No. 26 Closing—To Think about Labor Laws One More Time (text 401-407)

"Initiative 2009—Grand Design for Reform of Japanese Labor Laws"

Ⅰ Introduction—Changing Society and Transformation of "Labor Laws" [1]

1 Historical/social background where "labor laws" were shaped

○Rigidly uniform laws in a homogeneous society (of mass production/ mass consumption)

2 Changing society and crisis/transformation of "labor laws"

○Diversification/complication of social realities and dysfunction of laws

Ⅱ Current of New Argument in the World

1 New theories on labor laws

○Theory of "procedural regulation" (Europe) [2]

○"Structural approach" (the U.S.) [3]

2 What these theories signify and influence on legal policies

○decentralization/ tenderization of laws to adapt to social complication

=Independent/dynamic laws that emphasize the process (collective communication)

← ・Urge of democracy (adjustment of diversifying interests by participation of parties)

・Urge of economic efficiency (revelation of individuals' limits of information/ ability in midst of complication)

○Influence upon policies on labor laws in Europe and North America [4]

Ⅲ Characteristics and Issues of "Labor Laws" in Japan

1 Characteristics and Issues of "Labor Laws" in Japan

○Japanese labor institution (**"**1930 Structure**"** or **"**Postwar Institution of Labor Laws**"**)

→ ・Labor institution as administrative regulatory legislation (Yamakawa)

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[1] See Yuichiro Mizumachi, *Labor Laws, 2nd ed*., Yuhikakau, 2008, infra p.9, and various literature cited there

[2] DE MUNCK (J.), LENOBLE (J.) et MOLITOR (M.) (dir.), 《Pour une procéduralisation de la politique sociale》, in *L'avenir de la concertation sociale en Europe : Recherche menée pour la D.G.V de la Commission des Communauté Européennes,* t. I, Centre de philosophie du droit, Université Catholique de Louvain, 1995, pp.33 et s.; H Collins, *Employment Law* (Clarendon Law Series, OUP, Oxford 2003) 28-33.

[3] S. Sturm, *Second Generation Employment Discrimination : A Structural Approach*, 101 $C_{OL.}$ L. $R_{EV.}$ 462-463 (2001) ; C. Estlund, *Rebuilding The Law of the Workplace in an Era of Self-Regulation*, 105 COL. L. REV. 319-404 (2005).

[4] See Yuichiro Mizumachi, ed., *Individual or Group ?: Changinf Labor and Laws*, Keiso Shobo, 2006, infra p. 109

・Complication/ formalization (dysfunction of laws) of legal regulations (circular notice or the like for purposes of administrative guidance/supervision)

○Actual application in labor-management realtions by corporation (formation of cooperative/stable labor-management relations)

=Formation of decentralized communication infrastructure

→Its barrier (closed and undemocratic nature of business community)

2 Doctrine to be pillar of reform

○Actualization of "fair" and "efficient" society

"Participation" of parties

○From "administrative" norm to "court" norm (from prior uniform regulation to ex post facto and flexible regulation)

←"Procedural" laws that emphasize independent tackling of parties

Ⅳ Grand Design of New "Labor Laws"

1 Labor-Management Relations Institution

〔Points of Reform〕

A) To build a foundation for decentralized communication capable to reflect diversified opinions of workers

B) To develop a foundation for a labor-management negotiations system capable to reflect distinguishing features of regions and industries

【Statute】Establishment of a law concerning workers' delegation, amendment of Labor Standards Law, amendment of Labor Union Law

〔**Background/Reasons for Reform**〕

◎Diversification/complication of society and diversification of workers' interests

→To establish a workers' delegation system as an institution to adjust "diverse interests," not just one assuming "homogeneity of interests" (labor union) [5]

[5] Granted autonomy, the labor union can be diversified in its objective and form. In Japan since right after the war, labor unions were shaped and developed connoting staff members and factory workers, and at present, they possess an aspect to function as organizations to represent a variety of interests like in the movement being observed to organize part-time workers who were formerly not treated as the subject of the union. In view of such, there can be an alternative to have the labor union bear a function to adjust diverse interests. As a matter of fact, however, there are overwhelmingly many corporations and business facilities where no labor union is yet organized centering on medium and small enterprises, and even among corporations/ business facilities with labor unions, many do not regard nonpermanent employees like part-time workers as the subject of the organizations. Based on this status quo it is considered to be appropriate to establish a workers' delegation system as an institution to represent diverse interests of workers including medium and small corporations and business facilities. Naturally upon designing such an institution it will be important to set up roles and authorities pertaining to the workers' representation so that a workers' delegation system will not weaken the labor union's function and significance, but rather the both parties will perform mutually complementary and synergistic functions (Oishi). (→cf. A described below)

◎Limits of decentralized negotiations (labor-management relations by corporation) in global competitions

→To develop a institutional foundation capable to reflect distinguishing features of regions and industries at their individual levels, beyond labor-management relations by corporation

A. Legislation of Organization to Delegate Diversified Workers (Workers' Delegation) and Promotion of Labor-Management Talks

◎Organization: workers' delegation (at business facility level) (cf. European workers' delegation institution: Kuwamura, Oishi) ○To make it an institution for diversified workers to be elected by a proportional representation system (number of delegates in proportion to the size of business facility) [6]

○To legislate for the committee member's guarantee of status (ban on disadvantageous treatment like dismissal) and guarantee of the activity time (guarantee of a certain length of time designated for the activity necessary as the committee member on the payroll), cost of which shall be borne by the management in principle

○As for workers employed by other corporations (dispatched manpower, contract workers, etc.) who are on the job in the subject business facility, in the light of their close association with interests of workers of the subject corporation, they shall be qualified to participate in the same way as the subject corporation's workers (the right to vote, eligibility for election). (→4, 5)

○The delegation committee member for oneself shall decide on the rules relevant to the coordination of opinions and decision making. [7]

◎Authority

○As for the conclusion/change of the contents of a labor contract, in order not to infringe on the right of collective bargaining acknowledged for the labor union (Article 28 of the Constitution), the system's scope shall be limited to the management's duty of "provision of information" and of "consultation" to the workers' delegate. Contents of the Information provision and consultation (fairness of these) constitute an

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[6] In case a labor union organizes a majority of the workers, there can be an institutional alternative to entitle such a labor union (majority union) to the workers' delegate (Tezuka, Hamaguchi, and others). In this case it is possible to consider that the measures will be taken to impose the duties on a majority union for listening to opinions of nonunion workers, and for fairly representing interests of nonunion workers. However it is questionable if these measures would facilitate the effective adjustment of workers' diverse interests. Rather, as in example in Europe, it is considered to be a more appropriate method for effectively conducting mutual adjustments of diverse interests that committee members, elected by a proportional representation system, hold direct discussions representing a variety of workers.

[7] As for concrete rules for making decisions, there can be manifold such as a unanimous decision, a decision by a majority, a decision by a special majority, and a composite of these depending on matters for decision. In each of the workers' delegation organization, it will be required to discuss and decide which rule should be adopted. Supposing the rule of a decision by a majority is adopted, it is legally required for such an organization to respect a minority opinion from a perspective of the demand for mutually adjusting diverse interests.

important factor in forming judgment on “rationality” and “abuse of rights” in Labor Contract Law and judiciary law. [8]

○In relation to the regulation legislation like Labor Standards Law and the policy legislation like securement of health and solution of discrimination, etc. (Industrial Safety and Health Law, laws on employment discrimination, etc. →3, 4, 5), in lieu of a past labor-management agreement with a representative of the majority , a “mutual consent (consent of the workers’ delegate)” between the management and the workers’ delegate shall be the requisite for the system so as to generate an effect of establishing exceptions to regulations and granting political incentive. [9]

◎Points to note

○In addition to imposing the duties of providing information and faithful consultation in order to urge a fair discussion, to set the duty of disclosing contents of the discussion (the main points of proceedings) may be considered.

○It is important to develop an infrastructure (government, labor-management body, NGO, etc.) in order to provide information required for the discussion so that the system will function in business facilities with no labor unions.

B. Development of a foundation for a labor-management negotiations system at levels of regions and industries

◎Present situation

Established under the current laws that have institutionalized labor-management negotiations and consultations at regional and industrial levels are: ① the labor-management consensus system based on the labor-management autonomy as in the regional expansive application of labor-management agreement (Article 18 of Labor Union Law), and ②the council system by the public authority, labor and management as in the minimum wages by region and industry (infra Article 9 and infra Article 15 of Minimum Wages Law). In fact, however, the item in ① is being scarcely utilized, and one in ② is limited to the matter of minimum wages.

◎Course of actions for reform

As the direction of the development of a foundation for a labor-management negotiations system at levels of regions and industries, the following methods may be considered: ① to make a labor-management consensus system—attaching importance to the initiatives of the workers and management—easy to use, ② to expand the council system of the public authority/labor/management beyond the domain of minimum wages [10], ③ to encourage local governments to reflect opinions

[8] In forming a judgment on “rationality” and “abuse of rights,” not only a negotiation process between the management and the labor union, but also fairness in the process of the discussion with the workers’ delegate will become an important factor for the decision. Naturally, the following factors will also be important for consideration: whether an attitude was assumed to pay attention to a minority opinion and interests (fairness in a procedure being considerate to a minority), whether a decision was made violating personal rights of workers (presence or absence of substantial violation of rights).

[9] Some point out that the right to consent (right to veto) of this workers’ delegation becomes an institutional backup to guarantee bargaining power of the workers’ delegation that is not approved of the right of collective bargaining such as a strike (Kuwamura).

[10] It may be considered that the council covers, for example, a decision pertaining to working hours like an arrangement to set New Year’s Day as a holiday for retail stores in a certain region. It is also conceivable

of the workers and management to settling upon ordinances in each municipality. By combining these methods, it is important to develop a foundation that promotes setting up of politically correct standards and policy decisions meeting features and realities of regions and industries.

2 Laws and Institutions for Labor Contract

〔Points of Reform〕
A) To seek the enrichment of the contents of Labor Contract Law
B) To introduce a perspective of collective communication into Labor Contract Law and the industrial court system
【Statute】Enactment and improvement of Labor Contract Law, reform of the industrial court system (modification in application)

〔**Background/Reasons for Reform**〕

◎Objective and history of the enactment of Labor Contract Law in 2007

○Law with the objective of "stability of individual labor-management relations" (protection of the worker as an individual) (Article 1)

○Turned to restrictive contents after discussions in the advisory council, etc.

→○To aim at enriching the contents (Yamakawa)

○To introduce a perspective of collective communication into the legal principles of labor contract

◎The industrial court system that was introduced in parallel to Labor Contract Law

○It achieves a certain level of fruit as means for solving the problems of individual labor disputes.

○Nonetheless, the system has not yet developed enough to the extent to positively take in labor-management communications through labor unions or the like as in the systems in France, Germany and the U.K.

→It is important to make it an institutional design that will induce taking in voluntary grappling with the solution and prevention of problems by the workers and management (realization of a chain that organically combines the parties' voluntary grappling and the laws for the solution and prevention of disputes).

A. Enriching the Contents of Labor Contract Law

◎To scheme supplementation of the judiciary law (legal principle on tentative job offer, one on trial employment, one on reshuffle, one on dismissal due to economic conditions, and one on discontinuation of employment) that are not incorporated in the current Labor Contract Law.

◎To study the introduction of the system of notifying change and cancellation (whether to approve the worker's agreement with the reservation to object), the system to resolve dismissal with money (whether to approve the employer's insistence based on the requisite of

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that , like Workforce Investment Board in the U.S., the committee comprised of the public authority, workers and management of each region decides on and operates labor market policies (vocational training, job placement , unemployment insurance, etc.) that meet the realities of the region.

a collective labor-management agreement) that were presented during the examination process of lawmaking.[11]

B. Promotion of Finding, Solving and Preventing Problem by Collective Communication

◎To position procedural fairness (process to find, solve and prevent problems by means of labor-management communications) as an important factor to make a judgment on fairness (rationality and abuse of rights) of the contents of a labor contract; also regarding matters classified as individual personnel affairs such as assessment, redeployment and individual dismissal, to emphasize from the stand point of forming a judgment on rationality and abuse of rights, whether there were collective involvements and close

watches in the institutional design and processing complaints. Further, having a support and close watch by the outside third party (specialist like lawyers) becomes an important

element to guarantee fairness of the process.

◎To legally urge institutionalization of the process to find, solve and prevent problems within a corporation through the legal system as a whole (←the entire legal system as in 1-5, concert between laws and CSR)

◎As for the industrial court system, the labor union shall be broadly approved to become a proxy, whereby minimizing the cost of settling disputes, and the concert shall be promoted between the system to settle disputes within a corporation and the industrial court system. (development of a structure that enables a feedback on a legal settlement of disputes into the inside of a corporation)

3 Laws and Institutions for Working Hours

〔Points of Reform〕

A) To seek to cope with the problem of long working hours

B) To seek to consolidate and realign the legal system to cope with diversification of workers (discrepancy between laws and the realities)

C) To seek for a systematic response to (prevention of) health issues (including the subject of (B) above)

【Statute】Reform of Labor Standards Law, reforms of Industrial Safety and Health Law and Workers' Compensation Insurance Law

〔**Background/Reasons for Reform**〕

◎Dysfunction of the old-time legal system

[11] Refer to the report by “the association regarding the working-hours system for the future” (Sep. 2005)

○Laws and institutions that modeled “subordinate workers who labored in groups at factories”

→・Flexibility after the 1980s (reform of Labor Standards Law in 1987, etc.)

・Not yet in conformity with the realities of working that is diverse and complex (discrepancy between laws and the realities)

◎Problem of long working hours

○Realities of the grave problem of long working hours in comparison to other advanced nations (→death from overwork, even suicide due to overwork-related stress)

○Smaller number of holidays taken and a lower rate of taking holidays

→Barrier to realizing work-life balance

◎2006 report of Ministry of Health, Labour and Welfare

○Report by “the association regarding the working-hours system for the future” under Ministry of Health, Labour and Welfare (January 27, 2006)

→Majority of the proposals were not incorporated in the revision of the law.

A. **Response to Problem of Long Working Hours** [12]

◎To legislate, from the stand point of securing health of workers’ in addition to the legal working hours, the longest working hours [13], guarantee of break time [14], securement of a six-day workweek (cf. regulations of EU countries)

◎To seek for the improvement of the system for holidays and a vacation (guarantee of a five-day workweek, complete grant of annual leave by imposing the duty of its specification upon the employer); nonetheless making it possible to set up exceptions based on an agreement with the workers’ delegate (flexible setup of the grant method)

B. Consolidation and Realignment of Systems for Exemption from Application and Discretionary Work

◎To consolidate and realign the existing administrative supervisor, the technical-duty type discretionary work system, and the planning-duty type discretionary work system into the three types of the scheme of exemption (the administrative-supervisor type exemption from application, the technical-duty type exemption from application, and the planning-duty type exemption from application) with the necessary conditions of the following; ①clarification of substantive requisites (requisite for duties/responsibilities, requisite for time management, and

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[12] In addition to this, it’ll be another issue to reexamine the way a regulation on working hours for workers holding a side job should be (Article 38, paragraph (1) of Labor Standards Law under the current institution of law).

[13] As for the maximum working hours, conceivable alternatives are: 48 hours a week (principle in EU), 60 hours a week (standard proposed as the maximum for opt out in EU), 251 hours a month (calculated on the assumption of 80 hours of overtime work per month of 30 days).

[14] In EU, a recess of 11 hours a day is guaranteed.

requisite for treatment) [15], ②agreement with the workers' delegate, and ③notification to a government office

→To exempt the application of the legal working hours (Article 32 of Labor Standards Law) and the overtime pay (Article 37)

C. Systematic Response to Health Issue

◎To induce a systematic response to securing health including those exempted from application in B above (consultation/agreement with the workers' delegate, grappling with health-securement measures by PDCA cycle, etc.[16], and promulgation of contents, etc)

→Influence on a premium rate of Workers' Compensation Insurance, to be considered as a reason for immunity from employer's liability (responsibility for compensation for damage as the employer's duty on the consideration of health)

4 Laws and Institutions to Ban Employment Discrimination

〔Point s of Reform〕

A) To establish a comprehensive institution of law to ban employment discrimination by taking a new look at the current laws and institutions

B) To develop a legal foundation to effectively sort out employment discrimination

【Statute】Establishment of a law to ban employment discrimination, the reform of Labor Standards Law and Equal Employment Opportunity Law for Men and Women

〔**Background/Reasons for Reform**〕

◎Trend of to prohibit employment discrimination in countries in Europe and North America (Sakuraba, Yanagisawa)

◎Ideology behind it: to prohibit discrimination on the basis of "invariable attributes one cannot alter" and the one on the ground of a "choice pertaining to fundamental rights." (Abe)

◎Importance of a legal foundation in order to effectively dissolve and settle discrimination that becomes latent and complicated (structural and procedural approach: Mizumachi, Iida)

A. Statute of Comprehensive Principle to Ban Employment Discrimination ("Prohibition of xxx discrimination without rational grounds")

◎Grounds for discrimination to be banned:

Race, social position, religion/belief, gender, sexual orientation, disorder, age, employment pattern

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[15] Upon determining these substantive requisites, instead of deciding in detail and uniformly by a statute, it is important to make a flexible response and decision possible meeting diverse realities according to labor-management agreements.

[16] Here, along with the process that actual health-insurance measures are practiced through PDCA cycle and the like in pursuance of the consultation/agreement with the workers' delegate, the subject of the evaluation shall be a certain outcome such as the decrease in suspension of work due to illness.

◎“Discrimination” to be banned:

○To include 〔in principle〕 not only “direct discrimination” but also “indirect discrimination.” However, the way to form a judgment as to whether or not a matter falls under “discrimination” shall not be based on a by-the-book criterion as in Article 7 of, but rather on presence or absence of “rational reasons” from the context.

○To include 〔in principle〕” reverse discrimination (Abe), except what is justified by “rational reasons” (cf. the positive action in Article 14 of Equal Employment Opportunity Law for Men and Women 〔Article 8 of the same Law〕) that shall be forgiven.

◎Stages for antidiscrimination:

〔In principle〕from recruitment, employment till the termination of employment (Iida)

◎Legal effectiveness:

Effect under private statute and guarantee by penal regulations (≠supervision, guidance by administrative authorities)

◎3 types of antidiscrimination:

○Ban on discrimination on grounds of race, social position, religion/belief, gender, sexual orientation

- Emphasis on the aspect of protection of human rights
- As for disadvantageous treatments founded on a discriminatory intent (direct discrimination) , creation of exception through consultation/agreement with the workers’ delegate shall not be approved, and be prohibited with penal regulations.[17]

○Ban on discrimination o grounds of age and disorder

- It’ll become necessary to make a judgment coordinating with other political requisitions such as job security and employment promotion.
- Judgement on presence or absence of “rational reasons” shall be considered flexible and no punishment shall be attached.
- As for the ban on age discrimination, regarding an age-limit retirement system and various systems related with this, as they may have a job security function, it is conceivable to regard them as a “rational reason” for the moment with the requisite of the procedure to have a consultation with the workers’ delegate, etc. (importance of step-by-step approach: Sakuraba). In addition, the length of one’s continuous service, albeit falling under indirect discrimination in some cases, is possible to be a “rational reason” inasmuch as it can be a barometer to indicate one’s vocational capability and relation with the corporation (cf. discussions in Europe and the U.S.)

[17] In spite of these reasons, such measures as positive actions and rational convenience become the subject of the consultation/agreement with the workers’ delegate, the process of which is likely to be evaluated importantly for the judgment of the presence/absence of “rational reasons.”

・With respect to the ban on discrimination of the disabled, the employer is requested to provide “reasonable convenience.” its content and degree have to be clarified　referring to discussions in Europe and the U.S. As the current legal measures to promote the employment of the disabled under, there are the system of the mandatory proportion of jobs for handicapped people, and the specially designated subsidiary system (Disabled Persons Employment Promotion Law). Regarding the former, there are similar examples in European countries and this is considered to be worthy of a “rational reason” for the moment. In regard to the latter, because “to segregate” [18] can be said to be discrimination in itself, a discussion is required as to whether there is a high degree of necessity for the promotion of employment.

○Discrimination on the ground of employment pattern

・Since an employment pattern per se is the contents/conditions of a contract, there is a discussion as to rights and wrongs in regard to prohibiting discrimination on its ground. (A legal position on this differs between Europe and the U.S.) Nonetheless, in the realities of employment in Japan, on one hand, the number of cases is not negligible that the choice of an employment pattern has a nature of attribute which cannot be controlled by oneself, and on the other, even in a case where one can make a choice on one's own initiative, it is also conceivable that one should give it a serious consideration as a choice having to do with one’s basic rights (respect for home life and civil liberties). (Abe)　From these points of view, discrimination on the ground of an employment pattern shall be prohibited too in principle. But discrimination at the stage of recruitment and employment shall be excluded from the ban due to its characteristics. Furthermore, as for discrimination on the employment pattern, because of its diversity and complexity, “indirect discrimination” and “reverse discrimination” shall not be the subject of prohibition.

・Prohibited here are the discrimination on the grounds of part-time labor, terminable contract, temporary labor, and contract labor. Nonetheless, as treatment by employment pattern is diverse, presence or absence of “discrimination” and “rational reasons” should be judged with flexibility in

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[18] In this segregation, there is a case in which their work facilities/duties themselves are segregated, and another where, though work facilities/duties are not segregated (carrying out duties at normal work places), they belong to a separate company (the specially designated subsidiary) in terms of personnel administration. A study on each case is required as to rationality (necessity to segregate, etc.)

accordance with the realities. [19] Particularly In this section, a profit adjustment process through consultation and agreement with the workers' delegate who represents a variety of workers is viewed importantly in making a judgment as to presence or absence of "rational reasons." In addition, in the light of realities of the difference in the assumption of typical employment and atypical employment, and an imbalance of treatments based on this assumption, it is important to induce the promotion of treatments in "equilibrium" as well as antidiscrimination ("equal" treatment"). (cf. Article 9 of Part-time Work Law)

B. To develop a legal foundation to effectively sort out employment discrimination problems

◎To clarify burden of proof on employment discrimination (for example, to place burden of proof as to "presence of external discrimination" and "presence of discriminatory intent" on the worker's part, and one as to "presence of rational reasons" on the employer's part)

◎To urge a prompt dispute settlement by a specialized organ (prompt and contextual dispute settlement by a specialized organ like the industrial court system or the like)

◎To promote collective recognition, resolution, prevention of problems (For example, when an employer, based on the consultation/agreement with the workers' delegate, implements systematic and continuous tackling toward solution of discrimination and releases its contents, such legal incentives as reducing a premium rate of unemployment insurance and presuming presence of rational reason are to be provided.)

5 Laws and Institutions on Labor Market

〔Points of Reform〕

A) To clarify definition and distinction of manpower dispatching, business processing contract or the like, and to consolidate and realign the legal system from the standpoint of applying laws in accord with the realities

B) To design institutional arrangements to neutralization the legal system as to employment patters (contract patterns)

【Statute】To establish a low concerning manpower outside the company in lieu of Manpower Dispatching Business Law, and to reform Unemployment Insurance Law

〔**Background/Reasons for Reform**〕

◎Problems surrounding the manpower dispatching have burst forth, such as camouflaged contract and dispatching for daily employment or the like. in the first place,

[19] For instance, if contents, method, and degree of difficulty are different by job, it may be considered rational to treat them differently by means of the basic wage in accordance with these variances, but concerning the use of corporate facilities, it is conceivable to acknowledge equal rights for dispatched/contacted manpower in principle.

the main points in regulating the manpower dispatching were ①to prevent risks of human trafficking and intermediary exploitation (which were legalized under Manpower Dispatching Business Law with the condition to observe the Law), ②to secure appropriate application of a regulation in the wake of pluralization of employment relations, and ③to protect regular employment. Actually, however, under the current institution of law the following have come to be regarded as problematic: ①the escalation of the problem of treatment differentials (problem of the working poor), ②the revelation of unlawful states due to camouflaged contracts (behavior to evade the application of the law), and ③the expansion of imbalance between regular employment and dispatched/ contracted manpower (an increase in dispatched/contracted manpower and a relative decrease in regular employment). in order to resolve these problems intertwined intricately, it is important to rearrange problems, practice the appropriate application of laws in conformity with their intended meanings (→A), and realize an institutional design so as to redress the balance of labor market as a whole (→B). (Hamaguchi)

◎Furthermore, the advance in global competition since the 1990s has expanded unstable employment centering on the youth, and has made us rediscover , not only the issue of the balance of labor market as a whole, but also importance of life security and occupational skills development. It is another challenge to build an institutional framework that can solve these issues at the same time. (→B)

A. **Consolidation and Realignment of the Legal System on Manpower Dispatching, Business Processing Contract or the Like**

◎Rearrangement from the three standpoints:

To seek appropriate legal application in conformity with individual realities by consolidating anew manpower dispatching, business processing contract from the following 3 points; ①With whom does one conclude a “labor contract” ? (Article 6 of Labor Contract Law), ②From whom does one receive a “command”?, and ③From whom does one get offered a “place” to be at work?

○As for duties and responsibilities under a labor contract, the employer under the contract (①) bears these obligations. Regarding who is to correspond to an “employer under a labor contract,” the judiciary law ("piercing corporate veil" doctrine, implied labor contract legal principle) has been established to form its judgment in accord not only with the letter/formality of a contract but also with the realities.

○As for legal duties and responsibilities that entail a command (working-hour regulation, regulation on industrial safety and hygiene), an employer in charge of the command (②) bears these obligations. Whereabouts of this command is to be judged in conformity with the realities. There might be a case in which both a supply source and supply destination take a command in duplication, where both parties shall bear obligations in conformity with the contents of each command.

○As for duties and responsibilities (responsibility for workplace safety, participation in the workers' delegate, etc.) that entail making an offer of a place for employment (having one work on the premises of own corporation), a party who offers a place for employment(③) bears these obligations.

○There are cases in which these 3 duties and responsibilities are placed on the above three (or two) parties severalfold. (For example the responsibility for worker/ workplace safety and the responsibility to prevent harassment are the obligations all the three shall be levied.)

B. Neutral Institutional Design on Employment Pattern (Contract Pattern)

◎Neutrality in choosing an employment pattern (contract pattern) [20]

○Whether a long-term employment or short-term employment, whatever contract pattern one picks is up to that party in principle. [21] However, regardless of the length of a contract, the institution shall be such that the subscription to the unemployment insurance is broadly imposed [22], and an employer who uses a short-term employment [23] (unstable employment) is to pay a premium to supplement its lack of stability. (As the system, a method to reflect this premium to the insurance rate is conceivable [24].)

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[20] Along with this, it is also important to settle nonneutrality of short- and fixed-term employments in social insurance programs (limitation on eligibility for participation in the health insurance and welfare pension, the third category of insurance scheme in the National Pension System).

[21] As an alternative for legal policy measures, it is conceivable to apply a legal restriction on the conclusion of labor contract and the use of manpower dispatching that have the provision on a time period (for example, ①to limit to situations with rational reasons, ②to limit duties that can be used, etc.). But such methods will significantly restrict alternatives for parties concerned and odds are that good enough results won't come about in legislative effectiveness. Instead of this type of "entrance" regulation that controls utilization itself, "contents" regulation (→A) that eliminates evil practices along with the realities is thought of as being more capable to respond properly to problems growing complicated.

[22] In the same way as the workers' compensation insurance system, by imposing the duty to take out the unemployment insurance on all employed workers (irrespective of short-term employees or fixed-term employees), employers' action to evade the insurance participation shall be kept under disciplines, and at the same time, safety net for instability of employment is to be enlarged. However, in order to restrain workers' moral hazard (act to repeat a shot-term employment and a receipt of insurance benefit) , it is presumable to set up certain conditions for receiving insurance (for example, a requisite to be on employment for 3 months or longer in 6 months before loss of employment).

[23] To be included in this are the following cases: ①employment on a labor contract with a provision on the period, ②one on a labor contract without a provision on the period, but cancelled in a short term, ③one on a labor contract without a provision on the period, but in the registration/calling-out form (on-call work) that is not a usual employment.

[24] In this case, taking advantage of this additional insurance bill, it is imaginable to expand the scope of an unemployment benefit to short-term employees and give an aid to the development of occupational skills. As for the insurance bill for dispatched/contracted manpower, it is thinkable that their recipients (employees providing working facilities) are also to bear joint liability.

○As for the termination of an employment (dismissal, discontinuation of employment), the legal principle on the abuse of the right to dismiss shall be applied in conformity with the realities, and where a process including a consultation with the workers' delegate is emphasized to form a judgment on "rationality." [25]

◎Neutrality in treatment

○To seek neutrality in treatments by means of prohibiting discrimination in employment patterns without rational reasons (→4). Nonetheless, as mentioned in the above, a judgment as to "rational reasons" takes a serious view of the process for adjusting interests through a consultation/agreement with the workers' delegate who represents diverse workers (→1) [26].

Ⅴ Closing—Agenda for Future

◎Theoretical studies for a doctrine to be the principal pillar of the reform (relationship among "fairness," "efficiency, " and "participation") (Morishima and others)

◎Concrete examinations on the contents of each institution (contents of the institution of law on the prohibition of employment discrimination, the way a neutral institution of law on labor market should be)

RESEARCH What should the way a system of laws on labor and a society of labor for the future be, and how should such laws and institutions be designed? Are the reform ideas proposed here appropriate?

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[25] For this case, having the labor-management consultation as to in what form the balance of employment ought to be built (so-called an employment portfolio), and whether a contract pattern adopted is consistent to that form (if that is specified to workers and is understood by them), shall be regarded importantly in the "rationality" judgment on dismissal (discontinuation of employment).

[26] In parallel with this at the same time, it is also important to organize dispatched workers and contracted manpower and to make working conditions fair through its collective bargaining. (The disposition of employers can be acknowledged in receiving corporations in relations with labor unions organized by dispatched/contacted workers.)