In Japan, the major factor determining wages and promotion has been seniority, namely the length of the employees' service at the particular firm.

The third feature is enterprise unionism. An enterprise union organizes workers in the same company irrespective of their type of job. As a result, both blue and white collar workers are organized in the same union. Enterprise unionism is not required by law. The Japanese Trade Union Act envisages not only enterprise unions but also industrial unions or other types of unions as seen in other countries. However, currently more than 90 per cent of Japanese unions are enterprise unions.[1]

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[1] According to the Basic Survey on Labor Unions in 2007 by the Ministry of Health, Labor and Welfare, 93.4 per cent of surveyed labor unions in the private sector are enterprise-based unions. See Takashi Araki, *Rodo-ho* [*Labor Law*], 469 footnote 1 (Yuhikaku, 2009).

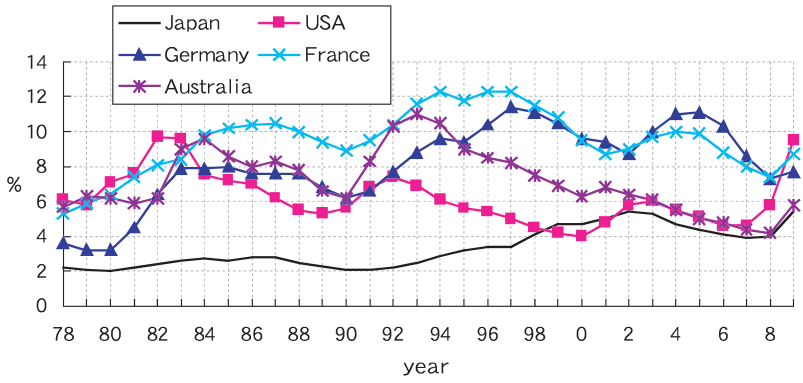
The main reason that enterprise unionism has continued to predominate to date lies in the functional excellence of enterprise unions in Japan's long-term employment system. Under the long-term employment system, dismissals are avoided at all costs. In turn, employees are subject to the flexible adjustment of working conditions. Each employee's promotions and wages are decided mainly by the individual's length of service and performance. In such a highly developed internal labor market, industrial-level or national-level collective bargaining has made little sense because an employee's concern is his/her working conditions within a particular company where he/she would stay for the whole of his/her working life. Enterprise-based unions and enterprise-level collective bargaining have been the most efficient mechanism to respond to the demands of employees who develop their working careers in the internal labor market in a particular company.

Both seniority-base wages and enterprise unionism are, therefore, an outgrowth of the internal labor market established under the long-term employment practice. In this sense, long-term employment is the key concept characterizing Japanese employment system.[2]

2. The Long-Term Employment Practice for Standard Employees

2.1 Employment Security: Prohibition of the Abusive Exercise of the Right to Dismiss

Figure 1: Unemployment Rate in Advanced Countries



Japan has boasted a very low unemployment rate, even after the two oil crises of the 1970s (Figure 1). Employment security at that time was, however, not sanctioned by statutory law. The Civil Code has always permitted (and still does) "employment at will" such that an employer

[2] Takashi Araki (2002) *Labor and Employment Law in Japan*, p.17. See also, Japan Institute for Labor Policy and Training, Labor Situation in Japan and Analysis: General Overview 2009/2010, p. 60.

may dismiss any employee without cause. Labor legislation at that time did not modify this classic civil law principle. However, Japanese courts established a judicial constraint on the "abuse" of the right to dismiss.[3] According to this doctrine, employers will be held to have abused their right to dismiss if the dismissal lacks objectively rational grounds and is considered socially inappropriate. The courts can nullify such abusive dismissals. In other words, Japanese employers are *de facto* required to demonstrate just cause for dismissals if dismissed employees challenge them in court. This judicial principle was incorporated into the Labor Standards Act in 2003 (currently Art. 16, Labor Contract Act).

Japanese courts have applied this judge-made law strictly. In one famous Supreme Court case,[4] a newsreader of a broadcasting company overslept and failed to deliver the morning news at 6:00 a.m., not only once, but twice within a two-week period. The broadcasting company dismissed the newsreader. However, the Supreme Court nullified the dismissal because the failures were not caused by malice but by negligence; the employee apologized, and a co-worker in charge of preparing scripts who also had overslept was not dismissed but simply reprimanded. Given this context, the Supreme Court reasoned, the dismissal can be regarded as too harsh, unreasonable and socially inappropriate.

The remedies in cases of abusive dismissals are very protective. The employer is obliged not only to back-pay wages during the period of dismissal, but also to confirm reinstatement of the dismissed employee because the dismissal is null and void. In many countries, unjust or unfair dismissals result in compensation or monetary awards. However, in Japan, courts must confirm the continued employment relationship between the employer and the unfairly dismissed employee.

2.2 Dismissal for Economic Reasons

In the 1970s when the two oil crises hit Japan's economy, the courts further established stringent rules governing economically-motivated dismissals. Namely employers must meet four requirements to legally dismiss employees. The four requirements are:

1) there must be a business necessity to reduce the number of employees;

2) the dismissals must be the last resort to cope with the economic difficulties, and thus the employer must take every possible measure to avoid adjustment dismissals;

3) the selection of those workers to be dismissed must be made on an objective and reasonable basis; and

[3] The Nihon Shokuen Co. case, Supreme Court (Apr. 25, 1975), 29 *Minshu* 456.
[4] The Kochi Hoso Co. case, Supreme Court (Jan. 31, 1977), 268 *Rodo-Hanrei* 17.

4) the employer is required to take proper procedures to explain the necessity of the dismissal, its timing, scale and method to the labor union (or group of employees if no union exists), and consult with them in good faith.

Traditionally, the validity of economic dismissals has been determined on the basis of whether the above-mentioned four requirements are met or not. If one of four requirements is not satisfied, the dismissal has been regarded as an abuse of the right to dismiss. Since 2000, by contrast, several district courts significantly changed the interpretation of the "four requirements". According to these courts, what the court should determine is whether or not a dismissal is abusive, because there are no solid legal grounds for insisting that all four requirements must be satisfied for economic dismissals. The so-called "four requirements" are nothing but "four factors" to analyze abusiveness. Therefore, according to their interpretation, if one of the four "factors" (for example, consultation with a union) is not met, such an economic dismissal can be held legal and valid by taking all other factors surrounding the dismissal into consideration.

Although labor unions and lawyers acting for workers have severely criticized such a new interpretation that relaxes restrictions on economic dismissals, more and more decisions by courts and scholarly opinions support a four-factor rule rather than a four-requirement rule.

Therefore, the legal framework to determine the validity of dismissals for economic reasons has been relaxed. However, there is no clear evidence that the new framework (a four-factor rule) has made economic dismissals easier than before. Even under the four-factor rule, it is generally understood that Japanese courts still severely restrict economic dismissals.

These case law rules — together with government employment policies to maintain employment, and labor unions' strong attitudes against economic dismissals — have created and sustained the norm to respect employment security in Japanese society.

2.3 Features of Employment Security in Japan

Viewed from a comparative perspective, several important characteristics of the employment security regulations have emerged in Japan.

First, severe restrictions on economic dismissals have been peculiar to Japanese law. While individual dismissals are universally restricted in most developed countries with the notable exception of the United States, attitudes towards economic dismissals are different from country to country. Since the 1970s, the Japanese courts have established a very

strict rule on economic dismissals as mentioned above. Among these four requirements or factors, the second one (the 'last resort' requirement) has compelled Japanese companies to exhaust all options to avoid economic dismissals. Since employers have many alternatives for cost reduction and maintaining redundant workers in Japanese employment relations, it is difficult for them to satisfy this requirement and, to say the least, it imposes a time-consuming process to live up to the requirement.

Second, the remedies for unjust dismissals are highly protective. In many countries, unjust dismissals result in the payment of damages. By contrast, under the abuse of the right to dismiss theory in Japan, the employer is obliged not only to pay wages during the whole period of dismissal but also to restore the employment relationship with the dismissed employee, as the dismissal is null and void. Such protective remedies function as a disincentive for Japanese employers to resort to arbitrary dismissals.

Third, the discrepancy in employment security between standard and non-standard employees has also been a notable characteristic of Japanese dismissal law. This issue will be discussed in detail in the latter part of this article.

3. Measures to Compensate for the Limited Numerical Flexibility

But is such an employee-friendly system viable in times of economic fluctuation? Employment security implies a lack of numerical flexibility (or flexibility to adjust the size of the workforce by dismissing redundant employees) to cope with vicissitudes in the economy. Until the mid-1990s, Japan maintained the traditional long-term employment system by utilizing three measures to compensate for the lack of numerical flexibility: 1) flexible deployment of employees through transfers (*haiten*), 2) flexible adjustment of working conditions through modification of work rules, and 3) utilizing non-standard employees whose contracts can be summarily terminated.

3.1 Flexible Deployment of Employees through Transfers

The flexible deployment of employees through transfers is one of the most significant characteristics of Japanese employment relations.

Since it is common in Japan that parties to an employment contract do not specify the place and type of work therein, transfer orders were previously regarded as within an employer's discretionary authority and free from judicial control. However, transfers entailing change of the place and/or type of work cause various inconveniences to workers and their families. Hence, a number of cases have been brought to courts challenging the validity of transfer orders. Courts review their

validity from the following two perspectives.

3.1.1 Contractual Grounds to Order Transfers

First, the courts consider whether the employer has the right to order a transfer by examining the existence of contractual grounds for ordering transfers and whether there is an agreement specifying the worker's place or type of work.

It is established that not only an individually concluded agreement but also a general provision in the work rules or even an implied agreement will suffice as contractual grounds for ordering a transfer. In practice, most employers have established their right to order a transfer by prescribing in the work rules that the employer may order transfers based on business necessity.

Even when employers have established the contractual grounds for ordering a transfer, however, the courts will also examine the validity of the transfer in light of any agreement limiting the worker's place or type of work. For instance, in a decision concerning a worker who had passed a difficult announcer's exam and had been engaged as an announcer for more than twenty years, the court held that her job had been specified and that she was able to reject a transfer order that would have transferred her to a clerical job. In another case, where a worker explicitly explained that he could not comply with transfer orders entailing relocation at hiring, the court held that his employment contract had specified the work place as it was.

Since an explicit agreement prescribing the specific type or place of work is rare, a central question is whether any implied agreement to limit subsequent modification of these matters exists. The courts' general tendency is to not recognize an implied specification of type or place of work that would hinder a transfer. In one typical case, an automobile manufacturer, after reaching an agreement with the majority union, decided to implement a reorganization of production and transferred the axle manufacturing division to another plant. Since the majority union opposed the transfer of workers to other plants that would entail relocations, the company transferred the workers in the axle manufacturing division to the assembly line in the same plant. Five members of the minority union who had been engaged as axle machinists for seventeen to twenty-four years claimed that their jobs were specified and thus limited to that of axle machinists by virtue of their long periods of service in the axle division. The court declined to recognize such a contractual limitation on the grounds that there existed various in-house regulations authorizing the company to transfer its workers and that there was a general trend to recognize wide transfers entailing the change of jobs in accordance with economic

developments and structural changes in industries.

3.1.2 Abuse of the Right to Transfer

Second, courts examine whether or not the transfer order is an abuse of the right to transfer. In a typical case a worker was ordered to transfer from the company's main office in Tokyo to its branch office in Hiroshima. At that time, three members of the worker's family were ill and depended on his care and income. There was no difficulty in transferring another worker as a substitute. The court held that the transfer order was an abuse of rights.[5]

However, courts are generally reluctant to nullify transfer orders. The Supreme Court has held that the framework for determining whether a transfer order is an abuse of rights is a weighing of the business necessity for the transfer against the disadvantage to be borne by the worker in his private life. "Business necessity" is interpreted broadly and includes appropriate allocation of the workforce, improvement of business efficiency, development of workers' abilities, enhancement of morale and harmonious administration of the business. Thus, the Supreme Court held a transfer that compelled a worker to live alone separated from his family to be valid by viewing such a disadvantage as a "normal inconvenience which a worker must endure".

In accordance with the increase of women in the workplace, transfers that compel a working couple to live separately or deployments that impede harmonization of work and family life have been contested. Currently the Supreme Court, in light of employers' measures to mitigate the inconveniences to workers, still maintains its position that the disadvantage caused to working couples are "normal inconveniences" which employees should accept and endure. However, some lower courts tend to pay more attention to the balance between work and personal life and have nullified a transfer order that compelled an employee to live separately from his dependent old mother and wife with a psychiatric disease.

If the transfer is found to be the result of improper motives (for example, for the purpose of forcing the redundant worker to voluntarily quit so that liability for the dismissal can be avoided) the courts have recognized tort liability.

3.2 Flexible Adjustment of Working Conditions

Second, the Supreme Court has established a unique rule governing the unfavorable adjustment of working conditions through the modifica-

[5] The Nihon Denki case, Tokyo District Court (Aug. 31, 1968), 19 *Romin-shu* 1111.

tion of work rules. Namely, an unfavorable modification of the work rules has a binding effect on all workers, including those who opposed the modification, on condition that such modifications are regarded as reasonable. Work rules are a set of regulations set forth by an employer for the purpose of establishing uniform rules and conditions of employment in the workplace (LSA Art. 89). In drawing up or modifying the work rules, the employer is required to ask the opinion of a majority representative at the workplace. However, consent from the workers' representative is not required. In this sense, the employer can unilaterally establish and modify work rules.

As for the effect of unfavorably modified work rules, the Labor Standards Act remains silent and many lawsuits challenging the binding power of such work rules have been filed with courts. On this issue, the Supreme Court in 1968 created a unique rule that when modifications are reasonable, such modified work rules are binding upon all employees in the establishment.[6] Despite severe criticism that there were no legal grounds for recognizing such a binding effect, the Supreme Court has adhered to this principle and repeatedly reconfirmed its position.

Underlying this ruling are the concerns of employment security and the necessity of adjusting working conditions. On the one hand, traditional contract theory dictates that an employee who refuses modifications of future terms and conditions of employment shall be discharged. However, under the Japanese case law, such a dismissal may well be regarded as an abuse of the right to dismiss. On the other hand, because the employment relationship is a continuous contractual relationship, modification and adjustment of working conditions are inevitable. In light of these circumstances, Japanese courts have regarded unilaterally modified work rules as having a binding effect on condition that the modification can be regarded as reasonable. The implication of this rule is that courts give priority to employment security and, in exchange for it, employees are expected to accept and be subject to reasonable changes in working conditions. This is a manifestation that introduces internal or qualitative flexibility into the Japanese employment relationship and compensates for the lack of external or quantitative flexibility. This case law was incorporated into the Labor Contract Act as Article 9 and 10 in 2007.[7]

[6] The Shuhoku Bus case, Supreme Court (Dec. 25, 1968), 22 *Minshu* 3459.

[7] Ryuichi Yamakawa (2009) "The Enactment of the Labor Contract Act: Its Significance and Future Issues", Japan Labor Review Vol. 6, Number 2, p. 4; Takashi Araki (2009) "Enactment of the Labor Contract Act and Its Significance for Japanese Labor Law", *Journal of Labor Law (Korean Society of Labor Law)*, Vol. 32, No. 12, p. 97.

3.3 Utilization of Non-standard Employees

The third measure to compensate for the rigidity in numerical flexibility of the long-term employment system is utilization of non-standard employees. Non-standard employment includes fixed-term employment, part-time employment, and dispatch (temporary) work.

For instance, fixed-term labor contracts are utilized in the economic upturn and during the downturn the employer terminates these contracts by simply not renewing them at the expiry of the term. Fixed-term contracts automatically end at the expiry of the term. This is not a dismissal and thus dismissal regulations and case law does not apply, at least directly.

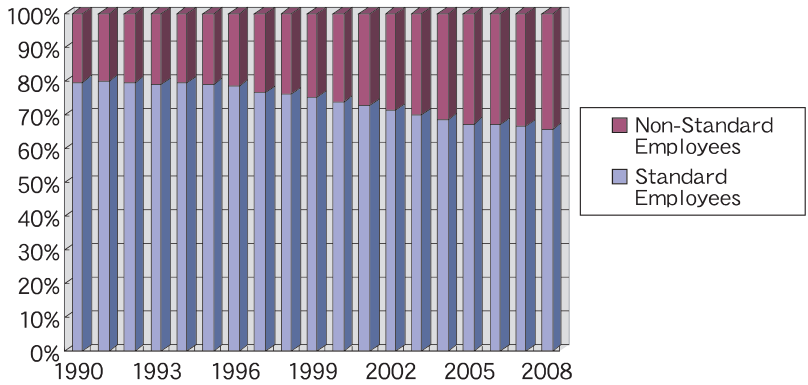
As a result, non-standard employment has worked as a shock absorber against economic fluctuations. Their numbers expand during economic upturns and contract in downturns without affecting the employment security of standard employees.

Non-standard employees have always existed in Japan and their presence in the labor market has not, until recently, given rise to any serious social concerns. Since the mid-1990s, however, this has changed, with significant quantitative and qualitative changes occurring in non-standard employment.

4. Emergence of Non-standard Employment Issues

4.1 Quantitative Changes: Shrinking Core Employment and Increasing Non-standard (Peripheral) Employment

Figure 2: Ratio of Standard/Non-Standard Employees in Japan



Since the collapse of the bubble economy in the early 1990s, the media has repeatedly reported the demise of lifetime employment. This view misleadingly gives the impression that Japanese employees have lost their employment security and are now subject to arbitrary dismissals.

However, this is not the case. What is in fact occurring is that the share of standard employment is shrinking and, in turn, the share of atypical or non-standard employment is increasing. In 1990, non-standard employees made up 20 per cent of the Japanese work force, whereas in 2008 this had risen to 34 per cent (Figure 2).

The employment security of standard employees has not been drastically diluted. On the contrary, it is precisely because management has defended the employment security of standard employees that it has resorted to increasing the number of non-standard employees to cope with economic uncertainty.

4.2 Qualitative Changes: From Sideline Workers (Homemakers and Students) to Mainline Workers

It is true that non-standard employment constituted a social problem in the 1950s. However, in the course of high economic growth in the 1960s and 1970s, most non-standard, fixed-term workers were promoted to standard employees because of the labor shortage and union activism. As a result, most of the remaining non-standard employees were homemakers (housewives) and students. They were "sideline" workers financially dependent on their partners or parents, and thus non-standard employment was no longer regarded as a serious cause for concern.

However, after the collapse of the bubble economy in the early 1990s, Japanese companies stopped hiring new graduates as standard employees. This was a natural response for them. Under the long-term employment system, Japanese employers are severely constrained from dismissing redundant employees due to the four-part test for economic dismissals. Faced with an economic slump and labor surplus, Japanese employers waited until elder workers reached mandatory retirement age. Next, they terminated fixed-term contracts at the expiry of the contract term rather than renewing them. Then, they opted not to hire new graduates.

As a result, university graduates and high school graduates, who had been hired as standard employees, could not get standard jobs and were compelled to take non-standard work in the late 1990s. A common trend for young couples is for both partners to work as unstable non-standard workers. For them, non-standard jobs are not "sideline" positions; they are essential for their livelihood. Since non-standard work is precarious, they cannot have concrete and stable household plans for the future, triggering the decline in the birth rate in Japan.

In short, the ratio of non-standard employees has dramatically increased and their attributes have changed. This is why the issue of

non-standard workers has become one of the hottest social issues in Japan today.

5. Problems of Non-standard Employees

So far, I have not clearly distinguished between different types of non-standard employees. Legally speaking, they can be divided into three groups by comparison with standard employees: 1) Fixed-term employees, as opposed to standard employees employed on indefinite, open-ended contracts, 2) part-time employees, as opposed to full-time employees, and 3) dispatched (temporary) employees (temps) as opposed to standard employees who are directly employed by an employer.

As for the ratio of these three types, there are no precise statistics. Although the problems and abuse of dispatch (temporary) work, especially those of daily dispatch workers, has attracted much attention, the ratio of dispatch workers is still limited. Dispatch workers comprised only 2.1 per cent of all employees, and 6.3 per cent of all non-standard employees in 2009. Thus, hereinafter, the focus is placed on fixed-term employees and part-time employees.

5.1 Common Downsides of Non-Standard Employment

What are the common downsides of non-standard employment? First, employment is unstable. This is especially true of fixed-term workers and dispatch workers. As for part-timers, some of them are employed on open-ended contracts but many part-time workers are hired under fixed-term contracts. Therefore, unstable employment is common to non-standard employment.

Second, the terms and conditions of employment are lower than for standard employees. Standard employees' wages rapidly increase in accordance with their length of service; by contrast, part-timer's wages remain flat. Consequently, the gap between standard and non-standard employment widens depending on the length of service.

5.1.1 The European Approach

To cope with these problems, European countries and the EU have introduced the following regulations.

As regards the instability of employment, European countries restrict free usage of fixed-term contracts. First, they often require objective or rational reasons to conclude fixed-term contracts. For instance, France lists allowable grounds for utilizing fixed-term contracts and any contracts that fail to include these listed grounds are regarded as having an indefinite term. Second, renewals of fixed-term contracts and the duration of fixed-term contract usage are limited. For instance in

Germany, fixed-term contracts can be renewed three times within the period of two years without any objective basis. Fixed-term contracts that exceed these limitations (renewed more than three times/lasting more than two years) are automatically regarded as indefinite contracts.[8]

As for lower-level working conditions, the EU Directive[9] introduces equal treatment between open-ended contract workers and fixed-term contract workers, and between full-time and part-time employees.

5.1.2 The American Approach

In the US, these two downsides are not recognized as matters to be redressed by law. As regards employment security, the US still maintains the principle of employment at will. No regulation exists on the conclusion of fixed-term contracts. The discrepancy in working conditions between full-time employees and part-time employees is not deemed to be discrimination because if the part-timer is not satisfied with the working conditions, he/she can and should leave the job and find another position. In short, in the US, the gap between standard and non-standard workers is expected to be redressed by the functioning of the market.

5.2 Employment Protection for Fixed-term Workers in Japan

Compared with these two different approaches, Japan has taken the middle road. Japan's regulations on fixed-term contracts are more relaxed than those in Europe but stricter than in the US.

First, Japanese employers are free to conclude fixed-term contracts. No objective reasons are required. Second, renewal and total duration of the fixed term are also not restricted by legislation. Therefore, it is legally permissible to renew a one-year contract ten times.

However, case law establishes protection in the case of such repeatedly renewed contracts. Because Japan enjoyed long-term economic growth in the 1960s and 1970s, fixed-term workers had their contracts renewed repeatedly. As a result, many fixed-term workers have been employed for many years and their employment relations have become indistinguishable from that of standard workers. However, when a company refused to renew the contracts of fixed-term workers in response to a management slump, the question of social protection for those workers arose.

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[8] See Bernd Waas, "Labour Policy and Fixed-Term Employment Contracts in Germany", in Roger Blanpain, Hiroya Nakakubo, and Takashi Araki (eds) (2010) *Regulation of Fixed-term Employment Contracts: A Comparative Overview*, p. 85.
[9] Council Directive 1999/70/EC of 28 June 1999, Fixed-Term Work.

On this issue, the Supreme Court[10] ruled that where both contracting parties desired continued employment, and where the fixed-term contracts were repeatedly renewed so many times that they were *de facto* indistinguishable from indefinite-term contracts, the refusal to renew is tantamount to a dismissal, and accordingly, the legal theory concerning abusive dismissal applies *mutatis mutandis*. As a result, when a repeatedly renewed fixed-term contract is regarded as indistinguishable from an indefinite-term contract or as the employee's expectation for the renewal is reasonable, an employer must demonstrate just cause to legally refuse the renewal.

However, compared with Germany's concrete criteria (three times renewal/two-year duration) the protection criteria are very vague: they rely on whether the repeatedly renewed contract is indistinguishable from an open-ended contract or whether the employee's expectation is reasonable. In fact, the uncertain scope of protection is very problematic. In one case where a part-time lecturer was terminated, a one-year contract was renewed twenty times (namely, it was continued for twenty-one years) but the employer's refusal to renew was held to be legal.[11] In contrast, in another case involving the termination of a taxi driver, a first refusal to renew a one-year contract was held to be illegal because the employee had a reasonable expectation for the renewal.[12]

Therefore, it is necessary to make the governing rule more efficient and enforceable. In September 2010, a study group established in the Ministry of Health, Labor and Welfare submitted the final report on the legislative policy on fixed-term contracts. Currently the issue is under deliberation in the tripartite Labor Policy Council.

5.3 Equal Treatment Regulations for Non-standard Employees

As for the equal treatment between fixed-term workers and open-ended contract workers, Japan has not adopted any regulations to date.

First of all, Japan does not have an established doctrine of "equal pay for equal work." Under the seniority wage system, wages have been determined not by job or performed work but by the length of service. Therefore, if the same job is done by newly hired worker A and worker B with twenty years of service, worker B's wages should be higher than worker A. Recently, the seniority-based wage system has been modified into one that is based more on performance or merit. However, wages are still understood to be paid to the "person" or the person's ability to perform work, rather than to the "job" or results that the employee

[10] The Toshiba Co. case, Supreme Court (Jul. 22, 1974), 28 *Minshu* 927.
[11] The Asia University case, Tokyo High Court (March 28, 1990), 41 *Rominshu* 391.
[12] The Ryujin Taxi Co. case, Osaka High Court (Jan. 16, 1991), 581 *Rohan* 36.

actually performed.

Furthermore, the wage determination mechanism is quite different between standard and non-standard workers. Standard workers are paid on a monthly salary basis whereas non-standard workers are paid on an hourly wage basis. A standard worker's salary is determined in the highly developed internal labor market mechanism. Factors such as a future role in the corporation or an expectation to be a managerial employee are considered as important determinants for his/her salary. By contrast, non-standard workers' wages are determined by the external labor market. Non-standard workers, especially part-timers, do not hesitate in moving from one job to another seeking higher hourly rates.

Thus, in Japan, the prevailing view was that it is very difficult or at least impractical to introduce equal treatment rules between non-standard and standard employees.

However, in 2007, the Part-time Act (PTA) was revised drastically and reinforced protection for part-time workers.[13] In particular, the amendments prohibit discrimination against part-time workers when they are regarded as the same as standard employees in terms of function (job description, responsibilities, etc.), manner of utilization within the organization (the possibility of transfers, the scope of transfers, etc.), and the employment period (definite or indefinite). This is the first prohibition of discrimination against part-time workers in Japan, and also the first regulation between non-standard and standard employees.

The PTA also introduces an open-ended duty on employers to "endeavor" to provide "balanced treatment" for part-time workers even if their job or performance is not the same as standard workers. This moral duty is sanctioned by the employer's duty to explain the factors taken into consideration when determining the part-timer's treatment and working conditions. This is not a duty of equal treatment but a procedural duty to explain the reasons for the current treatment. If the explanation is irrational, the employer is expected to reconsider the current treatment. Part-timers might want to organize labor unions to have their requests heard.

5.4 Organizing Non-standard Workers into Labor Unions

As mentioned above, part-timers or other non-standard workers who are not satisfied with their current working conditions are able to join labor unions and bargain collectively for better working conditions.

[13] See generally, Michiyo Morozumi (2009) "Balanced Treatment and Bans on Discrimination--Significance and Issues of the Revised Part-Time Work Act", Japan Labor Review, Vol. 6, No. 2, p. 39.

However, until now, non-standard employees have remained unorganized. Estimated unionization rate for part-timers is 5 per cent as of 2008. This is because most labor unions in Japan are enterprise unions, and they usually confine their membership to standard employees. According to a 2008 survey, only 23 per cent of labor unions allow part-timers to enroll in their unions. Legally speaking, there is no obstacle to allowing non-standard employees membership but most enterprise unions have not done so because of the conflicting interest between standard and non-standard employees.

However, Japanese society is increasingly recognizing deregulation and marketization of the labor market has had the greatest adverse impact on the most vulnerable, namely non-standard workers. Enterprise unions are criticized for only serving the interests of already well-protected standard workers and leaving non-standard workers unprotected. Thus, enterprise unions and their confederations started to actively organize non-standard workers. The unionization rate of non-standard workers has slightly increased but it remains to be seen whether the unionization of non-standard workers will pick up pace.

6. Conclusion: Does Japan's Employment System Still Respect Employees?

As mentioned at the beginning of this article, Japan's employment system is known for offering employment security with the interests of standard employees well-protected by enterprise unions. In the context of corporate governance, the Japanese model is often called employee-centered or employee-sovereign governance. However, when we look at the situation of non-standard employees, the picture becomes more complex. Their employment is very unstable and most enterprise unions do not admit their membership. They are unprotected.

Standard employees and non-standard employees have been regarded as totally different groups. The Japanese employment system, and maybe Japanese labor law as well, has focused solely on standard employees. In the past, this did not cause serious social problems because the ratio has been rather small (20 per cent) and those non-standard workers could depend on their partners or parents. Currently one third of the workforce is non-standard and self-reliant.

6.1 Various Approaches to Address Non-standard Employment Problems

So, how should Japan tackle this problem? Several different approaches are conceivable.

The first approach is to legally limit the use of non-standard forms of employment (restrictive regulation). Europe has traditionally adopted this approach by restricting the use of fixed-term contracts and tempo-

rary work. However, such stringent regulations may bring about the rigidity of the labor market and result in high unemployment as experienced in the 1980s and 1990s in Europe. Therefore, European countries are now slowly relaxing these regulations.

The second approach is to allow non-standard employment but require equal treatment with standard employees (anti-discriminatory regulation). Europe adopts this approach as well and orders equal treatment between indefinite and fixed-term contracts and between full-time and part-time workers.

The third approach is to entrust market adjustment (market function approach). The United States basically maintains this approach. In order to make the market function properly, discrimination is strictly prohibited in the United States. However, part-time and fixed-term statuses are not regarded as potential grounds for discrimination.

The fourth approach is to encourage negotiation and collective bargaining between employers and non-standard employees to redress the unfair gap between standard and non-standard workers (negotiation approach). This approach is compatible with the above approaches; therefore, to take this approach does not exclude other measures.

6.2 The Impact of Protective Measures for Non-Standard Employees

Japan is now considering which approach to take. The market function approach is not an option since employment security is the backbone of the Japanese employment system.

Considering the adverse effect of the restrictive approach on employment, careful selection of the manner of regulation will be necessary. As regards fixed-term regulations, it would be more appropriate to regulate the maximum number of renewals or the maximum duration of a fixed-term contract, rather than to require objective reasons to conclude fixed-term contracts.

Whether to adopt the anti-discriminatory measures is a very controversial issue. Equal treatment of non-standard employees with standard employees may first result in the enhancement of lower-level working conditions to the higher level of that of standard workers. However, if the wage resource is fixed, equal treatment results in the redistribution of wages from standard to non-standard workers, namely the lowering of standard employees' wages in the long run. Currently enterprise unions have begun efforts to organize non-standard employees. But when they seriously discuss the distribution of wage resources or employment security during times of economic downturn, a conflict will emerge between standard and non-standard employees. Therefore,

it is a difficult issue for labor unions to handle. In other words, simply encouraging non-standard employees to enroll in enterprise unions would not be a solution. The law should intervene to redress the current gap between well-protected standard employees and unprotected non-standard employees.

In Japan, all labor legislation must be deliberated in the tripartite council comprising members representing the labor unions, management and public interest. The majority of labor members are from enterprise unions representing standard employees. Therefore, it remains to be seen whether labor members will reach a consensus on how to strengthen equal treatment between standard and non-standard employees.

6.3 Complicated Tasks for Contemporary Labor Law

Herein lies the dilemma for contemporary labor law. In the past, labor could be treated en bloc as a protectable working class and labor law could simply contend labor protection *vis-à-vis* the employers. However, now labor law must apply a balancing act in meeting the conflicting interests between protected and unprotected employees.

This difficulty is heightened when the issues are considered beyond the domestic context. In the globalized market, Japanese companies are competing against foreign companies with cheaper labor costs. Thus, the intensification of labor protection will cause arguments about the risks of industry hollowing out or shifting production to foreign countries. Japanese management contends that current levels of employment are sustained by the supply of cheap labor provided non-standard workers; if the law were to require across-the-board wage increases, production sites would need to be relocated to other Asian countries. In a sense, here Japan is facing a conflict of interest between domestic employees and foreign employees.

Non-standard employment problems require a full-scale reconsideration of Japan's traditional employment system focused on standard employees. Traditional Japanese labor law, premised on lifetime employment and enterprise unionism, has unconsciously sacrificed the interests of non-standard employees. The well-protected have been helped and those who need more help have been left unprotected. Non-standard employment issues also lead us to recognize that the tasks that contemporary labor law must undertake are more complicated and difficult than ever, including delicately balancing the interests of different classes of employees. As difficult as this this task might be, it is one that needs to be undertaken. Japan should guarantee decent work and fair treatment for all irrespective of their forms of employment. By so doing, Japan could reestablish a human-centered society.