

LABOR AND EMPLOYMENT LAW IN JAPAN: CHANGING TRADITIONAL MODEL

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I. Introduction: Three features of the traditional Japanese employment system

Japanese labor and employment system has long been characterized by three features: lifetime employment, seniority-based wage and human resource management, and enterprise unionism. All these three are changing but to clarify the significance of the changes, it is worthwhile mentioning the traditional features.

First, Japan has been known for its life-time or long-term employment practice. Regular workers hired immediately following graduation enjoys employment security until they reach the mandatory retirement age. Regular workers experience periodical transfers and change in assigned jobs because they are not hired for a specific job, but hired as a member of the corporate community without job specification.

This leads to the second feature, seniority based wages and human resource management. As Japanese workers are not hired for a specific job, their remuneration is not determined by the job they perform, but by other factors related to the worker's attributes such as age, seniority (the length of the worker's service at a particular company), and the worker's ability to perform tasks. As ability to perform task is difficult to objectively evaluate, assessment tends to be based on length of service. Therefore, wages and promotion has been determined on the seniority basis.

The third feature is enterprise unionism. Enterprise unionism is a system

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in which unions are established within an individual enterprise, collectively bargain with a single employer, and conclude a collective bargaining agreement (hereinafter "CBA") at the company level. As of 2015, 93.5 % of all labor unions in Japan were enterprise-based unions, and they consisted of 88.7 % of all organized workers.

These three elements are intertwined and still explain significant parts of the Japanese labor and employment system.

II. Long-term Employment and its Changes

1 Regular and Non-regular Workers

When we discuss the scope of lifetime or long-term employment, it should be borne in mind that the Japanese workforce is divided into two groups, regular (standard) and non-regular (non-standard) workers. Regular or standard workers conclude indefinite period contracts, work on a full time basis, and are directly hired by their employers. The other group consists of non-regular or non-standard workers such as fixed-term contract workers, part-time workers or dispatched (temporary agency) workers.

Regular workers have enjoyed high employment security known as lifetime or long-term employment. The typical model of the long-term employment practice is as follows. A worker enters a company immediately following graduation and enjoys secure and stable employment until he reaches the mandatory retirement age, which is usually the age of 60. He or she receives systematic in-house education and training (called OJT) and experiences various types of work under a periodical transfer program. Regular workers' remuneration is not determined by the job they perform, but by worker's attributes such as age, seniority, and the worker's ability to perform tasks.

In contrast, employment security of non-regular or non-standard workers

is very limited because about three quarters of them are hired under a fixed-term contract. They are often hired for a rather specific and simpler job than regular workers, usually not subject to wide-ranging transfers like regular workers, and are often paid on hourly basis and paid less than regular workers.

2 Changing Workforce Structure and Long-Term Employment

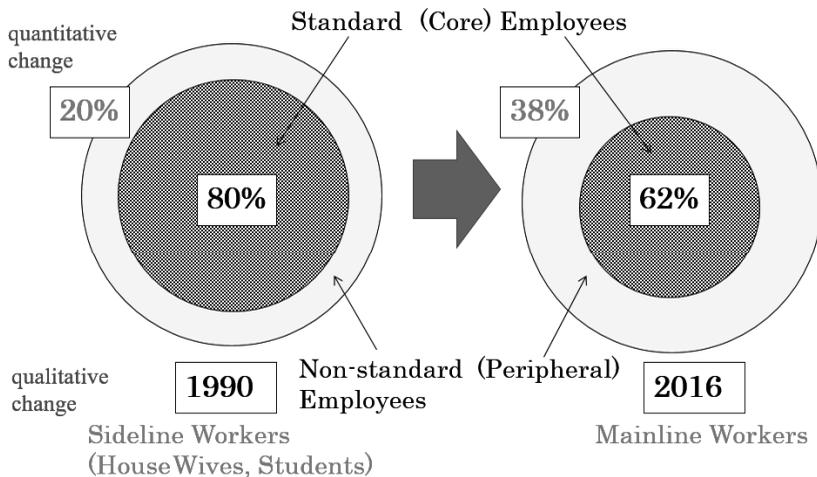
Thus, traditionally the Japanese workforce has consisted of highly protected regular workers and less protected non-regular workers. However, two notable changes have occurred.

First, the regular workers' employment has become more diversified recently and so-called typical "life-time employment," in which a worker once hired at one firm would never quit until he/she reaches the mandatory retirement age is not common any longer in Japan. Among the younger generation, lateral mobility between jobs is not at all rare. In the 1990s, it was already reported that 70% of junior high school graduates, 50% of high school graduates and 30% of university graduates left their first job within three years.² In larger companies, where "life-time employment" has been deeply rooted, senior workers are often farmed out (called "*Shukko*") to subsidiaries or other related companies before the mandatory retirement age.

Second, the proportion of regular workers has significantly decreased and that of non-regular workers, has constantly increased in the last quarter century. The percentage of non-regular workers in 1990 was 20.2%, but it increased to 38% in 2016 (see Figure 1). This means that the scope of long-term employment practice has decreased from about 80% to 62%.

² Yuji Genda, "Youth Employment and Parasite Singles" 39-3 Japan Labor Bulletin 5 (2000). < <http://www.jil.go.jp/bulletin/year/2000/vol39-03/05.htm> >

Figure 1: Shrinking Scope of Long-term Employment



3 Two Myths about the Japanese Employment System

It is often said that lifetime employment has gone and only about 30% of Japanese workers enjoy lifetime employment security. When this story is combined with the dual structure of the Japanese labor force, foreigners sometimes mistakenly believe that about 70% of Japanese workers are classified as non-regular workers and subject to arbitrary termination. This is not the case. Though decreasing, two thirds of the Japanese workforce still maintain the status of regular workers and their termination is regulated by the prohibition of abusive dismissal as discussed below.

The other myth runs in a contrary direction. It is often contended that "in Japan, employment laws make it almost impossible to fire regular workers."³ However, this is a gross exaggeration of the current Japanese dismissal regulations.⁴ The Japanese case law established the rule that prohibits

³ Editorial, "Abe's Missing Arrow", Financial Times, October 7, 2013. <http://www.ft.com/intl/cms/s/0/afed1b6a-2f4b-11e3-8cb2-00144feab7de.html#axzz344GxKNjZ>

abusive dismissals in the 1950s and the rule was incorporated in the Labor Standards Act in 2003 and the provision is now contained in the Labor Contracts Act. Namely, Art. 16 of the Labor Contracts Act stipulates that, "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." Although this provision does not squarely require just cause for a dismissal, an employer must *de facto* demonstrate the existence of just cause or that the dismissal is objectively reasonable and socially appropriate. Otherwise, courts tend to regard such a dismissal as abusive.

Under this rule, dismissals are possible when they are regarded as objectively reasonable and socially appropriate. In fact, in 2012, more than 50,000 disputes involving dismissals were brought before the administrative offices and about 5000 dismissal disputes were filed with the administrative consultation services, labor tribunals and ordinary courts. Most of them were disposed of informally and expeditiously with relatively inexpensive monetary settlements. Among 963 cases filed to the ordinary courts, only 343 cases proceeded to final judgment. Of these, 166 cases were held to be abusive and 177 cases non-abusive.⁵

Therefore, the long-term employment practice is certainly changing and its scope is shrinking, but employment security remains still a corner stone of the Japanese employment system. However, employment security is not absolute one and legal framework regulating employment security is rather flexible considering all factors surrounding dismissals in respective cases.

Reflecting social norm respecting employment security, Japan had long maintained very low unemployment rate. Although the unemployment rate

⁴ See Kazuo Sugeno and Keiichi Yamakoshi, "Dismissals in Japan, Part One: How Strict Is Japanese Law on Employers?" Japan Labor Review, vol. 11 no. 2, p.83 (2014).

⁵ Id., at 91-92.

increased in the 1990s after the burst of bubble economy and at financial crisis in the late 2000s, as of 2017 it is as low as 2.8% (see Figure 2).



III. Characteristics of Wage Systems in Japan

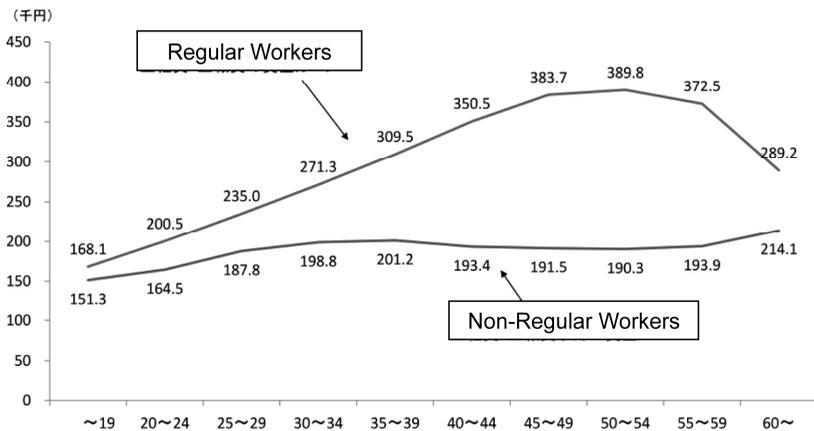
1 Long-term Employment and Japanese Wage Systems

Wage systems in Japan are strongly affected by the long-term employment practice. In other countries, wages are generally determined by job content and the work performed. In Japan, the decisive factors determining wages have not been the work performed by the worker, but the worker's attributes. At one time, these included the worker's age and seniority (length of service), and more recently, the worker's competence to perform his/her duties which is measured by an in-house certificate and grading scheme under the so-called "skill-based grade system [*shoku-no shikaku seido*]". In other words, wages in Japan are paid not to a job but to a person. Therefore, even if a worker is internally transferred to a different job

and the content of work is altered, the amount of basic wage remains the same because wages are paid not to the job but to the person, in accordance with his skill or competence grade. This wage system has enabled internal and functional flexibility through transfers in the Japanese employment relations.

The current Japanese wage system is not a simple seniority-based wagesystem, but incorporates an evaluation of the worker's competence as measured by the skill-based grading system. However, even under such skill-based system, the length of service is still one of the most important factors affecting wages. As a result, a Japanese regular worker's wage profile has a steep curve. Though such a wage curve is not uncommon for white-collar workers in other countries, it is unique that the wage curve for Japanese regular blue-collar workers also has a similar pattern. By contrast, non-regular workers' wage profile remains flat. (see Figure 3).

Figure 3: Wage Profile of Regular and Non-regular Workers



Source: Ministry of Health, Labor and Welfare, Survey on Basic Structure of Wages 2011

Under such wage system where seniority plays a greater role, younger

workers have been underpaid for their productivity while senior workers have been over-paid. In other words, in the Japanese seniority-based wage system, the younger workers have invested in their company by being underpaid, and this underpaid portion has been returned to the workers when they reach more senior levels in the form of over-payment. Accordingly, this system has provided the workers with a strong disincentive to change employers. By contrast, non-regular workers demonstrate lateral mobility in accordance with the higher hourly rates. In other words, regular workers wages are determined in the internal labor market mechanism, whereas non-regular workers' wages are governed by the external labor market mechanism.

2 Wage Structure in Practice: From Seniority to Skill-Based or Performance-Based Wage?

Japan was famous for its seniority-based wage system. The contemporary wage system in Japan is more complex than a simple seniority-based system. To maintain high morale and provide incentives for improved performance, wage systems intended to reflect an individual's competence to perform duties and performance have been introduced.

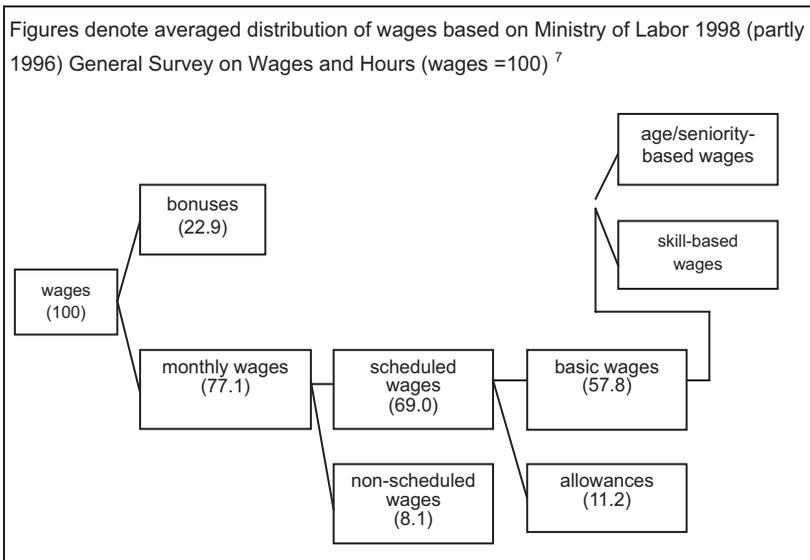
Since the law does not regulate the types of wages, in practice, wages consist of various forms. Generally, wages of regular workers can be divided into monthly wages and bonuses (see Figure 4). Monthly wages are divided into scheduled wages (i.e. basic wage and various allowances) and non-scheduled wages (such as overtime or rest-day work allowances). Scheduled wages are further divided into basic wages and various allowances. Various allowances regularly paid include job-related allowances⁶ and other

⁶ E.g., allowances for taking special posts, special skills, special work, perfect attendance or good performance.

allowances which are paid according to workers' personal circumstances, such as family allowances, housing allowances and commuting allowances.

Currently basic wages normally consist of two types of wages: age and seniority-based wages that are increased automatically in accordance with workers' age or length of service; and skill-based wages determined under the "skill-based grade system."

Figure 4: Wage Structure in Japan



The "skill-based grade system" is a wage system based on a graded evaluation of the worker's level of skill and competence development. This wage system is commonly adopted in many Japanese companies to attempt to coordinate lifetime employment practices with the need to remunerate workers in accordance with their performance and skills⁸. Under this plan, there are a certain number of grades (e.g. A-G), which are further divided into

⁷ Based upon the calculation by Sato, H, Fujimura, H and Yashiro, A, *Materiaru Jinji Romu Kanri*, 52 (2000). The figures indicated are adjusted making wages 100.

subgrades (A1-A5, B1-B5, etc.). A high school graduate may start at A1, and a university graduate at B1. Though one can automatically be promoted to a higher subgrade after spending the maximum period in a particular subgrade, a worker whose performance is excellent will be promoted in a shorter period and may sometimes skip subgrades. In order to move to a higher grade, workers must fulfill certain prerequisites, undergo evaluation, and complete the required training. Promotions to higher grades or subgrades are decided on the basis of job-performance evaluations conducted by the employer as well as the worker's length of service.

However, the job-performance evaluation in the skill-based grade system has gradually evolved to become indistinguishable from the seniority-based evaluation. Not only was it difficult to evaluate an individual's performance in the Japanese team-oriented work environment, but also length of service was considered to be the most impartial and acceptable criteria.

Recently, however, it has become the general opinion that drastic wage reform is required to cope with intensified global competition, and to address the issues of surplus middle and senior workers whose wages are excessive in light of their productivity. On the part of workers, wage differences in accordance with the individual's performance are increasingly accepted as more fair than egalitarian seniority-based wages. Accordingly, companies are introducing more individual performance-based wage systems, such as the annual salary system under which remuneration is determined by an agreement between the employer and the individual worker, and the "discretionary work scheme," whereby wages are determined by the performance itself rather than by the number of hours worked.

⁸ Takeshi Inagami, *Japanese Workplace Industrial Relations* 17 (The Japan Institute of Labor, 1988); Kazuo Koike, *Human Resource Development* 81 (Japanese Economy & Labor Series No. 2) (The Japan Institute of Labor, 1997).

Hence, the individualized, performance-based wage management is gradually replacing collective wage management based on length of service, and this trend is becoming increasingly more evident.

IV. Enterprise Unionism and Decentralized Industrial Relations in Japan

The most significant feature of collective labor relations and collective bargaining in Japan is its decentralized system reflecting the enterprise unionism.⁹

1 Enterprise Unions

Enterprise unionism is a system in which unions are established within an individual enterprise, collectively bargain with a single employer, and conclude collective agreements at the enterprise level. Enterprise unions within the same industry often join an industrial federation of unions, and the industrial federations are affiliated with national confederations. However, industry (sector) or national level collective bargaining is very rare.¹⁰

An enterprise union organizes workers in the same company irrespective of their jobs. As a result, both blue and white collar workers are organized in the same union. Enterprise unions normally confine their membership to regular or standard workers though there are no legal obstacles which prevent enterprise unions from organizing non-standard workers, such as part-time, fixed-term and dispatched (temporary agency) workers.

⁹ See generally, Kazuo Sugeno & Yasuo Suwa, *The Three Faces of Enterprise Unions: The Status of Unions in Contemporary Japan* (JILL Forum Paper No. 6) (The Japan International Labor Law Forum, 1996).

¹⁰ One exception to this pattern is industry-level bargaining between vessel owners' organizations and the All Japan Seamen's Union, one of the few industry wide unions in Japan.

This is due to the fact that the interests of regular workers and that of non-regular workers differ and sometimes even conflict. Regular workers are employed under indefinite term contracts with monthly salary while non-regular workers are usually under fixed-term contracts at an hourly rate. It is understood that regular workers implicitly agree to comply with overtime orders or transfer orders in accordance with business necessity, while non-regular workers usually do not owe such obligations. Due to the established practice, endorsed by the courts, that employment contracts of non-regular workers with fixed-term contracts can be terminated before that of regular workers, the employment security and better working conditions of regular workers are often sustained by the unstable and contingent employment of non-regular workers. Non-regular workers tend to migrate towards other employment opportunities which offer them better hourly rates, and respond to incentives in the external labor market, whereas regular workers operate within the internal labor market. This difference between regular and non-regular workers, and hence the variance in their interests, has been an obstacle for enterprise unions to actively organize non-regular workers within the same enterprise.

Facing the rapid increase in non-regular workers in the last two decades, however, *Rengo* (the Japan Trade Union Confederation), the largest national level confederation of labor unions to which 68.1% of all union members belong, started the campaign organizing non-regular workers since the early 2000s. While union density of all workers is continuously decreasing (17.1% in 2017), that of part-time workers is gradually increasing from 2.6% in 2000 to 7.9% in 2017.¹¹

¹¹ Ministry of Health, Labor and Welfare, 2017 Labor Union Basic Survey.

2 Why does Enterprise Unionism Predominate in Japan?

Enterprise unionism is not required by law. The LUA 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. As of 2015, however, 93.5 % of all labor unions in Japan were enterprise unions, and they consisted of 88.7 % of all organized workers.¹²

There are several reasons for the dominance of this pattern of organization. Historically Japan had little experience with industry-wide unionism before World War II, and the experience of the wartime regime that mobilized all workers into units at the enterprise level may have had influence. After the war when GHQ (General Headquarters of the Allied Powers) encouraged labor unions as vehicles to democratize Japanese society and employers could no longer suppress union activities, workers freely used the enterprise-level workplace facilities as the most convenient place and unit of organization.¹³

Apart from these historical reasons, the main reason for the enterprise unionism that has continued to predominate to date is its functional excellence (flexibility, adaptability and responsiveness to the grass-root needs of workers) in the Japanese employment system.

Under the long-term employment system, employment security of regular workers has been highly respected. In turn, regular workers are subject to the flexible adjustment of working conditions. Those workers are transferred within a company and receive in-house education and on-the-job training. The

¹² Takashi Araki, *Rodo-Ho [Labor Law]*, 567 (Yuhikaku, 2016); Ministry of Health, Labor and Welfare, 2015 Labor Union Basic Survey.

¹³ Hanami, Komiya and Yamakawa, *Labour Law in Japan (2nd.)*, 45 (Wolters Kluwer, 2015).

promotion and wages of each regular worker are determined mainly by that individual's length of service and ability to perform work. In such highly developed internal labor market within a particular enterprise, industrial-level or national-level negotiations have made little sense. Enterprise-based unions and enterprise-level collective bargaining have been the most efficient mechanism for responding to the needs of both the employers and regular workers properly, swiftly and flexibly. Thus, even though labor unionists in the 1950s endeavored to transform enterprise unions into industry-level unions, enterprise unionism has continued to be predominant and the hallmark of the Japanese industrial relations.

3 Collective Bargaining Agreement concluded at Company Level

As a result, almost all collective bargaining agreements in Japan are concluded at the enterprise or company level. Therefore, in contrast to European practices, collective agreements in Japan prescribe not minimum standards which shall apply to workers across companies but the actual working conditions in a particular company. Since their application is confined to the individual company, collective agreements in Japan do not create universal norms that apply to workers in a particular industry, sector or occupation as in European countries.

As mentioned above, the decentralized bargaining system has enabled enterprise unions and employers to adapt to changing socio-economic circumstances swiftly and flexibly.

4 Defects and Compensatory Systems of Enterprise Unionism

On the other hand, however, enterprise unionism has several defects, such as weak bargaining power, the lack of a universal impact across the industry or nation, and the lack of social and political influence on national labor

policy.¹⁴

i. *Shunto* (the Spring Offensive)

To compensate for the weakness in bargaining power and lack of industry or nation-wide impact of collective bargaining, union leaders devised in 1955 a unique wage determination system called "*Shunto*" (spring offensive).¹⁵

Under the *Shunto* system, every spring, industrial federations of enterprise unions set the goal for wage increases and coordinate the time schedule of enterprise-level negotiations and strikes across enterprises and industries. According to the schedule, strong enterprise unions in a prosperous industry chosen as a pattern setter start negotiations first, and set the market price for that year. Other unions then follow suit. The market prices established in *Shunto* have also been reflected through the recommendation by the National Personnel Authority in the public sector where strikes are prohibited, and also in regional minimum wages which are revised every year by the tripartite national and local Minimum Wages Councils in the framework of the Minimum Wages Act. In this manner, the *Shunto* strategy has compensated for the limitations of enterprise unionism in terms of bargaining power and establishing social standards across companies.

ii. Birth of RENGO and Tripartite Labor Policy Council

Under enterprise unionism, where union influence is confined to particular enterprises, social issues which should be dealt with by national legislation or

¹⁴ Kazuo Sugeno and Yasuo Suwa, *The Three Faces of Enterprise Unionism: The Status of Unions in Contemporary Japan* (JILL Forum Paper No. 6, 1996).

¹⁵ As for the details of historical development and economic analysis of *Shunto*, see Akira Takanashi et al., *Shunto Wage Offensive* (Japanese Economy & Labor Series No. 1), (The Japan Institute of Labor, 1996).

national labor policy cannot be properly addressed. These issues include the rapid aging of society, offshore movement of industries to developing countries, international trade conflicts and the increased flow of migrant workers into Japan's labor market.

To increase the political influence of labor unions in the formation of national labor and social policy, the Japanese Trade Union Confederation (*RENGO*) was established in 1989 by absorbing four former national confederations (Domei, Churitsuroren, Shin-sanbetsu and Sohyo). The *RENGO* has 6.75 million members as of 2015, two thirds of all union members in Japan.¹⁶ *RENGO* is invited to various government councils deliberating various policies, which are not confined to labor issues, as a representative of workers.

Another important compensatory mechanism is the tripartite Labor Policy Council [Rodo Seisaku Shingi-kai] and its subcommittees established in the Ministry of Health, Labor and Welfare. These tripartite Councils consist of representatives of public interest (academics), labor and management. It is established practice that the content of labor law bills submitted to the Diet by the government is deliberated and decided in these Councils. Therefore they have become the most important fora in determining the content of new labor legislation and labor policies. In a sense, deliberation in these tripartite councils is quasi-collective bargaining at the national level involving government and academics as mediator and conciliator.¹⁷

Therefore, it should not be overlooked that Japanese industrial relations based on the enterprise unionism is supplemented by the foregoing quasi-corporatist mechanism.¹⁸

¹⁶ Ministry of Health, Labor and Welfare, Heisei 27 nen Rodo Kumiai Kiso Chosa [2015 Labor Union Basic Survey] <http://www.mhlw.go.jp/toukei/itiran/roudou/roushi/kiso/15/dl/06.pdf>

V. Flexibilization and Derogation of Labor Law Regulations and Decentralized Industrial Relations in Japan

1 Derogation through Labor-Management Agreement (LMA)

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 derogation mechanism for norm 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' minimum rights.

¹⁷ In addition, joint labor-management consultation has been utilized at the national and industrial level. At the national level, the tripartite council called "Sangyo Rodo Konwa-Kai" (the Industry and Labor Round Table Conference) was established in 1970. In this forum, representatives of the public interest (the government and academic experts), labor, and management meet periodically to discuss and exchange opinions on industrial and labor policy. At the industry level, major companies and federation of labor unions in the same industry voluntarily establish labor-management councils. They exchange information and opinions on the state of the industry, working conditions and future strategies for the growth of the industry and enhancement of workers' welfare.

¹⁸ See Toru Shinoda, "Ima Mata Corporatism no Jidai Nanoka? (The Era of Corporatism?)", in Takeshi Inagami et al, *Neo-Corporatism no Kokusai Hikaku* (International Comparison of Neo-Corporatism), 357 (Japan Institute of Labor, 1994).

The Labor Standards Act allows derogation from the minimum labor standards based upon a "labor-management agreement" when the Act explicitly prescribes such derogation. For instance, the Labor Standards Act 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.¹⁹ The majority of workers are represented by a union who 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 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 for overtime. In spite of such a significant responsibility, for years the Labor Standards Act and its bylaws did not provide any provisions concerning the qualifications of any person who stood

¹⁹ 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 labor standards. It 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 contractual obligation for workers to obey overtime order. 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 compel workers to work overtime, an employer is required to establish contractual grounds through an individual agreement, work rules or a collective agreement.

to represent the majority of workers, or the procedures to select such a person.

2 Abuse of Derogation Mechanism

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 Labor Standards Act explicitly incorporated the contents of the guidance into the Ordinance for Enforcement of the Labor Standards Act (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.

Although derogation and flexibilization is necessary to make statutory labor protective norms adaptable to diversified employment relations, the Japanese experience tells that 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 Discussion to Introduce 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. As mentioned above, the reason lies in the 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 required by law would 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 the proposal to introduce works council system.

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

VI. Conclusion: Increasing Unorganized Workers and Challenges for Labor Law

Just like in many other countries, the labor union organization rates are declining in Japan, and dropped to 17.1% in 2017. In other words, more than 4/5 of workers are non-union members. They are outside of the application of CBAs because collective agreements at the company level in Japan cannot have erga omnes effect, 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 (*Bezugnahmenklause*). Therefore, in these unorganized sectors, the picture appears as shown in Figure 3. 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.

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 non-mandatory statute that will intervene only where the vacancy of the agreement between the labor contract parties trigger legal disputes. 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.²⁰ Such

²⁰ 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 (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).

diversification of statutory norms should be considered.

Second, we must reconsider the method of 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 will be more 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 future labor legislation 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 unorganized, and introduce machineries to convey unorganized workers collective voices.

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