Developments and Issues in the Regulation of Illegal Labor in Japan

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Employment laws and their related systems in Japan first appeared in the form of state conscription in around the eighth century onward, and shifted over the course of history in the direction of employment that is fundamentally based on consensus. However, despite such changes brought about by economic progress and the establishment of contractual principles, there were no signs that such laws and systems were protecting the human rights of workers or fostering an independent labor movement, not only in the feudal period, but even after the Meiji Restoration in the late nineteenth century. Even the Labor Standards Act and other legislation enacted to protect workers under the Japanese constitution, which is centered on respect for fundamental human rights, have not been sufficiently effective. Instead, power structures supported by binding personal relationships and paternalism became commonplace in Japanese company organizations. As a result, contemporary Japan faces ongoing difficulty in sufficiently preventing harsh long working hours that undermine physical and mental health, and tackling the prevalence of harassment that denies workers their rights to personal character and dignity. In order to overcome this situation, it is hoped that active policy responses will be taken on the basis of an effective combination of hard law, using penalties and other such means, and soft law, using administrative guidance and other such approaches.

I. Introduction: Concepts of and Responses to Illegal Labor

In the current decade, labor laws and systems in Japan are in a period of major transition. As part of a series of major reforms following Japan's defeat in the Second World War, the Constitution of Japan established principles such as individual workers' guaranteed rights to work, the legal stipulation of minimum working conditions, and a society free of child labor (Article 27). By guaranteeing workers' rights to organize and engage in collective bargaining and action (Article 28), the constitution also established a system to overcome the inevitable difficulties that arise from individual labor relations (such as a lack of the equality and impartiality between contractual parties needed to support the principle of freedom of contract, workers conducting labor based on unilateral orders and other such relationships that tend to generate social hierarchies, and the potential for harmful effects on health and lifestyle to arise due to the content of obligations being to provide one's labor). While the fundamental framework of this structure remains the same, specific labor laws and systems founded on the constitution are changing significantly to respond to the considerable shifts in economic society.

At the same time, a dark shadow is being cast on the development of such changes by the breakdown of labor-management relations and retrogression to primitive labor relations in the workplace. Leaving the breakdown of labor-management relations aside as an issue to

be discussed in detail at another opportunity, here I would like to note the retrogression to primitive labor relations and its role as a powerful factor in encouraging reform to labor laws and systems in Japan.[1] The shift toward primitive labor relations is evident from the growing numbers of "black companies" (*burakku kigyo*). While "black companies" are generally perceived as companies that treat young people as expendable commodities, in legal terms the term refers to unscrupulous employers that almost deliberately fail to comply with the mandatory laws and regulations that should be applied to workers. For instance, there are numerous cases of employers that force workers to work long hours that far exceed the maximum working hours clearly prescribed in the Labor Standards Act without fulfilling—or by simply ignoring—the requisites for such work to be recognized as an exceptional case, or that make workers engage in hard labor without taking into account their duty to ensure that workers take days off and breaks from work. There is also frequent violation of "personal interests" (physical health, freedom, privacy and other such factors that allow individuals to lead their lives with personal character and dignity) in the workplace, and also a number of cases in which workers are placed under such mental strain that it leads to their death.

This paper addresses this situation by examining the actual conditions of employment in Japan and the state of the legal system in place to regulate it, and highlights the issues in the system that are factors behind the current situation. It then draws on these insights to present a few views on potential future directions.

II. Legal Regulations in the History of Employment

1. The Situation before the Meiji Period[2]

As in many other countries and regions, the institutional foundations of Japan as a unified nation originated from a social hierarchy based on statuses. People's rights and obligations were defined by their status, and contracts based on free will were not the foundation for economic activity. Examples of labor in the Nara Period (710–94), at the time when Japan first began to function as a unified nation, include the work of *nuhi* (domestic slaves), a group in the lowest rank of the hierarchy, who were supplied through the slave trade, and of *komin* (peasants who held land assigned to them by the government), who were under obligation to fulfil a number of different duties. In addition to being obliged to engage in hard labor in the imperial capital for a certain period each year without compensation (a system known as *saieki*), *komin* were frequently also put to work as necessary for a wide range of other purposes, work that was in fact an even greater burden than their initial obligations (Maki 1977, 10). On the other hand, aside from such obligatory labor, in this period it was also possible to put people to work having paid for their labor costs, under certain

[1] See Konno (2012).
[2] The following description is largely based on Maki (1977).

conditions. However, this was mainly used by government offices and other authorities, and therefore differed from modern employment in the sense that although the worker received wages they were not guaranteed the freedom to accept or refuse the work (Maki 1977, 11). However, even in the *ritsuryo* period (the period when the nation was governed under the *ritsuryo* system of criminal and administrative codes) from the Nara period to the thirteenth century, there was a system by which labor was provided under consent and wages were paid. At the same time, even this form of labor, which was the closest to the modern form of employment, operated on the premise of difference in the status of the person employing and the person being employed, and free consent transcending differences in status did not exist with regard to employment (Maki 1977, 13*ff.*).

It is thought that in the *ritsuryo* period—which, as noted above, was the first period in which administration through a legal system came into widespread use in some form—the types of work that had legal significance as people providing their labor to others were the slave trade, unpaid conscription, paid conscription, and employment based on consent on the premise of difference in status. There was no sign at this point of the concepts of regulating severe heavy labor or improving the efficiency of labor relationships, and it can easily be inferred that the prohibition of the slave trade of *komin* was introduced with the need to procure taxes and secure public labor as necessary in mind.

In contrast, the concept of *hoko* (service) that developed in Japan's feudal period from the thirteenth century onward differed in some aspects from the institutionalization of labor in the *ritsuryo* period. Particularly from the seventeenth century, following the establishment of the Tokugawa shogunate (1603–1867) and the beginning of a period of stability in the state organization, *hoko* arrangements were, in principle, established on the basis of the consent of the parties concerned. There were also certain limitations on the period and the work duties, and it was assumed that remuneration would be paid—albeit with certain differences according to whether the *hoko* was for samurai families, merchant families, or farming communities. This could therefore be interpreted as "a transitional period" during which there was a "shift from relationships based on the subordinate status of workers, to employment relationships based on laws of obligations" (Maki 1977, 47). However, although status did not have the same implications in feudal society as it had during the *ritsuryo* period, differences in status still formed the foundation of employment relationships. The Tokugawa shogunate's institutional approach to *hoko* was to regard the relationship between the *hokonin* (servant) and their *shujin* (master) as a hierarchical relationship like that between a master and his retainer. Up until its fall, the shogunate maintained the framework that the *hoko* relationship could only be terminated by the master, on the premise that a *hokonin* should remain loyal toward their master, and this approach allowed the general perception of employment relationships as "master-retainer relationships" to firmly take root (Maki 1977, 47). It must be noted that the Tokugawa shogunate did adopt certain approaches that seem to suggest that the concept of protecting personal liberty was recognized to a certain extent, as it consistently enforced a strict ban on the slave trade, and also initial-

ly refused to allow *hoko* arrangements for a period limited to one year. However, neither of these provisions seems to involve the concept of protecting servants' rights or restricting overwork. The prohibition of the slave trade was due to fears that, as peasants were the source of supply for the slave trade, the trade could lead to the collapse of farming communities and a drain on the agricultural labor force (Maki 1977, 94), while the ban on *hoko* for short term periods was aimed at avoiding the potential instability in *hoko* relationships and thereby stabilizing the status-based social order (Maki 1977, 88).

As this section has described, employment in Japan prior to the Meiji Restoration (1868) started out as a system by which manpower was mobilized through the use of authority, and although it later shifted to a pseudo-modern system under which labor was provided on the basis of consensus and the payment of remunerations, it can be suggested that in reality the outcomes of such a system were the justification of exercising of authority over workers and strong administrative power based on status. While still lacking the institutional foundations required for labor relationships involving overwork and violations of workers' human rights to be recognized as unjust or illegal, the employment system in Japan throughout this period of its history can be surmised to have established the perception of employment relationships as "master-retainer relationships" as a universally-accepted view, at the same time encouraging workers to submit to such conditions through such factors as the payment of wages and the certain amount of paternalism that stemmed from such feudalistic master-retainer relationships.

2. The Situation before the Enactment of the Factory Act

Not long after the Meiji Restoration, a symbolic incident occurred in which Japan faced international criticism for the antiquated nature of its employment relationships—the earliest known incident of such criticism. This was the incident of the Peruvian cargo ship *María Luz* in 1872.

The *María Luz* entered the port of Yokohama for repairs on June 5, 1872. While it was there, one of 231 Chinese coolies onboard escaped to avoid the hard labor they were subject to, and was rescued by a British warship. As the British representatives determined that the *María Luz* was a "slave transport ship," the British consul to Japan made an appeal to the Japanese government to rescue the Chinese coolies. Foreign Minister Soejima Taneomi responded by decisively rescuing the Chinese, and the ship's captain was prosecuted at a specially-established court. The court permitted the ship to leave on the condition that it release the Chinese coolies, based on the grounds that the "immigration contract" under which the Chinese coolies were working was essentially a slave contract and thereby contrary to the laws of humanity. At the same time, the ship's captain's defense cited the Japanese custom by which women could be forced into prostitution (*shogi seido*) as an example that there were "far harsher slave contracts" that were considered valid in Japan. This highlighted the fact that Japan was not in the position to criticize the slave trade given that such prostitution was essentially a form of slavery, and the Japanese government had no choice

but to issue an act to emancipate *geisha* and prostitutes in October that year.

In reality, the emancipation act did not lead to the prohibition of prostitution or the abolition of the pleasure quarters, but only placed prostitutes in harsh circumstances under which they returned debts through prostitution (Maki 1977, 268). However, it is at least notable that it was possible for labor conducted in relationships between individuals to resemble slave labor, and that at this time there arose concrete examples of the fact that the first step to liberation from such circumstances was employment through a contract based on free will. On one hand, this represented the gradual materialization of the development from *hoko*, a power structure centered on master-retainer relationships, toward a modern legal system of employment based on contracts. On the other hand, it is undeniable that the framework of "contracts based on free will" in fact essentially legally justified the master-retainer relationships of *hoko*, and opened up the way for the spread of even harsher forms of heavy labor.

As the Meiji Period progressed, Japan's factory labor system was rapidly modernized amid the government's calls to "enrich the nation and strengthen the army," but before long the grave conditions of the forms of labor that had developed under such efforts were gradually brought to light.[3] Inhumanely harsh working conditions were widespread, including cases such as severe late-night work in spinning mills (Ministry of Agriculture and Commerce 1903, 1:46), employers forcing workers to stay by deducting "guarantee money" or "compulsory savings" from their wages (Ministry of Agriculture and Commerce 1903, 1:117), and long working hours (a 12 hour day was almost the shortest working day, and 16 to 18 hour days were considered a matter of course) (Ministry of Agriculture and Commerce 1903, 1:308). It is also well known that the factory girls (*joko*) working in the silk mills were confined in dormitories and had limited freedom even outside of work (Hosoi 1925, 164). Moreover, under Japan's legal system at the time these labor conditions were hardly ever recognized as illegal. It could be said that the modernization of the factory labor system also even diminished the little brakes that the paternalistic system of the feudal age had been able to place on working conditions, and in turn less institutional and social consideration was given to the situations in which workers were placed. It was therefore natural that it became urgently necessary for legislation to be established to address such working conditions in factories. This meant addressing the problem of what specific principles and content such an act should contain.

3. The Enactment of the Factory Act and Issues of Legal Regulation

Was the enactment of the Factory Act achieved in a form that incorporated principles and content that took health and safety, and freedom and human rights into consideration? To some extent, such a form was realized.

[3] The following descriptions are based on Ministry of Agriculture and Commerce (1903), Yokoyama (1899) and Hosoi (1925).

As the difficult conditions faced by factory workers began to come to light around the end of the nineteenth century—following developments such as the publication of a report *Shokko Jijo* (Ministry of Agriculture and Commerce 1903), the government body responsible for addressing labor issues—awareness of the necessity of a legal system for protecting workers gradually became more widespread. However, the actual work of enacting laws and regulations ran into difficulty. The Ministry of Agriculture and Commerce frequently prepared bills to protect factory workers and other workers, but both the financial and political circles were for the most part not ready to accept such proposals, and comprehensive laws and systems to protect workers were not enacted before the Russo-Japanese War (1904–1905). With the growing competitiveness of Japan's production system, which had started out as government enterprise and gradually shifted to private enterprise, extremely harsh labor for long hours without breaks and squalid working environments took root in the factories such as the mills that powered the silk-spinning industry, a powerful export industry, and recognition of the necessity to tackle such conditions, particularly from the point of view of hygiene and health, gradually began to develop. The Factory Bill was submitted to the Diet several times, but failed to get as far as deliberations, and ultimately it was not until 1911 that it was finally passed.[4] A discussion of its specific content is beyond the aims of this paper, but the distinctive nature of the Factory Act from the point of view of responses by legal systems regarding forms of labor was that its emphasis was on the contents that responded to appeals from industrial circles for the stable supply and maintenance of the labor force, rather than elements aimed at guaranteeing the personal interests of workers on the whole and ensuring "decent work" (work that meets human values and aspirations for quality of life and a dignified existence).

The regulations in the Factory Act that directly protected workers can be divided into guarantee of minimum age, the establishment of the concept of "protected factory workers," and limited industrial accident compensation. The minimum age prohibited taking on people under the age of 12, excluding cases of allowing people aged ten or over to continue work (Article 2, Paragraph 1). However, employers were permitted to employ people aged ten or over provided that they had permission from the authorities. Workers under 15 years of age and female workers were defined as "protected factory workers," and were prohibited from working more than 12 hours a day (Article 3), working late at night, namely, between 22:00 and 4:00 the following morning (Article 4), and engaging in dangerous or harmful work (Article 9). The act also established the provision that in principle workers should receive two days off per month and breaks in the working day (a 30 minute break for work lasting more than six hours, and a one hour break for work lasting more than ten hours) (Article 7). At the same time, it must also be noted that strong opposition from the textile industry led to the inclusion of a stay on the prohibition of late night work for the

[4] For information on the events leading up to the enactment of the Factory Act see Oka (1917, 59*ff*.).

first 15 years after the act came into effect, during which time two-team systems of day and night shifts were permitted (Article 5). To address the need for assistance in the case of illness or injury, provisions were also included to ensure that a certain amount of assistance would be provided by imperial ordinance in the event of work-related illness, injury, or death that was not due to the gross negligence of the factory worker (Article 15). These provisions themselves were insufficient based on current standards. Moreover, the number of workers to whom they actually applied was also limited, given that the act was based on the premise that it would only be applied to factories that normally employ 15 people or more, and that factories could be exempted from its application by imperial ordinance in the event that it was not deemed dangerous in terms of the nature of the operations.

As described above, it can be suggested that while the external conditions for the Factory Act to be enacted were in place, there was extremely strong resistance from financial circles, and the bill that was finally enacted as the culmination of a great amount of efforts was extremely limited in its capacity as a law to protect workers. It is also noted that its enactment was largely due to the initiative of bureaucrats from the Ministry of Agriculture and Commerce and scholars from organizations such as the Association for the Study of Social Policy (*Shakai Seisaku Gakkai*), as opposed to calls from labor movements, political movements, or other such action by workers themselves.[5] In that sense, it was natural that there were suggestions that the act was aimed not so much at protecting workers as preserving a labor force (Ishii and Hagisawa 1979, 19).[6]

On the other hand, we cannot overlook the fact that due to various factors—including the publication of and popular support received by *Joko Aishi* (The Pitiful History of Factory Girls) (Hosoi 1925) which followed on from "Conditions of Factory Workers" in presenting the real conditions faced by factory girls in the silk mills; the prosperity of the labor union movement; the ground that was gained by the proletarian parties; the popular democratic movement in the Taisho period (1912–26), and the influence of the Russian Revolution—the Factory Act was revised repeatedly and gradually furnished with provisions that could actually provide protection for workers. In addition to the expansion of its scope of application to factories employing ten or more factory workers, when the act came into effect in 1916, factory inspectors were assigned to factories nationwide to oversee its implementation, and working hours were also gradually shortened (in 1939 they were shortened

[5] The Ministry of Agriculture and Commerce published a report entitled *Shokko Jijo* (Conditions of factory workers) in 1903, and frequently drew up bills and sought to secure understanding from relevant parties, particularly the financial circles. Moreover, the Association for the Study of Social Policy supported the enactment and enforcement of the Factory Act in their responses to government inquiries (Reports from 1909, 1910 and 1916).

[6] In explanations of the Factory Bill, the government representative noted that the proportion of illness among factory operatives was extremely high in comparison with that of the average for general citizens, and even higher than that of "prisoners in jail," and went on to say that "if such circumstances are in fact the case, this constitutes an issue that is highly related to the military preparedness for the national defense of our country" (Records of the Imperial Japanese Diet, vol. 8, 207).

to a maximum of 12 hours for male adult workers). In addition to the Factory Act, the Mining Act, the Act on the Minimum Age of Industrial Workers, the Shops Act, the Workers' Accident Assistance Act, and other such acts each established provisions to protect workers. While many of these regulations were temporarily suspended due to the Second World War, on the whole the laws and systems to protect workers had been enriched to the extent that they would be able to make a significant impact once the Labor Standards Act was enacted in the postwar period.[7] Two key points of such prewar legislation that are noted for their links with the Labor Standards Act and the Labor Contract Act are firstly the system of factory inspectors (this was naturally a factor behind the establishment and smooth implementation of the system of labor standards inspectors), and secondly the enactment and notification system for rules of employment prescribed in Article 27-4 of the enforcement ordinance of revisions to the Factory Act in 1926 (this became an institutional guideline that encouraged the tendency to prioritize rules of employment in postwar labor relationships).

As described above, improvements were undoubtedly being made to the specific regulations that made up the provisions for protecting workers. However, on the whole Japan's labor laws and systems prior to the Second World War ultimately failed to express the principles of protecting workers' human rights or respecting their personal interests. There was also no sign of the influence of labor unions or the trends in labor movements opening the way for the development of laws to protect workers. Even in the case of specific provisions to protect workers—such as provisions for curbing long working hours, giving consideration to workers requiring protection, and aid in the case of industrial accidents—if such provisions have been developed under the agreement of industrial circles from the point of view of stably securing good quality manpower, the tendency to curb long working hours and violations of workers' personal interests is diminished as long as manpower can be secured. Moreover, efforts to secure the human rights and freedoms of individual workers in the workplace and to control violations of those rights and freedoms will be determined from the point of view of maintaining team work and securing productivity as opposed to respecting personal interests, and it is easy to expect that this trend will gather increasing strength if the power of the labor unions declines.

It is surmised that such developments significantly determined the way in which the laws and systems to protect workers would take shape when Japan's legal system was completely reset under the new constitution following the Second World War.

III. Issues in Regulations Established by Legislation to Protect Workers

In addition to provisions of general fundamental rights such as respect for basic human rights, prohibition of forced labor, and the right to the pursuit of happiness, the Constitution of Japan, which took effect in 1947, set out the guarantee of the right to a certain

[7] For more on these points see Watanabe (1996, 11*ff*.).

standard of living (Article 25) and provisions for the protection of workers, such as the right to work, the legal provision of working conditions, and the prohibition of child labor (Article 27) as direct rules of the constitution. For the most part the content of these provisions could be said to have been aimed at ensuring that respect for individuals—a concept that had not materialized before the Second World War—is also consistently applied to workers as another form of individual. However, there is significant reason to question whether or not this has actually been achieved in concrete terms, as is clear from the harsh handling of workers that continues even today on a certain scale. What are the factors behind or foundations of such a divergence between the principles of legislation and the reality?

Firstly, it is necessary to note the fact that the short period between the end of the Second World War and the enactment of the Labor Standards Act was covered with a provisional revival of the Factory Act. Namely, with Imperial Ordinance No. 600, "Annulment of Wartime Exemptions to the Factory Act" and Imperial Ordinance No. 601, "Annulment of the Factory Workplace Management Ordinance, etc.," of October 24, 1945, the government abolished the special exceptions that had been implemented in the wartime to relax the content of the Factory Act, and adopted the makeshift measure of temporarily reviving the Factory Act, Mining Act, and the Workers' Accident Assistance Act as a stopgap until the enforcement of the Labor Standards Act (Watanabe 1996, 12). It is particularly noted that the work of the labor inspector system, which had continued to the smallest detail even during the war, was once again reviewed as part of the revival of the Factory Act, and before long was renewed as the system of labor standards inspectors. As is clear from prior research (Watanabe 1996, 13), while Japanese representatives were not able to guide the development of the Labor Union Act, they were to a considerable extent able to shape the Labor Standards Act, despite being under the guidance of GHQ. On one hand, this allowed them to construct rules that were compatible to the labor relations that actually developed along with the circumstances faced by Japan. On the other, it also meant that the limitations and inconsistencies that were intrinsic to the existing laws and systems for protecting workers remained in the new act.

For instance, the GHQ Advisory Committee on Labor called upon the Japanese representatives to consider a succession of points, in which the committee suggested that it was questionable that bonuses be excluded from average wages, and recommended that deductions from wages should be strictly regulated and that it should be mandatory to ensure that wages after deduction were sufficient to cover costs of living. However, many of these points were not accepted as they were. Instead, they were adjusted by the Japanese representatives and settled in a form that matched the trends in the economic environment and labor market at the time (Watanabe 1998, 60).[8] On the other hand, the Labor Standards Act was also devised under firm links with the administration of the labor standards inspection

[8] For more on the specific course of events such as the detailed content of GHQ's demands and the Japanese government's responses, see Nakakubo (1998, 60*ff.*).

system. The civil validity of labor contracts was left up to the provisions of the Civil Code—apart from the application of the minimum standards set out by the Labor Standards Act to contracts that fail to meet those standards—and no provisions whatsoever were established regarding the conditions required for the validity and legal consequences of hiring, reassignment, secondment, disciplinary action, or dismissal, and other such practices. Moreover, as the prohibition of discrimination was established as a provision entailing penalties, no provisions were set out regarding compensation for damage for, or the invalidity of juristic action against, discrimination on the grounds of sex, creed, or other factors. Furthermore, in the period of rapid economic growth that followed the practice of long-term employment and internal labor markets took root, and coupled with the principle of treating one's company as one's family, the connections between companies and their employees developed into strong human relationships. Consequently, on the one hand it became the norm for companies to provide benefits and limit the number of dismissals, while on the other, unique power structures that differ from normal civil society became widespread. This in turn generated a tendency for marked neglect of workers' personal interests and rights to protect those interests, and the structures of the Labor Standards Act and related laws were almost powerless against this.

Furthermore, concurrent with the enactment of the Labor Standards Act, the Industrial Accident Insurance Act was also enacted to officially guarantee compensation in the event of industrial accidents. The enactment of the Employment Security Act, the Minimum Wage Act, the Industrial Safety and Health Act, and other such laws that also followed undoubtedly allowed for fine-tuned responses that appropriately addressed the enhancement of industrial structures, the diversification of forms of employment, and other such developments, at least in the fields in which it was possible for government inspection, guidance and other such intervention to function.

As described above, even under the application of the Labor Standards Act and other acts established in the postwar period, the legal systems that have covered the protection and support of workers since the Meiji Period remained the same in the fact that they involved penalties, advice, and guidance as tools for enforcement, with a focus on responses centered on administrative supervision. It is undeniable that until the 1970s the labor unions held a certain extent of power despite this and supplemented and thereby supported the legal system for the protection of the rights and benefits of individual workers. However, following the two oil crises and other such developments, suggestions arose that Japan was suffering from "advanced nations' disease"—the adverse effects suffered by modern industrial societies such as the UK—and the labor movement began to decline, in turn highlighting the lack of substance of the measures to overcome the issues faced by workers in the workplace.

IV. Methods of Regulating Illegal Labor

1. The Labor Standards Act and Penalties and Administrative Supervision

How are the historical developments described above specifically reflecting themselves upon the state of illegal labor and responses to it within current labor laws and systems?

Firstly, as noted in the introduction to this paper, when the concept of illegal labor is limited to cases in which workers are illegally forced to engage in harsh labor that can undermine physical and mental health and safety, the most typical examples of such illegal labor practices in Japan at present are the normalization of long working hours, work late at night and on prescribed days off, as well as bullying, sexual harassment, "power harassment" (using one's authority to harass subordinates), and other repeated violations of personal interests in labor relationships. The legal tools that are potentially available for suppressing and offering aid in response to such situations are supervision and crackdown systems on the basis of the Labor Standards Act and related laws, as well as civil measures based on civil laws and regulations such as the Labor Contract Act.

The structure of the Labor Standards Act covers the elements that constitute criminal conduct in each article of the act, encourages employers that have actually committed violations to make corrections based on guidance and recommendations, etc. from labor standards inspectors, and allows for employers to be turned over to the public prosecutor's office in the case of malicious intent.[9] If we take working hours as an example, the maximum number of working hours is 40 hours per week, eight hours per day, and work on prescribed days off is also prohibited in principle. The system allows for more relaxed terms regarding what constitutes direct violations of the act due to the normalization of overtime work or work on holidays under labor-management agreements (agreements on overtime and holiday work based on Article 36 of the Labor Standards Act, also known as "Article 36 Agreements"), but under Article 37 (Paragraphs 1–4) employers are obliged to ensure that workers receive extra pay for any work that falls under either overtime, work on days off, or work at night—or risk facing penalties—and there is sufficient potential for cracking down on violations of this article. As the normalization of work in excess of legally prescribed working hours or late at night or on days off without extra pay truly undermines physical and mental health, this should be an effective means of protecting workers from being forced to engage in harsh labor.

However, even if violations of Article 37 are in fact prevalent, such violations are not being prevented or curbed through responses that exercise the functions of the labor standards inspector system. Two key issues can be highlighted as reasons for this. Firstly, across Japan there are only 321 labor standards inspection offices and only just under 3,000 in-

[9] However, for a criminal violation of the Labor Standards Act to actually be established it is necessary for deliberate intent to be ascertained when determining illegality.

spectors with more than 52 million workers and more than 4 million places of business under their jurisdiction. Given the limits on resources, it is clear that there are extremely large physical restrictions on the ability of labor standards inspectors to crack down on illegal labor. It is therefore necessary for them to attach orders of priority to the cases that need to be cracked down on, and, even in cases involving violations that are equal in terms of the prescriptions of the Labor Standards Act, to respond first to the case that involves higher levels of actual maliciousness. Moreover, considering the need to ensure that such crackdowns are implemented efficiently, as targeting companies of and above a certain scale rather than exposing the violations of small and medium sized companies clearly provides more effective deterrents, even companies where violations are liable to occur are not always subject to having such violations exposed. In other words, in the current circumstances it cannot be expected that the system can effectively crack down on and demonstrate its capacity to curb normalized illegal labor.

Secondly, the premise for violations of Article 37 to be established is that the same article can be applied to the relevant worker, and the types of workers who are said to work too much are often white collar workers who have a certain amount of flexibility to determine their own working hours and how they conduct their work. Companies therefore treat such workers as "persons in positions of supervision or management" ("supervisors and managers") as defined under Article 41 (Item 2) of the Labor Standards Act, allowing companies to refuse requests for the payment of extra pay on the grounds that such employees are excluded from the provisions regarding working hours under the terms of said article. Even if the labor standards inspector begins the process of exposing a company, if it is necessary to determine whether the relevant worker falls under the "supervisors and managers" category as a premise for this, this comes under the jurisdiction of the courts, and is no longer under the scope of administrative supervision. Moreover, even if the employer does not fall under the "supervisors and managers" category, in the case of white-collar work there are many times that do not clearly qualify as working hours, and there are a number of cases in which it is extremely difficult to determine whether or not the employee actually engaged in overtime work when such time is included in calculations. As labor standards inspection offices and inspectors also do not have the authority to determine what classifies as working hours, they lack the premise for exposure if it is not made clear. In other words, it can be said that the labor standards inspection system is operating under a legal structure that does not allow it to sufficiently demonstrate its functions as a tool for protecting workers from long working hours and late night work, etc. While there is no end to the number of lawsuits demanding extra pay on the grounds of Article 37 of the Labor Standards Act, there are next to no precedents of violations being exposed by a labor standards inspector and a court disputing whether or not a crime is established under Article 37, and also almost no precedents of employers actually having penalties imposed upon them. In addition to the fact that it is difficult to take cases down the route of criminal procedures—as crimes under the Labor Standards Act are in principle intentional crimes, are difficult to prosecute as

criminal cases, and most cases are dealt with fines—it is also undeniable that the structural issues raised above are significantly diminishing the intrinsic functions of administrative supervision.

The same issues arise in applying the other provisions of the Labor Standards Act. If we look up the existing judicial precedents related to the various provisions of the Labor Standards Act, particularly in the last fifty years almost all cases have been civil cases, and there have been no cases in which the administrative supervision of labor standards seeking to "crack down on illegal labor" is reflected. There are many civil cases in which long working hours that far exceed the content of an "Article 36 Agreement" are approved, and cases in which workers have no choice but to work on days off or late at night are prominent, but in spite of this, labor standards inspectors have not exercised their functions for ensuring that employers engaging in illegal labor practices receive punishment.

2. The Functions of the Equal Opportunity Act and the Child Care and Family Care Leave Act

On the other hand, illegal labor also encompasses potential issues that accompany the extension of the concept of human rights, and there are also many issues with regard to the legal responses to such issues.

The discriminatory treatment of workers based on their nationality, creed or social status is also prohibited in labor contract relationships (Labor Standards Act, Article 3), and equal wages are guaranteed for both male and female workers (Labor Standards Act, Article 4). However, given that, as described above, it is not possible at the level of the Labor Standards Act to sufficiently respond to illegal labor that is in violation of such regulations, at present various other laws are adding certain regulations on discrimination or different treatment related to the worker's sex, whether or not the worker has a disability, old age, or form of employment. Gaps in treatment of workers due to discrimination or differential treatment without reasonable grounds inevitably come in a variety of different forms, and are also varied in extent and scale. There are also a significant number of cases in which it is difficult to ascertain whether or not the case falls under the type of "illegal labor" that is addressed in this paper. However, at the least, there is no question that equal treatment for workers is a principle that forms the basis of human rights, and that forms of employment that violate such rights may fall under the category of illegal labor.

In Japan, the practice of long-term employment and seniority-based wages and personnel systems, which took root in the period of rapid economic growth, led to the establishment of the category known as "full-time housewives," and also to the development of clear disparities in terms of labor conditions and personnel treatment between males in their twenties to early sixties and other groups (women, older people, and minors) in companies, as well as highly severe differences between the treatment of regular employees and non-regular workers. It can be said that the certain amount of "success" of such "Japanese style employment practices," combined with the ubiquitous trend of strong and cooperative

labor-management relations between companies and company-based unions, has led to increased discrimination in Japanese business society on the basis of sex, health, age, and form of employment, and developed the conditions by which workers accept such circumstances.

However, the international trend toward seeking to abolish discriminative treatment on all fronts, and the development of various factors such as women gaining high levels of education and pursuing professional careers, the increasing use of electrical appliances for housework, the progressive decrease in the birthrate and the development of nuclear families—factors that arose due to the establishment of a mature society in Japan following its achievement of high economic growth—encouraged focus to first be placed on establishing a legal system aimed at abolishing gender discrimination in the workplace. In 1985, the Act on Securing Equal Opportunity and Treatment between Men and Women in Employment (Equal Opportunity Act) was enacted as a revision of the Working Women's Welfare Act. As the objective of this paper is to investigate the legal system and issues regarding illegal labor, we will not look at a detailed account of the contents of the Equal Opportunity Act and its later developments, but it is well known that the act underwent a process by which it was revised into effective content, to the extent that it could ensure a marked decrease in blatant gender discrimination, and, at the least, types of illegal labor that involve discriminatory treatment based on sex are on the decline.

The questions that need to be addressed are in what way the Equal Opportunity Act seeks to eliminate labor that is in violation of the relevant regulations—as has not been achieved by the Labor Standards Act—and if such approaches are effective, then why. Here the key point is the division of functions and the difference in effect between "hard law" and "soft law." If we distinguish the nature of each of the types on the basis of their functions, "hard law" is mainly concerned with using penalties and civil compulsory provisions, etc. to correct violations, and has its effectiveness secured by the court, while in contrast "soft law" is mainly focused on providing measures to present administrative guidance and standards or models regarding practical legal effects, and encouraging employers to conform with such standards by repeatedly noting employers' "obligation to make a sincere effort" (Araki 2004, 19*ff*.). While the typical forms of the conventional legal system have largely been directed toward hard law, there are suggestions that there are now an increasing number of fields in which it is effective to adopt the approaches of soft law. Acts such as the Equal Opportunity Act, the Child Care and Family Care Leave Act, and the Part-Time Employment Act are thought to be strong precedents in this trend toward soft law.

The initial Employment Opportunity Act did include frequent mention of employers' "obligation to make a sincere effort," and while the legal effectivity of this was questioned, it did in fact encourage the improvement of personnel management systems in companies, and understanding of gender equality in the workplace became more the norm as the promotion of women saw a certain amount of progress. These developments in turn led to the dramatic progress, expansion and increased depth of the Employment Opportunity Act that

followed. In issues such as work-life balance and information management—areas in which it is necessary to apply new values—it is also clear that the guiding approaches of soft law are better adapted than the methods of hard law, in which courts seek to draw clear-cut decisions between right and wrong.

However, in rectifying the illegal labor that directly violates the human rights, health, and safety of workers, it is essential for social rules that completely refuse to accept such illegal labor to be consistently upheld, and it is undeniable that the functions of hard law are still beneficial as a method for doing so. While the correction of illegal labor is a field in which the benefits of soft law are recognized in terms of the spread of new senses of values, there are in fact also a considerable number of cases in which a court decision which establishes a clear recognition of illegality should be utilized, and also many situations in which administrative functions are effective. For instance, cases where employers intentionally develop human resources management that makes it impossible for workers to take child care or family care leave, and said workers are faced with the choice of either pushing themselves to continue working with hardly any leave, or having no choice but to leave their jobs, should be clearly dealt with as illegal labor practices—in addition to demanding compensation for damage, it is necessary to confirm the suspension of validity or invalidity of the rules of employment, etc. in accordance with the Labor Contract Act as the basis for taking measures, to apply government supervision and crackdowns, and ultimately consider penalties based on defined requisites. This is not only because ensuring that workers are able to take child care and family care leave is necessary in order to respect their private lives, but also because such care contributes to supporting Japanese society, given its declining birth rate and aging population, and any measures by employers or companies that seek to obstruct the provision of such leave should be strictly abolished.

As this suggests, even in fields in which situations should by nature be dealt with using the flexible guidance of administrative bodies, in cases in which the conduct of employers violates workers' fundamental rights, such as their human rights and health, forceful measures need to be considered as responses to illegal labor.

3. Regulations through the Labor Contract Act

Let us now consider how responses to illegal labor are being achieved, and how they should be achieved, with regard to the field of labor contracts for which the Labor Contract Act should be applied.

In principle, the means of addressing illegal situations or illegal conduct in the field of civil law are such that in the case of contracts it is possible to dissolve or terminate the contract with the other party and receive compensation for damage, and that in the case of other legal conduct, it is possible to receive compensation for damage for illegal conduct. In both cases, the fundamental structure is being able to confirm invalidity. In response to actual conduct, damage compensation for illegal conduct is possible.

The same is true for labor contracts. After providing definitions of the parties of a la-

bor contract, namely, workers and employers, from Article 3 onward the Labor Contract Act prescribes the principles that apply to labor contracts, and also sets out the minimum provisions regarding the establishment, development, and termination of labor contracts. It does not differ from the field of general civil law in terms of the fact that in the event of violations of these provisions, confirmation of invalidity, denial of designated validity, and damage compensation, etc. may be recognized. However, do such principles also have completely the same functions in the case of illegal labor that violates workers' human rights, and merely influence the amount of damage compensation and factors for determining confirmation of invalidity?

We should first note that of the types of cases that have become a problem as illegal labor in Japan in recent years, cases involving conduct that violates personal interests in the workplace, such as bullying, power harassment, and sexual harassment, particularly encompass issues regarding the state of civil responsibility. Of course, in many cases such conduct is coupled with the aforementioned labor such as labor for long working hours and labor involving forced restrictions on freedom, but in a considerable number of cases it is not dealt with using the penalties of the Labor Standards Act, etc. or government supervision or crackdown provisions, and responses are focused on civil compensation for damage. As a result, from the point of view of the operation and issues of the legal system to address illegal labor, it is important to confirm how the Labor Contract Act and other general civil laws and regulations are serving their functions, or how they can serve their functions in response to bullying and harassment that leads to the violation of personal interests.

Looking at relevant court precedents concerning workplace bullying and harassment, etc., in many of the cases it has been approved that compensation for damage should be paid by the direct perpetrator on the grounds of illegal conduct under Article 709 of the Civil Code, and that compensation should be paid by the employer (the company) on the grounds of the liability of employers under Article 715 or liability for nonfulfillment of obligations under Article 415. One symbolic court precedent, in which the wording of an answerphone message (in which the victim was aggressively told to hand in his resignation and effectively threatened) was recognized as illegal power harassment,[10] states that with regard to the criteria required for power harassment to be illegal conduct, the case constitutes illegal conduct under Article 709 of the Civil Code as violation of the victim's personal rights only in the case that it is assessed that in the pursuit of their work duties a supervisor, etc. overstepped or abused the status or authority afforded to them in their role in handling their subordinates, and engaged in conduct that placed tangible or intangible pressure significantly beyond the scope of what a reasonable person would tolerate from an objective point of view in accordance with socially-accepted ideas. It then sets out a specific judgement in line with these criteria. As a result, other types of harassment claimed by the victim, the worker, in this case—such as other inappropriate messages on the victim's answer phone, or

[10] The Windsor Hotels International Case (Tokyo District Court, Mar. 9, 2012), 1050 *Rohan* 68.

the fact that the victim was forced to consume alcohol—were not recognized as illegal conduct. Here the criteria for processing cases of the inappropriate pressure placed upon workers through the hierarchies in corporate organizations are designated within the framework of general civil law, and the distinctive characteristics of labor relationships are not reflected on decisions.

Moreover, in one precedent related to the legal responsibility of an employer (in this case, the employing company) in bullying and harassment,[11] an employer that criticized, demanded explanations from, and engaged in other conduct to influence a worker with regard to union activities, continuing persistently and until late at night, to the extent that the worker developed a mental disorder, was recognized to be subject to the "liability of employers" set out in Article 715 of the Civil Code, and was ordered to pay compensation for damage. However, the court rejected the plaintiff's claim that the employer had violated their "duty to ensure the health of workers," without particularly addressing the significance or requisites of said duty. In another case in which it was recognized that the victim had been subject to illegal sexual harassment, and the company was ordered to pay compensation for damage on the grounds of the liability of employers,[12] although the court recognized the liability of employers under Article 715, it did not touch on responsibility under the Labor Contract Act. In contrast, there are still a remarkable number of cases in which bullying and harassment is recognized[13] in cases of workers seeking damage compensation for "violations of the duty to ensure safety," which was recognized prior to the enactment of Article 5 of Labor Contract Act, but all cases simply determine whether or not there is duty to ensure safety or whether or not that duty was violated, and there are few cases in which the grounds are sought in Article 5 of Labor Contract Act.

As noted above, it can be said that in the present situation courts almost only process cases regarding conduct that violates workers' personal interests using the framework of general civil law, and the Labor Contract Act is hardly used at all.

In parallel with Paragraphs 2 and 3 of Article 1 of the Civil Code, Paragraphs 4 and 5 of Article 3 of the Labor Contract Act establish the principle of good faith and provisions on the abuse of rights with regard to labor contracts. The Labor Contract Act then goes on to prescribe the "duty to ensure safety" (Article 5) as an obligation under positive law. As the Labor Contract Act is regarded as a special civil law, the principle of good faith, abuse of rights, and duty to ensure safety designated in the act should be in line with the unique legal nature of labor contract relationships, unlike the content that is recognized under the comprehensive provisions set out in the general articles and general rules on obligations of the

[11] The Kenshinkai Medical Corporation Case (Osaka District Court, Apr. 13, 2012), 1053 *Rohan* 24.

[12] Company C Case (Osaka District Court, Nov. 29, 2012), 1068 *Rohan* 59.

[13] Recent cases include the Case of Honda Cars Corporation A (Osaka District Court, Dec. 10, 2013; 1089 *Rohan* 82) and the Case of Social Welfare Corporation Y (Okayama District Court, Apr. 23, 2014; to be included in law reports).

Civil Code. For instance, the aforementioned duty to ensure the health of workers may also be established as part of the duty to ensure safety in Article 5, but in fact it is also sufficiently possible for it to be established as the materialization of "the principle of good faith in labor contracts" in Paragraph 4 of Article 3. If we make effective use of the principle of good faith and duty to ensure safety under the Labor Contract Act and also combine the fact that Article 1 of the Labor Contract Act cites "protection of workers" as one of the objectives of the act, illegal conduct that clearly violates workers' personal interests, such as persistent bullying or harassment should naturally be dealt with in a special manner on the basis of the Labor Contract Act. To be specific, it is conceivable that employers' obligations such as the duty to ensure a safe and comfortable workplace environment and respect for personal interests can be derived from the principle of good faith of Paragraph 4 of Article 3 of the Labor Contract Act, and that in response to violations of these obligations an amount of compensation that is sufficient to potentially act as a deterrent could be approved on the basis of the principle of protecting workers under the Labor Contract Act. It is of course undeniable that, as is clear from the recent trends in judicial precedents, particularly those concerning industrial accidents, there are cases in which factors on the side of the worker are taken into consideration, and decreases may in fact be made to the amount of compensation based on factors attributable to the worker and on the basis of comparative negligence. However, if such adjustments are made, it is also natural to reflect the objectives of the Labor Contract Act and the make-up of employers' duties on the amount of compensation. This point is an issue to be addressed in the future, but the fact that the Labor Contract Act—which was enacted as a special law of the Civil Code with the protection of workers as one of its objectives—does not have any effect against the type of illegal labor in which workers are actually subject to severe violations of their human rights in the course of their duties in the workplace highlights the essential need to review the Labor Contract Act.

V. Views on Future Approaches

Finally, I would like to conclude by giving a few views on future approaches for the state of the legal system with regard to illegal labor in Japan.

Firstly, the administration's systems for supervising and cracking down on illegal labor—which stemmed from the system of factory inspectors established in the Meiji Period and were reborn into the system of labor standards inspectors under the Labor Standards Act established as part of the post Second World War labor reform—have not been able to fulfil their anticipated role, and require radical reform. It is difficult to anticipate that responses to tackle labor practices that violate regulations will develop effectively given not only that the number and scale of the labor standards inspection offices and the number of labor standards inspectors are completely insufficient in proportion to the huge scale of the jurisdictions they oversee, but also that the regulations of the Labor Standards Act are in some aspects focused on penalties. However, as is clear from the recent prevalence of "black com-

panies," it is still essential to have a labor standards inspection system that is able to use forceful measures such as arrests and house searches, and such a system is an indispensable legal tool for eradicating malicious illegal labor. At the least, labor standards inspection offices should be increased to several times their current number and a dramatic increase should also be made in the number of inspectors.

Secondly, soft law certainly has advantages that are effective in responding to illegal labor by rectifying discrimination and achieving work-life balance, but its functions should not be overemphasized. While the methods of soft law are functional in the initial stages of establishing new rights and principles, it is necessary to effectively combine them with hard law methods, in order to avoid giving rise to the tendency for those rights and principles not to develop any further.

Thirdly, responses to illegal labor through civil measures represented by the Labor Contract Act can hardly be said to be functioning sufficiently, which may also in part be due to the fact that less than a decade has passed since its enactment. In addition to utilizing Article 3 (Paragraph 4) and Article 5 of the Labor Contract Act, in the process of revising the act in the future it will also be necessary to try to devise legislative responses regarding civil responses aimed at tackling breaches of personal interests and other such violations.

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