High Economic Growth and Labor Law: Reciprocal Construction of the Japanese-Style Employment System and Labor Law

Makoto Ishida
Waseda University

The question of "high economic growth and labor law" may be examined from two aspects. The first would be to consider what sort of labor law was formed in relation to the employment system that lay behind it, based on the economic environment of high economic growth. The second would be to consider the influence exerted by labor law formed in this way on ways of designating employment systems during the period of high economic growth. As these two aspects are interconnected, however, this paper focuses on the correlation between the two. Using a fixed perspective on the relationship of reciprocal construction between law and society (i.e. the reciprocal relationship between the 'construction of law by society' and the 'construction of society by law'), it attempts to unravel the relationship of reciprocal construction between the Japanese-style employment system, said to have been formed and established during the period of high economic growth, and labor law based on this perspective, mainly drawing on principles of labor law cases from that time. As a result, (i) in terms of the construction of law by society, principles of case law at that time acknowledged the reality of the Japanese-style employment system, and expressed it in the form of fixed rules (norms). On the other hand, (ii) in terms of the construction of society by law, principles of case law expressed in that way became a force giving the impression that the "Japanese-style employment system" was a universal system in Japan, although in reality it was merely one part of Japan's employment system.

I. Introduction

High economic growth is said to have started in 1955, ten years after defeat in the war.[1] It was in the following year, 1956, that the government's Economic White Paper famously declared "Japan is no longer in the postwar period," and the phrase "economic growth" also appears in said White Paper. In other words, the phrase "economic growth" was expressed in the same breath as the memorable declaration that "Japan is no longer in the postwar period." However, the statements by the White Paper linking this end of the postwar period with economic growth actually suggested that Japan's economy would need to be modernized as a prerequisite for subsequent economic growth, and that it would not be at all easy to achieve this.[2] Nevertheless, the economic boom that started in 1955 vastly

[1]Naomasa Ito, *Kodo Seicho kara "Keizai Taikoku he"* [From high economic growth to "economic superpower"] (Iwanammi Bukku Retto: Shirizu Showashi, no. 13 [Iwanami booklet: Showa History, no.13]) (Tokyo: Iwanami Shoten, 1988), 7.

[2] After declaring that "Japan is no longer in the postwar period," the 1956 Economic White Paper asserted: "We are now about to face a different phase. Growth through reconstruction is over. Future growth will be supported by modernization." As literature examining the statement that "Japan is no

exceeded the awareness shown in the White Paper, ushering in high economic growth that continued for nearly 20 years. The economic environment represented by this high economic growth utterly transformed Japan's economy and social system.

The main task of this paper is to study what sort of labor law was formed in this economic environment of high economic growth, in connection with the social system lying behind the law. To fulfill this task, however, it will be necessary to establish fixed theoretical positions on (i) the relationship between law and social systems formed under certain economic environments (or, to be more general, the "relationship between law and society"), and (ii) the relationship between labor law formed under the economic environment of postwar Japan, i.e. exceptional "high economic growth," and the social system lying behind it (or, to be more general, "the relationship between a social system under high economic growth and labor law").

In Section II, therefore, after outlining the relationship between law and society (i.e. the rationale of "reciprocal construction of law and society"), the relationship between labor law under high economic growth and the Japanese-style employment system as a social system lying behind it will be broadly discussed. Then, a scenario will be drawn in order to verify the relationship of reciprocal construction between the Japanese-style employment system and labor law. Following this, in Section III, the relationship of reciprocal construction mentioned above will be studied in connection with several areas extracted from the scenario in Section II.

II Social Systems and Labor Law amid High Economic Growth

1. The Reciprocal Construction of Law and Society

Sidestepping the tricky sociological question of what exactly constitutes "law" and "society," we may define "society" as a collective term for communal existence that cannot be reduced to the level of individual human beings,[3] and "law" as the rules (norms) governing how such a society is formed. These rules (norms) may be further defined as comprising "positive law" (statutes and case law), backed by the force of authority, and "living law," which actually regulates the behavior of the people who comprise a society.[4] Based

longer in the postwar period" in relation to high economic growth, see Haruhito Takeda, *Kodo Seicho* [High economic growth] (Nihon Kindaishi, no. 8 [History of modern and contemporary Japan, no. 8]) (Tokyo: Iwanami Shoten, 2008).

[3] On the concept of "society," see Masachi Osawa, Shunya Yoshimi, and Seiichi Washida, eds., *Gendai Shakaigaku Jiten* [Encyclopedia of contemporary sociology] (Tokyo: Kobundo, 2012), 559ff.

[4] Here, the main focus is on the concept of "law" in legal sociology. On this point, see Yozo Watanabe, "Hochitsujo no Genjitsuteki Kozo [Realistic structure of legal order]" in *Hoshakaigaku to Hokaishakugaku* [Sociology of law and legal hermeneutics] (Tokyo: Iwanami shoten, 1959), 153ff., and Takeyoshi Kawashima, "Hoshakaigakun ni okeru Ho no Sonzai Kozo [Existential structure of law in legal sociology]" in *Kawashima Takeyoshi Chosakushu (Dai 1 kan)* [Collected works of Takeyoshi Kawashima (vol.1)] (Tokyo: Iwanami shoten, 1982), 114ff.

on these definitions, we see that the relationship between law and society is already inherent in the definition of "law." Law is constructed by society, and at the same time constructs that society. In this paper, the phrase "reciprocal construction of law and society" is used to describe the relationship between the two.[5]

Firstly, viewing the relationship between law and society in terms of the former being constructed by the latter, it can be said that law, while premised upon the demands of a given social system, acknowledges the reality of those demands, and consists of words (or "linguistic contrivances"[6]) that express them in the form of rules (norms).

Secondly, viewing the relationship between law and society in terms of the former constructing the latter, law can be said to influence a given social system and shape its realities. This influence of law on a social system is not merely a case of embodying certain conditions expressed by positive law (i.e. legal effects) in the social system; it also lies in giving people, through the concept of the universality of law, the impression that the social system expressed by the law is something "universal" and "natural." In that sense, law may be said to influence the construction of specific social systems.

Of course, "the construction of law by society" and "the construction of society by law" are related to each other, and a complex interaction arises between them. However, if law, through its universality, can be considered to affect the way people think, and, through this, to construct the specific shape of a social system, then retracing this process of construction should be a meaningful endeavor when considering the relationship between the law and the social system at a specific point in time. In particular, moreover, the approach outlined above is also important when considering the relationship between labor law formed in postwar Japan's economic environment of exceptionally "high economic growth," and the social system that lay behind it.

2. High Economic Growth and the Social System in Terms of Labor Law: Characteristics of the Japanese-Style Employment System

Assuming the relationship of reciprocal construction between law and society discussed above, labor law could be said to be closely linked to the system of employment, as the social system lying behind it. In particular, the employment system called "Japanese-style" (hereinafter referred to as the "Japanese-style employment system") is said to have formed and taken root during the period of high economic growth in postwar Japan,[7]

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[5] The following points are suggested by Iwao Sato, "Ho no Kochiku: Shushi Setsumei to Kicho Hokoku [Construction of law: Explanation of purpose and keynote report," *The Sociology of Law*, no.58 (2003); 1ff.

[6] Takeyoshi Kawashima, *Kagaku to shiteno Horitsugaku* [Jurisprudence as a science] (Tokyo: Kobundo, 1961), 31ff.

[7] For example, see Haruo Shimada, *Nippon no Koyo: 21-seiki no Saisekkei* [Employment in Japan: A re-design for the 21st century] (Tokyo: Chikuma Shobo, 1994), 48ff., and Michio Nitta, *Henka no Naka no Koyo Sisutemu* [Employment systems in the midst of change], (Tokyo: University of Tokyo Press, 2003), 11ff.

and as such, the question of "high economic growth and labor law" could also be described in terms of the relationship between this Japanese-style employment system and labor law.

Of course, there is debate over how far the specifics of the so-called Japanese-style employment system could be deemed characteristically "Japanese."[8] Nevertheless, there seems to be a broad consensus that the Japanese-style employment system comprises what are known as the "three sacred treasures"[9]: (i) the custom of long-term employment (life-long employment), (ii) treatment based on seniority (the seniority system), and (iii) company-based unions.

The first of these, i.e. the custom of long-term employment, involves carrying out most new hiring through mass recruitment of new graduates and guaranteeing opportunities for employment until retirement age, as long as there are no exceptional circumstances (e.g. serious misconduct on the part of the worker or serious business difficulty threatening the very existence of the enterprise). Under this practice, employers create frameworks for flexible placement without clearly defining workers' duties, and develop a personnel policy whereby they cultivate their workers' abilities through on-the-job-training while at the same time assigning them to a wide range of tasks.

In the second of the "three sacred treasures," i.e. treatment based on seniority, a worker's age and years of continuous service are used as important appraisal standards to determine wages (pay raises), status (promotions) and other aspects of treatment. Under the job-ability qualification system established during the high economic growth period, a worker's initial grade (starting wage) is determined by the worker's age and academic background, and the worker thereafter receives pay raises and promotions depending on the number of years served and personnel evaluations. In this seniority-based treatment system, wages do not necessarily correspond to a worker's contribution at a given point in time, and so the worker has to continue working until retirement age to reach a final tally of contributions and wages (i.e. to recover the contribution made). This is the point at which seniority-based treatment and the custom of long-term employment converge.

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[8] This problem was raised in the era of high economic growth by Mikio Sumiya, "Nihonteki Roshi Kankeiron no Saikento: Nenkosei no Ronri wo Megutte (Jo) and (Ge) [Japanese labor-management relations revisited: A discussion of nenko system (Part 1) and (Part 2)]," *The Monthly Journal of the Japan Institute of Labour,* no. 185 (1974): 2ff., and no.187 (1974): 2ff.

[9] According to Kazuyoshi Koshiro "Sanshu no Jingi [Three sacred treasures]," *The Monthly Journal of the Japan Institute of Labour,* no.443 (1997): 2ff., the collective term "three sacred treasures" describing the main elements that characterize the Japanese-style employment system was used by the then Vice-Minister for Labour Masao Matsunaga in the "Introduction" to the Ministry of Labour's translation of the *OECD Report on Labor in Japan* (Tokyo: Japan Institute of Labour, 1972). This included the following statement. "The central concerns and problem awareness when the OECD studied Japan's labor force policies were the degree to which employment and wage practices involving lifelong employment, wages based on seniority, and individual company-based unions formed on the basis of a uniquely Japanese culture—collectively referred as the 'Japanese Employment System' in the report—have contributed to Japan's economic growth as the so-called 'three sacred treasures,' how are they being transformed today, and what issues they are posing for labor force policies."

The third "treasure," company-based unions, refers to labor unions formed by organizing the regular employees of individual companies. Postwar Japanese labor unions were organized by "equalizing" blue- and white-collar workers, employee categories with fundamentally differing interests, based on their shared identity as regular employees of the same company. However, in the closed internal labor market of corporations, formed by the custom of long-term employment and seniority-based treatment, the organizational format known as company-based unions became the mainstream organization for regular employees with shared interests. When this Japanese-style employment system, which was formed and became established during the period of high economic growth, is viewed from the two perspectives of employment relations (i.e. individual relationships between workers and employers) and labor-management relations (collective relationships between labor unions or workers' collectives and employers), the following characteristics can be pointed out.

Firstly, from the perspective of employment relations, relative stability of employment until retirement age is realized for regular employees as members of the internal labor market; on the other hand, this also permits employers to have broad discretionary powers over personnel matters and labor conditions.[10]

Secondly, from the perspective of labor-management relations, relations between employers and groups of regular employees develop as company-specific labor-management relations operated by company-based unions.

3. A Scenario for Verifying the Relationship of Reciprocal Construction between the Japanese-Style Employment System and Labor Law

How did labor law in the era of high economic growth perceive the above-mentioned characteristics of the Japanese-style employment system, which was formed and became established in that era, and with what sort of norms (rules) did it express them (i.e. the aspect of construction of law by society)? And what sort of role did labor law thus expressed as norms (rules) have in creating the Japanese-style employment system (i.e. the aspect of construction of society by law)?

To verify this relationship of reciprocal construction between the Japanese-style employment system and labor law, several areas of employment relations and labor relations will need to be picked out and subjected to specific study. Here, however, to identify which areas need to be studied, the author would like to create a certain scenario for setting areas, using principles of case law pertaining to the series of labor laws thought to have been formed in response to the Japanese-style employment system in the period of high economic growth[11] as a raw material.[12] Then, when creating this scenario, reference will be made

[10] This characteristic was already highlighted by Michio Tsuchida, "Nihonteki Koyo Kanko to Rodo Keiyakuron [Japanese-style employment practices and labor contract theory]," *Journal of Labour Law*, no. 73 (1989): 33.

[11] As there is a time lag between the establishment of the social system and the emergence of case law (court cases based on principles of case law), case law here mainly refers to Supreme Court

to the concept of "flexibility" proposed by Professor Takashi Araki[13] and applied to the understanding of the relationship between the Japanese-style employment system and labor law by Professor Yuichiro Mizumachi.[14] "Flexibility" is a concept that enumerates how the employment system responds to economic fluctuation affecting the labor market. It is called external flexibility when regulated by the functions of the external labor market, and internal flexibility when by those of the internal labor market.

(1) The Japanese-Style Employment System and Labor Law in Terms of External Flexibility

Firstly, the Japanese-style employment system, based on the custom of long-term employment (the lifelong employment system), is said to lack external flexibility in hiring and firing regular employees flexibly to suit business fortunes or economic conditions. As the hiring of regular employees involves mass hiring of new graduates, a characteristic of the practice of hiring regular employees in Japan is that they go through a "tentative hiring decision" stage and a "probationary period" before they are properly hired. The legal status of the tentative hiring decision and probationary period then becomes problematic. However, in the case of tentative hiring decision for new graduates, it was judged in the 1979 Dai Nippon Printing Case (Sup. Ct., 2nd Petty Bench, Judgment, Jul. 20, 1979, 33 Minshu 5-582) that a labor contract could be formed through such a tentative hiring decision. In the case of the probationary period, similarly, the formation of a labor contract was confirmed by the 1973 Mitsubishi Plastics Case (Sup. Ct., Grand Bench, Judgment, Dec. 12, 1973, 27 Minshu 11-1536).

Meanwhile, the dismissal of regular employees is subject to constraints designed to preserve the relative stability of employment. Even so, in the 1975 Nihon Shokuen Seizo Case (Sup. Ct., 2nd Petty Bench, Judgment, Apr. 25, 1975, 29 Minshu 4-456) and the 1977 Kochi Broadcasting Case (Sup. Ct., 2nd Petty Bench, Judgment, Jan. 31, 1977, 268 Rodo Hanrei 17), the courts created a legal doctrine on the abuse of the right to dismiss (doctrine of abusive dismissal), and imposed two stringent requirements of objective rationality and social appropriateness when dismissing regular employees. At the same time, though a lower court judgment as an extension of this, the courts developed a framework for making

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judgments between the 1960s and the latter half of the 1980s.

[12] The reason why case law (and principles of case law) is used as a main material is as follows. That is, the basic framework of statutes that govern labor matters (such as the Constitution, the Labor Union Act and the Labor Standards Act) had already been completed immediately after defeat in the war and before the period of high economic growth, and case law occupies a more important position in clarifying the precise nature of labor law formed in the period of high economic growth.

[13] Takashi Araki, *Koyo Shisutemu to Rodo Joken Henko Hori* [The employment system and the legal principle of changing labor conditions] (Tokyo: Yuhikaku, 2001), 7–10, 212–13.

[14] Yuichiro Mizumachi, *Rodoho* [Labor law] (Tokyo: Yuhikaku, 2012), 50–56. When writing this paper, numerous suggestions were taken from Chapter 2 "Functions of Labor Law" in Part 1 of this book.

judgments, in which rigorous examination based on four conditions was also applied to adjustment dismissals carried out for business management reasons.

On the other hand, based on the Japanese-style employment system, non-regular employees were placed outside this system and made to bear the role of ensuring external flexibility as a regulating valve for employment. Here again, in the 1974 Toshiba Yanagi-machi Factory Case (Sup. Ct., 1st Petty Bench, Judgment, Jul. 22, 1974, 28 Minshu 5-927) and the 1986 Hitachi Medico Case (Sup. Ct., 1st Petty Bench, Judgment, Dec. 4, 1986, 486 Rodo Hanrei 6), the courts recognized that the legal doctrine on abuse of the right to dismiss may be applied to cases of dismissal and termination of employment of non-regular employees. They nevertheless asserted that there is a "rational difference" between regular and non-regular employees, even in cases where the application of said legal doctrine is recognized, and that it would be "rational" for non-regular employees to be dismissed or have their employment terminated ahead of regular employees.

(2) The Japanese-Style Employment System and Labor Law in Terms of Internal Flexibility

As shown above, the Japanese-style employment system was also supported by principles of case law in relation to hiring and dismissal, and its structure was meager in external flexibility. On the other hand, it had internal flexibility that permitted various discretionary measures by employers and made full use of company-specific labor relations. Moreover, this internal flexibility was also given certain normative expression by principles of case law.

Internal flexibility comprises a quantitative flexibility, whereby the volume of business costs is altered by adjusting wage amounts and hours worked, and a qualitative flexibility, whereby the nature of the corporate organization is changed qualitatively by flexible changes in personnel and flexible changes to workplace rules, at the discretion of the employer. Important areas in the relationship between the Japanese-style employment system in the period of high economic growth and principles of case law in labor law are those related to the latter, i.e. qualitative flexibility.

Firstly, as already stated above, the Japanese-style employment system guaranteed relative stability of employment for regular employees, as the component members of the internal labor market, and granted employers extensive powers of discretion on personnel matters, with employees frequently and flexibly transferred or farmed out. In terms of case law, though somewhat shifted from the period of high economic growth in temporal terms, these extensive powers of discretion on personnel matters by employers were confirmed by the judgment in the 1986 Toa Paint Case (Sup. Ct., 2nd Petty Bench, Judgment, Jul. 14, 1986, 477 Rodo Hanrei 6). This legal precedent recognized the extensive rights of an employer to order transfers of personnel based on labor contracts, but at the same time placed certain constraints on employers' powers of discretion by using the framework of the abusive exercise of a right. However, these constraints were limited to extremely exceptional

cases.

Secondly, on flexible changes to workplace rules under the Japanese-style employment system, changes to work rules by employers have played an important role. In Japan, employers are entitled to create and change work rules unilaterally without obtaining their workers' consent (Labor Standards Act, Article 90 [1]) but the judgment in the 1968 Shuhoku Bus Case (Sup. Ct., Grand Bench, Judgment, Dec. 25, 1968, 22 Minshu 13-3459) made a ruling on the validity of an employer creating and altering work rules, to the effect that, as long as the content is rational, it can be binding on the worker. This marked the starting point for subsequent case law. Under this, even if a worker were to oppose changes to workplace rules, the employer can create new workplace rules by rationally changing work rules. The legal principle of changing work rules in case law had the function of transferring the employer's extensive powers of discretion, a characteristic of the Japanese-style employment system, to the content of labor contracts.

Thirdly, something else that contributed to flexible changes to workplace rules under the Japanese-style employment system was the flexibility of company-specific labor relations and the creation of a framework based on case law. As already stated above, under the Japanese-style employment system, labor unions took the organizational format of company-based unions, and substantial labor-management negotiations were also held at individual company level. Labor relations in Japan are legally governed by the Constitution and the Labor Union Act. These have frameworks enabling the organizational formats of labor unions and styles of labor-management negotiations to be broadly tolerated, and in that sense, positive law broadly recognizes flexible labor-management negotiations. It should be noted with care, however, that under the principle of case law, in the 1979 Japanese National Railways Sapporo Train Sector Case (Sup. Ct., 3rd Petty Bench, Judgment, Oct. 30, 1979, 33 Minshu 6-647), a certain framework was created in connection with the nature of action by company-based unions.

III. High Economic Growth and Labor Law: Some Aspects of Reciprocal Construction

As areas that require special attention when verifying the relationship of reciprocal construction between the Japanese-style employment system and labor law in the period of high economic growth, based on the above discussion, one may cite "the hiring process," "dismissal," "changes in personnel," "work rules" and "company-based unions and labor relations." In the following, owing to lack of space, the first three of these will be subjected to slightly detailed analysis.

1. The Hiring Process: The "Tentative Hiring Decision" and the "Probationary Period"

A kind of "common awareness" concerning the Japanese-style employment system,

whereby a "standard worker" is regarded as one who enters a company immediately after graduating from education then continues to work for the same company, is said to have taken shape in the process of high economic growth. Behind this lay the career pattern of male regular employees (including blue-collar workers) in large manufacturing corporations that propelled the high economic growth. And this career pattern involved a hiring system of "uninterrupted movement"[15] from school to occupations, with the periodical hiring of new graduates as its starting point.

Based on this hiring system, companies in the period of high economic growth responded to the tightness of the new graduate labor market by initiating a procedure known as the "tentative hiring decision." This involved carrying out their recruitment and hiring selection for prospective new graduates long before their scheduled time of graduation, and thus securing the services of persons they would eventually decide to hire after graduation. This tentative hiring decision was a formal indication that the company had decided to hire and the prospective graduate intended to join the company immediately after graduating, and was normally carried out through notification of a tentative hiring decision.

While the tentative hiring decision actually created expectation and constraints on both parties, to the effect that the hiring would take place, it was not necessarily clear what nature the tentative hiring decision had in legal terms. At first, there were two approaches to this question. In the first of these, (i) the "process of contract formation theory," the point at which a labor contract was established was seen as the moment when a letter of appointment was issued during the initiation ceremony in April; the process until then had merely one of forming contracts, including the tentative hiring decision. In the second approach, (ii) the "reservation theory," the tentative hiring decision was treated as a "reservation," whereby a labor contract would be concluded upon graduation.[16] Both of these approaches were challenged by the Supreme Court's judgment in the 1979 Dai Nippon Printing Case.[17] This was the case of a 4th-year university student who had taken a company's entrance examination based on a recommendation from the university, had received written notification of a tentative hiring decision in July of the year before graduation, and had submitted a

[15] Shinji Sugayama, *"Shusha" Shakai no Tanjo* [Birth of the "corporate" society] (Nagoya: The University of Nagoya Press, 2011), 448. Sugayama describes the situation as follows: "Workers would now enter employment immediately upon graduating from school, and then continue working for the same company until retirement or close to retirement age… While this mainly involved male workers in the large corporate sector that has led high economic growth, it expanded beyond differences in educational background between junior high school, senior high school and university graduates and differences in occupational skill between white collar and blue collar workers. If anything, it created a common awareness that this was a "standard" occupational path for company employees." (445).

[16] On the process of forming labor contracts, including these trends in legal theory, see Yuichiro Mizumachi, "Rodo Keiyaku no Seiritsu Katei to Ho [Process of formation of labor contracts and the law]" in *Rodo Keiyaku* [Labor contracts], ed. Japan Labor Law Association (Tokyo: Yuhikaku, 2000), 41ff.

[17] Dai Nippon Printing Case, Sup. Ct., 2nd Petty Bench, Judgment, Jul. 20, 1979, 33 Minshu 5-582.

promissory note to the company. The judgment ruled that it was "reasonable to construe that a labor contract retaining rights of dismissal based on the five grounds for withdrawing a tentative hiring decision stated in the promissory note had been established." The Supreme Court thus overturned the conventional view that a labor contract is not in any sense established by a tentative hiring decision (as in [i] or [ii] above), and recognized that a labor contract could be formed in connection with a tentative hiring decision to a new graduate (adoption of the "labor contract theory").

This Supreme Court precedent in the Dai Nippon Printing Case was a judgment on a tentative hiring decision in the year in question by the company in question, but the case itself was a general case for prospective new university graduates. In fact, the Supreme Court also premised its judgment on the recognition that "Considering Japan's employment situation, it is normal practice for prospective new university graduates, having once entered the relationship of a tentative hiring decision with a specific company, to reject opportunities and possibilities for employment with other companies in expectation of taking up employment after graduation, irrespective of whether the offer is accompanied by the retention of dismissal rights."

While the above relates to tentative hiring decisions as a component of the hiring system, in the periodical hiring of new graduates, it is normal practice for there to be a further period of 1–6 months to judge job aptitude until the recruit is formally hired, even after employment has started via the tentative hiring decision. This is known as the probationary period. In the hiring system for new graduates, the gist of the system is that job aptitude needs to be carefully judged before full hiring, but in reality, it is not so much a period for judging aptitude as a regular employee, as a period of basic training. How to appraise the legal nature of this probationary period then becomes a problem in connection with an employer's refusal of full hiring. On the question of whether or not a contract during a probationary period is the same as a labor contract after full hiring, the Supreme Court, in its judgment on the 1973 Mitsubishi Plastics Case,[18] ruled that a labor contract retaining a degree of dismissal rights is formed, and therefore held that it is the same as a labor contract after full hiring.

Thus, on the subject of tentative hiring decisions and probationary periods as components of a unique hiring system for regular employees established in the period of high economic growth, the Supreme Court, in each case, adopted the rationale that labor contracts are formed. However, this reflects the fact that "hiring" in the Japanese-style employment system described above was not a question of employing new recruits for specific occupations on condition of certain skills, but was taken as a starting point for developing vocational ability in a general sense, based on a long-term perspective. In this sense, the Supreme Court's principles of case law on tentative hiring decisions and probationary periods effectively recognized basic aspects of the realities of hiring in the Japanese-style em-

[18] Mitsubishi Plastics Case, Sup. Ct., Grand Bench, Judgment, Dec. 12, 1973, 27 Minshu 11-1536.

ployment system, and expressed these linguistically in the form of legal rules (norms). However, the new graduate hiring system was only customary among large corporations; in small and medium-sized enterprises, workers who changed jobs were frequently hired in mid-career. In the case law mentioned above, the Supreme Court noted most carefully that they were judgments limited to the cases in question. Nevertheless, although the rationale that it is standard for a person to enter employment immediately upon graduating from school, and then to continue working for the same company until retirement or close to retirement age has become general, it cannot be denied that the Supreme Court's principles of case law on tentative hiring decisions and probationary periods premised upon the hiring system in large corporations has had some kind of effect.

2. Dismissal: Legal Doctrines on Abuse of the Right to Dismiss and Adjustment Dismissal

(1) Legal Doctrines on Abuse of the Right to Dismiss

According to Professor Michio Nitta, the long dispute between labor and management in large Japanese corporations from the 1950s to the 1960s culminated in "a mutual exchange of commitment in which, on the one hand, workers would not quit a company once it had employed them and would continue to work diligently, in return for which the management would not dismiss workers unless they committed acts of serious misconduct or the company itself fell into a management crisis"[19]—in other words, the establishment of an "agreement" on long-term employment or "lifelong employment." However, this agreement was not one that was clearly expressed in writing as work rules, contracts, etc., but was nothing more than a "tacit assumption" for temporary convenience when entering into a contractual relationship. Nevertheless, by virtue of their accumulation during the period of high economic growth, these "agreements" became customary practice for regular employees in large corporations. In legal terms, the tacit assumption that "management would not dismiss workers unless they committed acts of serious misconduct or the company itself fell into a management crisis" was nothing more than the conclusion of a labor contract with no specified term until statutory retirement age; it was not a guarantee of employment in the legal sense. Rather, the Labor Standards Act enacted after the war established a period of notice for dismissal and other fixed legal provisions for labor contracts with no specified term, based on the premise of maintaining the principle of freedom to dismiss under the Civil Code.

Specifically, the Labor Standards Act set certain provisions on the premise of the freedom to dismiss, providing for restrictions on dismissal before and after childbirth and in cases of industrial accidents (Article 19) and an obligation to give advance notice of dismissal (Article 20), while also prohibiting discriminatory dismissal on grounds of nationality, creed or social status (Article 3). However, principles of case law had imposed limita-

[19] Nitta, *supra* note 7, at 20.

tions on the freedom of dismissal itself since the 1950s. A passage in a certain lower court case gives the following reason for this: "Japan's labor market lacks fluidity, and not only did employers once have an overwhelming advantage, but also the labor unions did not have sufficient solidarity or negotiating power. Moreover, in that systems of wages ranked by seniority and large retirement payoffs have been adopted on the premise of long-term employment, once a worker has been dismissed, regardless of age or sex, it is difficult for that worker to obtain equal or better working conditions such as wages, job grade and calculation of severance pay, and to find employment elsewhere immediately. As such, dismissal can deal a massive blow in terms of subsistence. In view of this, the court has weighed these circumstances of workers and the business-related claims asserted by the employer against each other, and has taken the step of imposing a restriction based on these legal principles on the basic principle of freedom to dismiss, in order to make a reasonable distinction in Japanese society."[20] "These legal principles" that impose a restriction on the basic principle of freedom to dismiss refer to the "principle of good faith or the legal principle of abuse of rights."

Thus, the legal doctrine of dismissal, whereby dismissal without rational justification is deemed an abuse of rights and therefore null and void, came to occupy the majority of lower court cases in the 1950s.[21] The Supreme Court judgment in the 1975 Nihon Shokuen Seizo Case[22] then formulated the flow of these lower court precedents as the "legal doctrine on abuse of the right to dismiss," asserting that "even when an employer exercises its rights of dismissal, it will be void as an abuse of the right if it is not based on objectively reasonable grounds so that it cannot receive general social approval as a proper act."

This Nihon Shokuen Seizo Case was a case in which there were problems in the existence or lack of grounds for dismissal and the rationality thereof, and the point of contention was whether dismissal based on a union shop agreement against workers expelled from labor unions should be permitted. In the 1977 Kochi Broadcasting Case, by contrast, the point of contention was whether or not an employee can be dismissed even when there are rational grounds for dismissal. In this Kochi Broadcasting Case, the Supreme Court[23] con-

[20] The Singer Sewing Machine Case, Tokyo Dist. Ct., Judgment, May 14, 1969, 568 Hanrei Jiho 87. A point of contention in this case was that the legal principle of dismissal under Japanese law had been applied to an American national working for an American company. In that connection, it is thought to have highlighted the characteristics of Japanese legal principles.

[21] Keiichiro Hamaguchi, *Nihon no Koyo to Rodoho* [Japanese employment and labor law] (Tokyo: Nihon Keizai Shinbunsha, 2011), 74. On postwar transitions in the legal principle of dismissal, see Takashi Yonezu, "Kaikokenron [Dismissal Rights Theory]," in *Sengo Rodoho Gakusetsushi* [History of postwar labor law theory], ed. Tsuneki Momii (Tokyo: Junposha, 1996), 657ff., and Shinobu Nogawa, "Kaiko no Jiyu to Sono Seigen [Freedom of dismissal and restrictions on it]," in *Rodo Keiyaku* [Labor contracts], ed. Japan Labor Law Association (Tokyo: Yuhikaku, 2000), 154ff.

[22] Nihon Shokuen Seizo Case, Sup. Ct., 2nd Petty Bench, Judgment, Apr. 25, 1975, 29 Minshu 4-456.

[23] Kochi Broadcasting Case, Sup. Ct., 2nd Petty Bench, Judgment, Jan. 31, 1977, 268 Rodo Hanrei 17.

firmed that a review of "propriety" is still required, even if grounds for dismissal exist, in that "even where there are objective reasons for a dismissal, and an employer does not always have the right to dismiss. If, under the specific circumstances of the case, the dismissal is unduly unreasonable so that it cannot receive general social approval as a proper act, the dismissal will be void as an abuse of the right of dismissal."

In both of these cases, it was confirmed that dismissal is "null and void" if the exercise of dismissal rights is judged to have been an abuse. Thus, as a result of these two Supreme Court precedents, a "legal doctrine on abuse of the right to dismiss" consisting of three elements ([i] grounds for dismissal need to be rational, [ii] dismissal can be deemed proper in terms of social norms, [iii] the dismissal is made null and void by the effect of abuse of the right to dismiss) has been established as a principle of case law.

In this way, the "agreement" on long-term employment, which became customary among regular employees of large corporations in the period of high economic growth and formed a "tacit assumption" as an "exchange of commitments" between the parties, was given legal expression as the "legal doctrine on abuse of the right to dismiss" by the Supreme Court. This gave the impression that the Japanese-style employment system involving long-term employment, which had previously been customary among large corporations, was now established as a universal system in Japan, including small and medium-sized enterprises.

(2) The Legal Doctrine of Adjustment Dismissal

The custom of long-term employment (including the legal doctrine on the abuse of the right to dismiss) that was established during the period of high economic growth had a specific significance in the period of employment adjustment in the 1970s. That is, during the economic recession triggered by the first oil crisis at the end of 1973, many companies were forced to restructure their workforce, but even now, particularly among large corporations, employment adjustments were carried out in accordance with a set procedure without disputes. This was because, on the one hand, the large corporation labor unions at the time had accepted the employment adjustment measures based on the course of labor-management cooperation, while on the other hand, the employers also followed careful procedures when making employment adjustment. Specifically, (i) they had first responded with measures such as overtime restrictions, suspension of mid-career hiring, transfer or farming out of personnel, suspension of new hiring, termination of temporary or part-time employment, and temporary closures or layoffs. Then, (ii) if these measures alone were not enough, as a final measure, they would offer voluntary redundancy accompanied by preferential severance packages and assistance with re-employment, and would avoid named redundancies as far as possible, as long as this did not lead to a crisis in business management. On top of this, in the labor relations of large corporations, talks were held and information

was disclosed on employment adjustment through labor-management consultation.[24]

While this was the case in large corporations, the situation was different for employment adjustment in small and medium-sized enterprises. In these enterprises, of the employment adjustment measures by large corporations mentioned above, there was little scope for personnel transfer or farming out, while there was also no room for temporary closures or layoffs. In many small and medium-sized enterprises, therefore, voluntary redundancy would be offered immediately, and if the surplus personnel could not be absorbed in this way, dismissals would then be made.

So how did the courts deal with this employment adjustment, and particularly adjustment dismissal in the 1970s? Firstly, previous research suggests that a principle of case law governing adjustment dismissal had not been fully established before the employment adjustment described above.[25] Although copious personnel adjustments were carried out immediately after the war, when the validity of adjustment dismissal was contested in such cases, the courts merely reviewed (i) the necessity of personnel cuts and (ii) the rationale behind the selection of workers to be dismissed. However, as employment adjustment procedures such as those described above became established in large corporations, the courts also came to incorporate these procedures as requirements for judging the validity of adjustment dismissal. Then, as lower court precedents accumulated, the legal doctrine of adjustment dismissal described here as the "four requirements of adjustment dismissal" became established.[26] These are the four requirements of (i) the necessity of reducing the

[24] Kazuo Sugeno, *Shin Koyo Shakai no Ho* [Law in the new employment society] (Tokyo: Yuhikaku, 2004), 69.

[25] *Ibid*., 70.

[26] The judgment in the 1975 Omura-Nogami Case (Nagasaki Dist. Ct., Omura Branch, Judgment, Dec. 24, 1975, 242 Rodo Hanrei 14), said to have first formulated the legal principle of adjustment dismissal, includes the following text. "So-called adjustment dismissal, the purpose of which is to adjust surplus manpower, unilaterally causes workers to lose their status as employees already acquired by means of labor contracts, for reasons not attributable to the workers' responsibility, and the result of this fundamentally destroys the lives of workers (and their families) who have maintained a subsistence through wages alone. Moreover, if this occurs during a recession, such workers will face certain difficulties in finding re-employment, making the impact of dismissal on them even more severe. In view of this, when an employer carries out adjustment dismissal, it is reasonable to construe that the employer should be subject to certain restrictions led by the principle of good will in labor contracts. Specifically, although the exercise of dismissal rights inherently belongs to the exclusive rights of the employer as the manifestation of the employer's management rights, and is in principle free, arbitrary exercise of those rights by the employer is by no means permissible, and, depending on the way the rights are exercised, it should be possible to be deemed an abuse of rights. This is not limited to dismissal rights alone but could be stated with regard to rights in general. Nevertheless, considering the special nature of dismissal rights, they are required to be exercised even more closely in accordance with the principle of good faith than in the case of other rights. In addition, this court construes that whether or not adjustment dismissal constitutes an abuse of rights should mainly be judged after taking into account the following perspectives. That is, firstly, that there is a pressing need, in that if dismissals were not made, the survival of the company would be threatened; secondly, that efforts have been made to absorb the surplus manpower using measures that cause less hardship than dismissal for workers, such as personnel transfer, temporary layoffs or offering voluntary redun-

workforce, (ii) efforts to avoid dismissals, (iii) justifiable reasons for selecting workers to be dismissed, and (iv) the appropriateness of procedures. The setting of these requirements embodied general or abstract requirements concerning the objective rationality and social reasonableness of dismissal under the legal principle on abuse of the right to dismiss in cases of adjustment dismissal, while incorporating the actual practice of employment adjustment at the time in legal judgments. Requirements (ii) (efforts to avoid dismissal) and (iv) (the appropriateness of procedures), in particular, are not found in case law on adjustment dismissal immediately after the war. As such, they reflect the trend toward implementing employment adjustment after exhausting measures other than dismissal (corresponding to [ii] above) and carrying out labor-management consultation in advance (corresponding to [iv] above) in the 1970s employment adjustment procedures described above.

Thus, the legal doctrine of adjustment dismissal was established in the second half of the 1970s, somewhat shifted temporally from the period of high economic growth. However, this reflects the employment adjustment procedure in large corporations, and differed from the reality of small and medium-sized enterprises. Nevertheless, many of the cases actually brought to courts in contention against adjustment dismissal had occurred in small and medium-sized enterprises. This gave rise to the appraisal that "Regulation of adjustment dismissal by the courts has resulted in the same efforts being applied in small and medium-sized enterprises as in large corporations, as far as possible."[27]

3. Changes in Personnel: Transfer and Farming out

The Japanese-style employment system guaranteed relative stability of employment for regular employees, as component members of the internal labor market, while granting employers extensive powers of discretion on personnel matters. What gave employers these extensive powers of discretion, in terms of legal language, were the principles of case law on transfer and farming out.

(1) Transfer

Transfer is a concept covering long-term changes to job duties or working locations, and includes both reassignments (changes of department within the same business site) and relocations (changes of working location). Although the emergence of transfer as a central aspect of employment management is said to have occurred after the establishment of the

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dancy; thirdly, that the situation has been explained to labor unions and/or the workers (or their representatives) and their acceptance has been sought, and efforts have been made to gain the understanding of the workers on the timing, scale, method and other details of personnel adjustment; and fourthly, that the standards for adjustment and the method of selecting personnel based on this are objective and rational. If adjustment dismissal sufficiently satisfies the above points, it can be deemed from the employer's point of view that, unless there are exceptional circumstances, the right has been exercised in good faith."

[27] Sugano, *supra* note 24, at 72.

Japan Productivity Center in 1955,[28] it was during the period of high economic growth that transfer became a frequent occurrence in many sectors. And what presented an institutional basis for this frequent occurrence of transfer was a system of wages so assembled as to prevent workers from suffering a disadvantage even when transferred—in other words, the system of seniority-based wages in which the main criteria were age and years of service. This is because, under the system of seniority-based wages, transfer basically had no impact on wages, even if the occupation, work content, working location and other aspects changed.

In the period of high economic growth, many companies incorporated provisions asserting the employer's comprehensive right to order transfer (e.g. "Depending on the circumstances of the job, the employer may order reassignments or relocations") in their work rules or labor contracts. In its judgment on the 1986 Toa Paint Case, the Supreme Court ruled that the employer acquires the comprehensive right to order transfer by virtue of such provisions, together with background circumstances.[29] Of course, even if the employer is granted the comprehensive right to order transfer, abuse of that right is not permitted. However, in judging such abuses of rights, the Supreme Court strictly limited the scope of abuse, asserting that "Whether or not a need for a transfer order exists in terms of work operations, a transfer order will not constitute an abuse of rights unless there are exceptional circumstances, such as when said transfer order is made for other unlawful motives or objectives, or when a worker is made to bear a disadvantage significantly exceeding the level that should normally be tolerated." In the Toa Paint Case, in fact, the disadvantage in family life suffered by a male worker who had an elderly mother, a wife on the organizing committee of an unlicensed nursery, and a 2-year-old child, and who was forced to take a post away from his family, was deemed not to be "a disadvantage significantly exceeding the level that should normally be tolerated by a worker." The transfer order was therefore deemed not to be an abuse of rights.

Thus, the Supreme Court gave legal expression to the reality of transfer frequently undertaken by employers, based on their extensive powers of discretion on personnel matters, and legally justified internal flexibility under the Japanese-style employment system.

(2) Farming out

Farming out is a change in personnel whereby, based on a farming out agreement between companies, a worker goes to work for the other company under orders, while still maintaining a labor contract relationship with the original company. In legal terms, this kind

[28] Hamaguchi, *supra* note 21, at 80. According to this note, the first of three principles of productivity decided when the Japan Productivity Center was established was that "improving productivity will ultimately expand employment, but from the viewpoint of the national economy, public and private sectors will cooperate in taking appropriate steps against temporary surpluses of manpower, to prevent unemployment as far as possible through reassignment, transfer and other means."

[29] Toa Paint Case, Sup. Ct., 2nd Petty Bench, Judgment, Jul. 14, 1986, 477 Rodo Hanrei 6.

of farming out constitutes an assignment of the employer's right to claim the provision of labor from the worker to a third party (the other company), and as such, the "consent of the worker" is required (Civil Code, Article 625 [1]). For this reason, in initial court precedents on farming out, it was thought necessary to have individual consent when sending a worker on farming out, as it differs from transfer in that the party receiving the provision of labor is different.

However, since the 1960s, i.e. the period of high economic growth, farming out to other companies in the same group going beyond transfer within the same company came to be a frequent event. In fact, farming out came to be undertaken on an everyday basis as one aspect of change in personnel indistinct from transfer, and with this, changes also appeared in case law. In particular, in a case where provisions on farming out were included in the work rules, internal procedures for farming out had been established as a system, and the possibility of farming out to an affiliate had been explained to the worker on joining the company, the court judged that the employer "had acquired the comprehensive right to order farming out based on the contract upon joining the company."[30] Thus, just as with transfer, a principle of case law recognizing the employer's comprehensive right to order farming out, particularly in the enlarged field of the internal labor market formed by corporate groups, emerged amid the systematic development and normalization of farming out in the period of high economic growth onwards. It may be said, then, that case law gave legal expression to farming out in the internal labor market, thus justifying it.

IV. Conclusion

In the foregoing, the relationship between the Japanese-style employment system and labor law in the period of high economic growth has been studied from the perspective of the reciprocal construction of law and society, drawing mainly on principles of case law. To close, the author will summarize what has been clarified by the discussion in this paper, from the dual aspects of the reciprocal construction of law and society—namely, the "construction of law by society" and the "construction of society by law."

Firstly, in terms of the "construction of law by society," the various principles of case law studied in this paper reveal an aspect whereby the law is truly is constructed by society, in the sense that these principles acknowledged the realities of the Japanese-style employment system and expressed them in the form of rules (norms).[31] The legal principles on

[30] Kowa Case, Nagoya Dist. Ct., Judgment, Mar. 26, 1980, 31 Ro Minshu 2-372.

[31] Of course, the principle of case law in labor law does not always have to be like this. It would also be possible to construct (relatively independent) legal principles at a distance from the Japanese-style employment system and other social realities; in fact, this kind of discussion actually existed during the period of high economic growth. On this point, see the author's "Rodo Keiyakuron [Labor contract theory]," in *Sengo Rodoho Gakusetsushi* [History of postwar labor law theory], ed. Tsuneki Momii (Tokyo: Junposha, 1996), 641ff. There, the author points out that there are three trends: "Labor contract theory reflecting Japanese-style employment customs as a reality in the com-

tentative hiring decisions and probationary periods, abuse of the right to dismiss, and adjustment dismissal expressed the employment stabilization function of the Japanese-style employment system, i.e. mass hiring of graduates and guaranteed employment until statutory retirement age, in the form of rules (norms). Meanwhile, the legal principles on trasfer and farming out expressed the function of acceptance of employers' powers of discretion in the form of rules (norms).

Secondly, what significance does the study in this paper have in terms of the "construction of society by law"? This point is related to the reality of the Japanese-style employment system as recognized by principles of case law. That is, even in the period of high economic growth when it was formed and became established, the Japanese-style employment system was almost solely established in large corporations and core companies; even if these were companies with 500 or more employees, the workers to whom they applied constituted only 25% of the total workforce.[32] It is beyond doubt that a reality differing from the Japanese-style employment system existed in small and medium-sized enterprises. But in spite of that, it was unquestionably the existence of these principles of case law, which by embodying the Japanese-style employment system, gave the impression that the Japanese-style employment system existed as a universal system in Japan, even though it only accounted for part of Japan's employment system. In that sense, the principles of case law became a force that sublimated (universalized) the Japanese-style employment system, which was merely one (albeit important) part of Japan's employment system, to something that represented the whole of it.

position of theory," "Labor contract theory distinguishing between Japanese-style employment customs as a reality and the composition of theory," and "Labor contract theory incorporating Japanese-style employment customs as a reality in the composition of theory within a range conforming to the basic principle of contracts."

[32] Sugano, *supra* note 24, at 6.