

Japan Labor Issues

11·12

November-December 2017

Volume 1 Number 3

● COUNTRY REPORTS

- Sukhwan CHOI (Korea)** A Step against All or Nothing Policy
- Yu-Fan CHIU (Taiwan)** The Practice and Changes of Taiwan's Labor Dispute Regulations Act
- Qian WEI (China)** Draft Regulation on Employee Invention and Innovative Workers Protection in China
- Itaru NISHIMURA (Japan)** Changes in the Wage System in Japan
- Hayati HASIBUAN (Indonesia)** The Development and Labor Situation in Indonesia
- Maria Catalina TOLENTINO (Philippines)** Philippine Report on Employment Trends and Policies
- Mary TIONG (Malaysia)** Report on Identifying Major Labour Policy Issues in Malaysia
- Trang TRAN (Vietnam)** Collective Bargaining and Collective Agreements in Vietnam
- Ingrid LANDAU (Australia)** Leader or Laggard? Australian Efforts to Promote Better Working Conditions in Supply Chains within and beyond Australia's Borders
- Hang TRAN (Vietnam)** Report on Vietnam's Rules Regulating Foreign Workers
- Eitra MYO (Myanmar)** Identifying Major Labour Policy Issues in Myanmar
- Kanharith NOP (Cambodia)** Overview of Labor Legal Issues in Cambodia
- Hochang ROH (Korea)** A Review of the Government Intervention in Labor Relations through Guidelines
- Manxue YIN, Biqian ZHAO (China)** Labour Models in Local Daily Service Platforms
- Girish BALASUBRAMANIAN, Manoranjan DHAL (India)** Industrial Relations Situation in India
- Yueh-Hung HOU (Taiwan)** The Changes and Development of Collective Bargaining in Taiwan
- Qi ZHONG (Japan)** Atypical Work Organizations as a Social Phenomenon Occurring throughout the Contemporary Labor World

SPECIAL ISSUE

The 1st JILPT Tokyo Comparative Labor Policy Seminar 2017
"Identifying Major Labor Policy Issues in Contemporary World of Labor — Commonalities and Differences Crossing Regions and Nations"



Japan Labor Issues

Editor-in-Chief

Kazuo Sugeno, The Japan Institute for Labour Policy and Training (JILPT)

Editorial Board

Mitsuji Amase, JILPT

Keiichiro Hamaguchi, JILPT

Hirokuni Ikezoe, JILPT

Harumi Muroyama, JILPT

Yuji Nochi, JILPT

Noboru Ogino, JILPT

Akiko Ono, JILPT

Koji Takahashi, JILPT

Tomohiro Takami, JILPT

Hiroko Uchida, JILPT

Editorial Advisors

Takashi Araki, The University of Tokyo

Souichi Ohta, Keio University

Editorial Office

The Japan Institute for Labour Policy and Training

International Research Exchange Section

8-23, Kamishakujii 4-chome, Nerima-ku, Tokyo 177-8502, Japan

TEL: +81-3-5903-6274 FAX: +81-3-3594-1113

For inquiries: j-emm@jil.go.jp

Japan Labor Issues website

<http://www.jil.go.jp/english/jli/index.html>

To sign up for mail delivery service

<https://www.jil.go.jp/english/emm/jmj.html>

Published by

The Japan Institute for Labour Policy and Training

8-23, Kamishakujii 4-chome, Nerima-ku, Tokyo 177-8502, Japan

<http://www.jil.go.jp/english/>

ISSN 2433-3689

© 2017 by the Japan Institute for Labour Policy and Training

All rights reserved.

Printed in Japan.

Japan Labor Issues

Volume 1 Number 3
November-December 2017
Special Issue

CONTENTS

<i>Preface</i>	3
1. A Step against All or Nothing Policy: The Scope of Industrial Accident Compensation Insurance for Independent Contractors in Korea Sukhwan CHOI (Korea)	4
2. The Practice and Changes of Taiwan's Labor Dispute Regulations Act Yu-Fan CHIU (Taiwan)	10
3. Draft Regulation on Employee Invention and Innovative Workers Protection in China Qian WEI (China)	14
4. Changes in the Wage System in Japan: Circumstances and Background Itaru NISHIMURA (Japan)	21
5. The Development and Labor Situation in Indonesia Hayati Sari HASIBUAN (Indonesia)	33
6. Philippine Report on Employment Trends and Policies: Can the Duterte Administration End Contractualization? Maria Catalina M. TOLENTINO (Philippines)	41
7. Report on Identifying Major Labour Policy Issues in Malaysia Mary Tze Mei TIONG (Malaysia)	51
8. Collective Bargaining and Collective Agreements in Vietnam: From Legislation to Practice Trang Thi Kieu TRAN (Vietnam)	58

9. Leader or Laggard? Australian Efforts to Promote Better Working Conditions in Supply Chains within and beyond Australia's Borders Ingrid LANDAU (Australia)	64
10. Report on Vietnam's Rules Regulating Foreign Workers Hang Thuy TRAN (Vietnam)	77
11. Identifying Major Labour Policy Issues in Myanmar Eitra MYO (Myanmar)	83
12. Overview of Labor Legal Issues in Cambodia Kanharith NOP (Cambodia)	95
13. A Review of the Government Intervention in Labor Relations through Guidelines Hochang ROH (Korea)	102
14. Labour Models in Local Daily Service Platforms: Current Situation and Challenges Manxue YIN, Biqian ZHAO (China)	115
15. Industrial Relations Situation in India: A Report Girish BALASUBRAMANIAN, Manoranjan DHAL (India)	120
16. The Changes and Development of Collective Bargaining in Taiwan Yueh-Hung HOU (Taiwan)	130
17. Atypical Work Organizations as a Social Phenomenon Occurring throughout the Contemporary Labor World: Current Status of Research and Future Issues Qi ZHONG (Japan)	135
<i>Seminar Outline</i>	141

*Entries are arranged based on the seminar program.

*The responsibility for opinions expressed in signed reports rests solely with their authors, and publication does not constitute an endorsement by the Japan Institute for Labour Policy and Training of the opinions expressed in them.

Preface

The 1st JILPT Tokyo Comparative Labor Policy Seminar 2017

“Identifying Major Labor Policy Issues in Contemporary World of Labor—Commonalities and Differences Crossing Regions and Nations”

As labor problems become more universal with the advance of globalization in recent years, there is a growing need for international comparative research in the planning and formulation of labor policy. With this in mind, the Japan Institute for Labour Policy and Training (JILPT) held the 1st JILPT Tokyo Comparative Labor Policy Seminar on March 27-29, 2017, under the theme of “Identifying Major Labor Policy Issues in Contemporary World of Labor—Commonalities and Differences Crossing Regions and Nations,” to provide an opportunity for researchers from major regions and countries, inter alia Asia, to come together and engage in comparative examination of their shared challenges.

Change is being manifested in modern society in a variety of forms. For example in Japan, the issues of the aging population and falling birthrate, globalization, and technological innovation are having major and diverse impacts. The forms in which change appears vary from country to country and region to region; however, one may be able to detect major commonalities behind such differences.

This special issue carries 17 reports submitted by promising young researchers from Asian countries and regions. They introduce their findings on the latest labor policy issues in each country and region addressing the broad theme of the seminar.

A Step against All or Nothing Policy: The Scope of Industrial Accident Compensation Insurance for Independent Contractors in Korea

Sukhwan CHOI
Myongji University

- I. Introduction
- II. Present situation and request for change
- III. Legal responses
- IV. Limitations and prospect

I. Introduction

In Korea, just like many other Asian countries, changes in economic market influence regulations for employment and labor. For recent 10 years, employers were consistently demanding flexibility concerning employment/labor relations. Two grand financial crises (1997 and 2007) gave rise to relatively deregulated labor market unavoidable, including flood of atypical workers. Legislation of fixed term employment contract, part-time employment contract, and temporary agency work were made during this period.

Along with rapid increase in atypical workers, we also had many changes in the area of independent contract. The places where originally classical employment contract dominated are now substituted with independent contract, by subcontract, outsourcing.

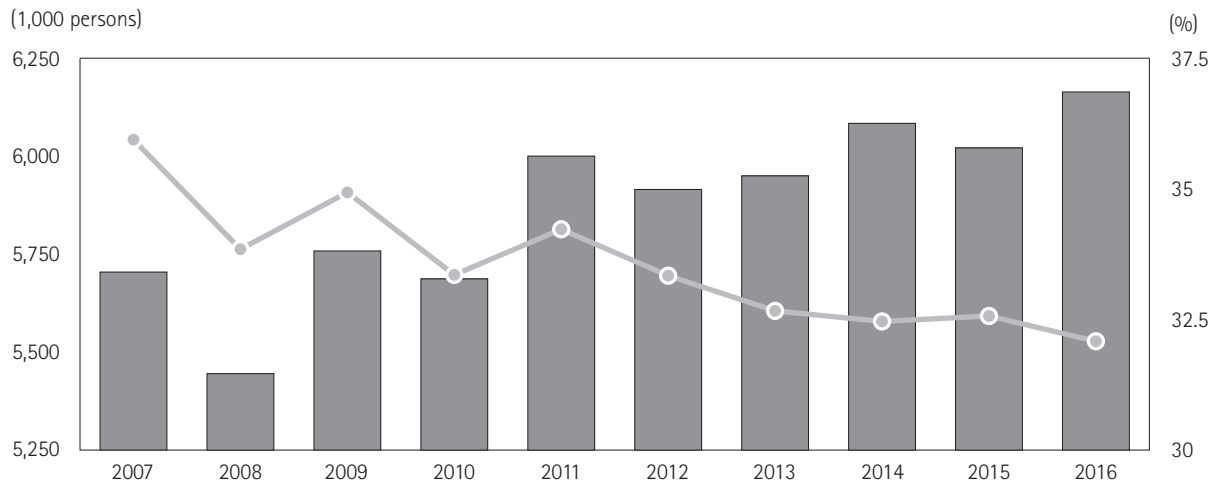
And because of Korean system of social security as a waged employee base, we are facing serious problem of social polarization. Informal workers (including statutory exempt, matter of practical exclusion, workers without social insurances) are increasing and making two extremes of society.

Today we will look over present situation about labor regulation, with requests for changes arising therefrom (II). Then I would like to pick up the issue of industrial accident insurance for independent contractors as a material for case study (III). New legislation for this area was accomplished for the last 10 years, but the legislation was very exceptional according to the classical way of regulations. I will introduce new system, pros and cons, too. With this, we can check what has been done, what is still there unsolved and (or) what is a new hurdle (IV). I expect to get an inspiration for other areas of employment/labor law, especially in the sense that special regulations are needed in employment relations from this lesson.

II. Present situation and request for change

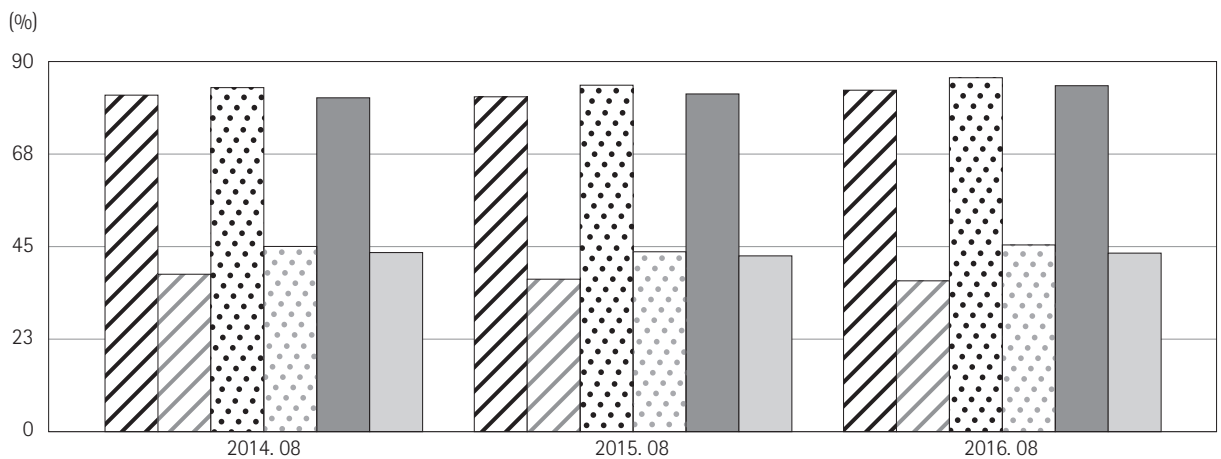
Increase of atypical workers including fixed term employees, temporary agency work, and part time workers is a common phenomenon in Korea during these days. Statistics shows 32.8% of paid workers are atypical workers, who are mostly paid with lower income and relatively lower protection by social insurance. For the National Pension Insurance (NPI), National Health Insurance (NHI), Unemployment Insurance, atypical workers are experiencing limited coverage by social insurance. This is partly because statutory exemption, for example excluding part-time workers with no more than 15 hours per week from NPI and NHI.

A more serious problem is here: working styles are transforming from employment contracts to different forms of contract, like outsourcing, subcontracting, and individual freelance contract. As a matter of fact, there are spectrums of working styles, and working conditions, as a result different needs for protection by labor law.



Source: Commissioner of Statistics Korea, Supplementary Results of the Economically Active Population Survey by Employment Type in August 2016.

Figure 1. Size and proportion of non standard employees



Source: Commissioner of Statistics Korea, Supplementary Results of the Economically Active Population Survey by Employment Type in August 2016.

Note: From left, National Pension Insurance (standard/nonstandard), National Health Insurance (standard/nonstandard), Unemployment Insurance (standard/nonstandard)

Figure 2. Coverage of social insurance

Traditionally, the term “worker” means a person, regardless of the kind of occupation, who offers labor to a business or workplace for the purpose of earning wages (Labor Standards Act (LSA) Art.2 para.1 (i)) in Korea. About the interpretation of this clause, the supreme court of Korea made firm criteria which include designated working place and working time, considerable control and directions by employer, fixed wages, character as an independent business owner, and status in the social security system, etc.

We also have “all or nothing policy,” which means if you are an employee by this LSA, then you can enjoy whole protection by labor law. If you are not, you cannot have any at all. So for the employers, an easy way to succeed in management efficiency is making peripheral (sometimes core) posts subcontracted, outsourced, along with employing atypical workers. Another important background of Korean law is strict regulation about terminating employment relations. That is “just cause” clause (LSA Art.23, Art.24), which prohibits not only discriminative dismissal, but also requires reasons that could be admitted enough for not

continuing employment relations.

With the all or nothing policy, every area arising from employment relations needs entrance ticket of “worker by LSA,” such as working time, severance allowances, industrial accident, lay off, health and safety, etc. As mentioned above, tendency to decrease employment contract inevitably broadened the range of persons working not as a “worker” by LSA. With these environmental changes, development in telecommunication techniques and the Internet, it becomes harder and harder to tell whether these persons are workers or not. One answer we can expect is changing the criteria of “worker,” to set new appropriate ones. We are thinking of this way, too. Actually, there have been many cases especially concerning independent contractors, like caddies in golf clubs, debt collectors, insurance solicitors, outsourced broadcasting producers, deliverers, and drivers. The conflicts are not just about LSA, but contain problems about the concept of “worker” in labor union act, too. But we did make another answer for this situation. There were debates about protection for industrial accident in Korea, and special exceptions were made to overcome traditional way of all or nothing policy.

III. Legal responses

We can find one example of exemption from the all or nothing policy in the amendment of Industrial Accident Compensation Insurance Act (IACIA). Like many other countries, IACIA in Korea also chooses definitions used in LSA. If you are inside the range of “worker” according to LSA, then you can have whole package protections which are given by employment/labor laws. If you are outside the range, as a principle you get nothing. This rigid frame sometimes prevents the pin-pointed regulation of law for the places where there is a need for protection. We have this kind of problem in the area of Industrial Accident Compensation Insurance (IACI) for the increased independent contractors, so there came a legal response.

1. Backgrounds

There had been so many labor disputes about whether a person is a “worker” according to LSA or not. This was more common among some of the jobs mentioned above. This is partly because they were originally “workers” by LSA, changed into independent contractors, and partly because their working conditions are poor, excluded from protection of labor law, which brought exclusion from social security law (mainly social insurance).

This tendency was speeded up at the time of financial crisis, and there has been a social dialogue body called “Economic and social development commission” (formerly “Korea Tripartite Commission”), from 1998. This was a body that labor, management, government and public interest groups participated, making consultation for labor, industrial, economic and social policies. Labor and management participation in the formulation of government policies are its main goal. A group in this commission thought of an appropriate answer for these independent contractors to be totally excluded from labor law.

With the high hurdle that whether they are “workers” according to LSA or not still pending, they thought of a few answers: A) Widening the range of “worker” according to LSA, through legislation or interpretation of the court; B) Regarding them as independent contractors and give protections by monopoly regulation and fair trade; C) Giving some special protections which are given to workers.

2. Legislation

For the protection of IACI, we have two special regulations. We can call these exceptions “small and medium business operators” and “Special Types of Employment” respectively.

First, for small and medium business operators, they are allowed to join IACI on their own will, paying full insurance premium (Art.124). This includes business owners employing less than 50 with some other conditions. Also persons running his own business with no employee can join IACI, too. This category includes self-employed persons engaged in passenger transport services, in cargo transport services, in

construction machinery services, in door-to-door couriers (a quick service provider). Artist is defined in Art.2 of the Artists' Welfare Act in accordance with a contract concluded with an intent to receive a consideration in return for providing artistic activities.

This is a system which permits small and medium business operators, and self-employed persons. They can join the IACI if they wish. Insurance premium and insurance payment will be set by presidential decree. Insurance premium is 100% employee's burden, contrary to regular IACI. For the artists, public foundations for artists take the 50% burden for the artists.

Second, for special case concerning persons in special types of employment (Art.125), the business which receives labor service, from persons who engage in jobs prescribed by Presidential Decree, among the persons who are not subject to the LSA, etc., even though they offer labor service similar to that of workers regardless of the type of contract, and therefore need protection from occupational accidents, and who also meet all the following requirements, he/she shall be deemed a business subject to IACIA (para.1). These "persons in special types of employment" need to fulfill next two conditions:

(i) They mainly provide one line of business with labor service necessary for the operation thereof on a routine basis, and receive payment for such service and live on such pay;

(ii) They do not use other persons to provide such labor service.

With this, persons in special types of employment shall be deemed workers of the business concerned in applying IACIA.

An interesting part of this regulation is that it determines specific jobs covered by IACIA, shown in the Enforcement Decree of the IACIA. At first when this special regulation was introduced in 2008, there were four kinds of jobs, insurance solicitors, owner-drivers of concrete mixer trucks, learning-aid tutors, and golf caddies. After that, they added more jobs, including door-to-door couriers engaged in collection or delivery affairs in courier services (referring to services delivering parcels after collecting and transporting them), engaged in delivery affairs entrusted from mainly one quick service provider. Also, credit card solicitors, consumer financing dealers, substitute drivers mainly called by one company are newly added to this category.

But when the persons in special types of employment request exclusion from the application of IACIA according to para. 4, they shall not be deemed such workers (para.2). This is called "retreat by his own will," which is different from the compulsory feature of social insurance.

Where a person in special type of employment does not want to be subject to IACIA, he/she may file a request for exclusion from the application of IACIA, with the service as prescribed by the Insurance Premium Collection Act. Also, this shall not apply to persons in special types of employment whose insurance premiums are paid fully by their business owners (para.4).

The amount of average wages, used as the basis for calculating insurance benefits for persons in special types of employment, shall be the amount published by the Minister of Employment and Labor (para.8). The criteria for recognizing occupational accidents that give rise to the payment of insurance would be the same as "workers" by LSA (para.9).

3. Pros and cons

It is very interesting that statutory legislation designated several kinds of jobs as objects for protection, instead of concrete situations and actual features, which traditional labor law always had its eye on. As easily expected, there are various types of golf caddies, from extremely close to subordinate employees, to perfect independent contractors. Because of this spectrum, courts were ready to examine with microscope all the time. Legislators did not touch on the scope of "worker" traditionally confirmed by court with this Special Types of Employment. They just noticed the fact that there were some jobs that needed protection of industrial accident compensation regardless of their position in the labor law. And they chose a special protection clause according to what they do, not how they accomplish that job.

Of course they were not perfectly blind to the argument of fundamentalists. They paid attention to how it is fulfilled, so they agreed on the three conditions, “one line of business,” “routine basis,” “live on such pay,” and “not using other person.” Exclusive working, continuity, economical dependence and work on his own would be conditions for this special protection. Actually these are criteria originally used for “worker” by LSA. But the degree would not necessarily be the same.

Debates for renewing this clause are one of the pending issues in Korea. There are arguments for the widening of the range of “worker” as a whole, which will consequently lead to solutions to this problem as a package. This is mainly on the ground that, new protection system by IACIA is not working well enough. Research shows that persons who joined IACIA system using this new protection clause are no more than 10%. The reasons for these poor achievements are not that clear. Analysis suggested by researchers includes that employee side does not feel needs for this protection. They say that 50% burden of insurance premium could be not that light for some persons; as mentioned above, unlike regular IACI which employers pay 100% insurance premium, for the Special Types of Employment, both sides pay 50% each. Persons covered by private insurance also are not that positive to this system. Another analysis points out that employer side that came to pay extra 50% insurance premium make employee of Special Types retreat from the insurance by forcing them to request exclusion from the application of IACIA.

Critics to this new system insist that it cannot be a good answer to the needs for the protection of independent contractors. On the contrary, it helps stabilizing the third category of “special type of employment,” and would influence the attempt to broaden the scope of “worker” through interpretation considering changed society and employment practice.

IV. Limitations and prospect

Where the boundary line should be drawn is not clear, so inevitably there arises demand by independent contractors from other areas. IACIA gradually has broadened its coverage that needs special regulation. Apparently it is up to date legal response, but to what extent? We feel like considering about the abstract concept of an entity covered by IACIA, consequently the concept of “worker” again.

Substitute drivers are one of the areas that are increasing rapidly, but not covered by employment/labor law at all. Amendment of IACIA suggests two solutions for this. Substitute drivers working mainly for one company (apps), can be covered by IACIA with 50% burden of insurance premium (Art.125). Substitute drivers working for multi users, can be covered by IACIA with 100% burden of insurance premium (Art.124). Of course substitute drivers can be covered by IACIA with 100% employer’s burden when he is regarded as a “worker” by LSA. In this sense, new attempt to deal with special treatment by specified legal issues could be an answer to solve the delicate problem, but still it makes us contemplate on the orthodox homework.

With the rapid increase of independent contractors, we feel like depending on classical question but still not faded even today: Who is an employee? In a sense, this old question still dominates the whole employment/labor regulations. But, there are other ways to address this situation. We can detour the classical question and just outline for which a certain type of protection should be proposed, just like Korean IACIA made a new clause for special type of employment.

This is attractive in that we can cope with the issue of employees’ protection on a case by case policy. It certainly can maximize optimal propriety and soundness. Where there is a need for protection, we can give it, whether he/she is a “worker” or not. For this, we introduced two ways of special regulation. Defaulted join and exceptional retreat is one way for special regulation. Joining by his own will would be another way to cover a protection. Various ways of regulation make it possible to choose protections according to his/her situation. Persons who don’t feel needs for this type of protections or needs for social insurance (maybe independent contractors who are far from workers) can choose optimized regulation.

But at the same time, we need to be guaranteed legal stability. Changes surrounding labor relations are

fast and diverse. We cannot imagine all the changes in advance, and if we respond every time there occurs a more serious problem, losing our expectation about what should be done.

Moreover, needs for protection by social insurance, from industrial accident may be a possible, good choice for the present. But it also can conceive the problem of effectiveness, as we have seen in Korean case. Request for protection, prior response for needs could be a good symptomatic therapy, but from the entire system of law, it could be another hurdle that would prevent consistency and clarity of the regulation.

Finally, collective voices on this type of special regulations should not be overlooked. We introduced special regulation in the arena of social insurance which emphasizes and essentially wears compulsory characters. But our choice was rather on the basis of at-will basis, permitting request for exclusion or making room for joining by his own will. This inevitably raises problems of “real will,” which could be hard to tell in the labor relations. At this point, we have to consult the ways of collective voices — unions, employee representative, or some other type of representing body. When we have this bodies, organizing and communicating (bargaining) is not interrupted, we can have better regulations regardless of what kind of new, special regulations we introduce.

The Practice and Changes of Taiwan's Labor Dispute Regulations Act

Yu-Fan CHIU

National Chiao Tung University

- I. Changes to Taiwan's Labor Dispute Regulations Act
- II. Legal protection in disputes
- III. Dispute restrictions in the new Settlement of Labor-Management Disputes Act
- IV. Conclusion

I. Changes to Taiwan's Labor Dispute Regulations Act

Taiwan's laws regarding the conduct of disputes were established in the trade union regulations of 1924, but as Taiwan was about to enter the rule of martial law for thirty years, any disputes were strictly forbidden during this period. After martial law was lifted in 1987, there were a number of large strikes in Taiwan; the 1990s saw the Far Eastern Company's textile workers' strike and Keelung Bus Company strike, but due to harsh strike restrictions at that time, launching a legitimate union strike was generally very difficult. During that time, the strikes of trade unions were restricted to "ceasing the provision of labor." There was no opportunity to obstruct public order, such as picketing factories or surrounding factories to preventing other workers from entering. Therefore, effectiveness of any strike was also greatly reduced.

However, along with the changes from the democratization of Taiwan's society, and the transformation of the industrial sector, the trade union law and the labor dispute settlement regulations did not meet the requirements of the twenty-first century work environment. The Government implemented three newly revised labor laws on the 2011 Labor Day holiday: the Labor Union Act, the Act for Settlement of Labor-Management Disputes, and the Collective Agreement Act. The aim of these labor laws was to reduce the dispute restrictions that could be applied by the state, to relax the restrictions on trade union actions, and within the Labor Union Act legislation, the employer was prohibited from punishing employees engaged in disputes through actions such as dismissal, demotion, reduction of salary, or other unfavorable treatment.

In 2011, soon after the implementation of these new laws, the Prince Motors Co. strike occurred in October, in which the labor union proposed salary adjustment, the payment of three bonuses, to restore the vehicle management and fuel subsidies, and to retroactively pay of untaken special leave days. The trade union association group agreed and signed twelve demands, which marked the first lawful strike after the implementation of the new labor laws. Since this action, in recent years Taiwan has experienced many large-scale strikes and industrial disputes, with the most recent being the China Airlines Flight Attendants strike in June 2016 and the collective refusal of overtime by the Taiwan railway staff in February 2017. Both actions highlighted the Taiwan's trade unions' ability to actively participate in economic democracy in order to seek improvements in working conditions.

II. Legal protection in disputes

The revision of the three labor laws in 2011 was the first step in the modernization of the dispute regulations in Taiwan. Before these amendments, there was no clear definition of how to conduct disputes or strikes in Taiwanese law, and so the Supreme Court used the definition of a strike as "ceasing the provision of labor" for the Keelung Bus Company strike case, which do not provide the opportunity

to impede public order, or harm others in terms of life, physically, freedom, or property; whether there was legal protection to the right to strike is doubtful. In Article 5(4) of the Act for Settlement of Labor-Management Disputes, the existing dispute resolution conduct is defined as “for a labor dispute party to reach its claims, implementation of strikes or other obstructions and confrontational actions of normal working business operations.” Compared with the older laws, there is a clear guarantee of trade unions and labor unions protection in their right to conduct disputes.

Although within Taiwan’s Constitution the protection of collective labor rights does not exist as it does in Article 28 of Japan’s Constitution, a Justice of the Constitutional Court has explained that Article 14 of Taiwan’s Constitution has provisions regarding the guarantee on freedom of association and rights of assembly in general. Scholars advocate that Article 22 of Taiwan’s Constitution regarding people’s freedom and rights can also be used as the constitutional basis of collective labor rights. In short, collective labor rights, regardless of the Constitution, are essentially constitutional rights, but in future the Taiwan’s Constitution should be amended to give specific legal protection to collective labor rights.

III. Dispute restrictions in the new Settlement of Labor-Management Disputes Act

After the revision and implementation of the three labor laws in 2011, the protection and restrictions of the conduct of disputes have been transferred to the Settlement of Labor-Management Disputes Act. This updated law related to disputes has a total of four conditions, stipulating the legitimate conduct of a dispute in terms of organization, purpose, procedure, and method. This amendment also expresses the behavioral and cultural guidelines for the conduct of a dispute, as described below.

1. Restrictions on the purpose of the dispute

(1) Right disputes cannot be settled by strikes

The Settlement of Labor Disputes Law Article 53(1) regulated that “right disputes cannot be settled by strikes.” According to these regulations, it can be understood that dispute regulations in Taiwan prohibit strikes as they should only be used with group agreement. If there is a labor dispute between employers and employees, there is a wide range of interpretation in this scope to even rationalize political or sympathy strikes, so long as the mediation meets with the necessary procedural requirements, and the purpose of the strike is not of too high importance, control of the strike restrictions will be relaxed.

However, Taiwan’s labor disputes are mainly associated with disputes over rights matters, and the revision of these rights matters are rare. The reason behind restricting the purpose of striking is based on keeping the function of peace and the priority of the judicial process, and so it is concluded that right issues cannot be concluded through strikes. However, Taiwan has not yet set up a labor court or labor tribunal to resolve labor disputes. If there are restrictions on the self-reliance of labor unions, this deprives labor unions of their ability to dispute labor rights issues. In practice, when workers cannot strike, they will collectively leave and refuse to work, in order to achieve the same dispute effect, and so prohibiting strikes due to rights matters only has the effect making the ban of seeming more unreasonable, and any actions taken more prominent.

(2) Rights issues disputes on the nature of improper labor conduct

One characteristic of the law amendment in 2011 was that the nature of improper labor conduct disputes, although is still a rights dispute matter, but it involves the issue of collective labor rights infringement, and so the new law uses dispute conduct to protect union unity. The Settlement of Labor Disputes Law Article 53(2) stipulates, “If the central competent authority decides that the employer or employer organization violates Article 35 of the Labor Union Act or Paragraph 1 to Article 6 of the Collective Agreement Act, the labor union may conduct protesting activities pursuant to the Act.” An example would be the dismissal of trade union members, as only after an improper labor conduct ruling by an adjudication committee, the union can focus on the dismissal rights dispute.

2. Only labor unions can strike

Taiwan's dispute laws have always limited the ability to strike to labor unions only, and so recognize the labor union's exclusive right to strike, but after the 2011 amendment, the organization of trade unions has changed in terms of autonomy and diversity from that of past factory trade unions; there has been development of more independent unions. Factory trade unions have been upgrading themselves into enterprise unions, and there has been a gradually increase in both cross-factory and cross-industry trade union organizations. In addition to industrial unions and enterprise unions, craft unions have begun to occupy a position within the three labor laws.

However, as the ability to strike is limited to trade unions, in Taiwan the percentage of enterprise unions and industrial labor unions organizations is low — the trade union organization rate was only 7% in 2011, and only 7.3% in 2016, and only when a majority of the workers are in agreement, do they go on strike. In recent years, non-traditional labor union has not increased, and as it is currently extremely difficult to join or organize trade unions, non-union strikes or non-officially recognized strikes are worth studying. And in view that the existing labor dispute settlement law has recognized that a certain number of non-official trade unions have “labor dispute parties,” it understood that these of non-official trade unions may not strike, but may have legitimate organization to conduct a legal dispute.

On the issue of whether or not a craft unions have the ability to strike, the Taoyuan Flight Attendants Union strike against China Airlines in June 2016 has led to further discussion. The China Airlines Flight Attendants strike was the first strike by a trade union, and Taiwan's cross-enterprise trade union organizations' first time using the new legal policy related to strikes. Craft unions have been the main principle of unions for a long time in Taiwan, but their functions were confined to the contracts of labor insurance protection. Unions contain many non-employed members, so whether craft unions have the right to strike is questioned. The legality of craft union organization's right to strike has been an important issue in Taiwan's dispute laws over the past few years.

3. Specific restrictions on industrial union and craft union employees

Article 54(2) of the Act for Settlement of Labor Disputes stipulates that teachers and workers of the Ministry of Defense and its organizations (institutions), and schools shall not strike, but some scholars in Taiwan have pointed out that other countries rarely legally prohibit teachers from striking. When considering the status of Taiwanese society, teachers could be requested to give makeup classes after a strike, or only limiting teachers of national compulsory education from striking, while at the same time providing relevant laws and regulations as other methods to resolve disputes, such as application for party labor arbitration.

As for the right to strike for workers within the public sector, the focus of the discussion is as follows. First, according to law, trade unions cannot be organized within the public sector, and public sector workers must not exercise the right to strike. Second, according to the law related to organized trade unions, while exercising the right to strike, civil servants are identified both as labor workers, and according to the relevant regulations, as workers within the public sector, and so are still unable to strike. Third, according to the law related to organized trade unions, only workers entirely removed from the public sector, such as being legally identified as private labor workers, have the right to go on strike. Is it right that those employed as civil servants, especially civil servants who are also identified as labor workers, to be deprived of the right to strike? This is controversial, as is whether firefighters and police should be included in the Labor Union Act. Taiwan is currently highly concerned about the issue of collective labor rights.

4. Procedural restrictions imposed by dispute conduct

If a trade union needs to initiate a dispute to resolve a labor issue, this should be under the autonomy of the trade union. However, the Act for Settlement of Labor-Management Disputes has three procedural

restrictions for initiating a dispute, limiting when the trade union can choose the opportunity to exercise a strike. First, before the dispute, the issue should be preceded by mediation, and this mediation procedure should be unsuccessful (Article 53(1) of the Act for Settlement of Labor Disputes). Second, before the strike, the issue should first be approved by over half of the members by a vote (Article 54(1) of the Act for Settlement of Labor Disputes). Third, the water industry, the electricity industry, the gas supply industry, hospitals, as well as banking and financial transactions for financial service, securities and futures transactions, accounts settlement, securities depository, and other payment business operations, should agree on necessary terms of service before a strike (Article 54(3) of the Act for Settlement of Labor Disputes).

IV. Conclusion

From the above dispute regulations, we can see the legitimacy of the disputes conduct has been recognized by the legal system and by the general community. Taiwanese society is undergoing industrial structural changes, while relaxing the constraints of labor union participation in its economic democracy. These reforms are also in response to national labor conditions due to industrial changes, and a need to reduce the control of trade unions and disputes. Taiwanese employees' working conditions over the long-term have been long hours and low wages. However, under the negotiation situation of individual worker and employers, Taiwanese can only rely on trade union consultation and labor disputes to improve the distribution of wealth. Taiwan's trade unions method of using collective bargaining supplemented by a disputes support model is still in its infancy, and worthy of continued observation.

Draft Regulation on Employee Invention and Innovative Workers Protection in China

Qian WEI¹

China Institute of Industrial Relations

- I. Why legislation on employee inventions
- II. Policy pavement
- III. Current legal framework of employee inventions
- IV. Draft regulation on employee inventions
- V. Conclusion: beyond the draft regulation

In the Era of digitalization and artificial intelligence, the technology is advancing rapidly. The patent power which is nourished and emerged mostly in the workplace in nowadays symbolizes the innovative capability of a society. However, the employee invention² was not considered a typical “labor” issue in China, and the government is reluctant to strengthen protections on innovative workers, especially in the private sector. Nevertheless, during the public discussion on *Draft Regulation of Employee Invention*, workers and their trade unions lost voices contrary to fierce oppositions from employers. In this report, the law-making process of *Draft Regulation of Employee Inventions* was illustrated. Under the New-Normality of economy slow-down and the great pressure of unemployment, China government has stepped into a “dilemma” in policy making to balance interests within labor relations. However, innovations will concern new industries and new employment in future. In the context of “Mass Entrepreneurship and Innovation,” it is important to make such a public conscience that innovative workers will not contribute to innovations unless they are respected and protected. In China’s labor relations, legal protections on innovative workers are expected to activate innovations in the workplace or in whole China society.

I. Why legislation on employee inventions

In the rush of globalized competition, the innovation power has been regarded as the crucial competitive factor in one country. As to China, other than technology and industry competition in the world, the innovation is expected to support the economy transformation as well as employment creations. Therefore, the government appealed its new policy as “Mass Entrepreneurship and Innovation.”³ The twin engines are expected to drive China out of the moss of “New-Normality” and to contribute to the economy growth in future.⁴ “Mass Entrepreneurship and Innovation” bridges investments, inventions and employments in a social context. Inside, the stimulation of innovations in itself is the purpose of the policy. In the Government Work Report of 2015, Premier Li declared that the government would promote, business startups and social innovation, to increase the employment and residents’ income, and to improve social mobility and social justice.⁵

Inside, the holding patents are usually considered as a core standard reflecting the innovation power

1 China Institute of Industrial Relations, Zengguang Rd. 45, Haidian District, Beijing China 100481. Email: wqfran@hotmail.com.

2 Employee invention is defined as “servant invention” (Zhi Wu Fa Ming).

3 “Wan Zhong Chuang Ye, Da Zhong Chuang Xin” was firstly claimed as a new policy to promote employment. Premier Li explained the twine engines as of “mass entrepreneurship” or “grass-root entrepreneurship” to encourage young peoples for new start-ups in order to moderate pressures on the unemployment; in addition, the policy aimed to encourage innovations by the mass and individuals.

4 To show the government attitude on social innovation, Premier Li met with individual Mak-ers (Chuang Ke) every time during his tours of local inspections.

of the country. According to the latest WIPO report,⁶ China has contributed the largest patent filings in the world in the year of 2015,⁷ overriding U.S.A. and Japan. In addition, patent application increased 18.7% in 2015, and the international patent applications reached to 43,000 succeeding to U.S.A and Japan in 2016.⁸ It is said that China is driving the innovations in the world.⁹ However, other than the great quantities of patent filing, China concerns more about the quality and utility of innovations. In accordance with IEEE's report on the patent power in 2016,¹⁰ among sixteen industries only four Chinese enterprises were ranked in, and at the same time only Tsinghua University ranked as the 16th among the world's most innovative institutes or universities.¹¹ Contrary to increasing patent numbers, the total factor productivity (TFP) in China, which reflected the substantial innovation power, declined from averagely 4.9% (during from 2000-2007) to 2.21% (during from 2008 to 2014).¹²

Confronting the laggings from developed countries, China government recognizes both quantities and qualities of patent inventions are crucial to level up its innovation power. Since over 90% patents are employee inventions in developed countries, how to regulate employee inventions so as to stimulate workplace innovations has been determined as a priority intelligent property legislation in China. Besides investment stimulation and IP rights protection, the bottle neck hindering China's innovation is how to dig out the inventive potentials in human resources.

II. Policy pavement

In pursuit of possible leap-forward development in innovation powers, China government made new policies and law amendments on this regard. Prior to the slogan of "Mass Entrepreneurship and Innovation," China government has decided to add motivative instruments for innovator workers. In the year of 2010, China government firstly issued *National Planning of the Development of Manpower in Medium or Long Term from 2010 to 2020* ("*National Planning of 2010-2020*"), in which *Regulation of Employee Invention* is included to enhance the legal protections on IP rights as well the benefits sharing system within the workplace innovation.

In March of 2015, CPC Central Committee and the State Council issued *Several Opinions on Deepening the Reform of Systems and Mechanisms to Accelerate the Implementation of Innovation-driven Development Strategies*,¹³ emphasizing to employ the market mechanism in stimulating social creations

5 The General Office of State Council issued "*Implementation Opinions on the Establishment of Demonstration Base of Mass Entrepreneurship and Innovation*" (Guan Yu Jian She Da Zhong Chuang Ye Wan Zhong Chuang Xin Shi Fan Ji Di de Shi Shi Yi Jian, Guobanfa[2016]35) on May 12, 2016.

(http://www.gov.cn/zhengce/content/2016-05/12/content_5072633.htm). According to Article 3(4), to promote talents' mobility, experts and technical personals in public sectors are encouraged to start their own businesses or have by-business in enterprises so as to improve the mobility of innovators.

6 Global Patent Applications Rose to 2.9 Million in 2015 on the Strong Growth from China, WIPO Geneva November 23, 2016, http://www.wipo.int/pressroom/en/articles/2016/article_0017.html (latest visit on March 19, 2017).

7 World Intellectual Property Indicators 2016, WIPO Economics & Statistics Series, p.8, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2016.pdf (latest visit on March 19, 2017).

8 Approaching to U.S.A. and Japan: China's Patent Applications Increased 45% in 2016, Wallstreet.cn Shanghai, <http://wallstreetcn.com/node/295652> (latest visit on March 19, 2017).

9 Ibid, n7.

10 IEEE Interactive: Patent Power 2016, <http://spectrum.ieee.org/static/interactive-patent-power-2016>.

11 For each industry, there ranked top twenty corporations or institutes according to the pipeline power, in which the pipeline power is determined by four factors namely patents number, the growth index, the impact, the originality and the generality. Pipeline Power = (Number Of Yearly Patents) X (Pipeline Growth Index) x (Adjusted Pipeline Impact) x (Pipeline Originality) x (Pipeline Generality).

12 China leads patents increasing for five years in the world, but how about the patent qualities? Yicai.com, Feb 15, 2016, <http://www.ithome.com/html/it/206365.htm> (latest visit on March 19, 2017). Also see Fan Jianping, "The Economy Situations in 2016 and the 13th Five Years Planning in China," State Information Center, <https://wenku.baidu.com/view/a845fcb2f01dc281e43af085.html>.

13 "Zhong Gong Zhong Yang Guo Wu Yuan Guan Yu Shen Hua Ti Zhi Gai Ge Jia Kuai Shi Shi Chuang Xin Qu Dong Fa Zhan Zhan Lve de Ruo Gan Yi Jian," issued on March 13, 2015.

and innovations. Especially, technical personals and R&D staffs should share benefits including economic and moral rewards from the innovative work. In addition, the free mobility of innovation related resources such as human resources, capitals, technologies and knowledges should be guaranteed.

In parallel to the new legislation on employee inventions, which covers workplace innovations either in public or private sectors, the amended *Law on Promoting the Transformation of Scientific and Technological Achievement* (herein refers to “PTSTA”)¹⁴ was promulgated in October 2015, to promote the utility and industrialization of scientific achievement outside of employee inventions. In particular, researchers subordinated to public institutes or universities (the public sector) are encouraged to begin their own business, or to mobilize between enterprises and the public sector.¹⁵ Moreover, there are several new instruments introduced in PTSTA to reallocate benefits between the researchers and the enterprises due to the achievement transformation.

By contrast, the law-making on employee inventions ceased. The Draft Regulation which embarked in 2012 and was passed to the State Council in 2014, however, after hearing public opinions especially opponents’ voices from employers, has been put aside. Instruments on benefits sharing and interest protection within employee inventions divide workers and employers far apart. In practice, innovative workers insist on voting with their feet. What’s wrong with employee invention system of China? To answer this question, it is necessary to have a look at the current legal system on employee inventions.

III. Current legal framework of employee inventions

In tradition, there is no doubt in China that the patent right of invention belongs to the employer. In the first patent law enacted by the Republic of China in 1940s, employee invention was regulated as an employer’s asset which excluded workers. The concerns within legal regulations focus on the reward and compensations for innovator workers. For mainland China, employee invention is mainly regulated by *Patent Law of People’s Republic of China* (issued in 1984, amended in 2000 and 2008) (herein refers to “Patent Law”).

1. Definition of employee inventions

According to Patent Law (Article 6), employee inventions can be categorized into three types — namely employee inventions, employment-related inventions, and non-employee inventions. Later on, *Detailed Rules for the Implementation of the Patent Law of People’s Republic of China* (issued in 2001, amended in 2002 and 2010) (herein referred to as “Detailed Rules”) issued by the State Council further extended the scope of employee inventions (Article 12).

(1) Employee inventions

Employee inventions are those made by an employee in the following circumstances: (1) in performing work or tasks for the employer during the employment; (2) primarily using material or technical means including the funding, facilities, parts and components, raw materials and private know-hows of the employer; or (3) inventions relevant to the original work or tasks created within one year following the termination of the employment relationship. The patent right of such invention belongs to the employer.

(2) Employment-related inventions

Employment-related inventions are those made by an employee using but not primarily any material

14 “Cu Jin Ke Ji Cheng Guo Zhuan Hua Fa,” issued in 1996 and amended in 2015, http://www.most.gov.cn/fggw/fl/201512/t20151203_122619.htm.

15 To maximize incentives for innovations by means of the achievement transformation, public employees can maintain their employment relations for at largest 3 years in the public sector after they start up their own businesses; or they could conduct part-time work in enterprises with the approval from the public employer. Article 2(7) of the *Notice of Several Regulations on Implementation of PTSTA*, by the State Council (Guofa [2016]16), effective as of February 26, 2016. http://www.gov.cn/zhengce/content/2016-03/02/content_5048192.htm.

or technical means of the employer. The patent right in such circumstances is governed by the agreement between the employee and the employer.

(3) Non-employee inventions

Non-employee inventions are those which are neither employee inventions nor employment-related inventions. For such inventions, the patent right belongs to the employee.

Since the broad definition on the employee invention, dually guaranteed by laws and the employment contract, the employer is possible to claim any inventions for patent rights made by the employee.

2. Rewards and remunerations for inventor employees

What could inventor employee benefit from the invention? Although the patent right belongs to the employer, the inventor employee is entitled to claim rewards once the patent is granted. In addition, the inventor employee is entitled to claim for a reasonable remuneration when the patent is utilized and generates economic benefits (Patent Law, Article 16). This reward and remuneration mechanism was enriched and strengthened by Detailed Rules in Chapter 6, by stipulating that the reward and the remuneration (including the amount and the payment way) related to employee inventions can be agreed in the employment contract, or can be governed by the enterprise's rules.¹⁶ Otherwise, the statutory standards on rewards or remuneration are applied.

(1) Minimum rewards

According to Article 77 of Detailed Rules, the inventor employee is entitled to claim for rewards of no less than RMB 3,000 (around USD 434) for each invention patent within three months of the patent license date; for rewards of no less than RMB 1,000 for each patent of utility model or design patent.

(2) Minimum Remunerations

In this regard, the inventor employee's remuneration should be paid annually throughout the validity period of the patent or by way of a corresponding lump-sum payment (1) at no less than 2% of the operating profit generated from the exploitation of an invention or utility model patent, or (2) at no less than 0.2% of the operating profit generated from the exploitation of a design patent; or be paid at the time of licensing no less than 10% of the royalties generated when the patent is authorized to others by the employer.

Thus the employer bears the obligations to pay rewards or remuneration to inventor employees, however the rewards or remunerations could be arranged by the employment contract or corporate policies in advance. The minimum standards on rewards or remunerations herein are not applied similar with labor standards, which means they could be much lower than the minimum standards in practice.

Here above is the whole picture of the legal arrangement on the rights and benefits related with employee inventions by laws. Seemingly the employer favors much more than innovative employees, for they have the patent rights and they decide what they can share with innovative workers. To some extent, it induces the employer and employees to play the game of "all-or-nothing." Indeed, under the current regulations on the employee inventions, a lot of disputes have been brought by both the employer, and employees which is making a great challenge to China's innovation. According to a recent survey conducted by State Intellectual Property Office,¹⁷ among 147 cases related with employee inventions decided by the people's court, most cases claimed for the judgment on whether the invention should be classified as employee inventions or not. Nearly 76% cases are claimed by the employer while 24% by employees. However, the difficulty to win those law suits is the same to both parties for which employees win 48% law suits while employers win over 50%. As for disputes on rewards or remunerations, employees are usually frustrated claiming that they failed to prove the reasonableness of the payments,

¹⁶ Detailed Rules, Article 76.

¹⁷ Survey on Disputes on Entitlements and Rewards within Employee Inventions, 2014.

for the employer might squash the benefits by low-price delivery, undefined profits, or even non-use at all.¹⁸ In another investigation on the enterprises' policies,¹⁹ the findings coincide with the disputes reality. According to the investigation, there are 62.9% enterprises with no internal policies on rewards or remunerations to innovator employees. In addition, 57.8% enterprises paid nothing for employee inventions.

As the local reform on employee invention regulations, in June 2013, the Shanghai Higher People's Court issued *Guidelines on the Adjudication of Disputes Involving Rewards and Remuneration for Inventors or Designers of Service Invention Creations* ("Shanghai Guidelines").²⁰ The Shanghai Guidelines have clarified some fundamental issues. For example, the key tone set by the Patent Law is that agreements between employee and employer prevail over the statutory minimum amounts. Despite this, as for the reasonableness of rewards or remunerations, the Shanghai Guidelines clarified that under normal circumstances, the agreements will be deemed reasonable, except if the agreed amounts are extremely low and obviously unreasonable. In addition, the most important is that the court will testify the legitimacy and validity of the agreement in accordance with Contract Law and Labour Contract Law.²¹ For an instance, the enterprise's policy on employee inventions should only be binding if it was made in due procedure by (labor) laws.

By now, regulations on employee inventions are no longer pure issues about IP rights. They are more about "labor" as its nature determined. And the balance between the employer and innovative workers is becoming the purpose of new regulation.

IV. Draft regulation on employee inventions

To correspond with the *National Planning of 2010-2020*, in the year of 2014, the Intellectual Property Office of China completed the *Draft Regulation of Employee Invention* (April 1, 2014, herein referred to as "Draft"), and later in April of 2015 it was published by the State Council for public discussions. The Draft was based on official opinions from related governor entities²² and raised the social concerns. However, contrast to broad oppositions from the employers' side,²³ there are few voices from the workers.

There are 44 articles of the Draft Regulation. The new regulation is aimed at strengthening the protection on inventor employees and increasing their benefits shares. The Draft Regulation adopted three principles precisely to encourage employee inventions, to balance rights and duties, and to respect the agreement and to protect the above minimum standards.

18 Explanations on Draft Regulation on Employee Inventions, the State Council issued on April 2nd 2015, http://www.sipo.gov.cn/ztzl/ywzt/zwfintzl/tlcayj/201504/t20150413_1100584.html.

19 Employee Inventions should be Special Legislated, China Legal Daily April 5, 2016, http://www.sipo.gov.cn/ztzl/ywzt/zlfjqsszdxscxg/xylzlfxg/201604/t20160405_1259850.html.

20 Zhi Wu Fa Ming Chuang Zao Fa Ming Ren huo She Ji Ren Jiang Li Bao Chou Jiu Fen Shen LI Zhi Yin, June 2013, <http://shfy.chinacourt.org/article/detail/2013/06/id/1017868.shtml>.

21 Article 5, Shanghai Guidelines. In addition, dispatched workers are entitled to claim rewards and remunerations to the employer. However, there are some shortcomings such as restrictions on the amount of rewards or remunerations claimed by the employee in case there was no agreement or internal policies on regard.

22 The Draft was based on discussions and opinions from the National Intellectual Property Office, Ministry of Education, Ministry of Technology, Ministry of Industries and Information, Ministry of Human Resources and Social Security, Ministry of Agriculture, State-owned Assets and Administration Commission, Bureau of Copy Right, State Forestry of Administration, Patent Protection Association of China, China Association of Invention. However, in this process, All China Federation of Trade Union was not involved.

23 To collect the opinions from employers, Patent Protection Association of China held a national conference in Beijing on February 27 of 2015, to introduce the draft contents to enterprises. It is to be noted that the conference is the only one recorded national conference directly to the related parties in employee inventions.

1. Report System

To avoid disputes on patent right, the Draft Regulation transplanted the report system to create chances for mutual negotiation between the employer and inventor employees.²⁴ Unless agreed in contract or prescribed in laws, inventor employees are obliged to report any invention related to work to the employer within two months since the invention completed. In case of cooperative invention, the reporter should have the consents from all inventors. To protect the right to be named in the invention patent, the report should list all inventors' names. In addition, employees should demonstrate whether the invention should be regarded as employee invention or not, including reasons beneath.

By contrast, the employer bears the duty to respond to the report timely, which requires him to reply in written form within two months after receiving the report. Otherwise, no timely reply will be regarded as the implied consent towards employees' report.

In case inventor employees disagree with the employer's reply, inventor employees may bring adverse opinions in two months. The employer may disagree again. The disagreement on the invention nature can be mediated by IP administration or resolved in a lawsuit.

This report system is the legal transplanting from France and Germany. It is considered the two-round negotiations that will be helpful to reduce patent right disputes. Once the invention is regarded as employee invention by both parties, the employer is obligated to notify employees how he would deal with the invention in six months, to file domestic IP, to protect as a know-how, or to be opened to the public. Especially during the patent filing, the employees have the right to know the whole process. In case the employer withdraws the filing or wave the patent right, inventor employee may have the IP right or as the patentee for patent application. Meanwhile, the employer will keep the shop right on the patent or IP right.

2. Right to rewards and remuneration

Firstly, in Chapter IV of Draft Regulation, the payment of rewards or remunerations becomes a legal right of inventor employees. This right can be extended after the termination of the employment, or be inherited if the inventor employee dies. In addition, the right to rewards and remuneration is not retrospective, which means the employers are not allowed to ask for payment return when the invention fails in patent license.

Secondly, rewards and remunerations can be determined upon the contract agreement, or regulated by enterprise policy; however for the latter situation, the policy has to be made in (labor) laws. It is noted that the Draft Regulation illustrates contents which should be included in the contract or policy as the procedure, the payment way, the amount, and the relief. Any agreement or policy excluding the right to rewards or remuneration is null. The employer should hear from inventor employees before he decides the payment way and the amount of rewards or remunerations. In short, the due procedure is emphasized during the process.

Thirdly, to enhance the benefits share, the Draft Regulation increases the minimum standards on rewards and remuneration. The total amount of patent invention rewards for all inventor employees should not be less than double monthly average wages of all workers, unless there are different arrangements in contract agreements or enterprise policies. Similarly, in regard to the remunerations, in Draft Regulation, there are four payment ways to be selected as the minimum standards for patent inventions: (1) no less than 5% of business net profits for yearly payment; (2) no less than 0.5% of sales figures for yearly payment; (3) reasonable times of average monthly wages for yearly payment comparing with the amount calculated in (1) and (2); or (4) a reasonable amount by a lump-sum payment according to calculations in (1) and (2). At last, all remunerations can be up to 50% business profits.

Besides, if the employer delivers or license the IP rights to others, inventor employees should be

²⁴ Chapter III, Draft Regulation.

remunerated no less than 20% of related income.

The Draft Regulation aroused great criticism from the employer side. Especially for the minimum standards on rewards and remunerations, enterprises complain that these standards are too high to implement, or these statutory provisions look more like labor standards which might conflict with market doctrine.²⁵ In addition, the report system requires more inputs on the corporate management. In short, the new rules “cost” employers too much for they have to do something new which they needn’t before. Contrary to chaos from the employer side, nearly nothing was heard from workers. Neither ACTFU nor labor academics are willing to show their attitudes since employee inventions are traditionally considered as an IP issue or individual issue which is quite distant from normal labor concerns.

V. Conclusion: beyond the draft regulation

Under the pressures from the employer side, the *Draft Regulation* is sheltered now. For example, according to *Shanghai Guidelines and Draft Regulation*, the legitimacy of contract agreement or enterprise policy should be testified by laws. That means labor laws should also be applied. There are at least several classic topics on employee inventions deserving consideration from labor side: how to consider the due procedure when the employer makes the corporate policy herein; how to verify the true will of a contract arrangement; what nature of the compensation to employees when the employer changes patent application for the know-how, and so on. Moreover, it is the time to think about what role trade unions should play. Can collective agreement govern the employee inventions? Can trade union help in related disputes? In the context of social innovation in China, the regulation on employee invention goes far more than protections on individual talent, and it is about all innovative workers. When we face the innovation challenge, we should be ready to carry out what we inherently thought to be done for the time.

25 Jiang Ge, Dilemmas of Regulations on Rewards and Remuneration of Employee Inventions and Practical Wayout, China Legal Science 2016, Vol. 3.

Changes in the Wage System in Japan: Circumstances and Background

Itaru NISHIMURA

The Japan Institute for Labour Policy and Training

- I. Contents of report
- II. Differences between Japan and other countries
- III. Basic rules for wage increases
- IV. Former system
- V. Current system
- VI. Summary

I. Contents of report

This article describes changes occurring in Japan due to the ongoing transition to a performance-based pay system, which began in the mid-1990s, and some of the characteristics that distinguish Japan from foreign countries. It will especially focus on changes in the qualification grade and wage scale, and briefly discuss the factors that underlie these changes.

II. Differences between Japan and other countries

The Japanese wage system is often referred to as a seniority-based pay system. However, according to research on wage profiles in other countries, a wage curve for white-collar workers¹ in the US and Europe also increases according to age,² and the seniority-wage curve is not unique to Japan. Meanwhile, according to a survey on case studies of white-collar workers in the US and the UK, wages vary to some extent on workers' performance as appraised through evaluations,³ even when their job duties are the same. Determination of wages based on supervisors' evaluations of subordinates is the norm both in Japan and in Western countries.

Here I will briefly outline differences between the personnel and wage systems of Japan and other countries (in particular Germany, France, and Sweden), based on my observations conducted by JILPT surveys from 2013 to 2016.⁴ In every country, there is a qualification-grade system that ranks each employee in a grade. Determination of employees' wages based on grade is also common to every country.

However, there are several differences among countries. One of these is the structure of the grade system. As shown in the rough image in Figure 1, other countries' grade systems emphasize the distinction between job duties more than does Japan's. For example, a Swedish manufacturer uses different grade scales according to the area of job duties, such as marketing or human resources, but in Japan, many companies tend to classify all "white-collar jobs," including marketing and human resources, in a single grade scale. In Germany, as well, the scope of each grade is separately determined for each job duty area: for example, an electrician is classified in a grade between fifth and eighth depending on specific tasks performed. In Japan, these specific tasks do not demarcate the upper and lower bounds of a grade. If they

1 There is no clear definition of "white-collar," but the following explanation by Koike (2003) is generally accepted: In short, it refers to people working in offices, by the (often) white collars of their shirts. There is another similar expression, "blue-collar," referring to people mainly working on production lines, by the blue collars of their work uniforms.

2 e.g. Koike (2003).

3 e.g. Koike (2015).

4 The results of the survey are summarized in Japan Institute for Labour Policy and Training (2016). The discussion here includes contents not in the above report.

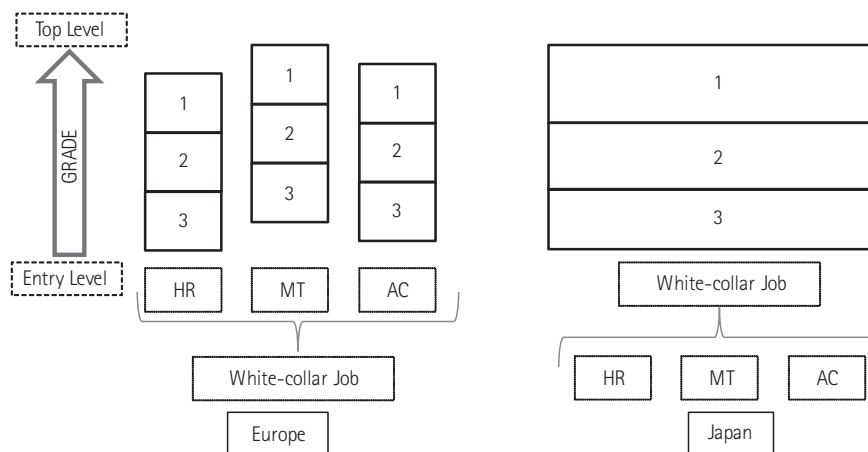


Figure 1. Image of grade structure

have comparable academic background, all new graduates are classified into the same grade, and all have the potential to be promoted to the highest rank of non-executive employee, regardless of their job duties with which employees are assigned for their first job in the firm they are hired.

Second, there are differences in terms of who designs the grade structure. For example, in both Germany and France, labor and management at an industry-wide level greatly influence the determination of grade structure, at both upper and lower ends of the scale. In Germany, labor and management at an industry-wide level also have a significant influence on wage level, while this is not the case in France. In Japan, the grade structure is mainly determined by labor and management at the individual company level, and this is also the case in some European countries like Sweden.⁵

Third, although the system itself is structurally similar in Sweden and in Japan, there are major differences in terms of formation of wage standards. Although wage standards are set at an industry-wide level in both countries, there are significant disparities in the degree of influence exerted at this level. Though in both countries, the degree by which wages should be raised is discussed in the industry level, in Sweden the rate of increase is set based on binding industrial agreements, which all companies are required to follow. Meanwhile, wage increases are not fixed in a binding manner on an industry-wide level in Japan, but rather there are guidelines, and wage rates can be set by labor and management at individual enterprises. In short, there are two notable characteristics that distinguish Japan from other countries: (1) Differences among job duties are not emphasized in designing personnel and wage structures, and (2) wages are primarily determined by labor and management at each individual company.

III. Basic rules for wage increases

Let us examine the basic rules for determination of wages in Japan. In Japan, there are two mechanisms for raising wages, namely base-up and *teiki-shokyu* (annual wage increment). Basic wage increase (base-up) are determined through labor-management negotiations conducted every spring (spring wage bargaining), while *teiki-shokyu* are conducted according to the company's wage system, without negotiations being involved. Japanese companies' wage systems incorporate these automatic periodic pay increases into their wage systems (e.g. employees' regular monthly wage) without designating them as based on age or years of continuous service. The system of annual increment will be described in detail

⁵ Thus, even setting aside discussions of division of authority between labor and management, there are some differences even among the advanced countries of Europe in terms of the roles of labor and management at an industry-wide level. Just as there is no system common to all East Asian countries, European countries also have diverse systems.

later in this article. What is important here is that the system of annual increment is one of the primary factors ensuring that wages for both blue-collar and white-collar workers follow a seniority-based wage curve.

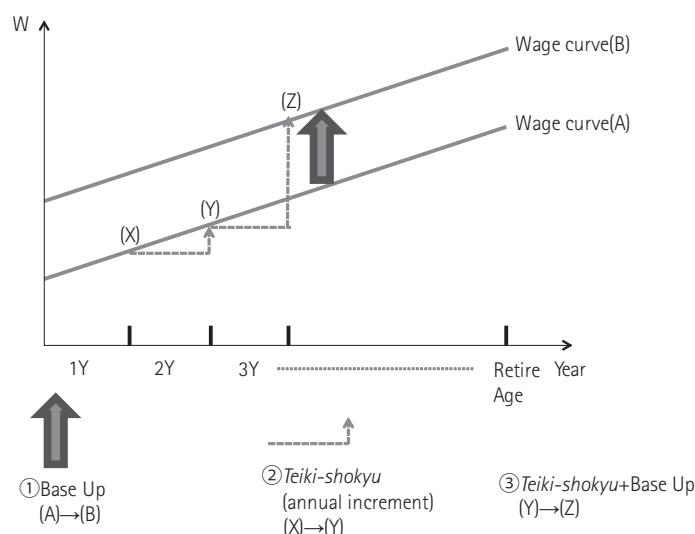
Figure 2 shows the relationship between base-up and annual wage increment, with the vertical axis being the wage amount, and the horizontal axis the years of length of service. When wage curve (A) is a wage curve resulting from operations of the wage system, base-up is what elevate the wage curve itself from (A) to (B) through wage negotiations. Meanwhile, annual wage increment is going up the wage curve itself based on the annual operation of the wage system. In Figure 2, the degree of elevation from (X) to (Y) indicates the action of annual wage increment. Thus, three years after an employee started to work for a company, if both annual wage increment and base-up are implemented concurrently, the employee's wages will be raised to point (Z) from point (Y).

IV. Former system

1. Ability-based qualification grades

As illustrated in Figure 2, wages rise to some degree as a result of the functioning of the wage system, even if labor-management negotiations do not succeed in getting wage increases. To understand the mechanism of these automatic periodic pay raises (*teiki-shokyu*), it is necessary to examine the wage system itself. This article will discuss this system both before the introduction of performance-based pay and afterward. First, let us examine the former.

Before the introduction of performance-based pay, workers' wages were fixed according to a wage table with a gradual build-up, under an "ability-based qualification grade" system. The point here was that wages were decided based on evaluations of the workers' abilities and knowledge (possessed, rather than actually demonstrated in practice), with length of service factored in to some degree. It should not be overlooked that even prior to the advent of performance-based pay, wages were decided not only according to age or length of service. However, the qualification grades in which workers were classified and the amounts of wages paid did not necessarily correspond to the degree of difficulty of tasks or the post currently demonstrated in practice in the organization. A key characteristic of this system was its intent to pay wages in accordance with workers' abilities and knowledge (as opposed to results).



Source: Prepared by the author based on Imano and Sato (2002).

Figure 2. Base-up (basic wage increase) and *Teiki-shokyu* (annual wage increment)

2. Approaches to ability-based qualification grade

Next, let us examine the concept of ability-based qualification grades, and discuss this system briefly based on an explanation by Kyu Kusuda, who designed an ability-based grading system and, in his capacity as consultant, made great efforts to popularize it. An important point here is that he tried to form a system of qualification grades by rating the degree of difficulty of various tasks, investigating the various operations needed for each task in the workplace. According to Kusuda (1987), it was optimal for grades to be formed and workers graded according to the following order of criteria:

- 1) What kind of work do they perform in the workplace, and what kind of tasks does this work consist of?
- 2) If the tasks are arranged in a line in order by degree of the difficulty, what would that order look like?
- 3) Create grades for workers based on this order of difficulties.

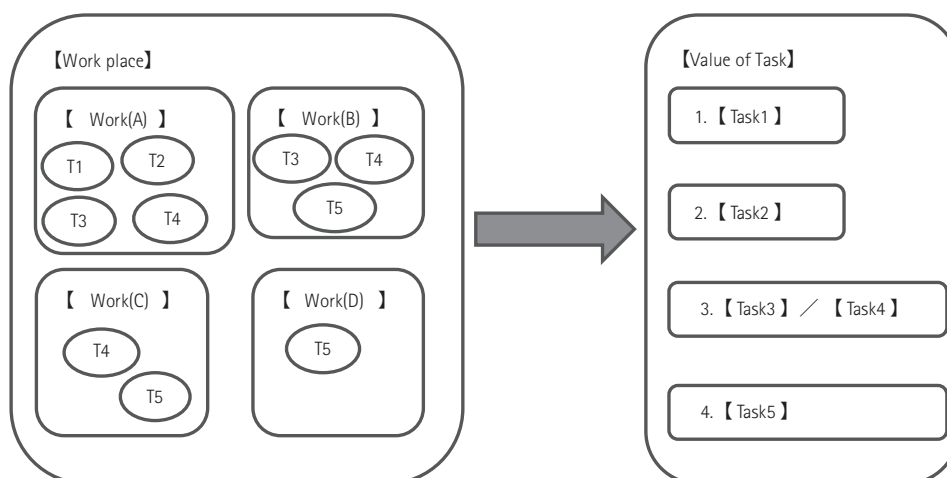
As shown in Figure 3, each type of work is assumed to consist of various tasks. For example, let us hypothesize that there are four main types of work in a workplace. First, we list the contents of each type of work and verify what they consist of. Then, we rank the degree of difficulty of these contents of tasks. Next, we define workers' handling of these tasks more finely, according to criteria such as whether they are able to perform the tasks only with senior employees' help, are able to perform the tasks by themselves, or are even able to lead other workers in performing them. Then, we define the abilities and knowledge they should have for each grade, and grade the workers according to this definition.

For example, if we define the J-2 grade as shown in Figure 4, workers would be graded based on whether they meet that definition. Because workers are graded based on his holding capability, workers are not reassessed later based on how tasks were actually performed. Also, the grades are composed based on rough classifications like office work, engineering, or manufacturing, rather than fine classifications based on specific job duties like marketing, human resources, or administration.

3. Wage tables based on ability-based qualification grade

Now, let us have a look at typical wage tables under the ability-based grading system, with classic examples shown in Figures 5 and 6. Two common characteristics are evident, one being the steady rise in wages, but the other being disparity in the amount of individuals' pay raises depending on supervisors' evaluations. This system was applied not only to white-collar but also to blue-collar workers.

For example, on a wage table like that shown in Figure 5, the amount of pay increase for each worker



Source: Prepared by the author based on Kusuda (1987).

Note: T means task.

Figure 3. Relationship between work and task

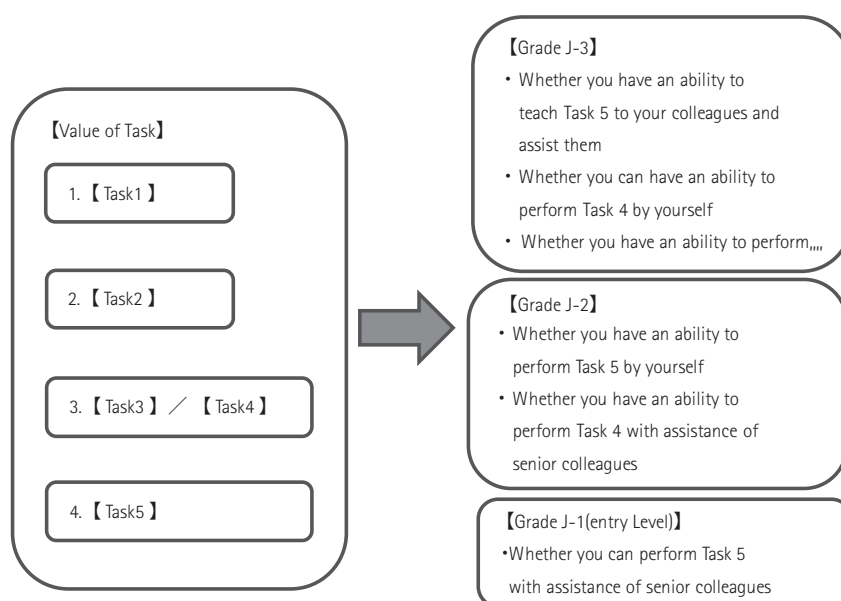
is decided according to an annual evaluation, with separate evaluations for each grade. If a worker were placed in Grade J-2, he or she would get a 2,800 yen raise if evaluated as rank B, and a 3,100 yen raise if evaluated as rank A. Determined in this way, wages rose steadily under this system, although there were some disparities in the amount of increase for each individual worker.

Figure 6 is an example of a wage table where step-numbers are assigned according to evaluations of workers. In this case, if a worker were evaluated with a standard rank of B, he or she would get a five-step raise. Thus if the worker had number 1 in J-2 and was assigned a rank of B, he or she would rise to number 6 in J-2. As a result, wages would grow from 44,800 yen to 47,600 yen.

The pay raises given through these systems correspond to the *teiki-shokyu* outlined in Figure 2. Meanwhile, in the case of annual basic-wage increases (base-up), the amounts on the wage table itself are revised. For example, in Figure 5, an annual basic-wage increase might mean that the wages of a worker graded as rank B and class J-1, now 2,500 yen, would increase to 3,000 yen or so as a result of labor-management negotiations.

4. Characteristics and the background of the system prior to introduction of performance-based pay

Thus far, in this section we have reviewed the characteristics and the background of the system in place before a performance-based pay system was introduced. Now, let us summarize the outcomes of this qualification-grade system, in which workers were primarily graded on their abilities and knowledge, and the system of periodic pay raises incorporated with assessments of these abilities and knowledge. For one, workers had steady opportunities for promotion to higher grades and corresponding pay raises. Also, these systems had advantages for enterprises in terms of giving workers motivation to improve their skills, abilities and knowledge, and enabling enterprises to maintain a pool of competent human resources. However, it was a somewhat costly system for enterprises in that the abilities workers demonstrated in practice and the posts they currently held were often inconsistent with their wages. Nonetheless, at least until the 1980s and early 1990s, Japan was blessed with an economic climate in which this system was viable. On this topic, please refer to Imano (1998) and Ishida (2006). Summing up the findings of both, the



Source: Prepared by the author based on Kusuda (1987).

Figure 4. Tasks and grading

background behind this system was as follows.

According to Imano and Ishida, Japan enjoyed a degree of stability thanks to an economy that was playing catch-up to Europe and the United States. One reason for this was that it was already clear what kind of products and services needed to be created, as Western companies in countries like the US and Germany gave examples of products to create and the specifications these products required. Thanks to these role models, Japanese enterprises could concentrate on improving product quality and production efficiency. A second reason is that the product and services enterprises created were steadily consumed in the domestic market due to the favorable conditions of the Japanese economy. A third reason was that while

(Unit:Yen)

Rank Grade	S	A	B	C	D
J - 1	3,100	2,800	2,500	2,200	1,900
2	3,400	3,100	2,800	2,500	2,200
3	4,000	3,600	3,200	2,800	2,400
S - 4	4,400	4,000	3,600	3,200	2,800
5	4,800	4,400	4,000	3,600	3,200
6	5,500	5,000	4,500	4,000	3,500
M - 7	6,000	5,500	5,000	4,500	4,000
8	4,800	4,400	4,000	3,600	3,200
9	3,600	3,300	3,000	2,700	2,400

Source: Prepared by the author based on Kusuda (2006).

Figure 5. Wage table with a gradual build-up approach (Type 1)

(Unit:Yen)

Grade Step	J-1	J-2	J-3	S-4	S-5
1	31,700	44,800	58,600	77,800	98,200
2	32,200	45,300	59,200	78,500	99,000
3	32,700	45,800	59,800	79,200	99,800
4	33,200	46,400	60,400	79,900	100,600
5	33,700	47,000	61,000	80,600	101,400
⑥	34,200	47,600	61,800	81,400	102,200
7	34,700	48,100	62,400	82,100	103,000
8	35,200	48,600	63,000	82,800	103,800
9	35,700	49,200	63,600	83,500	104,600
10	36,200	49,800	64,300	84,200	105,400
⑪	36,700	50,400	65,000	85,000	106,200
12	37,200	50,900	65,600	85,700	107,000

Source: Prepared by the author based on Kusuda (2006).

Figure 6. Wage table with a gradual build-up approach (Type 2)

enterprises themselves were growing and expanding steadily, they were consistently able to offer workers opportunities to demonstrate their abilities and knowledge. These factors made it possible for the workers to utilize their abilities and knowledge effectively within the enterprise, and for companies to maintain the overall personnel budget to cover the annual costs incurred through the operation of this kind of wage system. The former Japanese wage system based on employees' abilities and knowledge was underpinned to some extent by the above-described business-environment factors.

V. Current system

1. General characteristics

Naturally, there is fierce competition among enterprises in any era, but compared to today, this competitive environment was relatively mild in the Japan of the 1980s and early 1990s. As the business climate rapidly grew more severe from the 1990s onward, wage systems began to be revised accordingly.

This revision can be seen as taking on three major forms. One is that personnel management and wage systems have increasingly come to incorporate assessment of current post or duties within the organization, and abilities demonstrated in practice rather than simply possessed, into the conventional ability-based system. There has been a growing emphasis on treating and compensating human resources based on their immediate value to the company, not in terms of the abilities and knowledge they are evaluated as having, but those they are currently putting into practice and their current areas of responsibility. The system is evolving to one in which employees are rewarded for their most recent contributions to generating added value for their enterprise.

The second is a growing tendency for systems to be designed based on enterprise-specific business models. Enterprises that view the consistent quality of their products and the high skill levels of workers at manufacturing sites as being their core competencies have introduced somewhat modified versions of the old ability-based grading system, whereas enterprises such as department stores that see ability to outsell competitors in the market as their core competences have formulated systems that emphasize scope of duties and actual performance (Ishida 2006). As systems are designed in accordance with business models, the systems in place at individual enterprises are diversifying. This is difference point between the era before performance-based pay, when many enterprises converged under the umbrella of the ability-based grading system, regardless of industry and era after it. As a result, various names for the grading system have emerged, including "ability-based grading system," "job duties-based grading system," "role-based grading system" and so forth.

The third major area of change is the emergence, as a result of these new areas of emphasis, of wage tables diverging from the conventional gradual-increase model. These have not been widely discussed in the literature, but as harbingers of significant change from the previous era, they should surely not be overlooked.

2. Core concepts of a qualification grade system

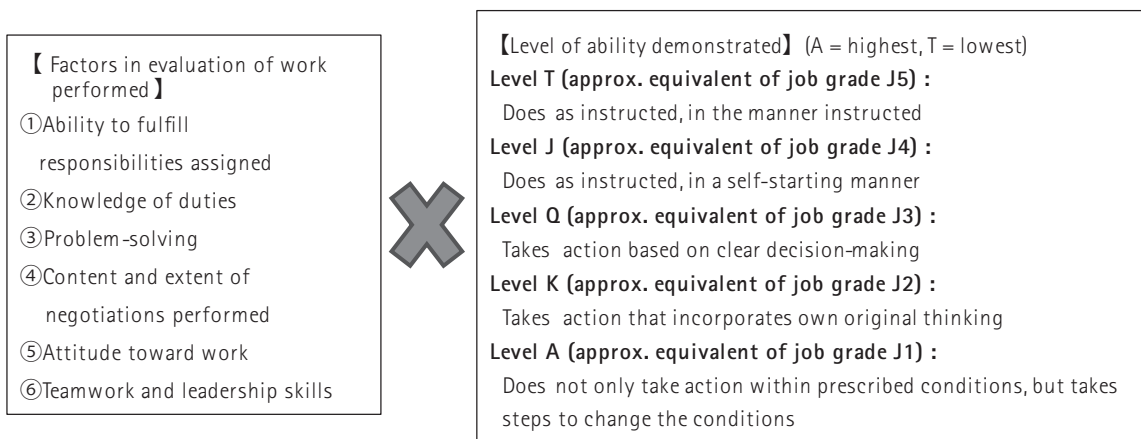
While wage systems have been diversifying as described above, one fundamental concept has come to be increasingly emphasized across the board, namely "role." This concept came to the forefront when management considered the design of qualification grades based on workers' degree of contribution to creation of added value for their enterprise. They sought to redesign the qualification grade system based on this concept, from the standpoint of assessing the magnitude of workers' responsibility to the enterprise, and the value of their practically demonstrated ability, as the most important factors for added value creation. Specifically, this entailed ranking employees by post at the managerial level, and by ability (as actually demonstrated, and producing concrete results) at the non-managerial staff level. Thus, "role" can be seen as a mixture of both the contemporary viewpoint of emphasizing current position and duties performed, and the traditional Japanese emphasis on (possessed) ability. Indeed, this combination of both

elements — duties (currently performed) and ability (of potential use to the enterprise) — is the practical benefit of the “role” concept. It seems to have been a useful concept in that it enabled the incorporation of new ideas, such as post and duties, without giving up the benefits of the traditional ability-based system, namely the ability to hold on to human resources and cultivate them.

Let us examine some case studies of grade systems in Japan, which can help us to understand the importance of the concept of “role.” To make a long story short, even when a grading system is called “job duties-based,” what is emphasized is in fact something very close to “role.” When we look at these case studies of enterprises implementing job duties-based grading, it is clear that in formulating new systems they have adhered to the concept of “role” outlined above.

In one example of a Japanese enterprise that adopted job duties-based grading, at the managerial level rank according to qualification grade is determined based on the post currently held, and among non-managerial-level employees, rank according to qualification grade is assigned based on degree of demonstration of ability. This means that even when two workers are doing the same job, under this system they may be assigned a different rank according to qualification grade if they demonstrate different levels of ability. While the system is ostensibly “job duties-based,” it takes into account both post of organization and ability of individual employees in assigning grades.

What follows is one example of a method of ranking workers based on duties. Figure 7 shows rules for ranking general employees under a job duties-based grading system, with the left side listing the factors taken into account when evaluating employees. Specifically, these are: (1) Ability to fulfill responsibilities assigned (2) Knowledge of duties (3) Problem-solving (4) Content and extent of negotiations performed (5) Attitude toward work, and (6) Teamwork and development of leadership skills. Employees are assigned ranks in each of these areas depending on their job content. Meanwhile, the right side lists levels based on degree of ability demonstrated, from “T” to “A,” i.e. lowest to highest. The left- and right-side factors are combined to give workers a final rank, on which their overall grade is based. For example, when an employee is seen as having “Q-level in Knowledge of duties, K-level in Problem-solving due to outstanding ability, but J-level in Attitude toward work due to unresolved issues,” he or she is assigned a grade accordingly, with the degree of individual ability demonstrated also taken into account. Under these rules, two workers might have the same jobs (same scope of duties), but one might be ranked in a higher grade than the other.



Source: Yanashita (2005).

Figure 7. Rules for ranking non-managerial staff according to a job duties-based grading system

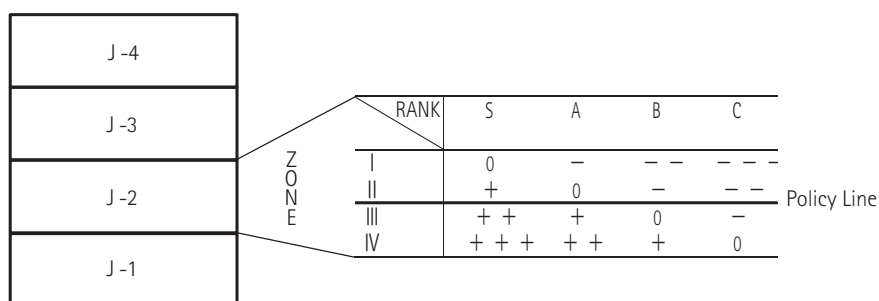
3. The emergence of new wage tables

Next, let us examine the change in wage tables. This can be called the area where the greatest changes have occurred since introduction of a performance-based system. Some enterprises have begun using what is known as a “matrix type of wage table.”⁶

Figure 8 presents an image of a matrix type of wage table. One feature of this wage table is that each grade is divided into zones, and a salary increase amount is assigned to each zone. At the same time, benchmark line (called a “policy line”) defines the standard wage level for each grade. The system is designed so that when a worker’s wages are below the policy line, they are raised more swiftly, while above the policy line pay raises are less forthcoming (and in some cases pay may even drop), which has the effect of grouping the wage levels of workers in a single grade in a cluster around the policy line.

The matrix type of wage table has the effect of curtailing periodic pay raises (*teiki-shokyu*), which were typical during the earlier era, and as such can be called a radical departure from the older model. Also, the fact that wages have the potential to fall even among non-managerial staffs is a rarity on a global scale.

A more specific example is shown in Figure 9. Here, in the higher zones, wages drop even when the



Source: Prepared by the author based on Nishimura (2017).

Figure 8. Matrix type of wage table

(Unit: Yen)

Grade	Zone(Wage level)		Increases according to Score					
			E	-Omitted-	B	-Omitted-	S	
Grade V	Zone4	~Omitted~	~Omitted~					
	Zone3							
	Zone2							
	Zone1							
Grade IV	Zone4	210,000 or higher	240,000 or less	- 7,000	~Omitted~	- 3,500	~Omitted~	2,500
	Zone3	181,300 or higher	Less than 210,000	- 4,500		0		5,000
	Zone2	130,000 or higher	Less than 181,300	300		5,400		8,000
	Zone1	80,000 or higher	Less than 130,000	2,000		7,900		10,000
Grade III	~Omitted~							
Grade II								
Grade I								

Source: Nishimura 2016.

Notes: 1. The names of grades and evaluation guidelines are used for convenience and are not official.

2. The monetary amounts on the table are imaginary and not based on those of a real enterprise.

Figure 9. Example of a matrix wage table

6 This is actually a convenient term for research and is not actually used in practice.

employee is evaluated as “standard,” whereas in the lower zones, workers can receive larger raises even when receiving the same evaluation.

4. Effects and context of changes

Here I will summarize the effects of the transition to a performance-based system. One is that in determining workers’ wages, greater emphasis is now placed on their degree of contribution to the enterprise’s business performance, rather than the abilities they possess. Contribution to business performances is seen as creating added value for the enterprise, which in turn determines the “worker’s role” in the enterprise, and personnel management and wage systems have been redesigned based on this way of thinking. As an example of a concrete change, Nakamura (2006) points out that compared with the former system, posts and titles currently held by workers in their organizations are more greatly emphasized in classifying them into grade system.

Another effect is a diminishment of stable wage growth that workers can count on, due to the curtailing of *teiki-shokyu*. Compared to the earlier gradual-increase model, under a matrix type of wage table there are few or no automatic periodic pay raises, and it is very hard for all workers to achieve consistent wage growth.⁷

Nonetheless, there seems to be a positive aspect to the need for such systemic reforms, as the challenges they present indicate a certain milestone that the Japanese economy has reached. Increased uncertainty about the future, which accompanies Japan’s arrival as one of the frontrunners of the global economy, has played a considerable role in heightening the need to build a new wage system to replace the previous one.⁸

One area of uncertainty springs from the fact that it is no longer a safe bet to simply follow the example of Western enterprises in terms of what sorts of products to produce. This means it is no longer clear whether the products and services created will sell in the market or not.

A second area of uncertainty is that enterprises can no longer count on stable, sustained growth due to changes in the competitive environment, meaning in turn that enterprises can no longer guarantee their employees consistent access to opportunities to demonstrate their possessed abilities.

Amid growing uncertainty, enterprises were no longer assured of sufficient revenue to cover the wage costs incurred through automatic annual pay increases, supposedly commensurate with workers’ growing abilities, and were forced to scramble for a new kind of wage system. This meant that drastic measures needed to be taken to prop up the system, and it must be acknowledged that the current system is at least in some ways the result of sincere attempts to address challenges that cannot be resolved by looking nostalgically toward the past.

VI. Summary

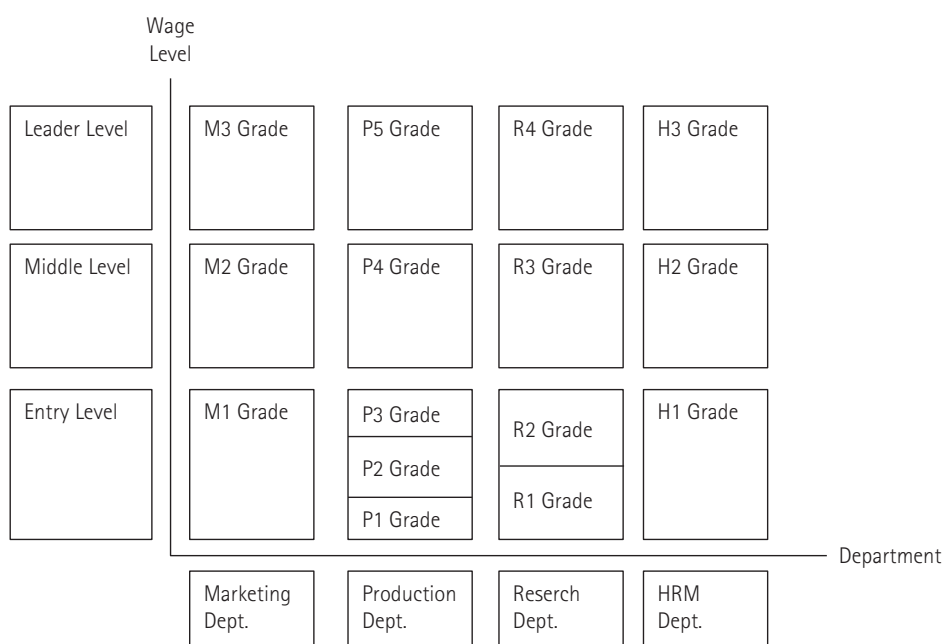
1. How Japan has changed

One change that has occurred is that in the qualification grade system, ranking rules take current position and practical demonstration of ability into account to a higher degree than before. Some enterprises have begun establishing different sets of qualification grades for each department, such as marketing or human resources (Figure 10). These new developments can be interpreted as a narrowing of the gap between Japanese and Western wage systems, as described at the beginning of this article.

Another change is the waning of the automatic periodic pay raise such as annual wage increment (*teiki-shokyu*), as represented by the introduction of matrix type of wage tables. With these tables, several zones are created within a single grade (pay range), and pay raise increments are determined for each zone. Until

⁷ The curtailing of annual wage increment (*teiki-shokyu*) in the new type of wage table is described in more detail in Ishida (2006).

⁸ The background described in the ensuing paragraphs makes considerable reference to Imano (1998), and Ishida and Higuchi (2009).



Source: JILPT 2013.

Note: The names of grades used for convenience and are not official.

Figure 10. An example of different sets of qualification grades for each department in Japanese company

workers’ wages reach the “policy line,” the median of the pay range for their grade, they now enjoy larger raises than under the previous system, but once they are above the policy line, it is harder to get raises than previously. A key characteristic of the matrix type of wage table is that wages do not rise consistently and indefinitely, but rather the enterprise sets a wage standard (median wage) for each grade and employees’ wage levels tend to cluster around that amount. The emergence of such wage tables is an aspect of the reform of Japanese wage systems since 2000 that cannot be ignored. The change is significant, in that wage systems increasingly have the effect of consolidating workers’ wages at certain levels within same grade rank.

2. Points of international comparison

Finally, let us see what prominent features emerge when we compare Japan to other countries. With regard to determining qualification grades, Japan is in line with the rest of the world when it comes to posts and specific duties playing a larger role, and in a sense, can be said to be drawing closer to Europe and the US.

However, a closer examination reveals undeniable differences. For example, based on the discussion comparing the US and Japan by Ishida, Higuchi (2009), somewhat different principles are used to determine the upper and lower boundaries of pay ranges for each grade. In the US, the “going rate” in the labor market is emphasized, meaning that the maximum and minimum wages for each grade fluctuate, and there is overlap between the pay ranges of different grades, defined by the standard wage levels in the market at the time. The market significantly affects enterprises’ wage systems,⁹ whereas in Japan, there is an emphasis in maintaining order through balance among different pay grades, and the influence of market rates is minimal. In other words, the upper and lower boundaries of each pay range and the overlap

9 In a survey in Sweden conducted by the author, one recent change to one enterprise’s white-collar wage system was mentioned that market rates were becoming more important in setting the upper and lower boundaries of wage ranges.

between pay grades are determined as enterprises see fit. The achievement of order and balance within enterprises and organizations is seen as more crucial than the integrity of the market.

Discrepancies can also be seen in terms of wage table design. For example, in the JILPT field survey of France¹⁰ in which the author took part, even at the level of department heads and other managerial personnel, monthly pay was set so that it did not fall below that of the previous year. While the amount of annual pay increase might fall from, for example, €500 in the year X to €300 in the year X+1, the system was not designed to allow monthly pay to fall from, for example, €2,000 to €1,800.¹¹ In Japan, however, there are wage tables where even non-managerial staffs have the potential to get no pay raise, or a pay cut, and the system is designed to allow drops from, for example, 200,000 yen per month to 198,000 yen.¹² In this comparison, Japan's wage conditions appear to be harsher.

As we have seen, when examined in detail, Japan's wage system can be seen to have unique features. At the beginning of this article it was mentioned that (1) when designing personnel management and wage systems, differences in specific job duties are not emphasized, and (2) labor and management at individual enterprises play a leading role in setting wage standards. Regarding the first feature, some degree of change has been evident recently, while no significant change can be seen with regard to the second feature. A third feature can be added, namely that compared to their counterparts in other countries, Japanese enterprises exercise more stringent control over pay increases. Naturally, further research is needed in order to back up this assertion with more accurate details. However, one thing that can be said for certain is that the winds of change are undeniably blowing with regard to wage systems in Japan.

References

- Imano, Koichiro. 1998. *Kachinuku chingin kaikaku: Nihon gata shigoto kyu no susume* [A winning wage reform strategy: Advantages of the Japanese-style job-based wage]. Tokyo: Nikkei Publishing.
- Ishida, Mitsuo. 2006. "Chingin seido kaikaku no chakuchi ten" [The destination of wage system reform]. *The Japanese Journal of Labour Studies*, 48, no.9: 47-60.
- Ishida, Mitsuo and Junpei Higuchi. 2009. *Jinji seido no nichibei hikaku: Seika shugi to Amerika no genjitsu* [Comparison of Japanese and US human resources management: Merit-based systems and American realities]. Kyoto: Minerva Shobo.
- JILPT. 2013. "Tayo na seishain" no jinji kanri ni kansuru kenkyu [Research on personnel management of "restricted regular employees"]. JILPT Research Report no. 158. Tokyo: The Japan Institute for Labour Policy and Training.
- JILPT. 2016. *Gendai senshin shokoku no rodo kyoyaku shisutemu: Matome to ronten* [Collective agreement systems in modern industrialized nations: Summary and observations]. JILPT Research Report no. 184. Tokyo: The Japan Institute for Labour Policy and Training.
- Koike, Kazuo. 2003. *Shigoto no keizaigaku (Dai 3 han)* [Job economics, 3rd ed.] Tokyo: Toyo Keizai.
- Koike, Kazuo. 2015. *Sengo rodo shi kara mita chingin: Kaigai nihon kigyo ga ikinuku chingin towa* [Wages in postwar labor history: Wages that let Japanese companies succeed overseas]. Tokyo: Toyo Keizai.
- Kusuda, Kyu. 1987. *Shokuno shikaku seido: Sono sekkei to un'yo (Kaitei shinpan)* [Occupational grading systems: Design and operation, rev. ed.] Tokyo: Industrial Labor Research Institute.
- Kusuda, Kyu. 2006. *Chingin hyo no tsukuri kata kaiteiban* [Making wage tables, rev. ed.] Tokyo: Keiei Shoin.
- Nakamura, Keisuke. 2006. *Seika shugi no shinjitsu* [The truth of performance-based pay systems]. Tokyo: Toyo-Keizai Shinpo-sha.
- Nishimura, Itaru. 2016. "Jinji/Chinginseido no hensen ni kansuru ichi kosatsu to kongo no kenkyu kadai" [Some observations on the evolution of personnel management and wage systems and future research topics]. (JILPT discussion paper 16-03). <http://www.jil.go.jp/institute/discussion/2016/16-03.html>
- Nishimura, Itaru. 2017. Chingin hyo no henka kara kangaeru chingin ga agarinikui riyu [Reasons for wages' failure to rise from the perspective of wage tables]. in *Hitode busoku nanoni naze chingin ga agaranai no ka* [Why wages are stagnant even when businesses are understaffed] edited by Yuji Genda. Tokyo: Keio University Press.
- Yanashita, Koichi. 2005. *Takeda "seika shugi" no seiko hosoku* [Takeda, recipe for success of a merit-based system]. Tokyo: Nikkei Business Jin Bunko.

10 The two enterprises surveyed were a manufacturer and an insurance company. Both are the large companies in France.

11 The monetary amounts of this example are imaginary and not based on those of a real enterprise.

12 The monetary amounts of this example are imaginary and not based on those of a real enterprise.

The Development and Labor Situation in Indonesia

Hayati Sari HASIBUAN
University of Indonesia

- I. Introduction
- II. The development in Indonesia: Current status and outlook
- III. Indonesia's population growth and demographic Bonus
- IV. Characteristics of recent labor issues
- V. Labor policy for equality and wellbeing of people
- VI. Conclusion and recommendation

I. Introduction

Indonesia is a sovereign archipelago in Southeast Asia made up of more than 17,508 islands, including nine big islands (Java, Sumatera, Kalimantan, Sulawesi, Maluku, Papua, Bali, East Nusa Tenggara, and West Nusa Tenggara). Indonesia has a population of 258,784,986 in 2016, and estimated at 263 million in 2017, which makes it the fourth most populous country on earth after China, India, and the United States. Indonesia's population share is 3.51% of world population. Indonesia has more than 300 distinct ethnic and linguistic groups. About 56.7% of its population lives on Java, the most populous island.

Indonesia has experienced a major structural shift in its economy. The manufacturing share of GDP increased by 19 percentage points while agricultural share fell by 35 percentage points. Rapid economic growth is highly correlated with structural change in the nation's economy. But the manufacturing share of employment absorption is slightly increased by 1.8 percentage points while agricultural share fell by 30 percentage points. Based on formal and informal category, the number of people working in informal sector was higher than in formal sector. By August 2016, 50.21 million people (40.42%) worked in formal sector, meanwhile 68.20 million people (57.60%) were in informal.

By 2010 half the population lived in urban areas and with the increasing pace of urbanization it is expected that 67% will be living in urban areas by 2030. This shift will have profound implications for the labor market. In particular, rural labor force participation tends to be higher than rural unemployment. If these trends continue, there is a risk of lower labor force participation and higher unemployment in the years to come.

The other main issue in the Indonesia's manpower is the education and skill gaps. Based on the graduation, workers was dominated by level of education of primary school graduated, at about 49.97 million (42% of the total workers). Only small percentage of workers are diploma graduated, 2.88%. The lack of education and skill of workers worsened with the mismatch of labor market demand.

II. The development in Indonesia: Current status and outlook

Typically, as a country's economy develops, the proportion of contribution from the agriculture sector declines relative to the contribution of the manufacturing and service sectors. While the growth of the service sector in Indonesia has been slower compared to other countries in the region and manufacturing contributes proportionately less to the economy. Overall trends indicate that the country is becoming less reliant on agricultural activities. Manufacturing and services play an increasingly important role. This can be expected to result in an increased rate of urbanization, since both manufacturing and services tend to be based in urban locations.

Employment and economic growth are dependent on one another. The economic growth contributes to

Table 1. Economic and Employment Growth, 2005–2014 (%)

Sectors	2005-2009		2010-2014	
	GDP Growth Rate	Employment Growth Rate	GDP Growth Rate	Employment Growth Rate
Agriculture, Forestry, Hunting, Fishery	3.9	0.2	4.2	-1.6
Mining and Quarrying	2.2	6.3	2.4	2.7
Manufacturing	3.8	1.8	5.2	2.0
Electricity, Gas, and Water	10.3	3.5	6.4	4.3
Construction	7.9	4.7	7.2	5.4
Wholesale trade, Retail trade, Restaurant, Hotels	5.8	5.2	6.2	2.0
Transportation, Storage, Communication	15.2	2.0	9.4	-1.9
Financing, Insurance, Real Estate, Business Service	6.7	6.8	7.4	11.7
Community, Social, and Personal Services	6.3	Na	5.8	Na
Total	5.6		5.7	

Source: Statistical Bureau 2016.

the employment growth from the labor activities created by economic sectors, manufacturing, and services. The government has set targets to create as many as 2 million jobs per year; this would require at least 7% of economic growth rate.

Table 1 displayed GDP by category and the elasticity of the employment growth from 2005 to 2014. Agriculture sector still had positive growth on those two periods, but the employment growth on that sector significantly diminished. Mining sector growth rate was stable in two periods, but contributed to the higher employment growth in the first period 2005-2009, and declined in the period 2010-2014. The highest economic growth was in financing sector and it contributed to the highest rate of employment growth rate. Manufacturing sector has positive economic growth and contributed to the positive employment growth, but the additional points in employment growth rate is lower than in economic growth.

III. Indonesia's population growth and demographic bonus

Indonesia experienced a condition of high population growth with more than 2% yearly growth rate in 1980s and before. This yearly growth rate slowed down in the rate of 1.9% in 1990s. In the period of 2013 and 2016, the yearly growth was about 1.2% and 1.17% respectively. The total fertility rate was 2.2 in 2013. And in 2016 it increased to 2.47. The annual number of births continues to grow, making Indonesia's population doubled within just 40 years from 119 million in 1971 to 241 million in 2010. In 2016, the population was 257 million and projected to increase to 345 million in 2030.

Age demographics have seen that Indonesia's population is youthful. In 2014 the percentage of the population aged 14 or younger was 25.42%, the percentage of working-age population (15-64) was 67.78% and the percentage aged 65 and above was 6.79%. This mostly same percentage happened in 2016 and these figures stood at 27.09%, 67.40%, 5.50% respectively (Figure 1).

The heavy concentration of population was seen in some urban areas in Indonesia, such as Greater Jakarta, Greater Surabaya, Greater Medan, and Greater Makassar. Indonesia's urban population was about 54% of the total population in 2016. The trend of urban population concentration has been increasing

yearly, and as of 2010 national census, approximately 49.7% of Indonesia's population centers in some urban areas. It has increased sharply from 30.1% in 1990 (Table 2).



Figure 1. Indonesia population pyramid 2014 and 2016 (source: Statistical Bureau)

Table 2. Population projections for urban and rural areas, 2010–2030

Variable	2010	2015	2020	2025	2030
Number of people (millions)					
Urban	118.8	136.2	153.7	170.9	187.9
Rural	119.7	119.3	117.4	113.9	108.5
Percentage of the population (%)					
Urban	50	53	57	60	63
Rural	50	47	43	40	37

Source: Statistical Bureau, Indonesia population projection, 2010-2030

IV. Characteristics of recent labor issues

Indonesia's total population stands at 258.7 million in 2016. Of this total, 70 million are aged 0-14, 174.4 million are in the 15-64, and 14 million are 65 or above (Table 3). The population aged 15 and older in August 2013 was 180 million, and increased to 183 million in August 2014, 186 million in August 2015, and 188.6 million in 2016. The data showed that population aged 15 and older increased approximately 3 million per year. The labor force yearly increased around 1.7 million per year during the period 2013 to 2016.

Employment tends to fluctuate by the years between 2013 and 2016, and fluctuate substantially between February and August of each year. The number of employment in Feb 2013 was about 115.9 million and the number increased in 2014, 2015, and 2016. Interestingly, the number of employment in August tends to be lower compared to the number in February of each year.

Indonesia is still facing the big problem of unemployment with more than 7 million unemployment every year during 2013-2016. While unemployment rate remain stable throughout the year, unemployment rate in August 2016 was 5.61% increased by 0.11 percentage point from February 2016 (5.5%) and slowed 0.57 percentage point compared to 6.18% in August 2015. Labor participation rate in Indonesia on August 2016 was 66.34% that is lower compared to Feb 2016 (68.06%).

Formal job creation has slowed considerably in recent years. In August 2015 growth in employment slowed sharply year on year. As Table 3 illustrates, fewer than 200,000 jobs were created in between August 2014 and August 2015, while the population aged 15 years and over increased by 3.1 million persons. In the same period, the number of unemployed workers increased by over 300,000 people in one year. The rate of unemployed was in the range of 5.5% to 6.2%. In 2013, the labor force participation ratio was 69.2%, and stand at the same percentage in 2014 and 2015, but it declined to 68% in 2016.

In resume, Indonesia's labor is still facing some big issues. First, 33.66% of people are not economically active. Second, 7.03 million people are unemployed. Third, 8.97% half employment. Fourth, 57.60% people are working in informal sectors. Table 4 presented labor force participation ratio classified by gender from 2013 to 2015. It points out the following characteristics of Indonesia's labor force ratio. (1) The labor force participation rate of men was in the range of minimal 82.7% and maximal 85.0% during the period 2013 to 2016. (2) This rate was much higher (approximately two times higher) than that of women which was in the range of 48.9% and 54.5%, hovering at around 50% of the workforce.

Urban concentration of labor

The concentration of economic activity rises with development: no country has developed without the growth of its cities. As countries become richer, economic activity becomes more densely packed into towns, cities, and metropolises. The share of a country's population settled in towns and cities rises rapidly with its development from low to middle income. Urbanization rate is 52% and GDP per capita \$3,475.

Employment in urban areas grew by 45% since 2001, against 6% growth in rural areas. Urban

Table 3. Indonesia key labor market indicators (2010–2016)

Key Indicator	2013		2014		2015		2016	
	Feb	Aug	Feb	Aug	Feb	Aug	Feb	Aug
Total population (millions)	247.7	249.4	251.0	252.2	254.4	255.5		258.7
Population aged \geq 15 years (millions)	178.1	180.0	181.2	183.0	184.6	186.1		188.6
Labor Force (millions)	123.2	120.2	125.3	121.9	128.3	122.4	127.6	125.4
Employed (millions)	115.9	112.8	118.2	114.6	120.8	114.8	120.7	118.4
Unemployed (millions)	7.2	7.4	7.2	7.2	7.5	7.6	7.0	7.0
Employment to population ratio (%)	65.1	62.7	65.2	62.6	65.5	61.7		
Labor force participation ratio (%)	69.2	66.8	69.2	66.6	69.5	65.8	68.0	66.3
Unemployment rate (%)	5.8	6.2	5.7	5.9	5.8	6.2	5.5	5.6

Source: Statistic Bureau, 2017.

Table 4. Changes in labor force participation by sex, 2013–2015

Labor Force Participation Rate (%)	2013		2014		2015	
	Feb	Aug	Feb	Aug	Feb	Aug
Men	85.0	83.4	85.0	83.0	84.6	82.7
Women	53.4	50.3	53.4	50.4	54.5	48.9

Source: Statistic Bureau, 2017.

employment growth has gradually outpaced rural areas over the last decade. Since 2008, jobs in urban areas have been growing faster than the working age. Importantly, urbanization has been associated with the rise in formality, with 72% of jobs created in urban areas being formal.

Indonesia's major urban area, Jakarta, which makes up an 11% share of the country's population, figures prominently internationally, showing a population on par with other megacities like Shanghai, Delhi, and Tokyo. In fact, if Jakarta's current levels of growth continue, it is expected to overtake Tokyo and become the largest metropolis in the world by 2028 (World Bank, 2016). Other major cities operate as economic engines for their respective countries. As such, Jakarta will play a critical role in helping Indonesia achieve its stated target of a sustained 7% growth rate.

Structure employment by sector

Structure of employment sector did not change significantly during the period 2013-2016 (Table 5). Agriculture sector, trade sector, service sector, and industry sector still stand as the most dominant absorption of employment in Indonesia. Meanwhile, in 2008, the service sector overtook agriculture as the sector accounting for the largest proportion of jobs in the Indonesian economy, excluding transport, communication, and financial services.

Table 5. Employment growth by sector, 2013-2016 (million)

Sector	2014	2015		2016	
	Aug	Feb	Aug	Feb	Aug
Agriculture, Forestry, Hunting, and Fishery	38.97	40.12	37.25	38.29	37.77
Manufacturing	15.26	16.38	15.25	15.97	15.54
Construction	7.28	7.72	8.21	7.71	7.98
Wholesale trade, Retail trade, Restaurants and Hotels	24.83	26.65	25.68	28.50	26.69
Transportation, Storage, and Communication	5.11	5.19	5.11	5.19	5.61
Financing, Insurance	3.03	3.65	3.27	3.48	3.53
Community and Personal Services	18.42	19.41	17.94	19.79	19.46
Others (Mining, Electricity, Gas, and Water)	1.73	1.73	1.61	1.72	1.83

Source: Monthly report of Social and Economic, Statistic Bureau, 2017.

The changes of employment pattern have been happening over time. In 1985, 54.7% of employed people worked in agriculture, 13.4% worked in industry, and 31.8% worked in services. By 2015, 30 years later, the composition of employment had further developed, with 37.2% of employed people working in agriculture, 15.2% worked in industry and 47.6% worked in services. Data in August 2016 shows, compared to that in August 2015, the employment working at service sector rose as many as 1.52 million (8.47%), trade sector rose as many as 1.01 million people (3.93%), transportation sector rose as many as thousand people (9.78%), manufacturing rose as many as 280 thousand (1.83%), and financing sector rose as many as 260 thousand (7.95%).

In the economic structure as a whole, the sector's absorption capacity of employment is still very low. The percentage of people working in agriculture declined approximately 20% in 30 years. But the percentage of people working in industry increased slightly 1.8% in 30 years, which means that the industry sector did not develop well in economic structure of nation. With this limited absorption capacity

of employment, therefore, 72.5% of employment in Indonesia is in the informal sector.

Education and skills trends

Indonesia has significantly increased rates of school enrollment and the average years of schooling in recent years. The supply of workers with more years of schooling and higher levels of education is increasing. However, the composition of the labor force continues to be dominated by workers with lower level of education. The characteristic of education level and age was as follows: the population aged over 40 years have primary school or below as their highest level of education, those aged below 40 years are more likely to have completed junior high school or senior high school, those aged below 30 years have the highest rates of high school completion and many have completed undergraduate.

Table 6. Indonesia human resources parameter, 2015

Parameter	2015	
	Number (million)	Percentage (%)
Total Workforce (million)	120.82	100
Workforce of primary school graduates	54.6	45.19
Workforce of junior high school graduates	21.47	17.77
Workforce of Senior high school graduates	18.91	15.65
Workforce of diploma (3 years) graduates	3.10	2.57
Workforce of undergraduates	10.00	8.28
Workforce not passing of primary school	12.74	10.55

Source: Ministry of Economic Affairs, 2016.

Challenges remain, particularly in terms of the quality of education outcomes. Indonesia's performance based on international assessment programs has uncovered issues related to the quality of mathematics, science, and literary education.

In average, wage of farm worker in December 2016 was 48,627 IDR/day, while construction worker was 83,190 IDR/day. Farmer exchange rate in January 2017 was 100.91 declined 0.56% compared with December 2016 and regional (village) inflation was 0.79%. In supply side, weaknesses in the education and skills of the labor force have hindered productivity gains.

Regional disparities in the employment situation have existed for a long time in Indonesia. A major factor underlying regional disparities in the employment situation is the uneven geographic distribution of industries with significant employment absorption capacity. According to the analysis of regional development in Indonesia, there were some regions with few employment opportunities and some regions with a high proportion of tertiary industry such as wholesale and retail trade, dining and accommodation, and the service sector.

The disparity in employment opportunities is causing an outflow of the labor force from less urban areas to more urban areas, which has the potential to weaken local communities, and develop into a full-blown crisis. In recent years the excessive concentration of young people in the urban regions, and the exodus of young people from provincial areas, have been the focus of growing concern. The migration of the nation's youth from rural to urban areas has repeatedly emerged as an issue every time.

V. Labor policy for equality and wellbeing of people

The Government policy is calling for wide policies to promote the growth of regional economies under the banner of nine Development Agenda (Nawacita) of Joko Widodo-Jusuf Kalla: (1) returning the state to its task of protecting all citizens and providing a safe environment; (2) developing clean, effective, trusted, and democratic governance, (3) developing Indonesia's rural areas, (4) reforming law enforcement agencies, (5) improve quality of life, (6) increasing productivity and competitiveness, (7) promoting economic independence by developing domestic strategic sectors, (8) overhauling the character of the nation, and (9) strengthening the spirit of unity in diversity and social reform. In short, this nine-priority agenda of government is to improve the quality of Indonesians by improving the quality of education and training through "smart Indonesia" program and increasing the social welfare and health through the "healthy Indonesia and prosperous Indonesia" programs.

Based on National Development Planning Phase, the period of 2015-2019 is the term of: more competitive, economic, efficient national resources, qualified human resources, and science and technology. National target of unemployment rate reduction is from 6.18% in 2015 to 4.0-5.0% in 2019. And national target of poverty rate reduction is from 11.13% in 2015 to 7-8%. In the last five years, 2010-2015, the number of poor people reduced around 486 thousand per year, or 2.43 million within five years. This number is only a half reduction from the period of 2005-2010 with 4.08 million of poor people reduction.

VI. Conclusion and recommendation

To ensure sufficient populations and workforces in rural areas, it is essential to alleviate the overconcentration of people in major conurbations, particularly the greater Jakarta area. Migration is most prevalent among young people aged 15 to 24, who are moving to cities to attend school or start jobs. And to stem the outflow of this demographic from regional communities, there is a need to boost attendance at universities and to encourage young people to return to their regions of origin to work after completing university in urban areas. To stabilize populations in local communities, jobs are required, but the reason young people most commonly give for not seeking jobs outside major urban areas is a lack of desirable employers there.

To boost the quality of labor, it is vital that each individual worker continues developing and heightening his/her professional skills. Indonesia needs to ensure that new entrants to the labor force are equipped to support economic development. Labor market institutions need to provide an enabling environment for supporting economic growth and job creation. There is a pronounced disconnect between the jobs companies offering and the skills workers have. So the strategy to overcome this sort of profound mismatch of what employers are offering and what labor force is having is to enhance the vocational training based on labor market demand.

Integrated solutions are badly needed to overcome regional disparity and rural-urban labor's problem. It is vital that regions utilize local resources to boost industry and generate employment. Social productivity and social security systems need to support the productivity of the labor force and help to resolve issues related to poverty and inequality. The connectivity between rural-urban and center growth dispersion is needed in providing economic and social services for people. And the other two key strategies are: diversifying economic activities in rural areas and strengthening economic rural-urban relations.

References:

- Ministry of Manpower and Transmigration Republic of Indonesia, Regulations on Manpower (in Indonesia), Center of Manpower Planning, Board of Manpower Planning and Development, 2016.
- Ministry of Manpower and Transmigration Republic of Indonesia, guidance on Manpower Planning: Macro and Micro (in Indonesia), Center of Manpower Planning, Board of Manpower Planning and Development, 2016.
- Ministry of Economic Affairs Republic of Indonesia and School of Environmental Science Universitas Indonesia (in Indonesia),

Analysis Economic Relation and Human and Culture Development, 2016.
Ministry of National Development Planning Republic of Indonesia, National Strategy in Achieving Target of Poverty Reducing (in Indonesia), Rahma Iryanti, Deputy of Population and Manpower, 2016.
Statistical Bureau, Monthly report of Indonesia's Social-Economic, 2016.
World Bank, 2016, Indonesia's Urban Story: The role of cities in sustainable economic development.

Philippine Report on Employment Trends and Policies: Can the Duterte Administration End Contractualization?

Maria Catalina M. TOLENTINO¹
University of the Philippines

- I. Abstract
- II. Employment trends
- III. Workers in the informal economy
- IV. Labor policy pronouncements about contractual employment and regularization
- V. Labor laws about regular and contractual employment
- VI. The proposed Magna Carta for workers in the informal economy
- VII. Conclusion

I. Abstract

Precarious employment has been a lingering labor issue in many countries all over the world. This is manifested in many forms: contractualization, subcontractualization and informal work. Since the advent of globalization, these have become the trends putting into questions and doubts about the gains of a globalized economy.

The state as a principal actor in a tripartite industrial relations system, intervenes to mediate between the conflicting interests of labor and management, to create the balance among the actors. In the Philippines, companies and institutions, including government agencies follow the global trends on employment. Issues about labor-management relations or the non-existence of employer-employee relationships are rampant.

This paper begins by presenting employment trends by age distribution, by industry sectors and by size of enterprise. It proceeds to a discussion of relevant laws in the Philippine Labor Code (particularly on regularization and contractualization), laws in support of employment in micro, small and medium enterprises and policies such as the proposed Magna Carta for Workers in the Informal Economy.

The major issue addressed by this paper is sustainability of employment and regulating contractual arrangements. The Duterte administration has enforced stringent measures to reduce if not end short-term contractual work. The review of the Department of Labor and Employment (DOLE) DO 18-A, the signing of the new DO 174, and inspection of establishments practicing “endo” (end of contract) are important steps. According to news reports, there have been a number of workers regularized by employers since the start of the Duterte administration. Certain government agencies have also started to convert some “job order” employees into regular employees. However, labor groups continue to urge the DOLE to eliminate all forms of contractualization.

II. Employment trends

By age distribution

The young population of the Philippines is reflected in the employment and unemployment figures. In 2015, half of all Filipinos were 24 years old and younger, and the median age was estimated at 23, according to the Asian Development Bank (ADB) Outlook 2016.²

Looking at the total picture, employment rate in January 2016 was estimated at 94.2% by the Philippine

1 Assistant Professor and College Secretary, University of the Philippines School of Labor and Industrial Relations (UP SOLAIR). This paper was presented at the Comparative Labor Policy Seminar of the Japan Institute of Labor Policy and Training (JILPT), held in Tokyo on March 27-30, 2017. The author acknowledges Ms. Joyce Maxine Manansala for the data provided about labor policies.

2 ADB: Youth unemployment a 'policy challenge' for gov't" in <http://cnnphilippines.com/business/2016/03/30/ADB-Youth-unemployment-policy-challenge-govt.html>.

Statistics Authority. Employment is highest among the age cohorts 25-34 and 35-44 (Table 1). Among these age cohorts are those who may have reached or finished college and have undergone training and skills development, have acquired work experience, thus, have greater opportunities for work.

Unemployment is highest among 15-24 years old. This age group comprises of young people who reached high school or college level. Studies showed that on the average, high school graduates took three years to find work while college graduates took about a year to be employed. Those who could not find work join the informal sector, work part time or remain unemployed. The ADB report further stated that one in four young people is neither working nor pursuing education or training. On the demand-side, this indicates a large gap between the number of new entrants into the labor force and available jobs.

Unemployment is also high in age cohort 25-34. This can be attributed to the following factors: short employment contracts, high attrition rate, or perhaps due to low job satisfaction and thus are compelled to quit jobs. The ADB report, in fact, cited a mismatch of education and skills required in the labor market.

By industry sector

Employment figures by industry sector (Table 2) shows that the Philippines is still an agricultural country. Agriculture sector remains the biggest employer but many workers are described as small farm owners and informal agricultural workers. Ironically, many farmers remain poor due to many factors:

- weak implementation of the Comprehensive Agrarian Reform Program or CARP
- low investments in irrigation, rural roads and ports
- low funding in agricultural research and development (Habito and Briones in Diasanta, 2016).

Wholesale/retail ranks second among the top employers. This can be explained by the fact that the Philippine economy has become import-driven and consumerist, resulting to the numerous establishment of malls, small enterprises trading goods that must employ sales workers. Manufacturing ranks third and is way below wholesale/retail/repairs sector. Low employment in manufacturing means low rate of production within the country. Goods are coming from other countries. We can also attribute the employment trends to lowering of tariffs, making it is easy for imported goods to come to the country. Thus, investors tend to shift to trading business (Sibal in Diasanta, 2016).

Sunrise industries:

- Business Process Outsourcing (BPO)

This part of the paper looks into the sunrise industries (Table 3), their potentials for growth, and potentials to generate employment. Among the sunrise industries, the government has been vigilant in the growth of BPOs and tourism. In the past six years, almost 80% of new jobs have been generated by the service sector, particularly BPO, tourism, and retail trade combined.³

According to the Philippine Development Plan 2011-2016,⁴ there are two factors that contribute to the growth of BPO industry:

- (a) lowering trade barriers to allow companies find alternative locations and reduce operating costs
- (b) advances in information and communication technology (ICT) that enhance service delivery using the internet

The most common outsourced services include the operations of human resources departments, research needs, accounting services and transcriptions. In 2010, the BPO industry reached the US\$9 billion revenue target and employed about 530,000 full-time employees. The US remains the primary source for outsourcing activities.

Based on the Philippine Development Plan 2011-2016, on the supply side, the country produces

3 “ADB: Youth unemployment a 'policy challenge' for gov't” in <http://cnnphilippines.com/business/2016/03/30/ADB-Youth-unemployment-policy-challenge-govt.html>.

4 <http://www.neda.gov.ph/wp-content/uploads/2013/09/CHAPTER-3.pdf#67-70>.

Table 1. Employment and unemployment rates by age cohorts

Age cohort	Employed (%)	Unemployed (%)
15-24	17.8	48.2
25-34	26.8	30.9
35-44	23.3	9.8
45-54	18	7.1
55-64	9.9	3.3
65 and over	4.2	0.7

Source: Philippine Statistics Authority, January 2016 Labor Force Survey.

Table 2. Industries by rank and number of employed persons (in 000), 2014

Industries	Employed persons
1. Agriculture, hunting, forestry	10,405
2. Wholesale, retail, repairs	7,248
3. Manufacturing	3,212
4. Transportation and storage	2,686
5. Construction	2,578
6. Other service	2,187
7. Public admin. defense	1,964
8. Accommodation and food service	1,694
9. Fishing and aquaculture	1,396
10. Education	1,254
11. Administrative and support service	1,085
12. Households as employers, goods and service producing	508
13. Financial and insurance	491
14. Human health and social work	480
15. Information and communication	352
16. Arts, entertainment	349
17. Mining and quarrying	239
18. Professional, scientific and technical	209
19. Real estate	168

Source: Philippine Statistics Authority Labor Force Survey.

480,000 graduates per annum, some of these are in the IT sector. To improve its competitive standing, “the country would need to enhance the capability of its professionals in the IT sector to capture opportunities from India’s BPO market. Aside from labor resource, the Philippines also needs to develop suitable locations to ensure that BPO investments and expansions can be accommodated. Physical and IT infrastructures are key solutions to address growth of the industry.”⁵ Most BPO companies are located in Metro Manila but are now shifting to the provinces.

- *Tourism*

Another significant sunrise industry is tourism. From 2004 to 2009, the average shares of tourism in GDP and in total employment were 6.12% and 9.68%, respectively. Visitor arrivals grew from 2 million in 2004 to 3 million in 2009, based on figures from the Philippine Development Plan 2011-2016.⁶ The threat of terrorism has not weakened the industry.

Tourism receipts from inbound expenditure of foreign visitors from 2004 to 2009 have driven private and foreign investments in the accommodation, transportation, recreation and entertainment. Tourism is regarded as the fourth largest contributor to foreign exchange receipts. Two others are electronics/semiconductors and BPO.

However, the Philippines ranked only sixth in attracting foreign tourists vis-à-vis its ASEAN neighbors.

Table 3. Summary of Sunrise Industries in the Philippines

1. Business Process Outsourcing- According to the 2015 report of the CB Richard Ellis Group (CBRE), the BPO sector continues as the main driver for investment. BPOs generated roughly 11% of the country's GDP.
2. Retail- Developers have adopted the retail-tainment concept. Malls are not only havens for shopping but as venues for entertainment, as examples, the Arena in The SM Mall of Asia or Samsung Hall in SM Aura.
3. Green industries- With the crafting of Philippine Green Jobs Act of 2016 and Greening the Philippine Manufacturing Industry Roadmap, we foresee the creation of enterprises that produce goods and services that benefit the environment or conserve natural resources. In view of mounting ecological issues, some enterprises have begun to join the movement to address problems of the degradation of mother earth. It is forecasted that there will be rapid development of environmental standards for industries and products arising from new consumption patterns (Tolentino 2016).
4. Construction- The ADB reported that construction sustained double-digit expansion, with increases in both the public and the private sectors. Infrastructure projects include building national roads and bridges, rail systems, and ports to provide better access to the provinces.
5. Gaming- The casinos at Entertainment City are set to be joined by Okada Group's Manila Bay Resorts and Resorts World Bayshore in 2016 and 2018 respectively. Industry analysts are expecting double-digit revenues as licensed casino operators like Travellers International Hotel Group and Bloomberry Resorts Corp. go online.
6. Hospitality and Leisure- In 2013, tourists soared to 4.7 million. The government aimed to attract 10 million tourists in 2016. The government liberalized aviation policy and removed taxes on international airlines.
7. Real Estate- Stemming from the BPO sector, all businesses servicing it are expected to have a boost. One industry is the real estate. Even though in the last quarter of 2014, vacancy rates in key business districts – Makati, Bonifacio Global City, dropped and overall vacancy rates for Prime and Grade A buildings in Metro Manila slipped from 2.53% to 2.13% quarter-on-quarter, investors remain positive and on track.
8. Manufacturing- The manufacturing sector has grown 10 % since the last quarter of 2013 which accounts for 55% of GDP. What further gives this growth stability is that the expansion in manufacturing is broad-based coming from shipping, medical products, toys, auto parts, and agriculture.
9. Energy and Automotive- The energy sector recorded a total of 19 energy projects by the first half of the year, worth Php 159B. This is expected to generate 2,064 megawatt power to address the power cuts and shortages in the provinces.
10. Shipbuilding- The Department of Trade and Industry (DTI) reported that even the aerospace and shipbuilding industries have drawn interest from investors overseas shipbuilding and aerospace sectors to connect the islands of the Philippines.

Source: Casa, Michelle (September 2015).

5 <http://www.neda.gov.ph/wp-content/uploads/2013/09/CHAPTER-3.pdf#67-70>.

6 Ibid.

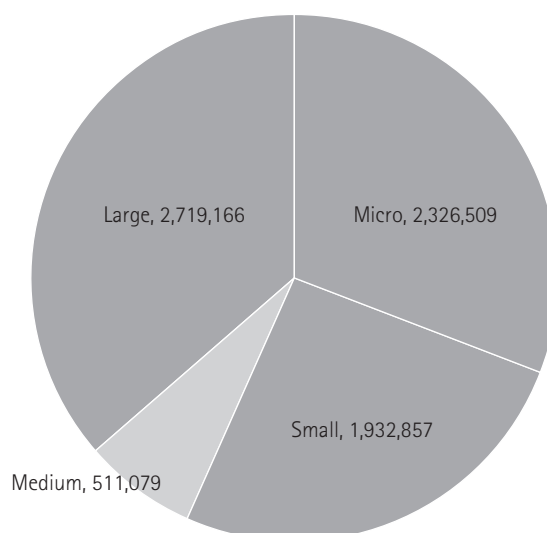
According to the Philippine Development Plan 2011-2016, more work is needed to enhance the country's competitiveness as a tourist destination. The country's attractiveness hinges "on the availability of support infrastructure (air, land, and water), a healthy business environment, and transparent and proactive rules and regulations. The Philippines ranked lowest among comparable ASEAN neighbors in terms of the number of airlines with scheduled flights originating in the country and the availability of good air connections to overseas markets to provide access for more foreign visitors. The Philippines also lagged behind in terms of quality of roads and ground transportation network that offers efficient accessibility to major tourism centers and tourist attractions."⁷

By size of enterprise

Employment can also be examined by size of enterprise. Based on statistics obtained from the Department of Trade and Industry (DTI), collectively, micro, small and medium enterprises (MSMEs) generated 63.7% jobs in 2013 versus 36.3% for the large enterprises (Figure 1).

These figures underscore the important role of MSME in employment generation. There are numerous policies in support of MSMEs. Among these are:

- Magna Carta for Small and Medium Scale Enterprises or RA 6977 amended by RA 8283 — The Magna Carta provides government "assistance, counseling, incentives and promotion" to qualified small and medium enterprises.
- Barangay Micro Business Enterprises (BMBE) or RA 9178 — defines barangay micro enterprise (urban and rural enterprises located in the smallest local government units in the Philippines) with total assets of Php 3 million or less. The Local Government Units are encouraged either to reduce the amount of local taxes and fees or to exempt BMBEs from local taxes. It also exempts BMBEs from the Minimum Wage Law.
- Kalakalan 20 or RA 6810 was enacted to develop and promote barangay or countryside small enterprises (rural only). The law defines a small enterprise as any business entity whose number of employees does not exceed 20 and whose asset at the time of registration shall not exceed Php 500,000.



Source: DTI website, the figures exclude the undocumented informal workers, own-account and unpaid workers.

Figure 1. Distribution of employment by size of enterprise, 2013

7 <http://www.neda.gov.ph/wp-content/uploads/2013/09/CHAPTER-3.pdf#67-70>.

The DTI abounds with programs to provide support to MSMEs due to their capability to generate jobs, notwithstanding the short-term employment contracts in these enterprises. In micro enterprises, workers render services on seasonal periods, have no security of tenure and no social protection.

III. Workers in the informal economy

The Philippine employment scenario is also characterized by informal work. The informal sector (IS) contributes substantially to job generation and a large share to the GDP but the figures are insufficiently recognized and documented.

In a serious effort to determine the size of the IS, the first official survey was conducted by National Statistics Office (NSO) and the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) in 2008. It was found out that there were about 10.5 million “informal sector operators.”⁸ NSO identified the “informal operators” as either self-employed without any paid employee or employer in a family-owned or operated small farm or micro enterprise.

Similar to informal work is the emerging peer-to-peer work transactions (Steinmetz, 2016). These are on-demand delivery of services offered by independent contractors (acting as middlemen using a software) between the workers and the individual clients. The contractors call themselves platforms. An example is the Uber company, a ride application company that operates a software allowing drivers and passengers to connect. In this arrangement, the company does not hire drivers as employees, maintain no cars and does away with employer-employee relationship. Employers are spared from granting salaries, social security benefits and impose no control over the workers. There are workers who attest to earning substantial income from independent contracting and enjoy the intrinsic reward of managing one’s own time.

IV. Labor policy pronouncements about contractual employment and regularization

The Philippines is besieged with challenges about uplifting the lives of workers and maintaining industrial peace. Based on the Philippine Statistics Authority, there were 1.3 million non-regular workers (in establishments with at least 20 workers) in the year 2014. From CNN Philippines, the figure is 20 million contractual workers in 2016. Many of these are struggling for job security. To cite a specific case, in May 2016, about 460 workers of rope-making factory in Laguna went on strike after their plea to be regularized was not granted. The strike happened after the parties failed to reach a Collective Bargaining Agreement. Management promised new workers regularization after ten months but were made to sign five-month contract that were renewable (Cinco, 2016).

When President Rodrigo Duterte campaigned in the 2016 May elections, one of his promises was to put an end to contractualization. After taking his oath, the new President issued a warning to businessmen practicing “endo,” a colloquial term for illegal contractualization. It means a contract of five months or less, either renewable or non-renewable. He instructed the Department of Labor (DOLE) Secretary Silvestro Bello III to inspect business establishments in the country (Ramos & Santos, 2016). Otherwise, a closure of businesses will be ordered, if violations were found.

Thereafter, the DOLE launched a more rigid inspection and discovered violations of labor standards. DOLE officers consult and meet with employers first to encourage them to voluntarily regularize workers. After this, a sustained inspection of establishments, principals and contractors which practice “endo” (Geronimo, 2016) is conducted.

According to news reports quoting the DOLE, there were around 10,352 workers who have been regularized by 195 employers since the start of the Duterte administration. Certain government agencies

8 www.census.gov.ph. In the survey, the reporting unit was the household, which means that the statistics from this survey refers to the characteristics of the population residing in households. Persons based in institutions and establishments were not within the coverage of the survey. The barangay or a group of contiguous barangays was the primary sampling unit.

such as the Philhealth has also started to convert some “job order” employees into regular employees. Job order is defined by the Civil Service Commission (CSC) as the following:

- Lump sum work or services such as janitorial, security, or consultancy where no employer- employee relationship exists between the individual and the government.
- Piece work or intermittent job of short duration not exceeding six months and pay is on a daily basis.⁹

Labor Secretary Bello said that the total ban on contractualization would seem not feasible as several sectors are project-based and seasonal such as the construction industry (Medenilla, 2016).

Furthermore, jurisprudence recognizes the exercise of “management prerogative” stating that managerial employees are “vested with the powers or prerogatives to lay down and execute management policies and/or to hire, transfer, suspend, lay-off, recall, discharge, assign or discipline employees.” Management prerogative is that broad freedom “to regulate, according to its own discretion and judgment, all aspects of employment... This right is tempered only by these limitations: that it must be exercised in good faith and with due regard to the rights of the employees.”¹⁰

Labor groups continue to urge the DOLE to fully eliminate contractualization by removing Articles 106-109 of the Labor Code completely (Geronimo, 2016) and amend related policies. Employees performing core functions and have served for long number of years should be regularized.

What are the implications of regularizing workers? Regularizing workers will result to an increase in the labor cost within the range of PhP200-500 per month to cover the mandated Social Security premiums, Philhealth and Housing Development Mutual Fund. Additional mandated benefits are Service Incentive Leave of at least five days convertible to cash and 13th month day.

Any increase in wages and benefits could translate to millions of pesos in expenses to the corporation, especially if it employs hundreds of employees. Small enterprises will be most affected by the labor cost adjustment.

V. Labor laws about regular and contractual employment

Philippine Labor Code Article 280, defines regular employment as “the provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are necessary or desirable in the business of the employer.”

The Philippines does not totally prohibit contractualization but rather regulates it through the formulation of laws and DOLE department orders. Below are policies about contractual employment:

- Philippine Labor Code (PLC) Articles 106-109 define the obligations of contractor or subcontractor, assuring the wages and protection of the worker.

When an employer (principal company) enters into a contract with another person to do work (contractor), the employee of the contractor (and of the latter’s subcontractor, if any) shall be paid wages... If the contractor or subcontractor fails to pay the wages of his employees, the employer shall be jointly liable with his contractor or subcontractor to such employees.

“Labor-only” contracting is defined as the person supplying workers to an employer. The labor-only contractor does not have substantial capital in the form of equipment and work premises. The workers recruited perform activities directly related to the business of the principal employer. In such cases, the labor-only contractor is merely an agent of the principal employer and is responsible for the workers.

- To implement the aforementioned PLC Articles, DOLE Department Order (DO) 18-A was issued in 2011 covering all enterprises engaging in contracting or subcontracting, also referred to as third party service providers. According to DOLE officials, the DO compels these enterprises to fully comply

9 Civil Service Resolution 020790 in <http://www.csc.gov.ph/>.

10 <http://www.laborlaw.ph/589/management-prerogative/>.

with minimum wages and general labor standards, including payment of social security premiums, security of tenure, self-organization and collective bargaining.

DO 18-A stated that contracting or subcontracting shall be legitimate, first and foremost, if the contractor is registered with DOLE and carries an independent business and undertakes to perform the job, work or service on its own responsibility, free from control of the principal company. Secondly, the contractor has substantial capital and/or investment so that it does not engage in labor-only contracting. This implies that labor-only contractors cannot be registered at DOLE under this Department Order, making labor-only contracting illegal.

- DO 174 recently signed on March 16, 2017 supersedes DO 18-A, after months of consultations with both labor and management, pursuant to the promise of President Duterte. Labor analysts opined that it is not substantially different from DO 18-A because it does not end all forms of contractualization as what labor groups demand. DO 174 only makes explicit what were implicit in DO 18-A so that the new DO cannot be circumvented, depriving the right of workers to security of tenure. DO 174 prohibits the following:

- labor-only contracting or the “cabo” system (a type of illegal contracting in which the contractor without substantial capital and equipment, supplies only workers)
- contracting out of work by reason of strike
- sign, as a precondition to employment, an antedated resignation letter; a blank payroll; a waiver of labor standards including minimum wages and social or welfare benefits; or a quitclaim releasing the principal or contractor from liability as to payment of future claims;
- repeated hiring of employees under an employment contract of short duration
- sign a contract that fixes the period of employment to a term shorter than the term of the service agreement, unless the contract is divisible into phases for which substantially different skills are required and this is made known to the employee at the time of engagement

The new DO 174 also shortens the validity of the certificate of registration of contractors and subcontractors from three years to two years and increases the registration fee from PhP25,000 to PhP100,000.¹¹ This means contractors and subcontractors will continue to operate.

Bello requested President Duterte to create 200 plantilla (government personnel positions) for Labor Laws Compliance Officers who will be deployed in the DOLE regional offices. DOLE would like to deputize labor groups to take an active part in the inspections.

- Department Order No.19 (series of 1993) refers to guidelines governing the employment of workers in the construction industry:

“The construction company and the general contractor and/or subcontractor shall be responsible for the workers in its employ on matters of compliance with the requirements of existing laws and regulations on hours of work, wages, wage-related benefits, health, safety and social welfare benefits, including submission to the DOLE-Regional office of Work Accident/Illness Report, Monthly Report on Employees’ Terminations/Dismissals/Suspensions and other reports. The prime/general contractor shall exercise sound judgment and discretion in contracting out projects to ensure compliance with labor standards.”

IV. The proposed Magna Carta for workers in the informal economy

Five versions of the magna carta had been filed at the House of Representatives and Senate (Sibal and Tolentino, 2010). They are products of persistent advocacy efforts by informal workers’ associations, women’s groups, human rights and other civil society organizations stretching for almost a decade.

All versions are comprehensively written with noted similarities. As proposed in the bills, workers

¹¹ <http://www.dole.gov.ph/news/view/3550>.

in informal employment shall have the same basic rights accorded to all workers as enshrined in the Philippine Constitution and in international instruments. All versions intend to bring the Workers in the Informal Economy (WIE) into the economic and social mainstream through facilitative and non-burdensome mechanisms. The bills propose accreditation with corresponding minimal fees, provision of basic rights which include safe and developmental work conditions, right to self organization and participation in policy-making. Tax exemption is also proposed for an accredited informal economy (IE) worker, an enterprise from all taxes, national or local, license and building permit fees and other business taxes.¹²

Lawmakers and the advocacy groups are working on the integration of the bills and passage into a law. If enacted into a law, implementation will pose a great challenge due to the all-encompassing features of the bills, the involvement of many agencies from national down to the barangay level.

VII. Conclusion

The Philippines must harness the potentials of its young population because this offers an opportunity to raise economic growth, but only if they are employed in productive jobs. There were identified sunrise industries that can possibly provide more jobs, especially for the young. The agribusiness segment, comprising more than 10 million working Filipinos, is another important sector that must be pump-primed.

After providing jobs, the next challenge is providing sustainable and decent employment. We go back to the principal question of this paper: can the Duterte administration end contractualization and uplift the lives of workers?

The concept of sustainable employment is hinged on regularizing workers and eliminating contractual work. But data shows that there are laws that regulate contractual work: PLC Articles 106-109, DO 174, CSC Resolution 020790 on hiring “job order” employees, and exercise of management prerogative. All of these laws legitimize contractual arrangements. Unless these laws are amended or repealed, contractualization will continue. Even the new DO 174 does not eliminate contractualization but further legitimizes it but with explicit prohibitions for abusive acts. What can possibly be eliminated is the “endo” system or illegal contractualization. Enterprises that are not granted DO 174 registration will be considered illegal operators and can be subjected to sanctions or closure.

After only a few months in office, President Duterte through the DOLE, has done concrete actions to address the problem: inspection of establishments, review of DO 18-A and consultations with labor, employers and academic sectors. On December 2016, DOLE, in fact suspended the granting of DO 18-A registration to new enterprises to have more time for inspection. In March 2016, DO 174 was signed. These quick actions indicate resolute leadership. Theories about leadership explain that major changes can happen if the change emanates from the top. It takes political will to use resources of the government to make the change happen. Leaders that can transform societies are imbued with courage, persistence and a vision. The president is resolute in ending contractualization but the implementing government agency, the DOLE is not as tough and resolute, made evident in the DO 174 he signed.

What is lacking is a clear agenda about employment generation or alternatives for people who will lose their jobs. This is from the point of view of employers. If they are pressured to regularize workers, some workers might be retrenched if employers could not afford the high cost of regularizing all employees. In relation to this, the opinion of labor leader Renato Magtubo speaking for the Partido ng Manggagawa is: “policy reforms should be introduced (a) to regulate labor markets, (b) to have provisions for adequate and quality social services which enhance the development of human capacities, and for the achievement of

¹² Except real property and capital gains taxes, import duties and other taxes on imported articles. In addition, any and all income, receipts and proceeds derived from their business operations shall be excluded in the computation of gross income for purposes of computing the individual income tax of the members, stated in SB 2381.

full employment. This can be done through strengthening labor market and industrial institutions as well as policies that will generate demands for generation of employment.”

Beyond regularization of employment, the ultimate goal is inclusive growth and social security, encompassing all industries and work categories. Industrialists and economists are hopeful, noting that the “Philippines remains a bright spot in Asia with growth targets between 7-8% that are attainable”¹³ vis-à-vis the various sunrise industries and government development projects. Economist Bernardo Villegas advised that government give more attention to the improvement of the agribusiness segment and help the farmers, thereby reduce the rate of poverty among the poorest Filipinos.

References

- Casa, Michelle (September 29, 2015) in <https://www.hoppler.com.ph/blog/experts-insights/top-9-industries-in-the-philippines>. Accessed on January 5, 2017.
- Cinco, Maricar (May 25, 2016). Contractual workers go on strike. *Philippine Daily Inquirer*.
- Diasanta, Angel Anne. (2016). Philippine labor employment statistical analysis. UPSOLAIR, Diliman, Quezon City (Manuscript).
- Geronimo, J. (October 4, 2016). DOLE: 10,532 workers regularized so far under Duterte admin. *Rappler*. Retrieved from: <http://www.rappler.com/nation/148159-dole-regularized-workers-100-days-duterte-administration>. Accessed on October 1, 2016.
- Macaraya, Bach and Maria Catalina M Tolentino. (2009). Growth, Development and Trends in Philippine Small and Medium Enterprises: Issues of Productivity and Competitiveness. Manila: Development Academy of the Philippines (Monograph).
- Magtubo, Renato. Interviewed as resource person in UP SOLAIR, Diliman, Quezon City on March 16, 2017.
- Medenilla, S. (June 27, 2016). Duterte won't totally ban contracting employees, only “endo” scheme — Bello. *Manila Bulletin Online*. Accessed on October 1, 2016
- Ramos, M. and Santos, T. (August 5, 2016). Digong: End ‘endo,’ or I kill you. *INQUIRER.net*. Retrieved from: <http://newsinfo.inquirer.net/803183/digong-end-endo-or-i-kill-you>, on October 1, 2016.
- Philippine Development Plan 2011-2016 in <http://www.neda.gov.ph/wp-content/uploads/2013/09/CHAPTER-3.pdf67-70>. Accessed on January 5, 2017.
- Sibal, Jorge V. and Catalina M Tolentino. (2010). Curriculum Design on the Integration and Application of Human Rights and the Philippine Informal Sector in Law and Public Administration/Governance Schools in the Philippines. ESCR-Asia and IIRA Philippines. (Monograph).
- Steinmetz, Katy. (January 18, 2016). The way we work: A new poll reveals the size of the peer- to-peer revolution. *Time Magazine*.
- Tolentino, Maria Catalina (2016). Creating niches in the green industries and the role of micro, small and medium enterprises: Discussion paper. UP SOLAIR, Quezon City (Manuscript).
- <http://citem.gov.ph/industry-news-list/132-gdp-growth-may-hit-8-10-in-10-yrs-villegas>. Accessed on January 7, 2017.
- <http://cnnphilippines.com/business/2016/03/30/ADB-Youth-unemployment-policy-challenge-govt.html>. Accessed on January 7, 2017.
- <http://www.csc.gov.ph/>. Accessed on January 7, 2017.
- <http://www.laborlaw.ph/589/management-prerogative/>. Accessed on January 8, 2017.

13 <http://citem.gov.ph/industry-news-list/132-gdp-growth-may-hit-8-10-in-10-yrs-villegas>

Report on Identifying Major Labour Policy Issues in Malaysia

Mary Tze Mei TIONG
Ministry of Human Resources

- I. Introduction
- II. The changing features of industrial sectors, business organisations and business activities: The Malaysian perspectives
- III. The changing features of work relations, work organisations and working styles
- IV. Background factors, such as progressing globalisation, new waves of IT, AI, IoT, demographic changes, etc
- V. Major issues of labour policies arising therefrom, such as tackling widening social inequality, redefining the demarcation of labour law, reforming the labour market, reconstructing the worker representation system, controlling migrant workers, etc.
- VI. Conclusion

I. Introduction

Malaysia is a parliamentary democracy with constitutional monarchy nation, comprising of thirteen states and three Federal Territories, namely Kuala Lumpur, Labuan and Putrajaya (Figure 1). It is a multiracial country comprising of Malay, Chinese, Indian, Dayak, Kadazan and others, with a population of 31.6 million. Labour force participation rate was 67.6% and unemployment rate as of 31st December 2016 was 3.5%, thus putting Malaysia in a state of full employment.¹ The working age population (between 15 to 64 years) constitute 32.4% of the outside labour force who were housewives, students, retired, disabled persons and those not interested in working.



Figure 1. Malaysia at a glance

Malaysia aspires to achieve its envisioned developed and advanced nation status by year 2020. In rising to the challenges of a globalised economic environment and to steer the nation's continued positive growth path, Malaysia has set in place long term initiatives through its new high income economic model which

¹ Based on the definition set by the Organisation for Economic Cooperation and Development (OECD), an unemployment rate below 4% is considered full employment.

serves to guide Malaysia in realising her national development agenda towards 2020 and the years beyond. This aspiration of achieving a developed nation was initiated by the then 4th Prime Minister of Malaysia.

The present Prime Minister has set Malaysia to embark on a new 30 years transformation plan, entitled 2050 National Transformation (Transformasi Nasional 2050, TN50), which sets a new vision for the nation. TN50 aims to transform Malaysia into a calibre nation with par excellent mindset and become a top 20 country in the world by the year 2050. It will serve as a national discourse series geared towards charting the nation's direction via a new canvas, which will transform the country's economy, citizen well-being, environment, technology, social interaction, governance and public administration.

Labour market in an advanced nation is characterised by effective market clearance that matches supply with demand and a comprehensive labour market support system. The Tenth Malaysia Plan, 2011-2015, provides for short and medium term growth initiatives. The progress achieved includes increase in job creation and strengthening of the labour market institutions. In the Eleventh Malaysia Plan, 2016-2020, strategic shifts have been formulated to elevate the labour market efficiency that aims to improve the productivity, wage structure and create quality jobs, improve labour legislation and information, and effectively manage low-skilled foreign workers. The focus and emphasis will be given to fulfil the labour requirements of industry in the economy.

II. The changing features of industrial sectors, business organisations and business activities: The Malaysian perspectives

Labour, in its own right, has played a critical role in contributing towards the nation's development. The country's economy has been transformed and reshaped from time to time since independence.

The pillars of the Malaysian economy then, the agricultural and mining sectors, have contributed immensely towards national growth. In the early 1970s, the main exports were primarily commodities from mining and agriculture contributing a total of 45.6% to the Gross Domestic Product (GDP). Foreign workers were brought into the country to meet the labour requirements of the two growing sectors. The ethnic population was mostly engaged in agriculture and small holdings with only a few, prepared to fill the manpower requirement of the two sectors. In the years following, with more plantations and tin mines being opened and more foreign workers entering the nation workforce, the system of labour administration in the country became more structured and prominent.

The years after the country's independence saw the growing importance of labour administration and hence the role of the Ministry of Human Resources (MOHR) Malaysia in the field of employment, labour protection and industrial relations. Complementing the realisation of the Government's development policy and objectives, the MOHR through her network of departments and agencies across the nation and working in collaboration and cooperation with other related Ministries performs vital functions in managing labour administration and maximising the nation's human resources potentials.

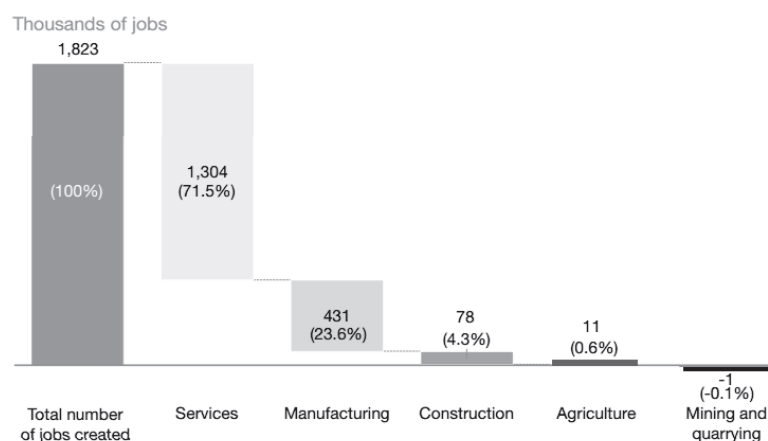
The 1980s saw the beginning of the transformation where the manufacturing sector took a strong hold on the country's economy. The GDP of the country was less than Ringgit Malaysia 60 billion with manufacturing contributing a mere 13% to GDP. The GDP per capita then stood at only Ringgit Malaysia 4,360.

The 1990s saw the beginning of a new era where the services sector gained its momentum in enhancing the national growth. In 2006, the contributions from agriculture and mining represent less than 20% with manufacturing contributing close to 30% of the total GDP at Ringgit Malaysia 297.95 billion and the GDP per capita has exceeded Ringgit Malaysia 19,600. The contribution from services output to GDP had risen significantly from 44% in 1980 to more than 50% in 2006.

Since then until 2016, services sector continued to register positive growth. The index of service expanded by 5.9% in fourth quarter of 2016 as compared to the same quarter a year earlier. Robust growth in the services sector was contributed by Information and Communication; and Transportation and Storage

(6.7%). Other major contributors to the expansion of the services sector was the Wholesale and Retail Trade; Food & Beverage and Accommodation (6.3%).

From a largely agriculture-based economy, diversification has proceeded to the extent that services is emerging as a leading sector. Now, it is a different scenario where the human capital dictates the trend for the future of economy. During the Tenth Malaysia Plan, the economy grew by 5.3% per annum and created 1.8 million new jobs, wherein 71.5% or 1.3 million jobs were in services and 23.6% or 431,000 jobs were in manufacturing, as shown in Figure 2. Research and development, and technological infusion are relatively important which can contribute to global products with enhanced productivity rate.



Source: Economic Planning Unit and Department of Statistics Malaysia.

Figure 2. Jobs creation by sector, 2011–2015

III. The changing features of work relations, work organisations and working styles

1. Work relations

Determining employer and employee relations is an important part of business, not only because it determines the obligations and responsibilities of both the employer and the employee but also because the survival of such relationship vests on employer with certain rights and duties. Employer-employee relation refers to the communication that takes place between representatives of employees and employers. More often than not, the employee relations engage employees and employers working together. It is bound by the employment contract, or popularly known as contract of service. In Malaysia a contract of service² is defined as an agreement whereby one person agrees to employ another and that other agrees to serve his employer as an employee.

The employment contract must comply with the labour legislations in force that provides terms and conditions. Benefits such as sick leave, maternity leave and annual leave are stipulated in the contract. In unionised sector, the terms and conditions are determined by collective agreement. Trade unions and employers are at the liberty to negotiate terms and conditions and draw up their collective agreement. If it is not resolved through negotiation, then it becomes a trade dispute and it will be referred to the Minister of Human Resources to the Industrial Court for arbitration.

The Government, particularly MOHR plays an important role in balancing the relationship between

² According to the Employment Act 1955, contract of service means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract.

employer and employee, social security and safety and health of workers in the country. Among the Departments and Agencies under MOHR are:

- (a) Department of Labour — This Department enforces 11 Acts including Employment Act 1955, National Wages Consultative Council Act 2011, Minimum Retirement Age Act 2012, Children and Young Persons (Employment) Act 1966 and Workmen Compensation Act 1952.
- (b) Department of Industrial Relations — This Department's role is to enhance industrial harmony in the country. Its main objective is to resolve trade disputes between employers and trade unions.
- (c) Department of Trade Union Affairs — This Department's main function is to register trade unions and monitor their activities.
- (d) Department of Occupational Safety and Health — This Department's main function is to ensure workplaces are safe.
- (e) Manpower Department — The Department is given the responsibility to ensure continuous supply of competitive and skilled workforce to meet the demands of the industries. This Department plans and conducts training for pre-employment skills, upgrade the skills of workers to meet the technological changes and provides financial aid to support these programmes.
- (f) Department of Skills Development — The role of this Department is to coordinate and regulate the implementation of skills training to produce Knowledge-Workers for the purpose of employment and recognition at national and international levels. The Department also does research and develop job competency standards and expertise to continuously improve the quality of skilled human resources who can contribute to the economic growth of the country.
- (g) Social Security Organisation — The Social Security Organisation (SOCISO) was established with the purpose, among others, to administer the Employment Injury Scheme and Employment Invalidity Pension Scheme as provided under the Employees' Social Security Act 1969.
- (h) Institute of Labour Market Information and Analysis (ILMIA) — The National Institute of Human Resources that created in 1997 was upgraded to the Institute of Labour Market Information and Analysis (ILMIA) under MOHR in 2012 with the mission to be the centre of excellence for the analysis of labour market trends and emerging knowledge-based economy. The Labour Market Information Data Warehouse (LMIDW) was established in 2013 to improve and share key information such as projections of workforce supply and demand by economic sectors and development corridors in a single platform. The LMIDW is key to guiding appropriate policy responses of stakeholders in understanding changes within the labour market and meeting the competitive challenges of uplifting the economic well-being of the population, which has enabled the Government to make better evidence-based policies, as well as improve dissemination of information to industries, educational entities, labour providers and other stakeholders including international organisations.

2. Work organisations

The Malaysian Trade Unions Congress (MTUC) being an umbrella body for trade unions and the Malaysian Employers Federations (MEF), a federation consisting of employers play a vital role in championing their rights. These organisations play important roles in the National Labour Advisory Council (NLAC), which is a tripartite body consisting of trade unions and employers' organisation and the Government.

3. Working styles

The landscape of working in Malaysia is currently taking a twist. There are many employers who allow their workers to work from home. Even the conventional payment for wages is now focusing on Productivity Linked Wage System (PLWS). There are some employers who staggered their work modes according to the market demand.

IV. Background factors, such as progressing globalisation, new waves of IT, AI, IoT, demographic changes, etc.

1. Globalisation

As far as Malaysia is concerned, globalisation brought advantages as well as disadvantages to the country. On the advantage side, it brought new investment in the area of information technology and other new technology-based industries. This helped to create many job opportunities for the people. On the other hand, many businesses closed because they could not compete with the stiff competition by the multinational companies. The retrenchment figures for the past three years are as Table 1:

Table 1. Number of retrenched workers, 2014–2016

Year	Number of Retrenched Workers
2016	37,699
2015	44,343
2014	21,208

Source: Department of Labour .

Under the Malaysian law, employers who undertake to retrench workers must give due notice or pay indemnity in lieu to the workers and also pay retrenchment benefit as stated in the Employment Act 1955 or as per their collective agreement.

Since there have been cases reported to the authority on the non-payment of retrenchment benefit, the Government is seriously considering to enact a new Act for the payment of partial wages, temporary financial aid, provide reskilling and upskilling as well as job placement to the workers. All these benefits are to be handled by the Government.

2. Demographic changes

Demographic transition influences overall human capital development in terms of both supply and demand of the workforce. The Malaysian population was 28.6 million in 2010 and is expected to increase to 32.4 million in 2020. However, during the Tenth Malaysia Plan, the population growth rate declined to 1.3% per annum as compared to 1.9% per annum in the Ninth Malaysia Plan (2006-2010). This was due to the decrease in the Total Fertility Rate³ to 2.1 in 2013, which is equivalent to the replacement level. This may inhibit the labour market to adjust to changing economic conditions.

The young population (0-14 years) is expected to decrease from 7.8 million in 2016 to 7.7 million in 2020, as a result of the decline in fertility rate. The working age population (15-64 years) is expected to increase from 22.0 million in 2016 to 22.4 million in 2020, contributing to demographic dividend.

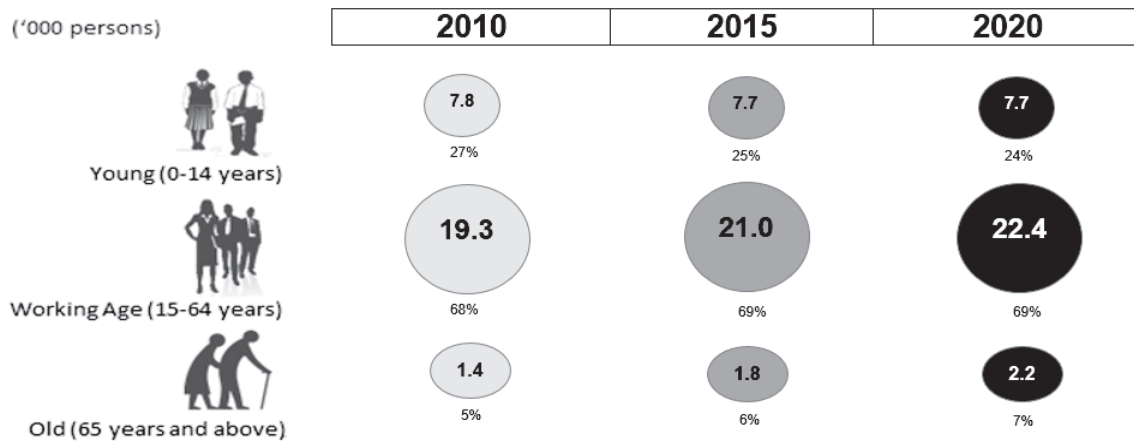
Life expectancy is expected to improve from 72 years in 2010 to 74 in 2020 for males and 77 to 79 for females. As a result, the older population (65 years and above) is expected to reach 2.2 million (7.2% of total population) in 2020, heading towards an aged nation (Figure 3). As a result, the dependency ratio is expected to increase slightly from 44% in 2016 to 44.2% in 2020.

Malaysia is expected to become an aged nation by 2035, where the composition of population aged 60 and above will be 15% of the total population.

The extent coverage of the social security schemes, labour legislations and social assistance programmes in Malaysia has obvious gap. Generally, the formal schemes cover contributors only up to

3 Total Fertility Rate refers to the average number of children borne by a woman during her child bearing age of 15-49 years old.

the age of 60 years old. Thus, the aged will have to depend on either their savings or social assistance programmes, both for daily subsistence or medical expenses. There are no formal family or child assistance social security schemes. Hence, Malaysia must prepare more hospitals and other amenities to enhance the social protection to cater for the needs of aged.



Source: Economic Planning Unit and Department of Statistics Malaysia.

Figure 3. Age structure, 2010 – 2020

V. Major issues of labour policies arising therefrom, such as tackling widening social inequality, redefining the demarcation of labour law, reforming the labour market, reconstructing the worker representation system, controlling migrant workers, etc.

1. Tackling widening social inequality

Malaysia often encounters challenges in its effort to strengthen the labour market. One of them is the distortion in wage structure. The wage gaps need to be reduced to improve equality. The Government aims to increase the compensation of employees to be on the same level as other middle and high income countries. Compensation of employees is expected to increase following greater compliance with minimum wage requirements, upward revisions in minimum wages linked to improved productivity, and enhanced recognition of prior learning. The recognition of technologists as professionals through the establishment of the Malaysia Board of Technologists will also improve wages of Technical and Vocational Education and Training (TVET) graduates. MBOT will serve as a statutory body to regulate, promote and develop the technologist profession in Malaysia. These measures are expected to contribute to an increase in the monthly median wage from Ringgit Malaysia 1,600 in 2015 to Ringgit Malaysia 2,500 in 2020. The Government will establish a National Wage Index (NWI) that serve as a guide and benchmark for employers in determining the right wage level for employees that is in accordance with their qualifications, skills and productivity.

2. Redefining the demarcation of labour law

The Malaysian Government feels that it is time to self-regulate some of the conditions in the legislations. This is in order to ensure that employers abide to the rules and regulations of the labour legislations. This measure will assist the Department of Labour, which is facing acute shortage of labour inspectors.

3. Reconstructing the worker presentation system

Trade Union Act 1959 and Industrial Relations Act 1967 provide provisions for workers and employers to carry out industrial actions such as picket and strike. But these rights are regulated by the authorities. This means that trade unions of workmen and trade union of employers must strictly follow the law in order to carry out picket or strike.

To defuse these situations, the Department of Trade Union Affairs and Department of Industrial Relations take swift action through conciliation to resolve the trade disputes and create industrial harmony in the workplace.

The Department of Trade Union Affairs and Department of Industrial Relations carried out various dialogues, workshops and seminars in order to educate trade unionists on their rights and their roles in creating industrial harmony.

4. Controlling migrant workers

In Malaysia, the issues on migrant workers are managed by two Ministries, which are Ministry of Home Affairs in terms of security and MOHR for welfare and labour protection. The Government of Malaysia accords priority of employment for locals. It is compulsory for every employer to advertise vacancies through the JobsMalaysia Portal, to provide opportunity to locals to apply for the vacancies. Only vacancies that are not filled by locals, the employers are entitled to apply for hiring foreign workers.

The employers who wish to hire foreign workers shall fulfil all the criteria outlined by the Government including providing accommodation with basic amenities, complying with minimum wage policy, no records on breach of labour and immigration laws. The Government only allows legal or documented foreign workers to work in Malaysia and the duration of employment is maximum 10 years, renewable on year to year basis. The Government of Malaysia requires all employers to obtain insurance coverage for foreign workers such as the Foreign Workers Compensation Scheme and the Foreign Workers Health Insurance Protection Scheme (exclude plantation and optional for domestic workers).

Foreign workers are also required to undergo medical examination within 30 days from the date of arrival. Work permit will only be issued by the Department of Immigration if the foreign workers clear the medical examination. Those who fail the medical examination will be sent back to their country of origin.

Malaysian Government has signed Memorandum of Understanding with some source countries for formal sectors and informal sectors for the smooth and speedy recruitment, employment and repatriation.

VI. Conclusion

Based on the information presented above, the main problem that Malaysia is facing currently is that the country depends too much on foreign workers. In this context, the Government has taken several measures including promoting automation and providing greater employment opportunities to local workers, with enhanced employment benefits. Local labour, however, will have to change their mindset, not to be too choosy in selecting jobs.

Collective Bargaining and Collective Agreements in Vietnam: From Legislation to Practice

Trang Thi Kieu TRAN¹
Hanoi Law University

- I. The legislation and practice of collective labor bargaining in Vietnam
- II. The legislation and practice of collective agreement in Vietnam
- III. Evaluation and recommendation

Collective bargaining and collective agreement are very important parts of industrial relations, recognized in the core conventions of the International Labour Organization including Convention C087 concerning Freedom of Association and Protection of the Right to Organise (1948), Convention C098 concerning the Application of the Principles of the Right to Organise and to Bargain (1949), and Convention C154 concerning the Promotion of Collective Bargaining (1981). In Vietnam, collective bargaining and collective agreement have been prescribed since the Labour Code 1994 and now exist in Labour Code 2012. Labour Code 2012 significantly expanded collective bargaining, marking a milestone in the regulation of industrial relations. After five years of implementation of Labour Code 2012, the quality and quantity of collective bargaining and collective agreements in Vietnam have improved. However, many major obstacles remain.

I. The legislation and practice of collective labor bargaining in Vietnam

Collective bargaining is a process through which the collective employees and employers discuss and negotiate their relations and interactions at the workplace, such as pay and other terms and conditions of work. This process of bargaining aims to reach mutually harmonious and stable industrial relations, improve working conditions and efficiency, and create a fair and expeditious process for enforcing the rights and obligations of each party.² Labour Code 2012 not only defines collective bargaining, but also fully describes the bargaining agents, the scope of bargaining, and procedural requirements for conducting collective bargaining.

First, regarding the bargaining agents

The bargaining agents are the trade union and the employer.

On the employee side, in Vietnam, trade unions are the only bodies permitted to represent employees' interests and to bargain on their behalf. Vietnam has a single system of employee representatives — trade unions which are led by Vietnam General Confederation of Labour (VGCL). Under Labour Code 2012, no other employee group is entitled to be a party to collective bargaining other than VGCL and its members. VGCL is the only recognized national representative organization of employees in Vietnam; all local unions are created by the higher-level VGCL union and are registered under the confederation.³

1 Lecturer, Department of Labor Law, Faculty of Economic Laws, Hanoi Law University, Vietnam

2 Labour code 2012. Article 66. Purpose of the collective negotiation.

The collective negotiation is that the labor collective makes discussion and negotiation with the employer for the following purposes:

- 1) Building harmonious, stable and progressive labor relations;
- 2) Establishing new working conditions as a basis for signing the collective labor agreements;
- 3) Settling the problems and difficulties in implementing the rights and obligations of each party in the labor relations.

The bargaining agent representing the employees will be either an occupation-based union or an umbrella union, respectively depending on whether collective bargaining is conducted at the enterprise level or sectoral level. The singular system of employee representation in Vietnam does not comply with the core international labor standard on freedom of association, because the Labour Code forbids employees from forming new trade unions outside the VGCL.

On the employer side, the bargaining agent usually is the employer itself or the employer's representative if the bargaining is conducted at the enterprise level, or a representative organization of the employers if bargaining is conducted at the sectoral level. At the national level, there are three representative organizations of employers: the Vietnam Chamber of Commerce and Industry (VCCI), the Vietnam Cooperative Alliance (VCA), and Vietnam Association of Small and Medium Enterprises (VASME). All these organizations do not legally and practically represent all employers in Vietnam.

Second, regarding the scope of collective bargaining

The scope of collective bargaining encompasses five general topics: (i) salary, bonus, allowance and salary increase; (ii) working hours, overtime, and break time; (iii) employment protection for the employee;⁴ (iv) occupational safety and hygiene, the implementation of internal labor regulations; and (v) other subjects of concern to both parties.⁵ This section of Labour Code 2012 is designed to encourage the collective agents to negotiate freely concerning internal working conditions and their expectations. If the collective bargaining negotiations conclude successfully, these five general topics will likely provide the framework of the collective bargaining resulting in collective bargaining agreement.

Third, regarding the principles of collective bargaining

Collective bargaining theoretically is predicated on the principles of goodwill, equality, cooperation, openness, and transparency.⁶ However, in both theory and practice, it is often difficult to define and differentiate the principle of cooperation and principle of openness.

Fourth, regarding the procedural requirements of collective bargaining

The procedure of collective bargaining includes three stages: (i) request collective labor bargaining, (ii) prepare for collective labor bargaining, and (iii) conduct collective labor bargaining. These procedures were promulgated for the first time in Labour Code 2012, and they dignify the important status of collective bargaining as well as the enhanced role of industrial relations in Vietnam.⁷

(i) In the stage of requesting collective bargaining: each side of the collective bargaining, the collective labor union or the employer, has the right to request a bargaining and to propose the scope of negotiations. Once an actor calls for a collective bargaining, the other actor must accept and conduct the collective bargaining. The principle of goodwill was legislated to ensure the process of bargaining. Usually, the process of collective bargaining is initiated by the labor.

(ii) In the stage of preparing for a collective bargaining: the Labour Code prescribes the time limits for the actors to prepare for negotiations.⁸ For example, the Labour Code provides that the party initiating collective bargaining must provide written notice of the proposed contents of bargaining to the other side at least five working days before bargaining initiator begins.

(iii) In the stage of conducting the collective bargaining: the employer is responsible for costs related to the bargaining process. The time and venue of bargaining is mutually agreed by both sides. The conclusion of such negotiation is formally recorded in a minutes with entire scope of negotiations, comments and signatures of each side. The collective agreement can be signed if both agents negotiate successfully. If

3 Article 3.3, Labour Code 2012.

4 Such as building the recruitment procedure, conditions for employee transfer, severance payment.

5 Article 70, Labour Code 2012.

6 Article 67, Labour Code 2012.

7 Labour Code 1994 did not regulate on the process of collective bargaining, and individual employment relation and its relevant contents were the main points of this code.

they could not reach an agreement, there might be a labor collective disputation.

II. The legislation and practice of collective agreement in Vietnam

1. Laws on collective agreement

A collective agreement is a written agreement made between an employer and a trade union of employees describing working conditions agreed to through the collective bargaining process.⁹ The collective agreement is the outcome of negotiations between the parties, and reflects the expectations and concerns of each party. In Vietnam, there are three types of collective agreements, including collective agreement at the enterprise level, sectoral level, and other type of collective agreements.

The parties to collective agreement are the same as the actors in collective bargaining: the employer (or its representative) and the labor union representing the workers.

The contents of the collective agreement mirror the scope of collective bargaining described in section I above.¹⁰ The specific terms of the collective agreement are valid so long as they (1) fall within the five scope-of-bargaining points described above, (2) meet minimum legal labor standards and do not otherwise violate the law, and (3) provide terms and conditions of employment for workers that are at least as good as the floor set by the labor laws. If the collective bargaining is the process, the collective agreement is the result which two parties achieve.

Regarding the conditions to conclude a collective agreement: after the process of bargaining, the bargaining agreement becomes binding on the parties once both parties have agreed to the terms of the agreement and the agreement is approved by more than 50% of (i) the enterprise labor union (if it is an enterprise-level collective agreement), or (ii) the executive committee of the sectoral labor unions (if it is an sectoral collective labor agreement). The conclusion of other types of collective agreements, such as multi-employer collective agreements, or regional collective agreements, is not yet regulated.

8 Article 71. Process of collective negotiation

1) The process for preparation of the collective negotiation is regulated as follows:

a) Before the collective negotiation meeting at least 10 days, the employer must provide information on the situation of production and business upon the requirement from the labor collective except for business secrets and technology secrets of the employer.

b) Gathering opinions of the labor collective

The negotiation representative of the labor collective party shall directly gather opinions of the labor collective or indirectly through the delegate conference of the employee concerning the requirements of the employee for the employer and the requirements of the employer with the labor collective;

c) Notification of the content of collective negotiation.

Within 05 working days before the start of the collective negotiation meeting, the party requiring the collective negotiation must notify in writing the other party of the estimated contents for the conduct of collective negotiation.

2) Procedures for the collective negotiation are regulated as follows:

a) Organizing the meeting of collective negotiation

The employer shall organize the meeting of collective negotiation with time and place agreed upon by both parties.

The collective negotiation must be recorded in writing, in which there must be the contents agreed upon by the two parties.

The estimated time for the signing of the agreed content; the contents with different opinions;

b) The minutes of the meeting of collective negotiation must have the signature of the representative of labor collective, of the employer and the person recording the minutes.

3) Within 15 days from the day of termination of the meeting of collective negotiation, the negotiation representatives of the labor collective party must diffuse widely and publicly the minutes of the meeting of collective negotiation to the labor collective and collect suggestion by voting from the labor collective on the contents agreed upon.

4) Where the negotiation fails either party may request to continue the negotiation or conduct the procedures for the settlement of the labor disputes in accordance with this Code.

9 Article 73, Labour Code 2012.

10 (i) salary, bonus, allowance and salary increase; (ii) working hours, overtime, break time; (iii) employment protection for the employee; (iv) occupational safety and hygiene, internal labor regulations implementation; protection; (v) other contents concerning both parties.

After concluding the collective agreement, the employer must within ten days deliver a copy to the Department of Labor, Invalids and Social Affairs (for enterprise collective agreements) or to the Ministry of Labor, Invalids and Social Affairs (for sectoral collective agreements). Simultaneously, the employer must announce the collective agreement to every employee in the company. The collective agreement will be in effect for one to three years after the date written on the agreement or the date the agreement is signed. The duration of first enterprise collective agreement may be less than one year. If the parties subsequently agree to amend the collective agreement, they may do so after three months (for agreements with a duration of less than one year) or six months (for agreements with a duration of one to three years). Vietnam and many countries in the world share a common commitment to and method of regulating collective bargaining and collective agreements. However, also like many countries in the world, often labor law as written does not translate into strong workplace protections in practice and enforcement.

2. The practice of concluding collective agreement in Vietnam

As collective agreements have been negotiated in Vietnam since 1994, so many enterprises are experienced on this issue. However, most collective agreements have heretofore been negotiated at the enterprise level; only a few sectoral or multi-enterprise collective agreements have been negotiated since 2012.

Enterprise collective agreement

Enterprise collective agreements are the most common type in Vietnam. The majority of these agreements have been concluded in state-owned enterprises or enterprises equitizing from state-owned companies.¹¹ This is because, when Vietnam first recognized collective agreements in Labour Code 1994, most companies were state-owned. Until now, some collective agreements in large corporations and some foreign-invested companies have been conducting. For those small and medium companies, there is almost no collective agreement signed. Besides that, the collective agreement only appears in the enterprise having labor union. According to Vietnam General Confederation of Labour (VGCL), by the end of 2015, Vietnam had 25,396 enterprise collective agreements; these enterprises accounted for 75.72% of all enterprises with labor unions. Only six enterprises without labor unions have successfully signed collective agreements.¹² These statistics also indicate that about 25% of enterprises have a labor union but have not signed a collective agreement. The ineffectiveness of enterprise's labor union might explain such statistics. Because workers are not entitled to form their own labor union independently and they find the labor union sometimes untrustworthy, they do not need a collective agreement in paper only.

Sectoral collective agreement

Sectoral collective agreements have existed in Vietnam only since 2012. The Labour Code 1994 defined the sectoral collective agreement, but provided no guidance to execute one. Additionally, it is very difficult to form a sectoral collective agreement in Vietnam because working conditions of enterprises vary considerably from region to region. By the end of 2015, according to VGCL, there were only a few sectoral collective agreements, including the agreement covering the rubber industry, the agreement of Vietnam's Postal Corporation, the agreement of Vietnam National Textile and Garment Group, and the agreement of textile companies in Binh Duong province.

Other type of collective agreement

Multi-employer collective agreements by definition cover employers in the same province and/or those that share a common business line. The bargaining and concluding collective agreements are carried out in five regions¹³ under the technical and financial supervision of ILO Vietnam. By the end of 2015, only

11 This means private companies that were rooted in state-owned companies, but the state sell their shares to private.

12 Report on the program "Enhance the quality of bargaining, concluding and executing collective agreement" of Vietnam General Confederation of Labour, December 2015.

13 Hai Phong city, Da Nang city, Ho Chi Minh city, Binh Duong province, Dong Nai province.

three collective agreements had been signed, including the collective agreement of four travel companies in Da Nang city; the collective agreement of four textile companies in District 12, Ho Chi Minh city; and the collective agreement of five electronics companies in Hai Phong city. The multi-employer collective agreement has the potential to develop significantly in Vietnam because its contents are flexible but it also fulfills the requirements of employees and the working conditions of the companies.

The scope of enterprise-level collective bargaining has expanded significantly. Previously, the collective agreement typically covered only salaries and working hours, but now it also sets out welfare regimes such as holiday arrangements; allowances for sickness, birthdays, and marriages; commercial health insurance; etc. The scope of sectoral collective agreements and the multi-employers collective bargaining mostly focuses on wages and working hours. For instance, the collective agreement of textile companies in Binh Duong Province required that the minimum wage be at least 3% higher than the regional minimum wage, and required that the gap between two salary grades in the same pay scale be at least 6%.¹⁴

III. Evaluation and recommendation

1. Evaluation

In general, Vietnam has a fairly comprehensive legal framework for collective bargaining and collective agreements. It governs the identity of the parties, the scope and the process of collective bargaining, and the final collective agreement. The role of collective bargaining has improved in the latest Labour Code 2012 by carefully guiding the process of collective bargaining.

Vietnam also has made progress in offering different varieties of collective agreements, respecting the right of each party to negotiate. For example, as in the Labour Code 1994, there are only two types of collective agreements¹⁵ whereas the Labour Code 2012 offers three types of collective agreements as mentioned in section II-1 above. Besides that, according to Labour Code 2012, the employer only needs to inform the proper governmental authority about the collective agreement. The collective agreement is effective since the signing date or the date written in such agreement, whereas according to Labour Code 1994, the collective agreement only be enforced since the authority approved its contents.

Labour Code 2012 also broadened the scope of collective bargaining and collective agreements, covering not only the basics such as wages, hours, and working conditions, but also anything that the parties mutually agree to bargain on, so long as those topics are not otherwise proscribed by law.

The negotiation and conclusion of collective labor agreement has produced positive results. However, significant limitations remain.

First, Labour Code 2012 restricts both employees and employers in their respective abilities to choose their bargaining representatives. Only labor unions under VGCL may represent employees. This limitation does not satisfy the core international labor standards on the right to freedom of association, which in turn obstructs Vietnam in concluding contemporary free-trade agreements. In addition, because there is a unitary labor union consolidated under VGCL, there is no competition among labor unions, and unions are not as effective at representing workers as they would be if they had to compete with each other for the right to represent workers. On the employer side, VCCI, VCA and VASME are the exclusive employer representatives, but these organizations do not cover every employer in Vietnam. Moreover, the three organizations do not correspond with the VGCL, creating mismatches in employer and employee representation.

Second, the labor management authorities seriously interfere the industrial relations, especially in regulating the boundaries and the scope and the process of negotiating and concluding the collective

¹⁴ Report on the program “Enhance the quality of bargaining, concluding and executing collective agreement” of Vietnam General Confederation of Labour, December 2015.

¹⁵ Enterprise collective agreement and sectoral collective agreement.

agreement.

Third, sectoral and multi-employer unions are underdeveloped. Likewise, the employer representatives for sectoral and multi-employer bargaining have not yet recognized.

Forth, employees often do not understand their rights under the labor laws. This significantly impedes the ability of unions to effectively negotiate collective agreements, particularly in small- and medium-sized enterprises.

2. Recommendations

First, the laws governing who may represent employers and employees should be amended to allow both employers and employees more freedom to choose their bargaining representatives.

On the employee side: repeal the requirement that all labor unions be integrated under VGCL, and allow employees to choose from among competing labor representatives or to establish their own independent representative. The employee representative should have the right to act independently or in conjunction with other employees' organizations. The employee representative should have the freedom to join the VGCL or not.

On the employer side: allow employers to choose whether to bargain individually or as a multi-employer bargaining unit. The employer's representative should function independently, and employers should have the right to form their own separate and independent associations.

Second, the law should be amended to provide comprehensive guidance on the other type of collective agreements. Current legislation provides such guidance only at the enterprise and sectoral levels. The law should be expanded to provide guidance on other type of collective agreements such as multi-enterprise collective agreements.

Third, regarding the implementation, employees must be educated about their rights to collectively bargain and to conclude collective agreements. This would improve the quality and quantity of both bargaining and of the final collective agreements. The result would be mutually beneficial to employees and employers: employees would receive better wages, hours, and working conditions, and employers could bargain for increased efficiencies and productivity.

Finally, labor unions should be independent, and free from interference from either the employer or VGCL. Only when labor unions are free and independent can objective negotiations with employers occur to their mutual benefit and to the benefit of the social structure generally.

Leader or Laggard? Australian Efforts to Promote Better Working Conditions in Supply Chains within and beyond Australia's Borders

Ingrid LANDAU*

University of Melbourne

- I. Introduction
- II. Background
- III. The regulatory landscape in Australia
- IV. What accounts for this paradox?
- V. Conclusion

I. Introduction

This paper considers the extent to which, and how, Australian law and policy encourages large firms to take responsibility for working conditions within their supply chains. In Australia, this issue is receiving increased public and scholarly attention in light of media revelations of serious labour abuses within the supply chains of large, high-profile companies. Recent examples involving domestic supply chains include systematic underpayment and other labour abuses of vulnerable workers on farms producing fruit and vegetables for Australia's largest supermarkets,¹ and labour exploitation within the supply chains of the largest chicken processor, Baiada Poultry.² Examples involving transnational supply chains include revelations of Australian clothing retailers manufacturing clothing in abusive sweatshops in Bangladesh,³ iconic Australian surf wear company Rip Curl sourcing from factories in North Korea,⁴ and Australian supermarket retailers Woolworths, Coles and Aldi procuring seafood from Thai processing plants using forced and child labour.⁵

A number of scholars have described and analysed Australian regulatory initiatives to promote lead firm accountability for employment standards within domestic supply chains.⁶ There is also a small literature on how Australia regulates, and could potentially regulate, Australian-domiciled companies with respect to their transnational supply chains.⁷ The modest objective of this paper is to survey the contemporary regulatory landscape with respect to state efforts to promote better working conditions in supply chains

* PhD Candidate and Research Fellow, Centre for Employment and Labour Relations Law, Melbourne Law School.

1 See Caro Meldrum — Hanna and Ali Russell, *Slaving Away: The Dirty Secrets behind Australia's Fresh Food*, Four Corners, 4 May 2015.

2 Fair Work Ombudsman, 'A Report on the Fair Work Ombudsman's Inquiry into the Labour Procurement Arrangements of the Baiada Group in New South Wales,' June 2015.

3 'Australian Retailers Rivers, Coles, Target, Kmart Linked to Bangladesh Factory Worker Abuse,' Four Corners, 4 June 2013.

4 Nick McKenzie and Richard Baker, 'Surf Clothing Label Rip Curl Using "Slave Labour" To Manufacture Clothes in North Korea,' *The Sydney Morning Herald*, 21 February 2016.

5 'Woolworths, Coles and Aldi Admit to Child Slave Labour Seafood Link,' *The Guardian*, 15 December 2015.

6 See, eg, Richard Johnstone and Andrew Stewart, 'Swimming Against the Tide? Australian Labor Regulation and the Fissured Workplace' (2015) 37 *Comparative Labor Law and Policy Journal* 55; Tess Hardy, 'Who Should be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29 *Australian Journal of Labour Law* 78; and various articles within the special issue of the *Journal of Industrial Relations* on 'Supply Chains, HRM Practices and Labour Standards,' Vol. 57(4), 2015.

7 See, eg, Ryan J. Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17 *Melbourne Journal of International Law* 188; Brynn O'Brien and Martijn Boersma, 'Human Rights in the Supply Chains of Australian Businesses: Opportunities for Legislative Reform,' *Catalyst and the Australia Institute*, September 2016; Michael Rawling, 'Cross-Jurisdictional and other Implications of Mandatory Clothing Retailer Obligations' (2014) 17 *Australian Journal of Labour Law* 191; and Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops' (2004) 28 *Melbourne University Law Review* 290.

both *within* and *beyond* Australian borders. It is hoped that this exercise will highlight some of the tensions inherent in Australian regulatory efforts to promote responsible business conduct, as well in encouraging greater exchange of analytical and empirical insights between what tend to be separate conversations running along disciplinary divides, with labour law and industrial relations scholars on the one hand, and the business and human rights and corporate law scholars on the other.

The overview presented in this paper reveals somewhat of a paradox. At the domestic level, Australia has adopted what are widely regarded as innovative and relatively effective, though fragmented and incomplete, approaches to supply chain regulation. These include the broader activities of the federal labour inspectorate as well as industry and standard-specific initiatives. At the transnational level, however, Australia is lagging well behind its counterparts, particularly in North America and Europe. Despite the high number of Australian businesses with transnational supply chains, the Australian government does very little in legal or policy terms to regulate this activity or even to encourage businesses to respect and promote basic labour rights throughout their business operations and relationships. The paper considers some possible reasons for this apparent paradox and ventures some observations on future regulatory possibilities and trajectories.

II. Background

As in many other developed countries, recent decades have seen increasing reliance by large businesses in Australia on supply chain or network arrangements for product and service provision. Rather than directly employing large numbers of workers to perform work in-house, large businesses organise the production and delivery of services and goods through extensive networks of smaller businesses, with relationships between these businesses governed by commercial contract.⁸ In Australia, supply chain arrangements are found across the economy but are particularly prevalent in road, rail and maritime transport, manufacturing, construction, agriculture, construction, off-shore oil, nursing and homecare, cleaning and waste disposal sectors.⁹ And it is not only private firms that are increasingly adopting supply chain modes of production — governments too are increasingly reliant on outsourcing goods and services.¹⁰

Supply chains often comprise complex business network structures within the same jurisdiction. However, it is also increasingly common for corporate supply chains to extend across multiple jurisdictions. As a result of trade liberalisation, technological innovation and falling transport and communication costs, and in line with global trends in business practice, large Australian firms have shifted the locus of many of their manufacturing and service activities to developing countries, particularly in the Asia-Pacific. Many have also moved away from direct production themselves or by their fully or partially owned subsidiaries towards production via supply chain arrangements, often involving multiple layers of corporate entities and different forms of corporate relationships spread across numerous countries.¹¹ Under this ‘new international division of labour,’¹² activities associated with raw material extraction, processing and manufacturing tend to be undertaken by suppliers in industrialising economies while activities associated with the design,

8 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It* (Harvard University Press, 2014).

9 Johnstone and Stewart, above n 6, 62, and sources cited therein.

10 Michael Rawling and John Howe, ‘The Regulation of Supply Chains: An Australian Contribution to Cross-National Learning’ in Katherine VW Stone and Harry Arthurs, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage, 2013) 233; and Katherine Ravenswood and Sarah Kaine, ‘The Role of Government in Influencing Labour Conditions through the Procurement of Services: Some Political Challenges’ (2015) 57(4) *Journal of Industrial Relations* 544.

11 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton, 2013) 2; Stephanie Barrientos et al, ‘Decent Work in Global Production Networks: Framing the Policy Debate’ (2011) 150 *International Labor Review* 299.

12 Jennifer Bair, ‘Global Commodity Chains: Genealogy and Review’, in Jennifer Bair (ed) *Frontiers of Commodity Chain Research* (Stanford University Press, 2009) 1, 5.

research and development and marketing continue to be performed by the large businesses within the industrialised economies.¹³

These developments in business organisation have significant implications for employment practices, including within supplier firms. In many circumstances, ‘lead firms’¹⁴ exert significant influence, if not control, over the business practices of their direct suppliers through contractual terms relating to the nature, price and quality of goods or services produced, the size and frequency of orders, and delivery schedules.¹⁵ Through setting these parameters — which are then passed further down the supply chain — lead firms also influence the pay, working time and other conditions of workers engaged by other entities at various tiers of the supply chain.¹⁶ In some cases, lead firms may directly monitor or intervene in the work practices of those employed within their supplying firms.¹⁷ The lead firm may also wield significant through its power to provide or cease to provide work to a specific supplier.¹⁸ In industries where outsourcing is motivated by cost reduction, contractual pressure from lead firms may have a ‘corrosive effect’ on employment standards, contributing to low wages, insecure employment, work intensification, and health and safety risks.¹⁹

While supply chain arrangements may enhance the economic efficiency of the business enterprise, they create significant challenges for the regulation of minimum employment standards. This is true for both domestic and transnational-oriented supply chains. Within Australia, employment regulation (principally by way of the federal *Fair Work Act 2009* (FW Act) and the common law) continues to be predicated on the dominant ‘employment paradigm’: that is, the presumption of a single employer directly employing employees at a single workplace.²⁰ This means, among other things, that in cases of contraventions of employment standards that occur within domestic supply chains, primary responsibility and liability is assigned to the direct employer at common law.²¹ The proliferation of supply chain arrangements, however, has meant that responsibility for workplace conditions has become ‘blurred.’²² Lead firms are able to structure their activities in a way that they exert significant control over their suppliers’ activities while distancing themselves from any potential legal liability under employment law.²³ As Hardy and Howe emphasise, exclusive focus on the direct employer may also limit the effectiveness of any sanctions imposed for contraventions of minimum standards as punishment of the direct employer may not address the key drivers of non-compliance which are shaped if not determined by more powerful firms higher in the supply chain.²⁴

The challenges posed by complex supply chain arrangements to the regulation of working conditions

13 Chris F Wright and Sarah Kaine, ‘Supply Chains, Production Networks and the Employment Relationship’ (2015) 57(4) *Journal of Industrial Relations* 483, 485.

14 The term is used in this paper to refer to ‘[l]arge businesses with national and international reputations operating at the top of their industries.’: Weil, above n 8, cited in Hardy, above n 6, 80.

15 Rawling, above n 7. The precise nature and level of control and/or influence varies significantly and depends on a range of factors including the nature and terms of the contract between the lead firm and its suppliers, the extent of supplier dependence on the lead firm and so on. For discussion see Hardy, above n 6; and Guy Davidov, ‘Indirect Employment: Should Lead Companies be Liable?’ 2015 37 *Comparative Labor Law & Policy Journal* 5. Within the context of transnational supply chains, see, eg, Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, ‘Global Justice, Labor Standards and Responsibility’ (2011) 12 *Theoretical Inquiries in Law* 117 and Mark Anner, Jennifer Bair and Jeremy Blasi, ‘Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labour Violations in International Subcontracting Networks’ (2013) 37 *Comparative Labor Law & Policy Journal* 1.

16 Rawling, above n 15, 195.

17 Ibid.

18 Ibid.

19 Wright and Kaine, above n 13, 489-90.

20 Johnstone and Stewart, above n 6, 80.

21 Hardy, above n 6, 86.

22 Weil, above n 8, 15.

23 Weil, above n 8, 14.

24 Tess Hardy and John Howe, ‘Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains’ (2015) 57(4) *Journal of Industrial Relations* 563, 564.

are only greater at the transnational level. Transnational supply chains often extend into developing countries with lower de jure or de facto levels of labour protection. Indeed, particularly in labour-intensive sectors, low wages and levels of social protection along with lax enforcement of existing laws may be significant if not determinative factors in many business choices of where to source goods and services.²⁵ As a general rule, Australian labour law does not extend to regulate the employment relationships within these supply chains.²⁶ Under the common law, contractual obligations may arise between an Australian firm and a worker employed overseas where there is a direct employment relationship. However it is far more common for Australian firms to engage labour indirectly through contractual relationships with other legal entities, particularly in developing countries. In these cases, no such contractual obligations arise. While indirect relationships may give rise to action in tort against a lead employer where a worker has experienced significant injury, there are numerous and significant legal obstacles to workers in developing countries pursuing such actions, including the challenge of establishing a requisite duty of care where the lead firm is distanced from the claimant by complex corporate structures and multiple tiers of a supply chain, legal doctrines such as *forum non conveniens*, and logistical and financial challenges.²⁷ The extraterritorial application of the FW Act is also limited. It does not generally extend to regulate the relationship between an ‘Australian employer’ and employees engaged outside Australia to perform work overseas,²⁸ let alone the relationship between an Australian firm and employees of indirect suppliers based in other jurisdictions.²⁹

III. The regulatory landscape in Australia

The increasing disjuncture between contemporary production and employment practices on the one hand and labour regulation on the other has led to the adoption within Australia of a number of regulatory innovations to promote greater accountability of lead firms for working conditions within their supply chains. I provide a brief survey of these efforts below. Before proceeding, however, it is important to clarify the scope of this overview. It considers both regulatory initiatives directed at securing compliance with national legally-mandated minima and initiatives that are directed at promoting better working conditions more broadly (such as those labour rights that constitute internationally-recognised human rights). Secondly, it adopts a broad approach to the concept of state regulation, taking into account not just efforts by the state to influence behaviour through conventional command and control forms of regulation (whereby the state seeks to regulate through the use of legal rules backed by sanction)³⁰ but the use by the state of other regulatory techniques such as provision of information and education, attachment of conditions to government public procurement contracts or offering financial incentives or rewards.³¹ It also recognises that state regulation of working conditions may emanate from a variety of sources and paradigms, ‘from the narrow confines of contract law to broader discourses of human rights and decent work.’³²

25 Richard Locke, Locke, ‘We Live in a World of Global Supply Chains’ in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 299.

26 See further Cooney, above n 7.

27 Ibid.

28 FW Act, s 35(3). Under the FW Act, an Australian employer includes a body incorporated in the country, or whose ‘central management and control’ is located within Australia: FW Act s51(1). There are some exceptions, see FW Act ss 33, 34(1). The FW Act provides that regulations may extend the operation of the Act to anything done by Australian employers outside the country: s 34(3).

29 For two recent cases considering the reach of the FW Act and the need for an ‘appropriate connection’ with Australia, see *FWO v Valuair* (No 2), [2014] FCA 759 and *Australian and International Airlines Association v Qantas Airways Ltd and Jetconnect Ltd* [2011] FWAFB 3706. For discussion see Joellen Riley, ‘Regulating the Employment of Non-Employed Labour: A View from the Antipodes’ in Douglas Brodie, Nicole Busby and Rebecca Zahn (eds) *The Future Regulation of Work: New Concepts, New Paradigms* (Palgrave, 2016) 61, 62-64.

30 Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1, 2.

1. Domestic regulatory efforts

As noted above, a significant amount of work has been undertaken by labour law and industrial relations scholars to describe and analyse Australian labour regulation directed at lead firm accountability and their domestic supply chains. This regulation is somewhat ‘piecemeal’,³³ and there remain significant gaps in Australia’s regulatory framework.³⁴ However many scholars have also emphasised the innovative and relatively effective nature of these initiatives. For some scholars, they offer a potential model for supply chain regulation in other sectors or even internationally.³⁵

(1) Accessorial liability for contraventions of the Fair Work Act

The ‘accessorial liability’ provisions of the federal FW Act have proven to be a key mechanism to promote greater accountability of lead firms for contraventions of employment standard regulation that have occurred within their supply chains.³⁶ In general, the civil remedy provisions in the Act for failure to comply with minimum employment standards reflect the dominant employment paradigm by ascribing liability for contraventions of certain provisions of the Act and of industrial instruments to the primary employer. However under section 550, responsibility for breach of civil remedy provisions in the Act may be extended beyond the person directly responsible in the breach to others ‘involved in’ the contraventions.³⁷ This includes where a person has aided or abetted the contravention; procured or induced it (whether by threats or promises or otherwise); conspired with others to bring it about; or been, in any way, by act or omission, ‘knowingly concerned’ in the contravention.

The Australian employment standards enforcement agency — the Office of the Fair Work Ombudsman (FWO) — has used these accessorial liability provisions in the past to hold company directors, managers and advisors accountable. It has also in a series of recent cases sought to use them against lead firms ‘involved in’ a contravention by a direct employer lower in their supply chains. In one of the earliest and most significant of these cases, the FWO launched legal proceedings against Coles (one of two giant supermarket retailers in Australia) alleging that it had been knowingly involved in the underpayment of trolley collectors employed by subcontractors.³⁸ The litigation was discontinued in 2014, after the retailer formally accepted ‘ethical and moral responsibility’ for the underpayments.³⁹ Coles also entered into an agreement with the FWO in which it undertook to ‘revamp’ its trolley collection services in recognition of the fact that its former practices rendered workers highly vulnerable to exploitation; repay ten workers; put

31 Peter Gahan and Peter Brosnan, ‘The repertoires of labour market regulation’ in C Arup et al. (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets* (Federation Press, 2006) 127; J. Howe, ‘“Money and Favours”: Government Deployment of Public Wealth as an Instrument of Labour Regulation’ in Christopher Arup et al (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 167.

32 Douglas Brodie, Nicole Busby and Rebecca Zahn, ‘Introduction’ in Douglas Brodie, Nicole Busby and Rebecca Zahn (eds) *The Future Regulation of Work: New Concepts, New Paradigms* (Palgrave, 2016), 1, 3.

33 Johnstone and Stewart, above n 6, 89.

34 See further Hardy, above n 6; Johnstone and Stewart, above n 6.

35 E.g. Michael Rawling, ‘A Generic Model of Regulating Supply Chain Outsourcing.’ In C Arup et al (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006) 520; Rawling and Howe, above n 10, Igor Nossar, ‘Cross-Jurisdictional Regulation of Commercial Contracts for Work Beyond the Traditional Relationship’ in C Arup et al (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006) 202.

36 For a discussion of others strategies used by the FWO in this space, see Hardy and Howe, above n 26.

37 Part 4-1 of the FW Act. These standards include the National Employment Standards, a term of a modern award or enterprise agreement or the sham contracting provisions. The civil remedies provided for generally include a pecuniary penalty and compensation orders, although the courts have a broad power to make ‘any order the court considers appropriate’: FW Act, s. 545.

38 *Fair Work Ombudsman v Al-Hilfi* [2012] FCA 1166 *Fair Work Ombudsman v Al-Hilfi (No.2)* [2013] FCA 16. For detailed discussion of this and other cases, see Johnstone and Stewart, above n 6, 76-78; and Hardy and Howe, above n 26.

39 Fair Work Ombudsman, ‘Coles Accepts “Ethical and Moral Responsibility” to Help End Exploitation of Vulnerable Trolley Collectors,’ Media Release, 7 October 2014; Coles Supermarkets Australia Pty Ltd, *Annual Report Pursuant to the Enforceable Undertaking between FWO and Coles* (3 November 2015).

aside a sum to cover any future underpayments; and conduct random audits of its subcontractors to ensure they were meeting their obligations. While FWO has subsequently launched similar proceedings against other firms, the precise limits of the accessorial liability provisions remain unclear.⁴⁰ However they appear to impose a high threshold in terms of the requisite level of knowledge a lead firm must be proven to have to establish liability for breaches occurring further down in its supply chain.⁴¹

The accessorial liability provisions have been used strategically in the context of a broader campaign by the FWO to promote responsibility among lead firms for compliance with minimum employment standards within their supply chains.⁴² While professing their commitment to ‘leverage the current laws to the fullest extent,’⁴³ the inspectorate has also shown a willingness to use various other regulatory levers available to it. It has, for example, consistently emphasised to the business community that, even where a firm may not attract legal liability for contraventions of minimum employment standards within its supply chain, it runs the risk of incurring significant reputational and brand damage if its customers, suppliers, shareholders or the broader public learn that it has been profiting from the exploitation of vulnerable workers, especially where the firm is an established, profitable brand.⁴⁴ The FWO has also produced information and educational material encouraging business to minimise the risks of non-compliance within their supply chains through measures such as including clauses in all contracts requiring suppliers to adhere to the requirements of the FW Act, and undertaking due diligence to ensure contracted payments are reasonably able to cover the entitlements of those employees performing the work.⁴⁵

(2) Work, health and safety regulation

A second economy-wide regulatory initiative directed at securing greater accountability of lead firms for working conditions within supply chains is found in Australian work health and safety (WHS) regulation. In recent years, all Australian states except Victoria and Western Australia have adopted harmonised WHS Acts which have purposefully moved away from the ‘employment paradigm’ towards a regime which more adequately recognises risks to workers arising from contemporary business models.⁴⁶

Three features of the harmonised WHS Acts are particularly relevant to supply chains. First, the statutes impose a primary duty of care not on the ‘employer’ but on ‘a person conducting a business or undertaking’ (PCBU).⁴⁷ This duty is owed towards all persons who carry out work for that businesses or undertaking, regardless of the arrangement under which they work.⁴⁸ Importantly, the provisions are drafted in such a way as to prevent business higher up a supply chain from shifting liability or responsibility for WHS onto businesses or workers further down the chain.⁴⁹

Second, the nature of the liability imposed on lead firms under the harmonised WHS Acts is duty-based

40 See further (Hardy 2016 paper, section 3.4).

41 To be liable under section 550, an alleged accessory must have had ‘knowledge of the essential matters which go to make up the contravention,’ even if they were not actually aware that the law was being broken. For discussion see Hardy, above n 6.

42 See Hardy and Howe, above n 26.

43 Natalie James, ‘The Fair Work Ombudsman’s Role in the Development of Workplace Law,’ Address to the Australian Labour Law Association National Conference, 4 November 2016.

44 See, eg, *ibid.*

45 See, eg, <https://www.fairwork.gov.au/about-us/news-media-releases/newsletter/august-2016/what-is-accessorial-liability>.

46 See further Johnstone and Stewart, above n 6, Part VI and Richard Johnstone, ‘Regulating Health and Safety in “Vertically Disintegrated” Work Arrangements: The Example of Supply Chains’ in John Howe, Anna Chapman and Ingrid Landau (eds) *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, in press).

47 See ss.19(1)-(2) of the harmonised WHS Acts. PCBUs includes ‘employers, principal contractors, head contractors, franchisors and the Crown’: WHS Acts s 5.

48 The term ‘worker’ is defined broadly to include a contractor, subcontractor, employee of a labour hire company, outworker and a volunteer: WHS Acts s. 7.

49 This is done through stating that: duties imposed under the Act cannot be delegated; that one person can owe a number of duties; and that more than one person can hold a duty and each person must comply with the duty even though it might also be owed by others: WHS Acts ss14-16.

rather than strict. All officers of a PCBU have the duty to ‘exercise due diligence to ensure that’ the PCBU ‘complies with’ a duty or obligation that the PCBU owes under the Act.⁵⁰ This due diligence obligation has the effect of requiring each officer of a PCBU to take proactive steps to gain an in-depth knowledge of the entity’s supply chain and the WHS risks worker engaged in these chains face, as well as to adopt additional voluntary measures to minimise legal liability.⁵¹

Third, the Acts effectively require lead businesses to consult, cooperate and coordinate their activities to ensure the health and safety of workers throughout their chains. This is done through imposing horizontal duties on PCBUs to consult with each other and vertical duties on PCBUs to consult workers involved in their work arrangements.⁵² As Johnstone and Stewart emphasise, to discharge this duty effectively, each party in a supply chain ‘must know who is carrying out the actual work and the terms and conditions under which they are working.’⁵³

(3) Industry-specific models

Australia also has several forms of industry-specific supply chain regulation, developed in response to a recognition of both the high level of vulnerability experienced by workers in these sectors and the need to regulate the activities of lead firms to improve working conditions sector-wide. The most well-known and longstanding of these industry-specific arrangements is in the textile, clothing and footwear (TCF) sector. This model seeks to leverage the commercial power of the lead firm to ensure that vulnerable workers in the supply chains receive basic workplace entitlements such as minimum rates of pay, conditions and work health and safety.⁵⁴ Key features of the model, which is implemented through statutory and award provisions at the federal and state levels⁵⁵ include:

- 1) provisions deeming ‘outworkers’⁵⁶ to be ‘employees,’ to enable their access to basic workplace entitlements such as minimum rates of pay and penalty rates for overtime;
- 2) provision of an expanded right of recovery, enabling workers to bring claims against third party firms higher up in the supply chain (who can then seek redress from the person actually liable),⁵⁷ and
- 3) a reverse onus of proof in cases where a demand for payment is served against ‘an apparent indirectly responsible entity.’⁵⁸

In addition, legislation in two Australian states provides for the adoption of mandatory clothing retailer codes which impose a series of disclosure and transparency requirements on retailers and suppliers within the industry. Under these codes, retailers and suppliers must include mandatory terms in their contracts requiring contractors and subcontractors in the chain to inform them where and under what conditions goods are produced. Retailers at the top of supply chains are also required to record and disclose information relating to work performed under all contracts for the supply of clothing products at every level of the supply chain. This includes details on the type of work being performed, by and through whom and what quantity. This information must be disclosed, regularly and on request, to the state enforcement agency and relevant trade union. The regime ‘capitalises on retailers’ commercial influence in the clothing supply chain to ensure the transparency of the contracting process in the supply chain and to efficiently capture crucial information about where production work is taking place and by whom.’⁵⁹ Moreover,

50 Harmonised WHS Acts, s. 27.

51 The substance of this duty is enumerated in section 27(5) of the WHS Acts.

52 Harmonized WHS Acts, ss. 46-49.

53 Johnstone and Stewart, above n 6, 82.

54 See further Igor Nossar et al, ‘Protective Legal Regulation for Home Based Workers in the Australian Textile, Clothing and Footwear Industry’ (2015) 57 *Journal of Industrial Relations* 585; Rawling (2014) and (2006).

55 At the federal level, see FW Act, Part 6-4A, and the Textile, Clothing, Footwear and Associated Industries Award 2010.

56 These are generally workers at the bottom of TCF supply chains employed as independent contractors. See FW Act s 789BB.

57 A worker cannot however recover entitlements against a retailer which did not have rights to supervise or otherwise control production prior to the delivery of goods: FW Act s 789CA(5).

58 FW Act ss 789CA-789CF.

through requiring disclosure of key information such as sites of production to the relevant trade union, it provides third parties with an important role in monitoring compliance with the regime.

A somewhat similar example of supply chain regulation is found in the transport sector. Here, a *Heavy Vehicle National Law* seeks to make each party in the supply chain with the capacity to exercise control or influence over any transport task equally responsible for compliance with the road transport laws.⁶⁰ It requires each party in the chain (even where they have no direct role as a driver or transport operator) to take all reasonable steps to ensure a heavy vehicle driver can perform their duties without breaching road transport laws and that the terms of work contracts or consignment do not result in, encourage, reward or provide an incentive for the driver or other party in the chain to contravene any road transport law. In addition, between 2012 and 2016, a Road Safety Remuneration Tribunal operated with a mandate to determine working conditions in the road transport industry across Australia and the power to impose binding requirements on all supply chain participants for the pay and safety of both employee and independent contractor drivers.⁶¹ While the Tribunal has been recently abolished by the Federal Liberal/National Coalition Government, scholars argue it continues to offer a promising model for supply chain regulation in sectors with complex hierarchical supply chains.⁶²

2. Transnational regulatory efforts

Before proceeding to outline the regulatory framework with respect to Australian-domiciled businesses and their transnational supply chains, it is important to provide some international context. Recent years have seen a growing international consensus on the nature and extent of business responsibility in this area. In 2011, the Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs).⁶³ A set of non-binding principles, the UNGPs reiterate the duty of all states under international law to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises.⁶⁴ They further make clear that states should clearly convey the expectation that all business enterprises domiciled in their jurisdiction respect human rights throughout their operations.⁶⁵ This may include through ‘domestic measures with extraterritorial implications [such as] requirements on ‘parent’ companies to report on the global operations of the entire enterprise.’⁶⁶

The UNGPs also state that business entities have a responsibility to respect all internationally-recognised human rights (which of course include a large number of labour rights).⁶⁷ This means that business enterprises should avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts where they occur. Most relevantly to supply chains, business should also seek to prevent or mitigate adverse rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to these impacts.⁶⁸ The UNGPs recommend that businesses operationalise this responsibility through conducting human rights due diligence: a process to identify, prevent, mitigate and account for how they address actual and potential

59 Rawling, ‘Cross-Jurisdictional and other Implications of Mandatory Clothing Retailer Obligations,’ above n 7, 204-206.

60 *Heavy Vehicle National Laws* have been passed in all Australian states and territories except the Northern Territory and Western Australia.

61 *Road Safety Remuneration Tribunal Act 2012* (Cth). For further discussion, see Richard Johnstone, Igor Nossar & Michael Rawling, ‘Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal’ (2015) 43 *Federal Law Review* 397.

62 *Ibid.*

63 *Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/4 (16 June 2011).

64 UNGP 1.

65 UNGP 2.

66 UNGP, Commentary on Foundational Principle 2.

67 UNGP 11 and 12.

68 UNGP 13.

impacts on human rights throughout their operations and activities.⁶⁹ Other global soft law instruments such as the *OECD Guidelines for Multinational Enterprises* have subsequently been updated in line with the UNGPs, and contain detailed guidance for companies on the nature and extent of the responsibility to conduct due diligence on their supply chains. These normative standards on business conduct with respect to transnational supply chains, while continuing to be ‘soft’ law, have gained even greater global momentum as a consequence of the Rana Plaza disaster in Bangladesh in 2014.⁷⁰

In a related development, a number of industrialised states have now adopted regulatory measures directed at encouraging large companies domiciled or operating within their territory to have regard to the actual and potential negative human rights (including labour rights) impacts within their supply chains. To date, these have consisted largely of transparency-based measures: that is, measures requiring businesses above a threshold size to disclose publicly the steps they are taking to identify and address certain egregious labour practices in their supply chains, such as slavery and human trafficking.⁷¹ Some states have gone further. France, for example, has recently adopted legislation imposing a duty on large firms to establish and implement ‘vigilance plans’ to identify risks and prevent human rights violations and serious health and safety injuries arising from their activities and those of companies they control, as well as from within their supply chains.⁷²

(1) Forced labour and human trafficking

Slavery, ‘slavery-like’ practices (including servitude, forced labour and deceptive recruiting for labour or services) and human trafficking are all criminal offences under Australian law,⁷³ and the Australian Government has adopted a ‘comprehensive whole-of-government’ approach to combating these practices within Australia and abroad.⁷⁴ As part of these ongoing efforts, it has recognised the ‘vital role’ business has to play in addressing severe labour exploitation, including within supply chains.⁷⁵ In 2014, the Minister of Justice convened a multi-stakeholder Supply Chains Working Group to propose strategies to address serious labour exploitation in supply chains. The Group delivered its report to the Minister in December 2015, which took almost a year to respond. In November 2016, in response to the Group’s recommendations, the Government committed to working collaboratively with business and civil society over the following twelve months on a suite of possible ‘light touch’ regulatory initiatives. The only firm commitment was to the creation of a suite of awareness-raising materials for business. The Government also committed to ‘consider’ the feasibility of a model for large businesses in Australia to publicly report on their actions to address supply chain exploitation; ‘examine options for’ an awards program for businesses that take action to address supply chain exploitation; and ‘explore’ the feasibility of a non-regulatory, voluntary code of conduct for high risk industries.⁷⁶

According to the Attorney-General’s Department, the Government has also established ‘robust’ Commonwealth procurement rules ‘which ensure that businesses providing goods or services to the

69 UNGP 15.

70 In June 2015, for example, the Leaders of the G7 called for the private sector to implement human rights due diligence, including in relation to working conditions within supply chains: *G7 Leaders’ Declaration* (8 June 2015) <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>.

71 *California Transparency in Supply Chains Act*, Ca. Civ. Code § 1714.43 (2012); the UK’s *Modern Slavery Act* of 2015, s. 54(1). See also the US Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

72 A company may be liable for a civil fine of up to € 10 million for failure to produce a plan, or three times this if such a failure leads to injuries that could have otherwise be prevented. The French text of the Act is available at <http://www.assemblee-nationale.fr/14/pdf/ta/ta0924.pdf>. At the time of writing, the Act was subject to constitutional challenge.

73 *Criminal Code Act* 1995 (Cth), Divisions 270 and 271.

74 See, eg, Commonwealth of Australia, *National Action Plan to Combat Human Trafficking and Slavery 2015-19*, 2014.

75 See, eg, Department of Foreign Affairs and Trade, *Amplifying Our Impact: Australia’s International Strategy to Combat Human Trafficking and Slavery*, 23 March 2016, 17.

76 ‘Working with Business and Civil Society to Target Human Trafficking and Slavery,’ Joint Media Release, the Hon Julie Bishop MP, the Hon Peter Dutton MP and the Hon Michael Keenan MP, 28 November 2016.

government do not use products affected by human trafficking, slavery or slavery-like practices in supply chains.⁷⁷ The regulatory framework for this undertaking, however, appears under-developed. It consists of a general requirement in the Commonwealth Procurement Rules for Commonwealth Government officials to act ethically,⁷⁸ and a two-page information sheet for Commonwealth procurement officers on ethical procurement and supply chain exploitation.⁷⁹ Procurement officers do not appear to be supported or equipped with the tools and information necessary to further this policy objective, nor do these considerations seem to be further formally integrated into the procurement process (for example through imposing specific requirements at the tender qualification, assessment or contractual stages).⁸⁰

Two other developments are relevant here, though neither has yet eventuated in the adoption of regulatory measures. First, the Australian Government has indicated its commitment to ‘consider’ ratification of the 2014 International Labour Organisation (ILO) Protocol to the Forced Labour Convention. This is relevant as the Protocol recommends that states ‘support due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour.’⁸¹ Secondly, and perhaps most significantly, the Attorney-General has recently requested the Federal Parliament’s Joint Standing Committee on Foreign Affairs, Defence and Trade ‘to inquire into and report on Establishing a Modern Slavery Act in Australia.’⁸² This inquiry will cover, among other things, the incidence and current regulation of modern slavery and other forms of severe labour exploitation in domestic and global supply chains, as well as the desirability of further regulatory intervention in this area.

(2) Addressing other forms of labour exploitation in transnational supply chains

Several Commonwealth government departments have web pages that seek to convey the Federal Government’s expectations with respect to businesses and their overseas activities. The Attorney-General’s Department’s ‘Business and Human Rights’ web page, for example, explains that ‘the Australian Government encourages businesses to apply the United Nations Guiding Principles on Business and Human Rights,⁸³ and briefly enumerates the ‘business case’ for voluntarily doing so.’ Similar information is published by the Department of Foreign Affairs and Trade (DFAT). Australia’s national human rights institution, the Australian Human Rights Commission (AHRC) is more active in this area. It has produced information and advice to business in the form of a research and guidance document entitled *Human Rights in Supply Chains: Promoting Positive Practice*⁸⁴ and a series of business and human rights factsheets.⁸⁵ In none of these cases, however, is there evidence of these statements of commitment or informational material being actively disseminated to a broad business audience. DFAT also promotes business engagement in this area through its business partnership program. However there has been only one partnership of particular relevance to date: a two-year AU\$350,000 partnership with the Global Compact

77 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx>.

78 Department of Finance, Commonwealth Procurement Rules: Achieving Value for Money, 1 March 2017.

79 [ps://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Human-trafficking-guidelines-and-fact-sheets.aspx](https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Human-trafficking-guidelines-and-fact-sheets.aspx).

80 Contrast this approach with the various initiatives developed by the US Government, including research tools and guidance for federal contractors. These initiatives are enumerated in the US National Action Plan on Responsible Business Conduct, Outcome 1.3: Leveraging US Government Purchasing Power to Promote Higher Standards.’ On using public procurement to promote labour standards, see further Howe, above n 30.

81 <http://dfat.gov.au/about-us/publications/Pages/amplifying-our-impact-australias-international-strategy-to-combat-human-trafficking-and-slavery.aspx>. See also the Department of Employment’s Submission Report to the Commonwealth Parliament on this instrument, May 2015, available at https://docs.employment.gov.au/system/files/doc/other/tabling_of_forced_labour_protocol_and_recommendation.pdf.

82 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery.

83 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx>.

84 AHRC, ACCSR, GCNA (2015) *Human Rights in the Supply Chains: Promoting Positive Practice*, Melbourne, December 2015. Available at https://www.humanrights.gov.au/sites/default/files/document/publication/2015_AHRC_ACCSR_HR_in_supply_chains_0.pdf.

85 <https://www.humanrights.gov.au/employers/business-and-human-rights/business-and-human-rights-factsheets>.

Network Australia to ‘promote its mandate and grow its Australian membership base.’⁸⁶

Since 2014, Australia has also held annual multi-stakeholder dialogues on business and human rights, at which supply chain issues have been discussed.⁸⁷ However despite repeated calls from civil society organisations for further progress in this area, including through the development of an Australian National Action Plan on Business and Human Rights,⁸⁸ the Australian Government has limited its commitment to ‘progress domestic consultations on the implementation of the *UN Guiding Principles on Business and Human Rights*, including the possibilities of guidelines to assist Australian businesses operating overseas.’⁸⁹

(3) Promotion of the OECD Guidelines for Multinational Enterprises

A survey of Australian efforts to promote responsible business conduct in transnational supply chains would be incomplete without a consideration of Australia’s obligations under the OECD Guidelines for Multinational Enterprises.⁹⁰ These Guidelines contain detailed recommendations from governments to companies on responsible business behaviour, including with respect to labour standards and human rights in transnational supply chains. As an adhering state, Australia is obliged to have in place a ‘National Contact Point’ (NCP) which is responsible for promoting and implementing the Guidelines by disseminating information and receiving and investigating complaints (termed ‘specific instances’) regarding alleged breaches by Australian-based companies. The NCP is a state-based but non-legal complaints mechanism through which, potentially, workers (or their representatives) engaged within transnational supply chains of Australian-based entities could pursue grievances up through the supply chain. The Australian NCP, however, is widely regarded as ineffective. It suffers from significant structural and operational deficiencies and is routinely compared unfavourably with its counterparts in states such as the UK.⁹¹ It has also come under criticism for misconceiving and misapplying the Guidelines and for failing to follow its own guidance documents.⁹² Despite repeated calls from civil society for its reform, there is little sign of any political appetite to do so.

IV. What accounts for this paradox?

Public policy in Australia now recognises that some level of regulatory focus on lead firms is strategically desirable — if not necessary — to address labour abuses within supply chains. This recognition is reflected in a series of regulatory initiatives applying to domestic supply chains. Yet this recognition stops abruptly at our shores. What accounts for this apparent paradox? While detailed analysis is beyond the scope of this paper, several possible explanations are discussed below.

The least convincing explanation is that regulatory efforts are not needed: Australian businesses

86 See further <http://dfat.gov.au/aid/who-we-work-with/private-sector-partnerships/opportunities/Pages/global-compact-network-australia-business-development-partnership.aspx>.

87 AHRC, ACCSR, GCNA, above n 84, 8. Summaries of these dialogues are available at <https://www.humanrights.gov.au/employers/business-and-human-rights>.

88 See, eg, AHRC, ‘Implementing the UN Guiding Principles on Business and Human Rights in Australia: Joint Civil Society Statement,’ August 2016 <https://www.humanrights.gov.au/sites/default/files/Implementing%20UNGPs%20in%20Australia%20-%20Joint%20Civil%20Society%20Statement.pdf>. A National Action Plan is a ways in which governments are expected to drive and guide implementation of the UNGPs. At least 12 countries (including the UK, USA and Germany) have adopted NAPs.

89 Department of Foreign Affairs and Trade, above n 72, 18.

90 Available from <http://www.oecd.org/corporate/mne/>.

91 See Shelley Marshall, ‘OECD National Contact Points: Better Navigating Conflict to Provide Remedy to Vulnerable Victims’, Non-Judicial Redress Mechanism Report Series 16, 2016; Kirsten Zornada, ‘The Australian OECD National Contact Point: How It Can Be Reformed,’ February 2017, draft report on file with author. The ANCP is currently a senior executive within the Foreign Investment Review Board of the Australian Treasury. See www.ausncp.gov.au.

92 See, eg, Marshall, above n 91, 31; Zornada, above n 91; Australian Human Rights Law Centre, ‘Australian National Contact Point Rejects Complaint Against G4S,’ 3 July 2015, <https://www.hrlc.org.au/news/australian-national-contact-point-rejects-complaint-against-g4s>.

already have sufficiently robust policies and processes in place to prevent and address labour rights violations that occur within their transnational supply chains. Evidence on the extent to which Australian businesses choose voluntarily to monitor and influence their transnational supply chains is limited, and there are clearly significant variations according to factors such as sector and business size. However the data available suggests it is the exception rather than the rule for an Australian company to be aware of the conditions under which workers in their supply chain are engaged. A 2015 report examining measures taken by over ninety fashion brands sold in Australia, for example, found over 75% of those brands did not know where their cotton, fabrics and inputs were sourced from.⁹³ Another study found an overall decline in the level of priority accorded to human rights and supply chain issues by Australian companies between 2011 and 2015.⁹⁴ In conjunction with evidence on the prevalence of labour exploitation in global supply chains in the Asia-Pacific,⁹⁵ this explanation seems somewhat implausible.

Another possible explanation goes to lack of regulatory capacity. There is no doubt that, in seeking to address labour exploitation in the transnational supply chains of Australian-domiciled companies, the state faces legal and practical obstacles that are not encountered with respect to domestic-oriented supply chains. However, other states are experimenting with regulatory measures that seek to influence how firms manage labour and human rights risks in their transnational supply chain through imposing reporting and transparency requirements upon firms domiciled within their jurisdiction. It is also the case that Australia has adopted legislation imposing due diligence requirements on firms with respect to their transnational supply chains in other areas.⁹⁶

A more plausible explanation lies in an absence of political will. While there is some recent activity in relation to forced labour and trafficking, there is little indication of a willingness to address broader labour rights issues in transnational supply chains, such as through improving the functioning of the Australian NCP. While the reasons for this state of affairs is beyond the scope of this paper, a contributing factor may be the absence of an international labour rights advocacy and advisory sector within Australia of the scale found in the US, UK and many European countries that is capable of placing the type of concerted and sustained civil society pressure that has been brought to bear in domestic labour rights campaigns, such as that leading to the adoption of supply chain regulation in the Australian TCF sector.

Institutional carriage of regulatory efforts may also be a factor. At present, the state entities tasked with promoting responsible business conduct are largely those responsible for promoting international business activity. There is no question that the involvement of these entities in the task of responsible business conduct is essential.⁹⁷ However it would also seem sensible for entities with a specific interest and expertise in labour and human rights to be more actively engaged in this area of public policy. In the US, for example, the US Department of Labor has been very active in the area of labour rights and transnational supply chains, including working cooperatively with other federal departments in the design and implementation of regulatory initiatives. The Australian Department of Employment has an international engagement section but the latest news and resources published on this section's activities date back to 2014. In a number of other countries, national human rights institutions have taken a leading role in promoting responsible supply chains.⁹⁸ As noted above, the AHRC has begun to engage with these issues — indeed it identified business and human rights as a strategic priority in 2015⁹⁹ — but this engagement

93 Baptist World Aid Australia, *The Australian Fashion Report 2015*, 16 April 2015. Available at www.baptistworldaid.org.au/assets/Be-Fair-Section/FashionReport.pdf.

94 ACCSR, *Annual Review of the State of CSR in Australia and New Zealand*, cited in AHRC, ACCSR, GCNA, above n 84, 8-9.

95 See, eg, ILO, *Decent Work in Global Supply Chains*, Report IV, International Labour Conference, 105th Session, Geneva, 2016.

96 See *Illegal Logging Prohibition Act 2012* (Cth) and the *Illegal Logging Prohibition Regulations 2012* (Cth). See further Turner, above n 7.

97 Indeed policy coherence has its own Guiding Principle: see UNGP 8.

98 See, eg, the work of the Danish Institute for Human Rights.

does not appear to have been supported by a significant allocation of financial or human resources. There may be more activity in the area of transnational supply chains and labour standards if the task were to be taken up ‘by a body that empathises with the social goals instead of one that begrudgingly takes on the duties.’¹⁰⁰

V. Conclusion

This paper has provided an overview of Australian regulatory efforts to promote better working conditions in the supply chains of large Australian firms. It has revealed that while Australia’s domestic labour regulatory framework has developed innovative responses to the regulatory challenges posed by complex supply chains, Australia has made little progress with respect to addressing these challenges at a transnational level. This latter response has consisted largely of statements expressing commitment to international instruments on responsible business behaviour and gently and rather passively encouraging businesses’ voluntary adherence. While the global momentum surrounding the UNGPs and Australia’s strong endorsement of the principles have opened up possibilities for further activity in this area, this has not yet resulted in concrete regulatory proposals or actions. This paper has offered tentative explanations for this inconsistency, arguing that it is largely attributable to a lack of political will although the nature of the present institutional configuration in this area may also be a contributing factor.

It has not been the objective of this paper to draw lessons or insights from the domestic regulatory regime to the transnational, although this is undoubtedly a worthy exercise. There is inspiration, if not instruction, to be drawn from the Australian labour inspectorate’s proactive and strategic approach to encouraging supply chain responsibility, including its willingness to use reputational and other levers to effectively convey regulatory expectations and begin to change industry norms. As others have argued, features of Australia’s TCF regulation may also be adaptable to hierarchically-organised transnational supply chains. Rather, the objective here has been to provide an account of current Australian efforts to engage with the complex public policy challenges that the proliferation of supply chain arrangements poses for employment regulation. This overview has demonstrated that Australia has made progress in conveying to large business domiciled within its jurisdiction that it is no longer acceptable to turn a blind eye to labour exploitation within domestic supply chains. The same message, in an equally compelling fashion, needs to be conveyed with respect to supply chains transnationally.

99 Professor Gillian Triggs, Australian Human Rights Commissioner, Address at the Launch of Human Rights in Supply Chains: Promoting Positive Practice, 2 December 2015. <https://www.humanrights.gov.au/news/speeches/launch-human-rights-supply-chains-promoting-positive-practice>.

100 Jeff Schwartz, ‘The Conflict Minerals Experiment’ (2016) 6 *Harvard Business Law Review* 130, 182.

Report on Vietnam's Rules Regulating Foreign Workers

Hang Thuy TRAN
Hanoi Law University

I. Overview of Vietnam's policy and legal system
II. Current issue
III. Conclusion and suggestions

The issue of regulating foreign workers in Vietnam is not a new topic, but always topical. To evaluate the effectiveness of the Vietnam's policies and the legal system, the author initiates the overview of policy and legal rules, and then analyzes some current issues. Finally, the author would like to set out some recommendations and suggestions.

I. Overview of Vietnam's policy and legal system

After nearly 30 years of renovation, Vietnam has achieved a variety of socioeconomic achievements, which created relative political stability, becoming an attractive destination for foreign investors. To achieve our target, Vietnam continues to implement reform policies which aim at integrating into the world economy, regulating the market economy under socialist orientation.

However, from the starting point of a poor economic base and low qualified workforce, Vietnam's economy needs skilled workers to apply high technology into production and exportation to international markets. This leads to the demands of hiring foreigners to carry out the work which Vietnamese workers are not able to perform. Therefore, the State issued Law on Investment 1987 which allowed FDI enterprises to hire foreigners for jobs requiring high technology. Article 16 of this Law is considered as the first legal rule in this field. After that, Vietnam has passed some acts, by-law documents regulating the use of foreign human resource.

This legislation can be classified into two categories: the first is situated in the Labor Code and its guiding documents; the second is situated in other laws such as Law on Investment, Law on Social Insurance, Law of Occupation, Law on entry, exit, transit and residence of foreigners, Law on tax. The Labor Code regulates the matters of labor conditions of foreign citizens working in Vietnam; conditions of employing foreign citizens; work permits; duration of the work permit; renewal and re-issuance of work permit. The remaining Codes regulate some rights as social insurance or obligations as individual tax or management of foreigners as visa granting or temporary residence.

Since 1987, the policy on the use of foreign workers has not changed. This policy only applies for highly technical or managerial jobs, in which Vietnamese workers cannot meet the demands of production and trade. The enterprises may hire foreigners in the limited quota, for short-term period, but must build plans of training Vietnamese staff to replace foreign workers.¹ The State has gradually expanded the range of employers who shall be entitled to employ foreign citizens. Labor Code 1994 and its guiding documents entitle for both of FDI enterprises and Vietnam companies.² Labor Code 2012 and its guiding documents

1 Clause1, Article 132 Labor Code 1994.

2 Decree No. 34/2008/ND-CP dated 25th of March, 2008 regulations on recruitment and management of foreign labor in Vietnam. Decree No. 46/2011/ND-CP dated 17th of June, 2011 amending and supplementing a number of articles of regulations on Decree No. 34/2008/ND-CP of 25th of March, 2008 regulations on recruitment and management of foreign labor in Vietnam.

supplement three categories of employers with the right of recruiting foreigners, which are State agencies, family households, individuals permitted by law to conduct business.

Overall, legislation regulating foreigners working in Vietnam has made a fundamental legal basis to implement State management of this type of employees, as well as ensured the rights and the obligations of foreigners when performing their job in Vietnam. Foreigners working in Vietnam enjoy to the rights and fulfill their obligations under the law of Vietnam, except where international agreements which the socialist Republic of Vietnam has signed or acceded to contain different provisions.

The basic rules regulating the activities of hiring foreigners shall comply with the following process:

Step 1: Determine the demand for foreign employees

Step 2: Send the application for a work permit

Step 3: Sign the labor contract

The first step is determining the demand for foreign employees. Every year, the employer has the responsibility to build demand for foreign employees under the guidance of the Ministry of Labor, Invalids and Social Affairs, which defines each job that Vietnamese workers did not meet the demand of production and trade, the need to recruit foreigners, the written explanatory report to the State authorities.³ Department of Labor, Invalids and Social Affairs approved the demand for foreign employees for each kind of job, according to the Decision of the Chairman of the Provincial People's Committee of provinces and central cities. If the demand changed, the employers must provide additional written explanation to the Department of Labor, Invalids and Social Affairs, where the employers' headquarter is located.

Department of Labor, Invalids and Social Affairs is responsible for the local demand and report to the President of the People's Committees of the provinces or central cities which decide which job is permitted to hire foreigners. Ministry of Labor, Invalids and Social Affairs is responsible for confirming the explanatory demand report of some types of employers, such as State agencies, the central offices of political organizations, political organizations-social, non-governmental organization of foreign countries, international organizations in Vietnam; occupational organizations as defined in point a, b, c, Clause 1, Article 2 of Decree No. 55/2012/ND-CP on June 28, 2012 of the government; project of foreign or international organizations in Vietnam; business association.⁴

The second step is applying for a work permit. At least 15 days before the date the foreigner is projected to begin working in enterprises, agencies and organizations in Vietnam, the employers shall apply directly or send by mail dossiers for granting work permits. Within seven business days, from the date of receipt of a complete application, the department of Labor, Invalids and Social Affairs shall issue work permits to foreign employees in the form prescribed by the Ministry of Labor, Invalids and Social Affairs. In the case of refusal, the Department shall provide a written response specifying its reasons.

The final step is signing the labor contract. After the work permit is issued to the foreigners, the employer and the employees must, prior to the proposed date when the foreigner is projected to work in Vietnam, sign a labor contract. The employers must, within five business days after signing the labor contract, send a copy of it to the Department of Labor which issued the work permit.⁵

Basically, labor contracts signed with foreign employees are similar to the labor contracts signed with Vietnamese employees. However, while the form of the contracts with Vietnamese employees can be the oral contract, the form of the contracts with foreigners must be the written ones.⁶ With Vietnamese workers, employers pay wages, bonuses and other cash allowances in Vietnamese currency; also for foreign workers working in Vietnam, the employer can pay the amount in foreign currency.⁷ Regarding the amount of

3 Article 170 Labor Code 2012.

4 Article 3 Circular No 40/2016/TT-BL?TBXH dated 25th of October, 2016 guiding the implementation of some articles of Decree No11/2016/N?-CP dated 3rd of February, 2016.

5 Article 12 Decree No11/2016/N?-CP dated 3rd of February, 2016 implementing the Labor Code on foreigners woking in Vietnam.

6 Article 12 Decree No11/2016/N?-CP dated 3rd of February, 2016 implementing the Labor Code on foreigners woking in Vietnam.

public holidays, foreign employees are entitled to one traditional public holiday and one National Day of their country, in addition to the public holidays in Vietnamese law.⁸

For the purpose of the administrative management of foreigners working in Vietnam under the contract labor, Law on entry, exit, transit and residence of foreigners 2015 shall provide a procedure applied to foreigners by the Public Security department as follows: granting visas, temporary or permanent residence after being granted a work permit. One more notable provision which has been newly complemented to the Law on entry, exit, transit and residence of foreigners 2015 is that foreigners who are expected to work in Vietnam shall be granted the work permit by the competent State authorities before granted an entry visa.⁹ The duration of the visa is up to two years.¹⁰ The purpose of the visa is not permitted to change while under the Ordinance on entry, exit, transit and residence of foreigners 2000 provided that the visa will be considered for entry purposes transformation, if required.¹¹ The new regulation aims to ensure the management, mitigating the chance of foreigners visiting Vietnam with the purpose of sightseeing or tourist, then changing to other purposes, particularly for transformation to work purpose, as many workers are working on the project due to the Chinese winning contractors.

As a result of the promulgation and implementation of the labor law and legislation on the management of foreigners working in Vietnam, we have made considerable success in the State management in this field. The units allowed to hire foreigners abide by the provisions on the management of foreigners working in Vietnam.

As reported by the Department of Labor, Invalids and Social Affairs of provinces and cities directly under the Central Government, foreigners working in Vietnam come from more than 60 countries, including those of nationality of Asia (China, Japan, Korea, Malaysia, and Taiwan), which accounts for about 58% of the total number of foreign workers. The figure for Europe (England and France) is 28.5% and that for the other countries is 13.5%. Most of them are men (89.9%) and aged more than 30 years old (86%). As of July 2016, there were about 80,000 foreign workers, mainly highly skilled experts and experienced managers, who operated advanced technology in production and helped to train local human resources by exchanging experience, especially in education, healthcare, information technology, and banking.¹²

II. Current issues

First, no Act on foreign workers, these regulations are still part of the Labor Code

While many countries in the world have enacted law on foreign workers, such as Korea, Japan, Singapore, and Malaysia, Vietnam still incorporates the regulations in this field. The regulations adjusting labor relation of foreigners are scattered on many laws and guiding documents, the legal effects of which are diverse such as Act, Ordinances, Decree, Circular. The legislation has not been included in the legislative program of the Congress.

Second, existing regulations are inappropriate and should be modified

- To some extent, regulations on procedures that recruitment shall be published in newspapers are not needed. Because, to hire foreigners with higher qualification as specified in the laws of the State, employers have conducted many different procedures in order to identify the main sources of recruitment determined. Moreover, the law has not yet recognized another way of informing.

7 Circular No 32/2013 / TT-NHNN guiding the implementation of regulations restricting the use of foreign currency in the territory of Vietnam.

8 Clause 1 Article 115 Labor Code 2012.

9 point c, Clause 4, Article 10 Law on entry, exit, transit and residence of foreigners 2015.

10 paragraph 5 Article 9 Law on entry, exit, transit and residence of foreigners 2015.

11 Clause 1, Article 7 Law on entry, exit, transit and residence of foreigners 2015.

12 Synthetic from data reported Department of Labor — Invalids and Social Affairs.

- In order to work legally in Vietnam, foreign workers must apply three important papers: judicial check, health certificate, copies of certificates of qualification. However, the State cannot control the legality of these documents because all of these papers are mainly provided by foreign parties. In Vietnam, the participation of the competent authorities in this activity is limited to a certain level (grading does not always include all three papers above). From what led to the violation: foreign workers have forged papers to get into Vietnam; most of them are unskilled workers, foreign contractors rationalized the worker's profile deliberately. More seriously, we cannot verify those who have criminal record such as theft or drug addicts.

- The Civil Code 2015 provides conflict rules determining the law applicable to contracts with foreign elements in Article 683. Accordingly, the parties may agree to choose the law applicable to the labor contract with foreign elements. In the case of disagreement, the court will apply the law of the country where the employees habitually carry out their work.

In contrast, Article 169 of the Labor Code 2012 provides that employees working in Vietnam shall comply with the labor law of Vietnam, international conventions and treaties, to which Vietnam is a signatory and provide differently. Foreign workers in Vietnam shall be protected by Vietnamese law. The provisions are controversial because the foreigners are obliged to comply with the labor laws of Vietnam, whether their labor contract agreements are allowed to apply foreign laws or not.

Third, rights of foreign workers need to be ensured

Provisions on the rights of foreigners working in Vietnam increasingly approach the principle of equality between domestic and foreign workers. This is illustrated by the fact that there is no discrimination by salary, gender or age between Vietnamese employees and foreign employees. The health insurance regime applies to all foreigners working in Vietnam. From 2018, foreign workers will be subject to social insurance applies, such as illness, accidents, occupational disease.¹³ At the same time, foreign citizens working in Vietnam must comply with the Vietnamese labor law, international treaties to which Vietnam is a member.¹⁴

Although regulations on the rights of foreigners working in Vietnam have been improved in a more positive way, there was an undeniable manifestation of discrimination. In recent years, scholars have concerns about the fact that foreigners working in Vietnam don't join trade unions as domestic workers. Lawmakers have their own reasons why the right to form, join trade unions will not be applied to foreign employees but, from the perspective of equal treatment for migrant workers, more should be done in the future.

Finally, the issue of illegal foreign workers needs addressing

The work permit for foreigners working in Vietnam is not really effective. Among 74,438 foreigners working in 2012, 24,455 (32.85%) workers carry out procedures and do not obtain a work permit. Some localities do not complete statistics on foreign workers. The data reported is mainly through the examination and the granting of work permits.

This problem has been going on in Vietnam for many years. Even today, we don't know exactly how many foreigners are working in Vietnam without work permits. In some countries, the law on the recruitment of foreign workers is very strict. The number of foreign workers in a project is set at less than 3% of the labor force. However, in Vietnam, for "tender packages" the bid winners (foreign tenders) have the right to decide on how many foreign nationals they would hire. This may be a loophole in our laws. A case in point is the Chinese projects. People working on these projects are mostly Chinese, including their support staff.

Under Labor Code 2015, the local authorities are empowered to grant work permits to foreigners

13 Article 168 Labor Code 2012.

14 Article 124 Law on Social Insurance 2014.

working in their localities. However, due to the policy of giving preferential treatment to foreign investors, many local authorities have turned a blind eye to foreigners working without permits in their localities. Department of Labor, Invalids and Social Affairs in each province has the responsibility of checking and inspecting the employment and management of foreign nationals in their locality but what would happen if the employers or employees violate the law. Department of Labor shall fine the employers and propose that the public security office (police) deport the employees. Nevertheless, there are no rules on the entity who would pay the cost of deportation. So, up to now, there has been no case of deportation reported.

III. Conclusion and suggestions

There was a major step in changing thinking, awareness about foreigners working in Vietnam.¹⁵ From the point of view that receiving foreign workers in Vietnam causes the unemployment of local workers as well as the poor, we are conscious that labor mobility to our country is an inevitable phenomenon as a result of global integration. The main problem is how to fully exploit their advantages and mitigate the negative economic-social impact. On the basis of the aforementioned findings, I would like to set out some of the suggestions, as follows:

First, Vietnam should enact a separated legislation to improve the efficiency in the management of foreigners working in Vietnam. One of my recommendations is studying the experience of other countries in this field.

Second, some unreasonable provisions need to be addressed, amended and supplemented.

- The Internet should be allowed as one of the forms of the recruitment notice. This provision helps both employers and employees save money and time.

- State agencies should be authorized to check the employees' certification and qualifications and to verify the accuracy of the papers issued by foreign authorities. In Australia, foreign workers who want to participate must work through a check issued by the Australian professional organization.¹⁶ Federal Institute of Technology will conduct proficiency tests, and language expertise for professionals and Council will recognize federal skills test for other workers. The conclusion of the agency is made on the basis of the decision to grant visas to foreign workers in Australia. It helps to ensure the foreign workforce in good quality.

Third, it is also necessary to continue studying the possibility of allowing foreign workers to join the Vietnam trade union in order to fully implement free trade union rights of workers and ensure protection of equal treatment between domestic and foreign employees working in Vietnam.

Four, to force the employer to pay the cost of repatriation, the highly strict measure should be taken to deal with illegal foreign employees. The cost of sending them back home is usually withdrawn from the nation's budget. In the context that public debt increased considerably, some countries, namely France, argued that it is employers who are responsible for a part of this cost through paying fines because they do not perform their financial obligations to the employees and to the State. Moreover, illegal employees must be equally treated by compensation, salaries and social security as domestic employees, regardless of the disagreement of the employers. Thereby, the increasing cost of hiring foreigners is expected to be an effective measure to reduce the demand for illegal foreign workers.¹⁷

References

Vietnam's legal documents:
Civil Code 2015.

15 The X Congress (2006) of the Communist Party of Vietnam affirmed that one of policies on improving labor market is importing technical foreign workers in the field of technology and management.

16 <https://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/assessing-authorities>

17 <http://www.west-info.eu/french-law-on-illegal-immigrants-complies-with-eu/lois-retenu-etranger/>

Labor Code 1994.

Labor Code 2012.

Law of occupation 2013.

Law on entry, exit, transit and residence of foreigners 2015.

Law on investment 1987.

Law on social insurance 2014.

Law on tax 2017.

Decree No. 233/1990 and Circular No. 19/1990 on the regulation of the foreign investment enterprises (Section II of the Circular).

Decree No. 34/2008/ND-CP dated 25th of March, 2008 regulations on recruitment and management of foreign workers in Vietnam.

Decree No. 46/2011/ND-CP dated 17th of June, 2011 amending and supplementing a number of articles of Decree No. 34/2008/ND-CP dated 25th of March, 2008 regulations on recruitment and management of foreign workers in Vietnam.

Decree No. 11/2016/ND-CP dated 3rd of February, 2016 implementing the Labor Code on foreigners working in Vietnam.

Circular No. 31/2011/TT-BLDTBXH of the Ministry of Labor, Invalids and Social Affairs guiding the implementation of some articles of Decree No. 34/2008/ND-CP of 25th of March, 2008 of the Government and Decree No. 46/2011/ND-CP of 17th of June, 2011 amending and supplementing a number of articles of Decree No. 34/2008/ND-CP of 25th of March, 2008 regulations on recruitment and management of foreign worker in Vietnam.

Circular No. 40/2016/TT-BLDTBXH dated 25th of October, 2016 guiding the implementation of some articles of Decree No. 11/2016/ND-CP dated 3rd of February, 2016.

Circular No. 32/2013 / TT-NHNN guiding the implementation of regulations restricting the use of foreign currency in the territory of Vietnam.

17 <http://www.west-info.eu/french-law-on-illegal-immigrants-complies-with-eu/lois-retenue-dun-etranger/>

Identifying Major Labour Policy Issues in Myanmar

Eitra MYO

SAGA Asia Consulting Company Ltd.

- I. Summary
- II. The changing features of industrial sectors, business organizations and business activities
- III. The changing features of working relations, work organizations and working styles
- IV. Background factors
- V. Major issues of labour policies

I. Summary

Labour Law reform in Myanmar has been initiated since 2011 as an effect of political and economic policy reform and open to international collaboration and economic integration. Prominent policy reforms which change the landscape of industrial relations and labour market are systemic labour dispute resolution mechanism, new labour organisation law, new social security system, stipulation on compulsory employment contract and minimum wage rate and so on. However, Myanmar labour market faces many major labour issues such as skill shortage, mismatch of education and labour market demands, weakness on labour law enforcement, limited social security coverage and awareness building on labour laws and regulations.

II The changing features of industrial sectors, business organisations and business activities

The economy of Myanmar had been predominated based on agriculture sector since 1990s.¹ After 2000, the GDP share of manufacturing and service sectors constantly increased. In 2014-2015, manufacturing sector contributed 34% of GDP and service and agriculture sector are 32% and 17% respectively.²

According to the Myanmar Enterprise Survey 2014, there are 632 registered enterprises in Myanmar.³ By sector, 353 enterprises in manufacturing sector, 105 in retail and 174 in other services. According to World Bank report, 80% of enterprises in Myanmar can be categorized as small and medium enterprises (SMEs).⁴

In 2015, 90.6% of the employed persons work in a business/establishment privately owned by national(s) and 7.3% work in government or joint ventures.⁵ Only 0.3% of establishments (including own account farm/business) are owned by households for domestic purposes.⁶ More than 61% of employed persons work in a business or establishment with a size of less than five persons.⁷

1. Development of labour intensive industrial sectors and new business activities

The pace and pattern of economic growth over the past five years have contributed to major shifts in

1 Central Statistical Organization, Myanmar Statistical Yearbook, 2015.

2 Central Statistical Organization, N 1 above.

3 World Bank Group, Myanmar Enterprise Survey 2014.

4 World Bank Group, Myanmar Economic Monitor, Anchoring Economic Expectations, December 2016.

5 Ministry of Labour, Immigration and Population and International Labour Organization, Myanmar Labour Force, Child Labour and School-to-work transaction Survey 2015, August 2015.

6 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

7 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

the sector composition of GDP.⁸ Despite some increase in agriculture output in 2013 and 2014, the share of the sector has dropped from around 37% of GDP in 2010 to around 29% in 2015.⁹ This has been offset by big gains in services (wholesale and retail trade, followed by transportation, and communications), which have been the biggest drivers of growth; and industries (manufacturing and processing, followed by construction, and energy, including gas).¹⁰

According to 2015 Survey, 51.7% of the employed persons were working in the agriculture, forestry and fishing sector, followed by the wholesale and retail trade, repair of motor vehicles and motorcycles at 14.3%, manufacturing 10.9%, transportation and storage 4.4%, other services activities 9.1% and construction 4.7%.¹¹ All other sectors account for less than 3%.¹²

Agriculture growth decelerated to 2% in 2015-2016 compared to 5.6% the previous year due to the impact of heavy rains between July and September 2015 causing widespread flooding and landslides.¹³ The agriculture sector is projected to bounce back, though there are downside risks from the effects of El Niño, which have created severe drought in early 2016.¹⁴

Myanmar's light manufacturing sector, dominated by food processing, is facing more competition from cheaper imports, which affects its ability to create new employment.¹⁵ Around 60% of industrial output comes from manufacturing and processing, approximately 70% of which is from food processing.¹⁶ Over the medium to longer term, the manufacturing and processing sectors continue to hold strong promise as potentially important drivers of inclusive growth.¹⁷

Food processing (e.g. rice milling, edible oils, snacks) accounts for around two thirds of manufacturing output.¹⁸ However, the slow recovery in agriculture has had negative spillover effects on the food processing industry, which accounts for an important share of manufacturing and industrial output.¹⁹ The industry is also finding it increasingly difficult to compete against cheaper and better quality imports of processed foods.²⁰

The garments sector could help address binding constraints in services and infrastructure that affect the manufacturing sector as a whole, whilst also absorbing unskilled labour. According to Myanmar Garment Manufacturers Association (MGMA) estimates, the sector employs nearly 1% of the country's working population.²¹ Most of this estimated workforce is unskilled youth, especially young women, migrating from rural locations to Yangon where 95% of the garment sector is located.²² The garments sector is slowly emerging as a potential source for non-commodity export growth.²³

Around 60% of growth in 2015-2016 came from expansion in the service sector, which helped maintain resilience amid external shocks.²⁴ The transparency, efficiency and stability of business regulations in particular areas may be affecting the pace of expansion in the service sector. Myanmar is also expected to

8 World Bank Group, Myanmar Economic Monitor, May 2016.

9 World Bank Group, N 8 above.

10 World Bank Group, N 8 above.

11 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

12 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

13 World Bank Group, N 8 above.

14 World Bank Group, N 8 above.

15 World Bank Group, N 8 above.

16 World Bank Group, N 8 above.

17 World Bank Group, N 8 above.

18 World Bank Group, N 8 above.

19 World Bank Group, N 8 above.

20 World Bank Group, N 8 above.

21 International Labour Organization, Myanmar Garment Sub-Sector Value Chain Analysis, 2015.

22 International Labour Organization, N 21 above.

23 World Bank Group, N 4 above.

24 World Bank Group, N 4 above.

continue building on the good foundations laid for expansion of tourism activity.²⁵

There has been a gradual easing in construction activity over the course of 2015-2016. The big construction boom of recent years was dominated by an expansion of the residential market, which in 2013 was estimated to account for around 40% of construction activity.²⁶ Construction activity, which has experienced a general slowdown in 2015-2016, decelerated further in 2016-2017.²⁷ Construction accounts for around 5.2% of GDP or around 18% of industrial output.²⁸ The earlier easing of construction activity was linked to slowing demand in the residential market. Although there was some shift towards commercial properties, even this has decelerated. Then in May 2016, the Yangon City Development Corporation suspended the construction of around 200 high-rise building projects.²⁹ This was prompted by concerns over projects starting without the necessary permits and violation of building standards.

Food and beverages, mineral-based products, textiles, footwear, furniture, jewelry, toys and various rubber and plastic products are all industries that match the country's current capabilities and benefit from high domestic demand.³⁰ At the same time, Myanmar could encourage investment and innovation by beginning to develop a few core industries with high growth potential and higher productivity, and where it could feasibly develop the capabilities to compete successfully over the long term. These segments could include automotive parts and assembly, chemicals, petroleum refineries, electrical machinery, and communications equipment, which are all high-growth and high-productivity industries.³¹ There is also more interest on intellectual property rights, licensing, franchising, standardization and environmental issues for commodities, showing signs of growth.³² IT utilization is also growing in the previous government period.

2. The importance of SME in economic growth

Increased private sector growth and competition in Myanmar affect firms' ability to survive, enter, and expand in increasingly dynamic markets. An ongoing update to the World Bank's 2014 Enterprise Survey (ES) points to high rates of firm exits in Myanmar over the past two years, with around 17% of firms ceasing operations annually.³³ This may not be a bad sign if exit reflects underlying reallocation of resources to more productive and innovative firms. Over 80% of exits are either micro or small enterprises, which tend to be less productive than larger enterprises.³⁴ Surviving firms tend to be larger, less likely to be credit constrained, and tend to have more experienced managers.³⁵ The net job creation from firm entry, expansion and exit was around 13%.³⁶ The high rates of firm exit underline the importance of continued efforts to improve the business environment, particularly access to credit, and maintain macroeconomic stability.³⁷

The only available estimates of the contribution of SMEs to the economy are those from the Institute of Developing Economies, which reports that in 2004 SMEs accounted for 92.6% of enterprises, 69% of output (in the private sector), 68% of investment value and 80% of employment.³⁸ In micro enterprises,

25 World Bank Group, N 4 above.

26 World Bank Group, N 4 above.

27 World Bank Group, N 4 above.

28 World Bank Group, N 4 above.

29 World Bank Group, N 4 above.

30 McKinsey Global Institute, Myanmar's Moment: Unique opportunities, major challenges, June 2013.

31 Mc Kinsey Global Institute, N 30 above.

32 Aung Min and Toshihiro Kudo, In Economic Reforms in Myanmar: Pathways and Prospects, New Government's Initiatives for Industrial Development in Myanmar, 2012.

33 World Bank Group, N 4 above.

34 World Bank Group, N 4 above.

35 World Bank Group, N 4 above.

36 World Bank Group, N 4 above.

37 World Bank Group, N 4 above.

male workers were found to be in the majority. Female workers are in the majority in trading and services. A large majority of SMEs employ family members and relatives.³⁹

Over the past two years the new Government has given indications that it accords higher priority to the development of SMEs. A Central Committee for Development of Small and Medium Enterprises, chaired by the President was set up in 2013 to develop an SME policy. The SME Development Centre is charged with implementing the SME policy. The Centre has only recently become operational, and its staffing and budget are unclear.⁴⁰ So far it has no representation outside Yangon.⁴¹ The focus appears to be on manufacturing, in spite of expected growth in the service and trade sectors.⁴²

In Myanmar, more than two third of the enterprises are SMEs and more than half of employment population work at SMEs. Regarding the increasing productivity and growth economy, development of SMEs is important. In order to support SME development, there are many tasks which require improving such as skilled labour, technology, financial support and so on.

III. The changing features of working relations, work organisations and working styles

There is a lack of up-to-date basic data on the composition of employment and labour markets in Myanmar. The Ministry of Labour, Immigration and Population conducted the Household Labour Force Sample Survey in 1990 with the collaboration and cooperation of ILO,⁴³ UNDP⁴⁴ and UNFPA⁴⁵ and after that no survey of this kind had ever been carried out for more than two and a half decades. In 2015, the “Myanmar Labour Force, Child Labour and School-to-Work Transition Survey” had been conducted by the Ministry with the collaboration of ILO and this is the latest data from official survey nationwide. Most of labour force data in this country report are used from this 2015 Survey.

The estimated household population in Myanmar is 48 million people living in 10.9 million households and persons in the working age group 15-64 years account for 64.94%.⁴⁶ The 2015 Survey estimated that the labour participation rate (of women and men above 15 years of age) in 2015 was 64.7%.⁴⁷ This is lower for women than for men (52% and 80% respectively).⁴⁸ The overall unemployment rate was 0.8%, with a male rate of 0.7% and female 0.9%.⁴⁹ The aggregate measure of the labour underutilization rate, which comprises unemployment, underemployment and potential labour force, was 6.9% and higher for females compared to males.⁵⁰ It can be said that the working age group in Myanmar is strong and the proportion of employment population is also high.

1. Working relation, labour dispute resolution mechanism and development of labour organisations

Since 2011, the previous government has made various labour policy reforms. In the working relation landscape, promulgation of Settlement of Labour Dispute Law on 28th March, 2012 was one of the key changes in the reform period. The Trade Dispute Law has been repealed with this law and the former

38 Gemunu Wijesena and Roel Hakemulder, International Labour Organization, Assessment of the business service and training market in Myanmar, 2014.

39 Gemunu Wijesena and Roel Hakemulder, N 38 above.

40 Gemunu Wijesena and Roel Hakemulder, N 38 above.

41 Gemunu Wijesena and Roel Hakemulder, N 38 above.

42 Gemunu Wijesena and Roel Hakemulder, N 38 above.

43 International Labour Organization.

44 United Nation Development Program.

45 United Nation Population Fund.

46 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

47 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

48 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

49 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

50 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

labour dispute resolution system has been resolved. The Law sets out the process and institutional framework for the resolution of labour conflict, replacing a very limited system of dispute resolution based around ‘trade disputes committees’ at township, divisional and central levels. The new system includes five levels such as workplace coordinating committee, township conciliation body, state/regional arbitration body, arbitration council and Supreme Court.

After promulgation of new law, the cases rapidly increased from year by year since 2012. Although the dispute resolution system has been initiated since 2012, the data are hardly collected. Based on public sharing decisions⁵¹ on the Ministry website,⁵² there are approximately 110 cases that have been decided by state/regional arbitration body. The disputes mostly came from factories especially garment factory and the number of disputes from service sector has also increased. The types of labour disputes are mostly for unfair termination of employment, severance payment, wages and salary, overtime, unfair dismissal, working hours, and annuity and other allowances. While the law frames unfair dismissal/termination of employment as requiring the reinstatement of affected workers, the Arbitration Council in some instances merely ordered the employer to pay compensation to the aggrieved worker. Furthermore, the sanctions and penalties for failure on complying with the decisions of disputes not strongly deterred the employers or employees.

The Labour Organization Law was promulgated on October 11, 2011. But the law came into effect on March 9, 2012 by announcing the Notification of the office of the President of Myanmar. The law clearly provides the rights and duties of labour organizations⁵³ and introduces collective bargaining⁵⁴ and permission on strikes and lock-out activity in some stipulation.⁵⁵ The formation and development of work organizations has flourished since the inception of the New Labour Organization law, with their number jumping from about 635 in mid-2013 to over 950 by March 2014.⁵⁶ All of this has fueled the rapid growth of farmers’ and agricultural workers’ unions, which in fact comprise a clear majority of all registered basic labour organisations.⁵⁷

The law allows the employers to organize parallel with labour organizations.⁵⁸ There are a number of established employer and business associations — most notably the Myanmar Garment Manufacturers Association (MGMA) and the peak national business association, the United Myanmar Federated Chambers of Commerce and Industry (UMFCCI) — that have in certain respects engaged with the design and practice of employment relations.

Another important aspect of the situation in Myanmar is that labour advocacy and representation is not solely a domain of the work organizations. In many cases, workers have sought support from a labour NGO, civil society organisation or a sympathetic labour lawyer to advise and represent them in the course of staging a strike or demonstration or pursuing a grievance through the dispute resolution system.⁵⁹ The gendered character of unionism is also important: while there are several female labour NGO leaders, and the large majority of workers are women in high-profile export industries such as garment manufacturing, it is unlikely that women will be equally represented in union organisational structures or that unions will

51 Decisions of State/Regional Arbitration Body, Arbitration Council and Supreme Court. Not all of the decisions are shared since some numbers of decisions are missing.

52 Website of Ministry of Labour, Immigration and Population, <http://www.mol.gov.mm/en/>.

53 Sections 17 to 23 of Labour Organization Law.

54 Section 21 of Labour Organization Law.

55 Sections 37 and 38 of Labour Organization Law.

56 Sakiko Tanaka, Christopher Spohr, and Sandra D Amico, ADB Economics Working Paper Series, Myanmar Human Capital Development, Employment, and Labour Markets, December 2015.

57 Michael Gillan and Htwe Htwe Thein, *Journal of Industrial Relations, Employment relations, the state and transactions in governance in Myanmar*, 2016.

58 Section 8 of Labour Organization Law, 2011.

59 Michael Gillan and Htwe Htwe Thein, N 57 above.

take up as central demands issues such as equal pay.⁶⁰

Finally, awareness and membership of labour organizations by employed persons has a very low percentage, according to the 2015 Survey. More than 88% of the employers as well as workers are not members of an employers' or workers' organization and about 12% were not aware of membership in a workers'/employers' organization.⁶¹ In regards to rights given in becoming a member of a workers'/employers' organization, awareness is still quite low and at the national level it was only 2.4% for employers and 4.1% for workers.⁶²

The laws provide the rights and duties of labour organizations, simple and complete Labour Dispute Resolution Mechanism, rights to collective bargaining, and encourage on registration and forming of employer/worker organizations. However, there are some negative facts on work relations in Myanmar such as weak awareness on laws, and less of law enforcement.

2. Features of working styles in Myanmar

The nature of work in Myanmar is predominantly informal. In 2015, 45.9% of all persons in employment were own account workers who refer to self-employed persons who do not hire paid employees on a regular basis.⁶³ The main occupations in Myanmar are: skilled agricultural, forestry and fishery workers (42.7%); elementary occupations (17.8%); service and sales workers (16%); craft and related trades workers (11.9%).⁶⁴

In urban areas the proportion of making contracts with limited terms is lower than in rural areas.⁶⁵ It is 62% in rural areas and 25% in urban areas.⁶⁶ 56.2% of contracts are made orally and only 12.6% is written contract.⁶⁷ For the length of the contract, 75.9% of contracts are in daily arrangements and the figures in rural is higher than in urban areas.⁶⁸ For a contract period of 12 months or more, the national average is 4%; females have more than males and the rate is much higher for urban areas compared to rural areas.⁶⁹ Occasional/ daily work accounts for 58.2% at the national level followed by seasonal work which accounts for 32%.⁷⁰

By occupation, the high average hours per week worked was in service and sales, at 54.06 hours and the shortest weekly working hours, 39.49 hours was for professionals.⁷¹ It also revealed that there are only a few employed persons working less than 40 hours per week at about 19%.⁷²

Considering all employees, the average wage per day (periodically all types of receipts are converted to day) was 4,760 Kyats and the daily wage was 4,280 Kyats.⁷³ It is much higher in urban areas than rural areas. Similarly males get higher wages than females. The service sector has the highest wage rates.⁷⁴

Length of service in a job is a good measure of the stability of a job. The length of service at present main job did not vary much over sex, but for type of residence the variation is quite high for urban areas compared to rural areas.⁷⁵ In the agriculture sector 56.7% of employed persons had continued with their

60 Michael Gillan and Htwe Htwe Thein, N 57 above.

61 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

62 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

63 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

64 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

65 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

66 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

67 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

68 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

69 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

70 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

71 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

72 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

73 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

74 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

main job for ten years or more.⁷⁶ It implies the persons employed in agriculture may not have enough avenues to find other jobs.⁷⁷

During the years 2011 to 2014, only 3.3% of people in Myanmar changed their usual place of residence from one township to another.⁷⁸ 25% of the persons changed their place of residence due to employment purposes.⁷⁹ Migrants mostly found work in the informal labour market. They tend to work as casual employees in restaurants, construction, and other low-skill employment and a quarter of male migrants worked in construction.⁸⁰ Around 55% of female migrants in Yangon were employed in light manufacturing, particularly garments, which are sought after due to better pay, more regular, and longer term work compared to alternatives.⁸¹

For the migrants to abroad, at the national level about 6% of households had at least one member currently living abroad.⁸² The percentage from rural areas is almost double in urban areas.⁸³ From a gender perspective, the proportion of males is slightly higher than females among the persons living abroad.⁸⁴ 98% of the persons living abroad went for employment, either to search for a job or to take up a job or to transfer to a job.⁸⁵

For the working age population (persons aged 15 years and above), the literacy rate for the country was 89.6%.⁸⁶ Literacy for females was lower than males and for rural areas lower than urban areas.⁸⁷ At the national level, the proportion of the working age population that have completed high school is 6.5%.⁸⁸ It is 11.1% in urban areas and only 4.4 % in rural areas.⁸⁹ Regarding attaining higher levels of education, the proportion is slightly favourable for males compared to females.⁹⁰ The proportion of the working age population with a graduate education qualification and above is 5.8%. In urban areas it is 13% while in rural areas it is 2.6%.⁹¹ The data shows 0.7% of the working age population had undergone trainings in the last year.⁹² In 2015, 56% of the employed population at a main job had a primary or below primary level of education.⁹³ The proportion rose to 77% for an education level below high school and 13% had an education level of high school or above.⁹⁴ The percentage of the employed population with an education level of bachelor degree and above is highest in the service sector. It is higher for males and higher in urban areas.⁹⁵

Based on recent surveys, in Myanmar, more than half of workers work in agricultural, forestry and fishing sector, and the majority are daily arrangement workers and work with oral contract. Most of migrants work in informal labour market. Moreover, wage rates in service sector are highest and

75 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

76 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

77 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

78 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

79 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

80 World Bank Group, N 8 above.

81 World Bank Group, N 8 above.

82 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

83 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

84 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

85 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

86 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

87 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

88 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

89 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

90 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

91 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

92 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

93 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

94 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

95 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

job stability is quite high; however, it is unclear because of less opportunities to change jobs. Another important fact is that there is high number in literacy but low in the skilled labour population.

IV. Background factors

After decades of near-dormancy, political reforms initiated by the Previous Government since 2011 have been in part premised on greater openness to international collaboration and economic integration. Broader changes in forms of political representation and participation in Myanmar, in part driven by international compulsions as the nation re-integrates into the global capitalist system, have clearly opened space for labour regulation, representation and labour-management relations.⁹⁶

These reforms, and the NLD's⁹⁷ return to politics in by-elections held in April 2012, led to the suspension or rolling back of sanctions by various nations, and most importantly by the United States in 2012.⁹⁸ In the same year, Myanmar was readmitted to the ILO as a full member on the basis of its efforts to address forced labour issues and significant reforms in the area of freedom of association.⁹⁹

The on-going reforms, with the aim of improving the business and investment climate also have positive impacts on development of labour productivity and labour market. They include: Promoting on industrialization; Easing restrictions on foreign investment under the Myanmar Investment Law; Changes in banking legislation; Establishing Special Economic Zones; and Plans to make increases in the health and education budgets and educational reform.

The military government aimed at changing the economy from agro-based to industrial-based with the implementation of a 30-year industrial development plan 2000-2030.¹⁰⁰ The share of the industrial sector in GDP in 2010-2011 was 24%, achieving the target set in the plan.¹⁰¹ The share of the industrial sector in GDP was 15% on average in the 1990s.¹⁰² The share of industry in GDP increased to 19% in 2010-11.¹⁰³

The new Myanmar Investment Law (2016) has introduced important reforms that could further help catalyse domestic and foreign private investment. One such important reform is the relaxation of the overly restrictive requirement that all Foreign Direct Investments or Joint Ventures (JV) have to be new processing plant, which can take up to two years to start. The Investment Law now allows for FDI¹⁰⁴ and JV with existing plant with intent to upgrade or build additional processing capacity, or a JV involving a combination of new processing plant and existing plant investments in selected sectors. The Law will become effective in April 2017, and swift adoption of by-laws and related regulations could help spur private investment.¹⁰⁵

It also complements another important initiative — the creation of special economic zones with favourable policies on customs, labour and utilities. One of the most promising is the 2,000-hectare Thilawa Special Economic Zone outside Yangon.¹⁰⁶ Funded by a number of large Japanese conglomerates, construction of factories in the zone has been commenced since 2014.¹⁰⁷

Changing in banking legislation gave the Central Bank of Myanmar more independence in setting

96 Michael Gillan and Htwe Htwe Thein, N 57 above.

97 National League for Democracy, currently serving as the government party by winning landslide election in 2015.

98 Michael Gillan and Htwe Htwe Thein, N 57 above.

99 Michael Gillan and Htwe Htwe Thein, N 57 above.

100 Aung Min and Toshihiro Kudo, N 32 above.

101 Aung Min and Toshihiro Kudo, N 32 above.

102 Aung Min and Toshihiro Kudo, N 32 above.

103 Aung Min and Toshihiro Kudo, N 32 above.

104 Foreign Direct Investment.

105 World Bank Group, N 4 above.

106 Peter Chalk, Australian Strategic Policy Institute, *On the path of Change: Political, economic and social challenges for Myanmar*, December 2013.

107 Peter Chalk, N 106 above.

monetary policy, aim at improving access to credit, easing interest rates controls, allow private banks to expand branch network and may allow foreign banks to operate in Myanmar.¹⁰⁸

As a critical foundation for evidence-based reforms, in early 2012 the government announced the first systematic analysis of the entire education sector in two decades. It completed the first phase of the CESR¹⁰⁹ in 2013 in collaboration with development partners in education.¹¹⁰ Following the completion of in-depth analysis under Phase 2, the CESR¹¹¹ will support the government's formulation of a National Education Sector Plan as a unified guide to government and development partner investments through the next five year plan period (2016-2020).¹¹² Priority health and education spending have seen large increments over the past five years, and whilst spending is still below needs, the pattern of further increases deserves close consideration.¹¹³ The share of health and education spending has increased rapidly from 8% of the Union Budget in 2010 to around 20% in 2015.¹¹⁴ At the same time, it will be critical to continue to increase public financing on education, particularly in the forthcoming National Education Sector Plan now being formulated for 2016-2020.¹¹⁵

There are many factors that will be directly or indirectly affected to the development of labour market and productivity. In Myanmar, Political reform, some prominent economic policy reforms and education policy reform have mainly positive impacts on labour market.

V. Major issues of labour policies

A large youth population is frequently cited as one of Myanmar's major strengths.¹¹⁶ Although the literacy rate for the working age population is high, the proportion of completed high school and graduate of higher education is moderately low in 2015.¹¹⁷ Due to university course offerings, enrolments are very limited in more practical subjects such as education, health and medical sciences, accounting, and entrepreneurial studies, which are likely to be in high demand in the labour market.¹¹⁸ One of the issues of labour force in Myanmar is under educated, skills shortage and mismatch of education.

"The Employment and Skills Development Law, 2013 proposes a number of bodies to take over responsibility for the development, adoption, assessment, and supervision of the skills system, and thus formalizing the temporary set-up of the NSSA.¹¹⁹ It is also responsible for developing the national continuing education and training infrastructure, to deliver training to meet the manpower development in each economic sector in Myanmar. The other important development under the law is the creation of a training fund based on a levy system on employers, and by donations from workers.

In recent years, the Ministry of Science and Technology has served as the technical lead agency for TVET¹²⁰ (and has played a prominent role in TVET analysis within the CESR).¹²¹ Furthermore, roughly a dozen other Ministries also offer TVET programs (depending on the precise definition of TVET).¹²² Due to financial constraints, training centres under the Ministries have limited capacity.¹²³

108 McKinsey Global Institute, N 30 above.

109 Comprehensive Education Sector Review by ADB, Australian Aid, United Nations Educational, Scientific and Cultural Organization (UNESCO).

110 Sakiko Tanaka, Christopher Spohr, and Sandra D Amico, N 56 above.

111 Comprehensive Education Sector Review.

112 Sakiko Tanaka, Christopher Spohr, and Sandra D Amico, N 56 above.

113 World Bank Group, N 8 above.

114 World Bank Group, N 8 above.

115 World Bank Group, N 8 above.

116 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

117 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

118 World Bank Group, N 8 above.

119 Myanmar's National Skill Standards Authority (NSSA).

120 Technical and vocational education and training (TVET).

121 Sakiko Tanaka, Christopher Spohr, and Sandra D Amico, N 56 above.

There are over 100 private-sector vocational/skills training providers and a few local NGOs (initiated with international support) that provide vocational and technical training.¹²⁴ At the national level, there are more investment on TVET programs required in Myanmar.

The labour legislation in Myanmar is currently composed of a number of old labour laws passed during colonial time and new laws adopted since the beginning of the reform process. This has included inputs into the Labour Organization Law 2011; the Settlement of Labour Dispute Law 2012; the Minimum Wage Law 2013; the Social Security Law 2012; the Payment of Wages Law 2016; Shop and Establishment Law 2016; the Employment and Skills Development Law 2013; and revision on Factories Act and Leave and Holiday Act.¹²⁵ There are however a lot more laws e.g.: a new law relating to overseas employment draft, a new workmen compensation law draft, a new dock labourers law, a new occupational health and safety law draft, a new labour census law draft, and a new foreign workers law etc. either currently in process or on the agenda for drafting.”¹²⁶

The labour law reforms were initiated in 2011 with the promulgation of Labour Organisation Law. The ‘rights and responsibilities’ of labour organisations under the Law include the collection of members’ dues and representation of workers in collective bargaining.¹²⁷ The ‘duties’ of employers include recognition of labour organisations and non-interference with their functioning, as well as a requirement that they do not form any labour organisation under their own ‘domination or control by financial or other means.’¹²⁸ The law also sets out the process by which strikes and employer-initiated lock-outs must be conducted and outlines penalties for non-compliance.¹²⁹

However, the labour advocacy and representation is not solely a domain of the work organizations and in many cases, workers have been supported from a labour NGO, civil society organizations or a sympathetic labour lawyer.¹³⁰ According to the 2015 labour force survey, more than 88% of the employers and employees are not members of an employers’ or workers’ organizations and awareness on becoming membership of labour/employer organizations is quite low at the national level.¹³¹

For all of the evident flaws of the reformed legislative framework, the enactment of the new labour laws had a direct effect on the perception of workers and citizens about the opening of social and political space for the representation of workers and their many grievances. However, in practice, it has been widely acknowledged that these laws, especially those pertaining to workers’ rights and representation, had little relevance or practical effect in contemporary Myanmar. Indeed, there were several high profile disputes in manufacturing enterprises where workers staged very visible public protests rather than relying on the formal institutional mechanisms of dispute resolution.¹³² The institutional limits of Myanmar’s new employment relations are therefore many and various. Collective bargaining as a concept is poorly understood and seldom practiced.¹³³

In 2012, the Government of the Union of Myanmar adopted a new Social Security Law, 2012. This new law provides for an extended social security scheme. In April 2014, the SSB¹³⁴ started the implementation of

122 Sakiko Tanaka, Christopher Spohr, and Sandra D Amico, N 56 above.

123 Gemunu Wijesena and Roel Hakemulder, N 38 above.

124 Gemunu Wijesena and Roel Hakemulder, N 38 above.

125 Website of Ministry of Labour, Immigration and Population, <http://www.mol.gov.mm/en/>.

126 Website of Ministry of Labour, Immigration and Population, <http://www.mol.gov.mm/en/>.

127 Section 21 of Labour Organization Law.

128 Section 30 and 31 of Labour Organization Law.

129 Section 37 and 38 of Labour Organization Law.

130 Michael Gillan and Htwe Htwe Thein, N 57 above.

131 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

132 Michael Gillan and Htwe Htwe Thein, N 57 above.

133 Michael Gillan and Htwe Htwe Thein, N 57 above.

134 Social Security Board is found under the Social Security Law.

the new contribution and benefit levels for the existing benefits (medical care, sickness, maternity, funeral and work injury) as well as the collection of contributions for the family benefits. SSB is compulsory registration for companies with five workers or more, excluding the following: government personnel, international organizations, seasonal farming and fishery, non-profit organizations, domestic work.¹³⁵ The social security scheme and the civil servants pension scheme cover about 3% of the population of the country.¹³⁶ According to 2015 Labour Force Survey, more than 61% of employment works in an enterprise with a size of less than five persons.¹³⁷ It can be assumed that current SSB does not cover the whole population of employment.

In September 2015, Ministry of Labour, Immigration and Population issued notification and informed all enterprises which has five workers and more shall conclude the employment contract within 30 days from the appointment date. Ministry issued the sample of employment contract.¹³⁸ In the notification and sample of employment contract, it is mentioned that the employer shall make an employment contract with employee and submit this contract and get the approval from respective township department of labour within 30 days from first working day. The employment contract may amend with the agreement between employer and employee. In practice, the township department of labour did not allow amending the sample of employment contract. As the sample contract is based on the manufacturing sector, enterprises in service sector face the difficulties to follow the sample contract because of the different nature of business.

New minimum wage law replaced the 1949 Minimum Wages Act. The rate of minimum wages is 3,600 Ks (\$US 2.70) per day.¹³⁹ The rate will be changed every two years. This is the positive impact on wages security and likely to be moved from the informal sector to formal sector. However, it also has the negative impact on labour market such as laying off employees, reduction of overtime and other incentives. Recently the Ministry of Immigration, Labour and Population found the National Committee for Revision on Minimum Wages Rate in order to revise the rate.

Labour laws deserve more attention in the context of promoting equitable and sustainable development, as they help reduce unpredictability in labour relations and promote productivity. Ensuring that labour laws are accessible and equally understood by employers and workers are vital. However, the accessibility, understanding and applications on labour laws and regulations are still weak.¹⁴⁰ Furthermore, labour law sanctions and penalties should neither deter investors nor infringe on worker rights. It is important for employers and workers to take laws seriously. However, if violations result in sanctions and penalties (such as fines), consideration should be given to comparing them with international best practice so as not to deter investment.

Further issue facing Myanmar is to quickly develop a cadre of skilled and talented officials who can navigate the country through many challenges that lie ahead.¹⁴¹ Laws and systems are decentralized and most of the decision power for labour matters is conferred to township level of the Ministry¹⁴² such as approval on employment contract, approval on overtime especially at factories, approval on registration of social security, inspection on safety and health at workplace and so on. However, some of officials are weak in application and understanding on labour laws and current conditions of labour market. Since officials in township level are directly in touch with the employers and employees and their knowledge on labour laws and labour market conditions are important.

Overview on labour market, the issues which require urgent actions to be taken are skill shortage, mismatch of education and labour market demands, weakness in enforcement on labour laws, expansion

135 Section 11 (a) of Social Security Law and Article 40 of Social Security Rule.

136 International Labour Organization, Social Protection within the framework of labour legislation reform in Myanmar, April 2015.

137 Ministry of Labour, Immigration and Population and International Labour Organization, N 5 above.

138 The notification 1/2015 is issued on 31st of August 2015. It is started effective from September, 2015.

139 By issuing the notification 2/2015 in August, 2015, Minimum wage rate is stipulated as 450 kyats per hour - 3600 kyats per day (official working hours - 8 hours per day) for workers in all enterprises except small enterprises with 15 employees and under and family enterprises and the stipulation started effective from on 1st of September 2015.

140 Sakiko Tanaka, Christopher Spohr, and Sandra D Amico, N 56 above.

141 McKinsey Global Institute, N 30 above.

142 The Ministry of Labour, Immigration and Population.

of social security coverage and awareness building on labour laws and regulations. Apart from the above issues, there are other issues to be settled at the same time, such as requirements on safety environment scheme for risky work sites, review of legislation and penalties, labour inspection, and so on.

Overview of Labor Legal Issues in Cambodia

Kanharith NOP
Attorney-at-Law

- I. Introduction
- II. Brief development of labor laws in Cambodia
- III. Labor legal issues
- IV. Conclusion

I. Introduction

Labor law compliance in Cambodia has been connected with the growth of garment industry. The modern garment industry emerged in 1993 when foreign investors opened factories for garment exports in Cambodia.¹ Starting from 1999, Cambodia faced with quota restriction on garment exports to the US market when Cambodia and the US signed a bilateral Trade Agreement on Textile and Apparel with effect from 1999 to 2002. This agreement imposed a condition that if apparel companies in Cambodia duly complied with the local labor laws and international labor rights, the quotas would be increased annually. In 2002, the agreement was extended to another three years with effect from 2002 to 31 December 2004. This reflects that most of apparel factories in Cambodia duly comply with labor laws.

Required by the Labor Law in order to realize the workers' rights, the labor arbitration council was established in 2003 under the project of ILO to resolve collective labor disputes.² Since 2003 until 2015, the labor arbitration council has received 2,408 cases and 88% of them belong to garment and footwear industry.³ Through consistent interpretation of laws, the labor arbitration council has developed several arbitrator-made rules that shape labor relations in Cambodia. The awards have been compiled and published on the homepage of the council.⁴

As of 2016, the number of enterprises registered with Ministry of Labor and Vocational Training increased to 11,168 that employed 1,187,227 workers and among which there were 1,107 garment and foot wear enterprises employing 743,615 workers.⁵ It is noted that in addition to garment and foot wear industry, other industries such as banking, transportation, restaurants, drink production, construction, real estates, restaurant, retail stores, training institutes, and NGO have registered with the National Social Security Fund.⁶ With the presence of these industries in the labor market, there has been remarkable development and improvement of working conditions for all workers of all industries through amendment to the existing labor laws and adoption of new laws and regulations.⁷

Notwithstanding the recent development of labor regulations and arbitrator-made rules mentioned

1 Garment Manufacturers Association in Cambodia, 2015 GMAC Bulletin, p.10 (2015), available at <http://www.gmac-cambodia.org/bulletin/2015.pdf>.

2 Law on Labor, Royal Code NS/RKM/0397/001, chap. 12 (1997) (Cambodia) [hereinafter called the Labor Law].

3 The Arbitration Council, 2015 Annual Report, pp.9-10 (2016), available at <https://www.arbitrationcouncil.org/en/media/publications/annual-reports>.

4 The awards of the labor arbitration council are available at <https://www.arbitrationcouncil.org/>.

5 Ministry of Labor and Vocational Training of Cambodia, Notice on Work Results in the Year 2016 and the Targets of the Year 2017 of the Implementation of the Strategic Plans for the Development of Labor and Vocational Training for the Year 2014-2018, p.1 (2017), available at <http://www.mlvt.gov.kh/index.php/en/official-docs/notification-guidelines.html>.

6 The National Social Security Fund of Cambodia, Annual Report on Achieved Works in 2016 and Future Goals, pp.65-67 (2016).

above, there are some legal issues that need to be resolved sooner or later. It is undeniably true that no country has perfect law and if compared to a developed country like Japan, Cambodia still has short history of application of labor laws and newly emerging labor relations. Moreover, although labor arbitration council has been developing many rules, such rules were adopted for collective labor disputes and consequently cannot provide resolutions for all labor issues. This article aims to highlight the legal issues concerning the labor relations in Cambodia. However, before going to the issues, it is important to brief the development of labor laws in Cambodia.

II. Brief development of labor laws in Cambodia

The employment relation in Cambodia was firstly treated as one of the contractual relations under the civil code adopted in 1920 based on the French Civil Code of 1804. After Cambodia had ratified several ILO conventions since 1969 and after Cambodia had become a member of the International Labor Organization in 1971, the civil code that was adopted based on the principle of private autonomy where parties to the contract were treated equally was no longer fit with the employment relation where workers are deemed inferior to employers. Accordingly, there was a call for new mechanism to provide better protection to workers rather than what have been provided in the civil code. Accordingly, the first labor code was adopted in 1972 and enforced until 1975.

During Pol Pot Regime from 1975 to 1979, pre-existing laws and the legal systems were completely destroyed. From 1979 until 1991, Cambodia's political system was based on socialism. However, since 1989, the economic system was changed from planned economy to free market system.⁸ According to Article 15 of the Constitution of 1989, Cambodian citizens had full right to possess, use and inherit the land granted by state for residence and commerce. Cambodia had its second labor code in 1992 until the adoption of the present Labor Law in 1997 in response to the adoption of the present Constitution in 1993 and to the presence of garment industry at the time. In 2007, the Labor Law was firstly amended regarding night work provided in Article 139 and Article 144.⁹

Law on Social Security Schemes for Persons Defined by the Provisions of the Labor Law was promulgated on 25 September 2002 to organize the social security schemes such as pension scheme, occupational risk and other contingencies to be subsequently determined by Sub-Decree based on the actual situation of the national economy.¹⁰ The services that supplement these benefits such as health and social activities are determined by Sub-Decree.¹¹ All above social security schemes are under the management of the National Social Security Fund ("NSSF").¹²

The NSSF, which is the public establishment, was formulated by Sub-decree on the Establishment of National Social Security Fund on 2 March 2007.¹³ Thereafter, the social security scheme on occupational risk was started to provide benefits to workers in the case of work-related accident and occupational disease pursuant to Prakas No.109 on Benefits on Occupational Risk issued by Ministry of Labor and Vocational Training dated 16 June 2008.¹⁴ Employers who employ at least eight workers are required

7 For example, Law on Trade Unions was adopted in 2016; and among the ministerial regulations, it is noted that there was a Joint Prakas on Fine Imposed on Those Who Violate the Labor Law, jointly made by the Ministry of Economy and Finance and the Ministry of Labor and Vocational Training on 6 June 2016. This Joint Prakas provides the list of legal requirements and their punishments, which are convenient to employers and employees for compliance and Labor Inspectors for discharging their duties.

8 Hor Pheng et al., *Introduction to Cambodian Law*, 36-37, (Konrad-Adenauer-Stiftung, 2012).

9 Law on Amendment to Article 139 and Article 144 of the Labor Law, Royal Code NS/RKM/0707/02 (2007) (Cambodia).

10 Law on Social Security Schemes for Persons Defined by the Provisions of the Labor Law, Royal Code NS/RKM/0902/018, art. 1 (2002) (Cambodia).

11 *Id.* art. 2.

12 *Id.* art. 3.

13 The Royal Government of Cambodia Sub-Decree No. 16 ANKr.BK on the Establishment of National Social Security Fund (2007) (Cambodia).

to join the scheme by paying contribution of 0.8% of the monthly average wage of the workers.¹⁵ Since November 2008 until today, 8,731 enterprises comprising of 1,136,271 workers have been registered with the scheme.¹⁶

Based on experience earned from the social security scheme for occupational risk, NSSF began the social security scheme for health care as the second project pursuant to Sub-Decree No. 01 ANKr.BK on Establishment of Social Security Scheme for Health Care for Persons Who Are Defined by the Provisions of Labor Law dated 6 January 2016 issued by the Royal Government of Cambodia and Prakas No. 109 B.K/Br.K on Benefit on Health Care on 17 March 2016 issued by Ministry of Labor and Vocational Training. However, for the first stage of implementation, the social security scheme for health care started from 1 May 2016 and only applies to enterprises located in Phnom Penh, Kandal Province, Kampong Speu Province.¹⁷

Fourteen years after the enforcement of the Labor Law, the Civil Code, adopted in 2007 with the support of Japanese government through Japan International Cooperation Agency, came into force in 2011.¹⁸ To harmonize with preexisting labor laws, the Code defines employment contract and the employer's obligation to present specific working conditions and to take care of security of the workers. However, the application of the employment contract shall be in conformity with labor laws unless otherwise specifically written in the Code. Once again, the employment relations are also included in the Civil Code.

On 26 July 2015, Law on Special Lease was promulgated for the purpose of protection of low-income lessees such as laborers and students who lease rooms for residence from lessors who have leasing business.¹⁹ This is because the provisions on lease stipulated under the Civil Code were adopted based on the principle of private autonomy which in principle treats all parties equally; and consequently, they cannot provide much protection to the low-income laborers who are lessees. According to the Law on Special Lease, special lease cannot be less than a period of two years within which lessor cannot increase the lease fee while the lessee has the right to terminate the special lease at any time.²⁰

The Law on Trade Unions was promulgated on 17 May 2016 after the Constitutional Council of Cambodia confirmed the constitutionality of this law on 5 May 2016.²¹ As a supplement and amendment to the existing labor laws and regulations, the Law on Trade Unions particularly deals with formation and participation of professional associations, registration of professional associations, finances of professional associations, dissolution of professional associations, representation of workers in the enterprise, rights and obligations of the workers' unions, rights and obligations of the employers' association, representation by workers' union with most representative status, unfair labor practices by employers, unfair labor practices by workers' unions, special protections for workers and their representatives, collective agreement and

14 Ministry of Labor and Vocational Training Prakas No. 109 KB/Br.K on Benefit on Occupational Risk, (2008) (Cambodia); Ministry of Labor and Vocational Training Prakas No.104 KB/Br.K on Amendment to Article 7 and Article 9 of Prakas No. 109 on Benefits on Occupational Risk (2010) (Cambodia); Ministry of Labor and Vocational Training Prakas No.233 KB/Br.K on Amendment to Article 8 and Article 10 of Prakas No. 109 on Benefits on Occupational Risk (2011) (Cambodia).

15 Ministry of Labor and Vocational Training Prakas No. 108 KB/Br.K on Determination on Contribution Rate and Contribution Payment for Occupational Risk, art. 2 (2008) (Cambodia); Ministry of Labor and Vocational Training Prakas No. 294 KB/Br.K on Amendment to Article 3 and Article 4 of Prakas No. 108 on Determination on Contribution Rate and Contribution Payment for Occupational Risk (2014) (Cambodia).

16 Annual Report on Achieved Works in 2016 and Future Goal, *supra* note 6, p. 2.

17 Ministry of Labor and Vocational Training Prakas No. 093/16 K.B/Br.K on Determination of stage and Date of Implementation of Social Security Scheme on Health, (2006) (Cambodia).

18 Law on Application of the Civil Code, Royal Code NS/RKM/0511/007, art. 56 (2011) (Cambodia).

19 Law on Special Lease, Royal Code NS/RKM/0715/009 (2015) (Cambodia).

20 *Id.* art.6, 8&9.

21 The Constitutional Council of Cambodia, Decision No. 160/002/2016 dated 05 May 2015, available at http://www.ccc.gov.kh/khmer/decision/2016/dec_002.pdf.

collective bargaining, resolution of professional organization's disputes, sanction and penalties.

The Law on Trade Unions categorizes the unions into three types. Enterprise-based union is formed by at least 10 workers in an enterprise or establishment. Federal union is created by at least seven registered enterprise-based unions. United unions or league of unions is created by at least five registered federal unions. As of December 2016, there were 3,497 enterprise-based unions, 103 federal unions, and 18 united unions registered with the Ministry of Labor and Vocational Training.²² Pursuant to Article 54 of the Law on Trade Unions, only the union with the most representative status can represent workers to negotiate and to conclude the collective bargaining agreement with the employer and to represent workers in the collective labor disputes.²³

III. Labor legal issues

1. Unclear employment contract

There are two main types of employment contracts under the Labor Law of Cambodia. They are fixed duration contract and undetermined duration contract. Undetermined duration contract is concluded with undetermined duration. It can be verbal or written agreement. Fixed duration contract is concluded for a specific duration and must contain a precise finishing date.²⁴ Any violation to this rule leads the contract to become employment contract of undetermined duration.²⁵ Furthermore, fixed duration contract must be written. If not, the labor contract will become undetermined duration contract.²⁶

In addition to above rules governing contract transformation, Article 67(2) of Labor Law reads, "The labor contract signed for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years. Any violation of this rule means that the contract shall be renegotiated as a labor contract of undetermined duration." Furthermore, Article 73 (5) of the same law reads, "If the contract has a duration of more than six months, the employee must be informed of the expiration of the contract or of its non-renewal ten days in advance. This is increased to two weeks for contracts exceeding one year. If this is not done, the contract is extended for a length of time equal to its initial duration or redefined as a contract of unspecified duration if its total length exceeds the limit allowed in Article 67."

The purpose of the transformation rules is to avoid the employer's excessive use of fixed duration contracts to replace the undetermined duration contract for continuous or long-term employment relation. However, the lack of clarity in the Labor Law makes this transformation confusing for employers and employees to determine the status of their contracts. There are two main different interpretations on Article 67 (2). The word "renewal" in Article 67 (2) is not clear and understood differently. On the one hand, the word "renewal" is understood as "duration of each renewed contract." In this sense, as long as the duration of each contract does not exceed two years, the contract can be renewed many times and the total duration may exceed two years. On the other hand, the word "renewal" is interpreted as the "act of the total length of the employment contract including the initial contract and all subsequent extensions." Accordingly, the contracts of fixed duration must automatically be transformed to undetermined duration contracts where the total duration of the employment contract (including the period of the initial contract and any renewals) exceeds two years. The labor arbitration council upholds the second interpretation.²⁷

Amendment to the Labor Law is important to deal with unclear practice of the types of employment

22 Notice on Work Results in the Year 2016 and the Targets of the Year 2017 of the Implementation of the Strategic Plans for the Development of Labor and Vocational Training for the Year 2014-2018, *supra* note 5, p.3.

23 Law on Trade Unions, Royal Code NS/RKM/0516/007, art. 54 (2016) (Cambodia).

24 Law on Labor, *supra* note 2, art. 67-1.

25 Law on Labor, *supra* note 2, art. 67-2.

26 Law on Labor, *supra* note 2, art. 67-7.

27 Arbitration Council, Arbitration Award Case Number 10/03, July 23, 2003.

contracts.²⁸ The amendment may be a challenge for the drafters since it is not easy to satisfy all stakeholders. In addition, they may find it hard to decide whether the draft amendment should be adopted based on the rule of the labor arbitration council or other approaches. The arbitrator-made rule was developed for resolving collective labor disputes mostly arising in garment and footwear factories. It may not be fit with other industries that have different working styles. However, it is noted that the interpretation by labor arbitration council has been applied since the outset of the establishment of the council in 2003.

2. Limited determination of minimum wage

Under the Labor Law, wage must be at least equal to the guaranteed minimum wage that must ensure every worker of a decent standard of living compatible with human dignity.²⁹ Any written or verbal agreement that would remunerate the worker at a rate less than the guaranteed minimum wage shall be void.³⁰ Furthermore, the minimum wage is established without distinction among professions or jobs. It may vary according to region based on economic factors that determine the standard of living. Minimum wage is set by Prakas (proclamation) of the ministry in charge of labor after receiving recommendation from the Labor Advisor Committee. The wage is adjusted from time to time in accordance with the evolution of economic conditions and the cost of living.³¹

Since 1997 until the present, only minimum wage for workers at garment and footwear industry has been determined by ministry in charge of labor while there has been no minimum wage determination for workers in other industries. In 1997, the Ministry of Social Affairs, Labor and Veterans³² issued a Notice No. 06 dated 3 March 1997 to set minimum wage for workers at \$40 per month. This amount was determined based on the negotiation between representatives of employers and employees in the textile and footwear industry. In 2000, the minimum wage was increased to \$45 per month by the Labor Advisory Committee composing of representatives of employers, employees, and ministry in charge of labor.³³ In 2006, the minimum wage was increased to \$50 per month.³⁴ In 2010, the minimum wage was increased to \$56 per month.³⁵ Since 2011, the minimum wage has been determined on annual basis. The minimum wage for the year 2017 was increased to \$153 per month.³⁶

From a practical point of view, employers would determine wage of their workers in a rate at least equal to minimum wage of the workers in the garment and footwear sector if they want to recruit new workers and retain their existing ones. Therefore, it can be said that minimum wage of workers in the garment and footwear sector is also used as reference for negotiation as well as determination of wages and other working conditions by employers and workers in other sectors. However, from a legal point of view, Prakas on minimum wage of workers in the garment and footwear sector does not apply to workers of other sectors.

28 The Ministry of Labor and Vocational Training also determined that amendment types of employment contract as one of its targets for the year 2017 of the implementation of the strategic plans for the development of labor and vocational training for the year 2014-2018, Notice on Work Results in the Year 2016 and the Targets of the Year 2017 of the Implementation of the Strategic Plans for the Development of Labor and Vocational Training for the Year 2014-2018, *supra* note 5, p.6.

29 Law on Labor, *supra* note 2, art. 104.

30 Law on Labor, *supra* note 2, art. 105.

31 Law on Labor, *supra* note 2, art. 107.

32 In 2005, the government of Cambodia established the Ministry of Labor and Vocational Training to be the ministry which is in charge of labor issues and vocational training. Law on Establishment of Ministry of Labor and Vocational Training, Royal Code, NS/RKM/0105/003 (2005) (Cambodia).

33 Ministry of Social Affairs, Labor and Veteran Affairs, Notice No. 017, dated 18 July 2000.

34 Ministry of Labor and Vocational Training, Notice No. 745, dated 23 October 2003.

35 Ministry of Labor and Vocational Training, Notice No. 049/10, dated 09 July 2010.

36 The Ministry of Labor and Vocational Training Prakas No. 414 KB/Br.K on Minimum Wage Determination for Workers in Textile, Garment and Footwear Industry for year 2017, (2016) (Cambodia).

The Labor Law specified the elements for determining the minimum wage, which include (a) the needs of workers and their families in relation to the general level of salary in the country, the cost of living, social security allowances, and the comparative standard of living of other social groups; and b) economic factors, including the requirements of economic development, productivity, and the advantages of achieving and maintaining a high level of employment.³⁷ In addition to the elements listed above, participants in the tripartite workshop conducted in April 2014 agreed to take the following elements in consideration when determining the future minimum wage adjustment. These elements include (1) needs of workers and their families; (2) cost of living; (3) inflation; (4) productivity; (5) competitiveness; (6) labor market/employment; and (7) profitability of the sector.³⁸ It is worth noticing that currently the Ministry of Labor and Vocational Training is preparing a draft law on minimum wage which aims to adjust minimum wage annually.

3. Absence of labor court

The Labor Law specifically mentions about the role of the Labor Court regarding the application of Labor Law. For example, the Labor Court has the jurisdiction to determine the magnitude of offenses other than the serious misconducts included in Article 83-B.³⁹ The Labor Court has sole jurisdiction to determine the legality or illegality of a strike.⁴⁰ The dissolution of the professional organization or the union of professional organizations must be pronounced by the Labor Court in the event of those organizations committing the wrongdoing as stated in the Labor Law or in case of serious, repeated violation of the laws and regulations, particularly in the area of industrial relations.⁴¹

The Labor Law provides that Labor Court must be created to have jurisdiction over the individual disputes occurring between workers and employers regarding the execution of the labor contract or the apprenticeship contract.⁴² The Labor Court not only has jurisdiction over the individual labor disputes but also all other issues relating to the application of the Labor Law.⁴³ There must be separate law determining the organization and functioning of the Labor Court.⁴⁴ However, since 1997 until the present, the Labor Court is not established. In addition, the Labor Law does not precisely mention whether the Labor Court should be separately established from the common courts or attached to the common courts. To deal with the absence of the Labor Court, the Labor Law provides that in the absence of the Labor Court, all labor issues relating to application of Labor Law must be submitted to common courts.

Law on Organization of Courts adopted in 2014 requires each court of first instance to be comprised of specialized courts, such as civil court, criminal court, commercial court and labor court.⁴⁵ The said labor court has competence to hear all cases relating to labor in accordance with the provisions on the labor procedures.⁴⁶ When hearing the cases, the labor court consists of one judge, accompanied by two labor advisors, among whom one is the worker and the other is the employer; and the judgment is rendered by a judge after the consultation with labor advisors. The labor advisors carry out their functions at the invitation extended by the president of labor court.⁴⁷ The procedure of electing and carrying out duty of

37 Law on Labor, *supra* note 2, art.107-3.

38 International Labor Organization, Cambodian Garment and Footwear Sector Bulletin, Issue 3, March 2016, available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_463849.pdf.

39 Law on Labor, *supra* note 2, art. 84.

40 Law on Labor, *supra* note 2, art. 337.

41 Law on Labor, *supra* note 2, art. 378.

42 Law on Labor, *supra* note 2, art. 387.

43 Law on Labor, *supra* note 2, art. 389.

44 Law on Labor, *supra* note 2, art. 388.

45 Law on Organization of the Courts, Royal Code NS/RKM/0714/015, art. 14 (2014) (Cambodia).

46 *Id.* art. 25.

47 *Id.* art. 26.

labor advisor shall be determined by a Sub-Decree upon the request of the Minister of Justice following the consultation with the Minister in charge of labor sector.⁴⁸ Currently, the above rules are not implemented and labor court which is a specialized court attached to the court of first instance is not established.

The Law on Trade Unions adopted in 2016 has reaffirmed the importance of the Labor Court in relation to the collective rights of the workers. For example, Article 29 of the same law mentions about the reasons that the Labor Court can dissolve unions or employers' association. Article 47 of the same law provides that any dispute in relation to the election, eligibility and fairness of election of shop stewards shall be referred to the Labor Court. Under Article 92 of the same law, illegal strike is the strike conducted after the Labor Court decides that such strike is illegal. Article 83 provides that illegal lock-out is the lock-out conducted after the Labor Court decides that such lock-out is illegal. Article 98 of Law on Trade Unions provides that in the absence of Labor Court, all disputes arising from the application of the Law on Trade Union shall be submitted to the common courts.

In the National Employment Policy 2015-2025, strengthening the labor dispute settlement mechanisms and creating the Labor Court is one of the measures to harmonize the industrial relations and to strengthen wage-setting mechanisms in order to enhance the labor market governance.⁴⁹ The Ministry of Labor and Vocational Training has been mandated to take charge of implementing this measure within the period from 2016 to 2025.⁵⁰ Presently, the common courts have jurisdiction over the labor disputes during the period within which the Labor Court is not yet established and the Code of Civil Procedure has been applied as the procedural rule.

IV. Conclusion

Along with the increase of enterprises of other sectors with newly emerging labor relations and working styles in addition to garment and footwear sector, there has been remarkable development of labor laws in Cambodia. Laws, Sub-Decrees, ministerial regulations and arbitrator-made rules have been adopted to protect and promote the rights and working conditions of workers in all sectors. However, there remain some labor legal issues such as unclear types of employment contracts, limited determination of minimum wage and absence of Labor Court. To resolve the above problems, political and social stability along with economic growth in Cambodia together with great effort and active cooperation of all stakeholders are the key factors to reach solutions.

48 *Id.* art. 28.

49 Royal Government of Cambodia, National Employment Policy 2015-2025, p.14 (2015).

50 *Id.* p.34.

A Review of the Government Intervention in Labor Relations through Guidelines

Hochang ROH
Hoseo University

- I. Administrative rulemaking and informal administrative action
- II. Problems with administrative action by guidelines
- III. Scopes and limitations to be included in the guidelines
- IV. Cases and problems in the intervention of labor relations by guidelines
- V. Conclusions

I. Administrative rulemaking and informal administrative action

The matters concerning the rights and duties of people shall be determined by Acts enacted by the National Assembly, the representative of the people. However, since it is actually impossible to specify all of the details on a case-by-case basis by Acts, the executive branch cannot but supplement the abstractness of Acts in the process of enforcing them. Because of this need, the Constitution recognizes administrative rulemaking.¹

Administrative rulemaking refers to the action of establishing a general or abstract rule in the form of provisions by administrative agencies, and administrative rules refer to norms established by the action. The reason why administrative rulemaking cannot be denied is that the administration is highly complex, specialized and technologized, and the deliberation of the administrative agencies is more appropriate than the deliberation of the National Assembly. Also, the need for flexible statutes to cope with the rapid changes in administrative phenomena has increased in modern countries.² For this reason, Acts stipulate only the outlines of the administrative functions or the stems of the purpose, and the requirements and the contents of the policies, and the details are mostly delegated to the executive authority so that the administrative agencies can regulate.³

Therefore, administrative rulemaking should have certain limits. If administrative rulemaking is abused arbitrarily with ignoring such limits, it will erode parliamentary legislation and threaten the foundation of the principle of separation of powers and rule of law, which are the basic principles of the Constitution. To recognize administrative rulemaking as to what extent systematically and practically, and to place it as to what limits are always concerns in terms of control for the administration.⁴

The main agents of the administrative rulemaking are the executive branches. The executive branches mean the central administrative bodies that actually enforce the policies determined by the President through deliberation of the Cabinet and other matters belonging to the executive agencies. The head of each administrative ministry, namely minister, shall be the person in charge of directing and supervising the executive departments as prescribed by the Constitution, and shall have authorities to supervise jurisdictional affairs, to issue various ministerial ordinances and to carry out other administrative tasks.⁵ In addition to the authority to enact ministerial ordinances, the ministers may revise and enforce internal

1 Donghee Kim, *Administrative Law I* (22nd ed.), Parkyoung Publishing & Company, 137 (2016) (S. Kor.).

2 *Id.* at 138.

3 *Id.* In addition, in Constitution, Articles 75 and 95 are also the bases.

4 Sunjin Kim, "Parliamentary Control of Administrative Rulemaking," *Sogang Law Review* Vol.3 No.2, Sogang Law Institute, 102 (2014) (S. Kor.).

5 Jongsup Chong, *Constitutional Law* (8th ed.), Parkyoung Publishing & Company, 1346-1347 (2013) (S. Kor.).

guidelines necessary for the enforcement of jurisdictional Acts and the interpretation standards of relevant Acts and subordinate statutes. This is the same for the Ministry of Employment and Labor (MOEL).

MOEL, as one of the central administrative ministries, enacts the enforcement regulations, namely, ministerial ordinances of each Act under the delegation of the Acts related to labor law. In addition, MOEL enacts and implements a number of regulations under various names such as ‘guidelines, examples, instructions, directives, rules, bulletins, manuals and the like’ (hereinafter collectively referred to as ‘guidelines’) for establishing criteria for internal affairs treatments, administrative supervisions, and administrative guidance. There are even hundreds of guidelines that are currently being implemented in the area of labor-management. Among the guidelines, there are administrative rules for the enforcement of Acts and subordinate statutes, but there are also many whose legal basis and legal character are not clear. It is the former, the guidelines as administrative rules, that these guidelines are enacted and enforced by the delegation of Acts and subordinate statutes. However, in the latter case, the guidelines whose legal basis and legal character are not clear, have nothing to do with the delegation. The latter case is as follows. If the Acts and subordinate statutes don’t grant any authority to the Minister of Employment and Labor or public officials, then there will be no affairs to be carried out by them. Even in this case, guidelines are also created. These guidelines do not basically impose a certain duty to do or not to do something on a particular person, but they may induce him/her to act in accordance with the expectation of the administrative agencies by influencing the formation of his/her intention. This type of administration function belongs to an informal administrative action. This kind of informal administrative action is enforced to the labor and management parties especially in the name of administrative guidance. In other words, MOEL distributes these guidelines to the workplace and instructs labor and management to follow them. Besides that, MOEL provides administrative guidance to labor and management for implementation of the guidelines.

After the collapse of the industrial structure during the Japanese Colonial Period and the Korean War, South Korea’s (hereafter, Korea) industrialization was pursued for economic development under the dictatorship regime from the 1960s to the 1980s. In this process, labor relations were not autonomously established, but formed by government’s orientation. The oppression of labor autonomy was carried out in a way of suppressing the labor movement under the name of national reconstruction and economic development. Anyway, Korea’s present economy grew amazingly through development dictatorship. Nevertheless, there seems to be an intention of the government to intervene in labor relations and to form the order of labor relations in a certain direction. However, the way to achieve such a goal has been refined in a way through administrative rulemaking such as guidelines. It is not appropriate for the government to actively engage in labor-management relations, which are basically civil relations. It seems that the role of the government has to be such as to enforce labor inspection for employers who do not comply with basic labor standards, to create jobs, to create an environment for labor-management autonomy, and to create industries. It would be interesting to examine the legal issues on the government’s intervention of labor relations through guidelines in the perspective of what is the role of the state.

II. Problems with administrative action by guidelines

Among guidelines that are arbitrarily enacted without delegations by Acts and subordinate statutes, there are also so-called administrative rules, which are merely criteria for the treatment of labor administration affairs inside MOEL. These are not particularly problematic. However, many other guidelines are distributed to the labor and management parties in the name of administrative guidance, affecting the formation of intentions of labor relations parties. In particular, some of the guidelines may be contradictory to the current labor law statutes, or they may be contradictory to the Supreme Court’s decisions, which are the final authoritative interpretations of labor relations laws. This can result in various problems.

For example, the “Rules for the Performance of Litigation by the Ministry of Employment and Labor,”

“Rules on the Disposal of Industrial Accident Statistics,” and “Regulations on the Research Project of the Ministry of Employment and Labor” are not related to labor relations and seem to be just for the treatments of internal affairs of MOEL. Among the cases in which the effect of the guidelines was actually a problem, the Supreme Court has ruled that the the “Rules on Medical Care and Medical Treatment Benefits,” one of the guidelines of MOEL, establishes merely the administrative standard of the internal affair treatments and has no binding force to the Court or ordinary people externally.”⁶ In addition, the Supreme Court ruled that the “Guidelines for the Protection and Management of Foreign Industrial Technical Trainees,” one of the guidelines of MOEL, is also merely a set of administrative procedures within the administrative agency and has no binding force to the Court or ordinary people externally.”⁷ However, the “Guidelines for the Calculation of Normal Wages,” “Guidelines for the Interpretation and Operation of Work Rules,” and the “Manual of Affairs for Collective Labor Relations” were enacted without specific legal grounds and distributed to the labor and management in the name of administrative guidance. These have an influence on the formation of intention of labor and management parties, and leads to an impact on labor relations. This is especially true because employers rely on these guidelines to operate their businesses.

In this regard, the Constitutional Court made a decision about the aforementioned “Guidelines for the Protection and Management of Foreign Industrial Technical Trainees” unlike that of the Supreme Court. The Constitutional Court has ruled that “if administrative rules are enacted as a rule of discretionary exercise and repeatedly implemented so as to constitute administrative practice, administrative agencies shall be subject to self-binding in relationship to people to obey the principle of equality or the principle of protection of trust. In this case, the guideline becomes the exercise of public power with external binding force. It may be subject to constitutional appeal because there is possibility of infringement of basic rights.”⁸ This Guideline stipulated that industrial trainees are not subject to the Labor Standards Act. However, the decision ruled that even though the industrial trainee is practically working under the supervision of employer with receiving a wage, if the labor standards guaranteed by the Labor Standard Act are not applied to him/her, this is an infringement of equality rights. And the decision also ruled that to restrict the right to enjoy equal working conditions of equal value of work as defined in the Labor Standards Act and the United Nations’ “International Covenant on Economic, Social and Cultural Rights,” it must be only by statutes, and it is illegal because the restriction was prescribed for the first time by the administrative rules without legal grounds.

If an administrative disposition, which is disadvantageous to people, is imposed based on guidelines, the people can contest it through administrative appeal or administrative litigation. Of course, in the case of labor relations, if a disadvantageous administrative disposition is imposed on an employer or a worker by MOEL, the party can dispute it. However, when guidelines are issued for the purpose of administrative guidance, employers apply these guidelines to labor relations, which causes problems because workers or labor unions are affected by them. Since employers are directly regulated in the relationship with MOEL, it is almost impossible for employers to ignore these guidelines and run a business. Thus, if these guidelines do not have legal grounds, or if their contents are different from statutes or precedents, labor relations can be twisted. That is, labor-management autonomy is distorted. In such cases, it is impossible for employers, workers and unions as the victims to file a judicial review of the guidelines. It is because the specific administrative disposition of administrative agencies has not been given to employers, workers or unions. In other words, although administrative guidance through guidelines is often in effect compulsory, it is difficult to make an administrative appeal or administrative litigation because of informal administrative action.⁹

6 Supreme Court 1995. 9. 15. 94Nu12326 ruling.

7 Supreme Court 1997. 10. 10. 97Nu10352 ruling.

8 Constitutional Court 2007. 8. 30. 2004Hunma670 ruling.

9 Donghee Kim, *supra* note 1, at 210-217; Kyunsung Park, *Administrative Law* (9th ed.), Parkyoung Publishing & Company, 366-367 (2012) (S. Kor.).

In principle, although these guidelines are not legally binding, they are practically applied to the workplace, and even though there is room for labor and management parties to be suffered from damage by the infringement on their rights, adequate remedies do not exist. In particular, as a result of the labor market reform initiative suggested by the government on the ground of the tripartite agreement on September 15, 2015, in January 2016 MOEL announced the “Fair Personnel Guideline” to propose dismissal requirements for low performers and the “Guidelines for the Interpretation and Operation of Work Rules” to alleviate the difficulty of procedures to amend work rules more disadvantageous to workers on the ground of Socially Accepted Rationality. This has led to a lot of controversy over labor relations intervention through the guidelines. With the announcement of these guidelines of which legal grounds are unclear by MOEL, it is likely that these guidelines will be applied to industrial relations through employers in the name of administrative guidance. Nevertheless, the legitimacy and justification of the guidelines must be reviewed separately.

III. Scopes and limits to be included in the guidelines

1. Overview

MOEL has issued guidelines and has been conducting administrative guidance by distributing them, in relation to the enactment and revision of labor-related statutes, labor-related precedents and important labor-management relations issues. These guidelines are not to be judged uniformly, but they should be assessed in whole or in part differently according to their contents, objects or others. If the contents of the guidelines are intended to clarify the treatments of administrative agencies affairs regardless of working conditions or labor relations, it does not matter. However, if the contents of the guidelines are related to working conditions or labor relations, there may be a problem in the authority of enactment or legal basis from the viewpoint of administrative guidance.

Administrative guidance is detailed in the “Administrative Procedures Act.” The Act defines the meaning of administrative guidance as “an administrative action, such as guidance, recommendation, advice by an administrative agency to encourage or discourage a particular person regarding performance of certain acts, within the scope of duties or affairs under its jurisdiction in order to realize specific administrative aims” (The Act, Articles 2, 3). In addition, the Act clearly states the limit of administrative guidance or the principle of administrative guidance by saying “(1) Administrative guidance shall be rendered only to the minimum extent required to attain its purpose and shall not be unjustly exercised against the will of the other party to such administrative guidance. (2) No administrative agency shall treat any other party to administrative guidance disadvantageously on grounds of his/her non-compliance with the administrative guidance” (The Act, Article 48).

Labor relations are also legal relations. Thus, it may be also necessary to provide guidelines sometimes for administrative guidance regarding labor relations. In such cases, if the nature of the administrative guidance is, for example, providing technical advice, knowledge or skills to a concerned person, it is not a problem even if there is no legal basis. However, if the administrative guidance has a regulatory nature that restricts certain acts, or a nature of adjustment of disputes or competitions between stakeholders, then there must be a legal basis. For example, in the former case, the Recommendation for Correction of Article 51 of the “Monopoly Regulation and Fair Trade Act” can be mentioned as an example,¹⁰ and in the latter case, the Industrial Disputes Adjustment Procedures of Sections 2 through 4 of Chapter V of the “Trade Union

10 “Monopoly Regulation and Fair Trade Act” Article 51 (1) If a violation of this Act has occurred, the Fair Trade Commission may determine a scheme for correction and recommend that the enterpriser or enterprisers' organization concerned comply with it.

(2) Any person who has been recommended under paragraph (1), shall notify the Fair Trade Commission within ten days of receipt of the notice of recommendation for correction, as to whether or not he/she accepts the recommendation.

(3) If a person, upon receipt of a recommendation for correction under paragraph (1), accepts the recommendation, it shall be considered that an order to take corrective measures has been issued under this Act.

and Labor Relations Adjustment Act.” In such cases, there are always legal grounds.

However, even if these guidelines for administrative guidance do not have direct legal binding force, they may be problematic, because if they serve as actual standards for the interpretation or application of labor-related Acts and subordinate statutes, they affect the legal status of labor and management parties. Particularly, when the guidelines are enacted, it is not workers but employers that rely on them. Therefore, their feelings will differ between the parties in its application. Needless to mention, the haptic effect is different from employers who apply working conditions and workers who receive working conditions.

The formation of working conditions and the dynamics of labor relations should be left basically to Acts, subordinate statutes, precedents and autonomy between labor and management. That is in principle, right. However, the guidelines become such a thing by which the administrative agencies instruct employers regarding working conditions that they will apply to workers without the legal grounds. Therefore, it is necessary to note that the administrative agencies may be implementing things without any authority and duty in Acts and subordinate statutes. In addition, although the guidelines are for administrative guidance and administrative guidance is intended to expect voluntary cooperation of the related parties, it should not be forgotten that even if employers apply the guidelines of MOEL by using the economically superior position, workers almost cannot do anything.

Moreover, even if MOEL has the authority to interpret Acts and subordinate statutes in the manner of administrative interpretation, it is thought that it is possible for the Ministry to interpret them, at least, in order to make unclear legal status of the related parties clearer and secure their legal stability when their legal status is unclear from their own perspective. However, when MOEL issues an administrative interpretation irrespective of an administrative disposition to the parties, or when employers ask questions for the purpose of worker management, administrative guidance is provided in the form of administrative interpretation. If the administrative interpretation meets legal grounds, it will not be a problem. However, if MOEL issues an administrative interpretation different from existing precedents, or if MOEL creates a ‘positive’ interpretation without authority in the absence of any precedent over the relevant statutes and forms a single stream in labor relations, this can make an extensive problem.

2. ‘What can be achieved’ and ‘What should not be achieved’ by the guidelines

MOEL can, in principle, express its opinion on the interpretation of statutes in the form of guidelines and the like, as it has the authority capable of interpretation. However, since the authoritative interpretation of administrative agencies is not the final stage of the interpretation, there are limits that can be categorized into ‘what can be achieved’ and ‘what should not be achieved.’

First, it will be possible for administrative agencies to express examples prohibited by Acts in the language of prohibition method. For example, Article 23, Paragraph 1 of the “Labor Standards Act” stipulates in the language of the prohibition method that “an employer shall not, without justifiable cause, dismiss, lay off, suspend, or transfer a worker, reduce his/her wages, or take other punitive measures (hereinafter referred to as “unfair dismissal, etc.”) against him/her.” Therefore, it would be possible for MOEL to interpret or explain authoritatively about examples to be thought as unjustifiable or matters to be cautious for legal prohibition by using precedents published until now. However, since the “justifiable cause” of this provision belongs ultimately to the interpretation area of the Court, it would not be permitted for MOEL to arbitrarily interpret justifiable causes except for examples of precedents and explain as “if a worker..., he/she can be dismissed.” This is because it can violate the Court’s ultimate authority to interpret Acts and subordinate statutes.

However, it is thought that the examples permissible by Acts can be expressed in a permissive language. For example, Article 51 of the “Labor Standards Act” stipulates that ‘an employer may extend work hours provided that...’ by using a permissible language with respect to the flexible work hours system. Therefore, it is considered possible to describe and explain in the guideline that the contents of the

Act are more strictly in the way of flexible work hours system and ‘the system can be carried out provided that...’ within the limits allowed by the Act. In this case, the guideline serves as a guide for what should be provided in order for the system to be possible under the Act. Thus, it can be considered that there is no additional legal basis for this guideline. In this regard, the “Flexible Work Hours Introduction Manual,” one kind of guidelines, can be an example. In this case, however, if there would be any part of the manual that has an effect on the labor relations without legal grounds, then there is a need for a separate judicial review on the legality of the relevant part.

In addition, in case the boundaries of judgment can be clearly divided within one subject area, when the jurisprudential interpretation is established through precedents or theory, it is possible for MOEL to accept it and describe the opposite interpretation in a guideline. For example, the Supreme Court has several times ruled that “if bonuses are paid periodically and regularly at a fixed rate, it has the nature of wages to be paid in return for work, but, if the occurrence of the reasons for payment is uncertain and temporary, the payments cannot be regarded as wages.”¹¹ These judgments show that the boundaries of the distinction can be clearly divided within the realm of wages. On this basis, if MOEL says that ‘since the payment terms of management bonuses are settled on an annual basis by collective agreement between labor and management, if the payment or the rate of payment is changed according to the production results of the year, and if it is not paid continuously or regularly regardless of production results, it is not a wage and the company is not obligated to pay it.’ This interpretation is deemed to be sufficiently possible as a reverse interpretation in accordance with the established case law.

3. Need of procedural control for enactment of guidelines

In general, the government’s legislative activities are subject to the Presidential Decree “Regulations on the Operation of Legal Affairs” and the Ordinance of the Prime Minister “Regulations for the Execution of Regulations on the Operation of Legal Affairs.” Besides that, when, regardless of its name, an administrative agency enacts Instructions, Examples, and Notices for the enforcement of Acts and subordinate statutes or treatment of administrative affairs, it should comply with the basic principles and procedures stipulated in the Presidential Directive “Regulations on the Issuance and Management of Instructions and Examples.” The Presidential Directive clarifies the basic principle as necessity, legality, appropriateness, harmony, and clarity. The Presidential Directive also asks for the administrative agency to consult with other administrative agencies such as the Ministry of Government Legislation, except for self-examination, when enacting administrative rules such as Instructions and Examples.

However, except for those administrative rules, guidelines are often enacted inside the administrative agencies neither for the enforcement of Acts and subordinate statutes, nor for the criteria for administrative affairs treatments. The problem is that the established guidelines like that often have effects on the rights and duties of people without legal basis.

Regarding the legal status of those engaged in the various job-related policies of the government, whether or not their legal status is a worker should ultimately be determined by the judgment of the Court. Nonetheless, on the spot, it is the reality that they are treated sometimes as workers or sometimes as paid volunteers through guidelines enacted arbitrarily by the related ministry. In some cases, those who were engaging in the policy and providing labor but were treated as volunteers, filed lawsuits for minimum wages by insisting their legal status as workers. However, they lost.¹²

Let us take for example the “Guide to the National Basic Livelihood Security Service” manual published annually by the Ministry of Health and Welfare. The manual is a kind of guidebook prepared

11 Supreme Court 2002.6.11. 2001Da16722 ruling.

12 Supreme Court 2015.12.24. 2015Da234350 ruling & related lower Court rulings. Even the Courts relied on the guideline of the job-related policy for the judgement of whether those who provided labor in the policy were workers or paid volunteers.

for public officials of the Ministry to refer to the implementation of the Service, covering various contents related to the Service. Since the various contents and procedures contained in the manual are actually related to the entitlement of a beneficiary, most of them are based on Act and subordinate statutes. However, in the manual, when a citizen was applying for Basic Livelihood Security Benefits, even if his/her income was below the standard and met seemingly the requirements, if he/she was presumed to have informal income, in a view of an official in charge, the guideline asked the official to impose Estimated Income to the applicant. When the Estimated Income was imposed on him/her, he/she could not be able to meet the requirements of the benefit. The ‘Estimated Income’ stipulated in the manual had no basis in Act and subordinate statutes, despite the fact that imposing it was a very important administrative action that influenced and determined whether or not to obtain the benefit. Therefore, in cases of failure to acquire the entitlement due to the disposition of the Estimated Income, the Court decided that the disposition of the Estimated Income was invalid due to the violation of the principle of legal reservation.¹³ Since the Court ruling like this has appeared several times, the imposition of ‘Estimated Income’ has disappeared in the manual. This case is not an informal administrative action, because it is mediated by administrative disposition. However, it shows the side effects of the guideline in that it is an administrative disposition based on the guidelines without the legal basis. A similar situation may well occur in the guidelines in the area of labor.

Therefore, there is a need of procedures for verifying and revising the guidelines in the enactment process or even after enactment, about whether there are no legal problems in enacting the guidelines. In this process, it may be necessary for scholars, lawyers, or even researchers who have particularly critical viewpoints, to participate and reflect on their opinions.

IV. Cases and problems in the intervention of labor relations by guidelines

1. “Fair Personnel Guidelines” case

A lot of controversy arose when the government announced on September 2015 that it would create an ordinary dismissal guideline as part of the deregulation in relation to labor market restructuring. Ordinary dismissal is distinguished from disciplinary dismissal and dismissal for managerial reasons. It is not a concept of Act, but a concept of lectures. It means dismissing workers for failing to fulfill their obligation to provide labor in labor contracts.

In this regard, questions of whether MOEL has the authority to make such guidelines and whether those guidelines are legally effective have been raised. This is because since Article 23 (1) of the Labor Standard Act stipulates that an employer cannot dismiss a worker without justifiable cause, the employer has the burden of proof on justifiable cause and the Court has the authority to determine the existence of justifiable cause. The Supreme Court Ruling says that justifiable cause for a dismissal due to poor work performance or a failure to provide the contractual work means that the worker’s performance is objectively too poor to maintain employment relations according to Socially Accepted Understanding. However, such situations shall be judged on a case-by-case basis.¹⁴

With regard to dismissal, since the criminal penalty clause for violations of the restrictions on dismissal stipulated in Article 23 of the Act was abolished in 2007, a labor inspector is no longer authorized to investigate a dismissal case. Thus, there is no reason for MOEL to be involved in judging the justification of dismissal. If the guideline for ordinary dismissal is only for explaining the Act and judicial precedents, then there is no need for it, and if the guideline is for administrative guidance for easier dismissal outside the Act and judicial precedents, it is illegal. With respect to the Ministry’s pushing the enactment of

¹³ Seoul Administrative Court 2014.2.20. 2013GuHap51800 ruling.

¹⁴ Supreme Court 2005.11.25. 2005Du9217 ruling; Supreme Court 2007.2.9. 2006Du18287 ruling; Supreme Court 2009.9.24. 2009Du12600 ruling; Supreme Court 2012.9.27. 2012Du13955 ruling; Supreme Court 2014.11.13. 2014Du10622 ruling.

guidelines for ordinary dismissal, the labor communities have suspected that there is an intention of the government to make it easy to dismiss poor performance workers because an ordinary dismissal for poor performance is not easy under the current restraining provisions of the Act and the attitude of precedents.¹⁵ In the case of a dismissal for managerial reasons, it is necessary to report to the Minister of Employment and Labor in order to dismiss a certain size or more (“Labor Standard Act” Article 24 (4)). Therefore, a guideline may be necessary to establish a standard for dealing with the declaration affair, but there is no such necessity in the case of ordinary dismissal.

However, in the case of the Labor Relations Commission, it may be necessary to internally set the treatment standard because it is responsible for judging the unfair dismissal relief case. Because the Labor Relations Commission’s judgment corresponds to the quasi-judicial function, independence and neutrality in the handling of a judging affair are important. Especially, independence from MOEL is more important. Article 4 (1) of the “Labor Relations Commission Act” also provides a clear legal basis for the enactment of the guidelines for the judging affair, stating that “each Labor Relations Commission shall independently perform duties belonging to its authority.” Therefore, if MOEL established an ordinary dismissal guideline, it was possible to criticize it as wrongful or illegal, because it might infringe the authority of the Labor Relations Commission to perform duties independently.

Anyway, after much controversy, MOEL issued guidelines on January 2016 under the name of “Fair Personnel Guidelines.” It is a 191-page brochure with the subtitle ‘Guidebook for Manpower Management Oriented to Job Ability and Performance.’ The Guideline consists of ‘manpower management centered on job ability and performance’ and ‘worker dismissal.’ The Guideline is characterized by the division of dismissal as disciplinary dismissal, ordinary dismissal and dismissal for managerial reasons, and an explanation in detail about the just causes and dismissal procedures with many precedents published until now. In particular, it is noteworthy that many cases as a type of ordinary dismissal have been categorized and summarized in detail with respect to dismissal based on the lack of work capacity or low performance. The Guideline also points out that in order for dismissal due to lack of work ability or low performance to be justifiable, it is also necessary for employers, from the viewpoint of procedure, to provide education and training opportunities to low performance workers to improve their work capacity, and to set up redeployments to maintain their employment.¹⁶

Basically, the labor communities have been afraid that this Guideline will affect employers and thus the dismissal will be abused in the name of ordinary dismissal. This is because it is judged from the viewpoint of the corporation whether a worker is a low performer, and it is an employer who sets the criteria of the performance and evaluates it. In addition, since there is no joint decision system in Korea unlike Germany, it is very difficult to regulate the employer’s managerial power. To the contrary, there is also a scholar who thinks that the Guideline is positive to some extent. Regarding the Guideline, he suggests as the grounds that the Guideline shows a direction for reasonable and effective manpower management from recruiting to termination of employment, presents clear procedures and judgment criteria for ordinary dismissal unclear until now, and produces important procedural requirements for justifiable dismissal, such as education and training opportunities or redeployments for job ability improvement.¹⁷ From an employer’s point of view, he/she may think that if he/she observes the Guideline, it may become more difficult to dismiss workers.

15 The labor communities have been raising questions about the government’s attempts to formulate the ordinary dismissal guidelines before the government’s announcement for the enactment of the guidelines on September 2015. Kiduk Kim, “Problems on the Guidelines regarding the Requirements for Ordinary Dismissal,” *National Assembly Symposium on National Assembly Act amended and Ministry of Employment and Labor’s Guidelines*, New Politics Alliance for Democracy Labor Department, 16-17 (2015.6.17) (S. Kor.).

16 Ministry of Employment and Labor, *Fair Personnel Guidelines*, 156-161 (2016.1) (S. Kor.).

17 John Lee, “The Significance and Function of Fair Personnel Guideline,” *Quarterly Labor Law* No.255, 36-45 (Winter 2016) (Jap.).

However, there is still a question to whether MOEL needed to formulate a guidebook like this Guideline, with much effort, by categorizing and summarizing many cases on the direction of effective management of manpower, or the requirements and just causes of ordinary dismissal.

Anyway, the Guideline is not criteria for treatments of internal affairs. Thus, the Guideline neither has the nature of administrative rule, nor legal effects, and it cannot be considered in judging the justification of any concrete dismissal cases. Furthermore, the Guideline is neither administrative disposition, nor an object of administrative litigation. Since the Guideline is not an exercise of public authority, it cannot be an object of constitutional litigation. Therefore, although an employer does ordinary dismissal in accordance with the Guideline, the dismissal cannot be justified in itself. Consequently, the Courts make a judgement for the justification of the dismissal according to its own criteria.

2. “Guidelines for the interpretation and operation of work rules” case

When an employer prepares or amends the work rules, he/she has to report such preparation or amendment to the Minister of Employment and Labor (“Labor Standard Act” Article 93). In this case, a labor inspector receiving the reporting has to write on a list of the work rules, and if there are any illegal points or any violations of collective agreements, he/she has to order the employer to correct the work rules as to be legal.¹⁸

It is doubtful, however, whether it is appropriate for the labor inspector to order a change to the work rules, which is enough even only by being reported. This is because, if the work rules conflict with statutes or collective agreements, it is a matter for the Courts to judge ultimately. By the way, if an employer violates the procedures of enactment and amendment of work rules, he/she shall be punished (“Labor Standard Act” Articles 94, 114). Therefore, since the “Guideline for Interpretation and Operation of Work Rules” (hereinafter referred to as “Work Rules Guideline”) can be used as a basis for the labor inspector to examine the employer’s violation of procedures or to treat the reporting affairs of work rules, it may have the nature of the statute interpretation rule.

Although the Work Rules Guideline has the nature of the statute interpretation rule, this is so only to the extent that the labor inspector deals with those affairs. The Work Rules Guideline cannot have an influence on the legal effect of the work rules amended. The Supreme Court also states that even if the employer did not obey the duty to report, the enactment or amendment of work rules would not become invalid.¹⁹ This is because the Courts alone judge whether the modified work rules are valid or not, regardless of the Work Rules Guideline.

An employer charged with violation of the procedures for the enactment and amendment of the work rules may contend Misunderstanding of Law on the ground of the Work Rules Guideline.²⁰ However, the employer’s contention is not easy to be accepted in the Courts.²¹ This is because the Work Rules Guideline has no legal binding force, and as the employer, he/she is in a position to fully understand such matters through consultation with legal experts, and if he/she has made serious efforts, he would be able to recognize the illegality.

The most problematic item of the Work Rules Guideline is the part explaining in detail about Socially Accepted Rationality as a basis of the justification for disadvantageous amendment of work rules. The

18 “Labor Inspector Affairs Manual” Articles 74, 75.

19 Supreme Court 2004. 2. 12. 2001Da63599 ruling; Supreme Court 2004. 2. 27. 2001Da28596 ruling.

20 “Criminal Act” Article 16 (Misunderstanding of Law) When a person commits a crime not knowing that his/her act constitutes a crime under existing Acts and subordinate statutes, he/she shall not be punishable if the misunderstanding is based on reasonable grounds.

21 Supreme Court 2008. 10. 23. 2008Do5526 ruling; Supreme Court 2010. 7. 15. 2008Do11679; Supreme Court 2009. 12. 24. 2007Do1915 ruling; Supreme Court 2006. 3. 24. 2005Do3717 ruling. Many Supreme Court Rulings did not accepted Misunderstanding of Law in the cases.

Supreme Court introduced the Socially Accepted Rationality concept for the amended work rules with violation of the legal procedures to become valid. However, the concept has never been stipulated in the Labor Standard Act. Because it is such a concept, the Supreme Court is extremely cautious about the application of Socially Accepted Rationality. Therefore, the detailed explanation about the Socially Accepted Rationality concept in the Work Rules Guideline may be understood as an implication that MOEL is working on matters outside its own authority. The precedents of the Courts just determine whether or not a specific disadvantageous amendment of work rules is against Socially Accepted Rationality without giving detailed explanations as in the Guideline. Such a detailed explanation of the Socially Accepted Rationality concept may cause employers to misunderstand the legitimate procedural requirements of disadvantageous amendment of work rules.

3. Several cases on guidelines regarding collective labor relations

It is appropriate to the original character of administrative guidance to make concrete methods for realizing industrial safety policy or employment policy and to guide labor and management to execute those methods. However, if the government intervenes in the conflicting collective labor relations with wrongful administrative guidance, it may raise conflicts and confusion. Thus, it may also cause the tripartite confrontation between labor, management and government.

For example, we can look at the guideline “Time-off Limit Manual.” In the “Trade Union and Labor Relations Adjustment Act,” Article 24(4) states that the trade union full-time officer may conduct affairs prescribed by this Act or other laws and affairs of maintaining and managing a trade union for the healthy development of labor-management relations without loss of wages, such as consultation or bargaining with an employer, grievance settlement, or industrial safety activities, within the maximum time-off limit. About the time-off scope, the 2010 Manual explained that industrial actions and dispatch of union members to upper groups were not related to the common interests of labor-management. Thus, they did not belong to the time-off affair. However, the amended 2013 Manual changed dispatch of union members to upper groups to be included in the time-off affair with leaving industrial actions alone. Regarding this, it would be the right interpretation to include industrial actions within the time-off affair in the point that the Act stipulates the time-off affair in a comprehensive manner. Therefore, it seems that MOEL intends to intervene in labor-management relations without authority or legal basis by limiting the scope of the time-off affair with the Manual.

In addition, the “Manual of Affairs for Collective Labor Relations” guideline book contains contents that clearly disagree with the Supreme Court precedent. Typical items are as follows. For example, the “Trade Union and Labor Relations Adjustment Act” Article 2 subparagraph 4 stipulates a reason for disqualification of the trade union “where an employer or other persons who always act in the interest of the employer is allowed to join a trade union.” Regarding the interpretation about ‘persons who always act in the interest of the employer,’ the Supreme Court stated that in the case of secretaries, drivers, and security guards, only if the duties and responsibilities of the job conflict with the obligations and responsibilities of the trade union members, they shall be regarded as ‘those who always act in the interest of the employer.’²² Nonetheless, the Manual uniformly, without analyzing and distinguishing between cases, states that they are all those who always act in the interest of the employer.²³

There is another example. If a trade union and an employer engaged in collective bargaining, but they enter an industrial dispute because of inconsistencies in their claims, the trade union has to file an application for mediation to the Labor Relations Commission, as a preliminary procedure, to enter an industrial action. In other words, no industrial action shall be permitted without completing adjustment

22 Supreme Court 2011.9.8. 2008Du13873 ruling.

23 Ministry of Employment and Labor, *Manual of Affairs for Collective Labor Relations*, 25 (2013) (S. Kor.).

procedures of mediation. In the case of labor disputes, if the Labor Relations Commission has conducted administrative guidance on the grounds of lack of collective bargaining, and the labor union has begun an industrial action (e.g., a strike), is the industrial action judged to be illegal for a procedural violation because it has not completed an adjustment procedure? In principle, the Labor Relations Commission has the authority to conduct administrative guidance without adjustment if it considers that the contents of the trade union's application for adjustment cannot be objects for adjustment.²⁴ Therefore, if the trade union's rushing into an industrial action after the administrative guidance of the Labor Relations Commission is considered to be without completing adjustment procedures, the side effect of restricting the right to industrial action of the trade union may arise.²⁵ In this regard, the Supreme Court consistently states that although the trade union applied for mediation of an industrial dispute but the Labor Relations Commission provided administrative guidance because of no sufficient negotiation, the trade union's rushing into an industrial action without additional application for mediation is considered to be legal as completing adjustment procedures.²⁶ Nonetheless, the Manual states that the industrial action without additional application for mediation after the Labor Relations Commission's administrative guidance because of no sufficient negotiation, is considered to be illegal as a violation of the procedural provision, Article 45 (2) of the "Trade Union and Labor Relations Adjustment Act."²⁷

In April 2015, MOEL conducted administrative guidance after investigating illegal or unreasonable matters of collective agreements (over 3,000) at workplaces with more than 100 workers. It may be acceptable to conduct administrative guidance of what constitutes an apparent violation of law. Administrative guidance is based on a certain direction, but the problem is that there is no basis for legal or democratic justification to 'guide' changes to collective agreements that are not illegal. It is up to the autonomy between labor and management to decide what to negotiate in collective bargaining. The "Trade Union and Labor Relations Adjustment Act" also stipulates the minimum standard on collective bargaining and collective agreement. This is because of the respect for the autonomy between labor and management. The intervention of the government on objects that labor and management can autonomously set as collective bargaining items undermines the principle of collective agreement autonomy. Rationality as a basis on which the Ministry asks for the amendment of collective agreements, is also not an absolute test, but a relative concept.

Suppose, for example, that a clause requiring trade union consent for a company in order to dismiss a trade union member is inserted in a collective agreement because of arbitrary personnel, abuse of dismissal, and resulting cost loss to the company. Is this clause "irrational" or "ineffective"? How is it possible to verify the validity of such judgments? And, is it appropriate for MOEL to intervene in labor relations through administrative guidance with such a judgment?

The intervention of the government in collective labor relations should be particularly limited. Aforementioned "administrative guidance" means an administrative action, such as guidance, recommendation, advice by an administrative agency to encourage or discourage a particular person regarding performance of certain acts, within the scope of duties or affairs under its jurisdiction in order to realize specific administrative aims. Specific administrative aims cannot be set up unilaterally by the administrative agency. The aims should, of course, be a legitimate purpose. Such an administrative purpose of negating the fundamental principle of labor-management autonomy and reducing the autonomy cannot be justified.

24 "Enforcement Decree of the Trade Union and Labor Relations Adjustment Act" Article 24 (2); "Rules of Labor Relations Commission" Article 153.

25 Chongyul Lim, *Labour Law* (15th ed.), Parkyoung Publishing & Company, 229 (2017) (S. Kor.).

26 Supreme Court 2001. 6. 26. 2000Do2871 ruling; Supreme Court 2003. 4. 25. 2003Do1378 ruling; Supreme Court 2003. 12. 26. 2001Do1863 ruling; Supreme Court 2008.9.11. 2004Do746 ruling.

27 Ministry of Employment and Labor, *supra* note 23, at 255.

V. Conclusions

The so-called labor relations Acts, such as the current “Labor Standards Act” and the “Trade Union and Labor Relations Adjustment Act,” do not grant the Minister of Employment and Labor any authority regarding the interpretation or validity judgment of legal requirements, or the procedures in various legal provisions. They are all prescribed by the Acts. The interpretation of the relevant statutes is also part of the authority of the Court, not that of MOEL.

Therefore, regarding the interpretation or validity judgment of the statutes, it does not seem that the affairs to be executed by the Minister of Employment and Labor and its public officials exist. In addition, many of the guidelines enacted by MOEL do not correspond to legislative rules that are typical administrative legislation, and it is difficult to comprehend them in the concept of administrative rules, which are the criteria of administrative affairs treatment within the administrative agencies. It is a logical contradiction to enact guidelines as a rule for the affair treatment, because there are no affairs to execute.

Finally, the guidelines that MOEL intends to enact belong to the category of ‘informal administrative action’ as ‘administrative tools to induce people to act in accordance with the expectation of administrative agencies by influencing the formation of the people’s intention without imposing on them certain duties or obligations to do or not to do something.’ These can be understood as administrative guidance, if in a favorable light. However, it is necessary to note that the contents of the “Administrative Procedure Act” must be observed in order for them to be legal as administrative guidance. Therefore, these guidelines will not be recognized as legally binding, but the employer’s applying them to the labor relations or their *de facto* binding force can become controversial. When it is necessary to clarify the ambiguity of Acts and subordinate statutes, which causes difficulty of labor relations regulation, MOEL can interpret it authoritatively. Nonetheless, the Ministry has to keep the range and limit of the interpretation. Particularly, the guidelines, which are not based on Acts and subordinate statutes, cannot bind the Court and people. If the guidelines without legal binding force actually bind the people, it causes problems that cannot be overlooked from the viewpoint of the rule of law. Not only are there concerns that the guidelines weaken the functions such as the elimination of arbitrariness, legal stability and predictability, which are the ideological foundations of the rule of law. Also, the labor and management parties who have been violated of their rights and interests due to the guidelines do not have appropriate remedies.

It should be noted, therefore, that the guidelines of MOEL may result in an increase of uncertainty as opposed to the original good intentions of resolving uncertainty in labor-related systems and practices. For example, the primary cause of the enormous social costs incurred by the controversy over the past decades on normal wages was the fact that when enacting the “Guidelines for the Calculation of Normal Wages,” MOEL had previously interpreted wrongly the relevant provision of the “Enforcement Decree of the Labor Standards Act” and failed to follow the Supreme Court precedents. In this regard, it is not a simple worry that huge social costs can arise due to various guidelines issued by MOEL.

The illegal guidelines of MOEL are adding to the confusion and uncertainty of the workplace. Moreover, guidelines have no legal effect, but they have *de facto* binding force in the workplace. Therefore, they are likely to be used as evasion measures to avoid difficulties in revising Acts. Even in a specific case, a court ruling judged the case by trusting the guidelines.²⁸ The guidelines violating Acts or the Supreme Court precedents become consequently confirmed as legal by the Supreme Court, resulting in serious confusion in the rule of law. There is also concern that the Court will judge the workplace issues such as the legitimacy of ordinary dismissal, the legitimacy of disadvantageous amendment of work rules, and the legitimacy of the wage peak system by relying on the guidelines.

It is best if MOEL does not set guidelines beyond its own authority. However, it is not realistic that

28 Supreme Court 2013. 12. 18. 2012Da89399 all the Justices collegiate panel ruling explains that point very well.

MOEL does not. If so, it is necessary to think about ways to control illegal guidelines. The following methods can be considered for this. First, the Court must actively interpret the standing to sue in the direction of expansion in the appeal litigation among the administrative litigations. Second, the “Administrative Litigation Act” should be revised to constitute the appeal litigation as an objective litigation for the purpose of ensuring the legality of administration. Third, the Constitutional Court should more widely acknowledge the scope of an “exercise of public authority” as a constitutional appeal object, and the immediacy of infringement of fundamental rights as a qualification for appellant. Fourth, the “National Assembly Act” should be revised so that the National Assembly can review and control the guidelines established by the executive branch.²⁹ In this process, it is also necessary to consider using the basic principles prescribed in the aforementioned Presidential Directive “Regulations on the Issuance and Management of Instructions and Examples” as an examination method for guidelines and the like. This Presidential Directive is related to the administrative rules originally enacted for the enforcement of statutes or internal affairs, but it could be thought as one of the control methods to use these principles as the criteria to review the guidelines belonging to informal administrative action.

After the change from the Park Geun-hye administration to the Moon Jae-in government, it was decided to abandon the two guidelines discussed in this paper: “Fair Personnel Guidelines” and “Guidelines for the Interpretation and Operation of Work Rules”.

²⁹ Sunjin Kim, *supra* note 4 at 114.

Labour Models in Local Daily Service Platforms: Current Situation and Challenges

Manxue YIN

Institute for Labour Studies

Biqian ZHAO

Institute for Labour Studies

I. Object of this study

II. Current labour models and workers' conditions

III. Challenges posed for protecting workers' rights

IV. Some considerations

Along with the development of technologies like mobile network and big data, local daily service digital platforms have expanded rapidly in China, creating a great number of job opportunities. Due to the needs for efficiency, cost control and risk avoidance, daily service platforms adopt diversified business models and corresponding labour models. This paper analyses labour models used by local daily service platforms and challenges confronting labour authorities in protecting workers' rights.

I. Object of this study

Local daily service platforms refers to businesses in the traditional daily service sector such as catering, housekeeping, beauty caring, ride-hailing, and etc. which integrates offline resources and online resources by means of the Internet and big data. Platforms use online and offline workers, and generally speaking, platforms tend to hire online workers on labour contracts, while adopting different models for offline workers. Therefore this paper chooses to focus on offline workers in takeaway delivery and ride-hailing — typical businesses of local daily service sector.

II. Current labour models and workers' conditions

1. Operational models and labour models

What labour models a platform uses depends on its operational models. Operational models of platforms in catering takeaway and ride-hailing sector can be roughly classified into three types: service-provider platforms, information-provider platforms and resource-sharing platforms. Some platforms tend to adopt multiple models rather than applying one single model. It also should be noted that platforms are still in their infancy and, as a result, operational models and labour models they use are constantly changed.

Labour model in service-provider platforms: Such platforms directly offer services to end-users, as traditional companies, but by means of the Internet or mobile network. Some service-provider platforms use traditional direct employment, signing labour contracts with workers, while some platforms tend to deploy agency workers. In the takeaway delivery sector, some platforms also contract out delivery to smaller companies or individuals.

Labour model in information-provider platforms: Such platforms act as information intermediaries between workers and end-users, rather than directly providing service to end-users. Therefore they don't employ offline workers for delivering service. Labour models of offline workers who provide service determined by companies joining in platforms. For example, Kentucky, McDonald's and other large chain businesses joining in takeaway delivery platforms generally recruit their own workers to deliver takeaway.

Labour model in resource-sharing platforms: It is still disputed that such platforms are information providers or service providers. Unlike traditional companies employing workers on labour contracts, platforms tend to use 'independent' workers to provide service and describe their relations as 'collaborative.'

Although in comparison to traditional employees ‘collaborative’ workers enjoy more freedom relating to work entry and exit, selection of work time, even in selection of work task, they are still subject to the rules of platforms to some extent.

2. Characteristics of labour models of platforms

This paper compares status of directly-employed workers in service-provider platforms and ‘collaborative’ workers in resource-sharing platforms.

(1) ‘Collaborative’ workers have more flexibility in entry and exit.

With respect to entry, direct employees of service-provider platforms need to go through procedures, including resume screening, face-to-face interview and signing labour contracts, before they start to work, while sharing-type platforms generally require simple conditions and only conduct online review of candidates’ application. For example, Mei-tuan Crowdsourcing Platform requires that as long as aged between 18-65, possessing a smart phone and health certificate, after uploading ID information and going through simple online training and exams, the applicant can start to work. In the ride-hailing sector, drivers now are required to take complicated exams. With respect to exit, ‘collaborative’ workers of sharing-type platforms usually can quit at any time, while direct employees of service-provider platforms are required to notify the platform in advance and go through some simple formalities before they quit the job. In spite of the fact that ‘collaborative’ workers enjoy more flexibility, they are still subject to rules set up by platforms.

(2) ‘Collaborative’ workers enjoy more flexibility in work.

In respect of working time, ‘collaborative’ workers, both in takeaway delivery platforms and ride-hailing platforms, have higher flexibility: they can select the time to start and to end works, and to determine the length of working time. For directly-employed workers, takeaway delivery platforms typically require them to be on duty during the peak hours (11:00-14:00 and 16:30-18:30) or night shift (after 21:00) and decide on their own for other time.

With respect to task selection, takeaway delivery platforms assign orders to directly employees, which generally are not allowed to refuse the order. Platforms set up rules of deducting wages, even dismissing for refusal of orders. For ‘collaborative’ workers in takeaway delivery businesses, they enjoy full freedom to decide what order to take, although there are incentives to encourage them to take more orders. In the ride-hailing sector, Didi¹ fast-ride drivers can no longer select orders but receive orders assigned to them.

With respect to how to execute specific work task, workers of both types are subject to control to a large extent. For instance, ride-hailing platforms set up rules regarding routes selection, while takeaway delivery platforms prescribe delivery time. In addition, certified drivers of Didi must follow some service standards, ranging from dressing to language.

(3) ‘Collaborative’ workers are covered by different remuneration system.

With respect to pay structure, end-users make direct payments to accounts of ‘collaborative’ workers, set up in platforms. The payments, in the form of service fees, are calculated on complex multiple factors, including service frequency, online time, and etc., and platform charges workers’ fees for information and management. For directly-employed workers, takeaway delivery platforms adopt a traditional pay structure, mainly composed of basic wage and piece pay. With respect to payment cycle, ride-hailing platforms and takeaway delivery crowdsourcing platforms transfer payments to workers’ personal bank accounts on a weekly basis, while directly-employed workers receive payments from platforms monthly. For both ‘collaborative’ workers and employees, service fees to be paid by customers and income of workers are determined ultimately by platforms.

1 Didi is the largest ride-hailing platform in China, which merged with Uber China in 2016.

(4) Workers of both types need to provide themselves with or rent equipment necessary for service.

In terms of ‘collaborative’ workers, in the ride-hailing sector, a driver of Didi need to have a private car or a leased car; in the takeaway delivery sector, crowdsourcing platforms require workers to provide themselves with equipment like electric bicycles. For directly-employed workers, most takeaway delivery platforms currently provide them with vehicles, thermal insulating boxes and other equipment, but collect fees for using the vehicles, while some platforms allow workers to use their own vehicles.

(5) Workers of both types don’t work in conventional workplace.

Rather than working in a fixed workplace, offline workers of daily service platforms may work in a large range of areas. They don’t have face-to-face communication with management, but receive assignments from platforms through APP. In addition, they may work in a place different from where the platform is located, as some platforms may cover wide geographic areas.

(6) Workers of both types are subject to work-related rules of platforms.

With the help of information technology and big data, platforms set up detailed rules to manage and evaluate workers. For example, Feng-niao Crowdsourcing has designed a credit evaluation system of delivery workers, connected with order receiving and grade of subsidies. The platform also set punishment rules for cancelling an order after taking it, exceeding delivery time limit and etc. Didi also set up 12-point assessment system for drivers. Once 12 points are deducted, the driver will be suspended for one month.

3. Work conditions of platform workers

As daily services don’t require high skills, people engaged are generally young migrant workers of relatively low education and without professional skills. Attracted by flexibility of the work in platforms and constrained by the employment pressure, a growing number of people choose to work for platforms and tend to work on a full-time basis, making the job the single source of income. Therefore, the issue of protecting their rights will be increasingly prominent.

High mobility: Since platforms are still in initial stage of development, merger, reorganization and close-down of platforms take place often, leading to unstable employment in the sector. In addition, platforms frequently change rules for payments, giving rise to lack of stable income anticipation, low job security. All these lead to a high mobility of workers in the sector.

Long working hours: Workers, especially full-time workers, tend to work long hours to complete more orders and thereby get more income. As revealed by our survey, the average daily working time of full-time takeaway delivery workers is 9.5 hours. Although takeaway delivery workers can take a rest during non-peak hours, but due to the lack of rest area, most of them are in a standby state, which blurs the boundary of work and rest. According to a survey,² above 70% of drivers interviewed were online for more than 10 hours and 40% of drivers interviewed were online for more than 12 hours.

Lack of stable income expectation: The average monthly net income of drivers in Beijing is around MB 4,000 after deducting car depreciation, maintenance and gasoline expenses; the average monthly income is RMB 5,494 for full-time takeaway delivery workers, RMB 2,686 for part-time workers (in 2015 the average income in Beijing is RMB 6,463). However, platforms often adjust the income calculation rules, making the income of workers instable.

Inadequate protection: In case of social insurance, although some platforms pay social insurance fees at a low level for directly-employed workers, most platforms workers don’t join social insurance schemes (as self-employed, they can join the pension scheme and medical insurance scheme, but not the work-related injury insurance scheme). In case of working conditions, they are liable to health problems because of the need for completing lots of orders during peak hours, working long hours, and working in extreme

2 Survey on Survival Status on Ride-hailing Drivers, Standard Ranking Institute, October 2016, <http://mt.sohu.com/20161018/n470609064.shtml>.

weathers. They are also exposed to the risk of traffic accidents due to the time limit for delivery and the need to answer phone calls from customers.

III. Challenges posed for protecting workers' rights

1. Platform work has raised debate over the definition of labour relations.

The relationship between platforms and 'collaborative' workers is still intensely debated. Currently, there is no legal definition of labour relationship in Labour Law and Labour Contract Law. In practice, arbitrators settle related cases in accordance with a document issued by the Ministry of Labour and Social Security in 2005. It is prescribed that labour relations between employing units and workers exist, if all the following conditions are met: (1) the employing unit and the worker are legally qualified; (2) work rules of the units are applied to the worker, the worker is subject to management of the unit and works under the arrangements of the unit for remuneration; (3) work provided by the worker constitutes a part of the businesses of the unit. However, such definition lags behind the reality. In recent years disputes over confirmation of labour relations were settled with different results. In China, labour laws and regulations only cover employees, meaning that protections on minimum wage, working time, rest and holidays and etc., prescribed by labour laws and regulations, are not applicable to workers other than employees. If 'collaborative' workers are not classified as employees, they are not entitled to protections under labour laws and regulations.

2. Platform work poses challenges to labour inspection.

The development of daily service platforms exacerbates the de-organisation of employing units. Contractors or companies joining in platforms are often micro- and small-sized businesses, or individuals. For the reasons of small-scale operation, short life cycle, small number but rapid flow of employees, as well as lack of professional human resources management, micro- and small enterprises are more liable to breach of labour regulations. Furthermore, micro- and small businesses, joining in daily service platforms, may spread in different locations, even without stable business venue. Workers of daily service platforms usually don't have fixed workplace and may change jobs frequently, which increases the difficulty for labour inspection. All these make it difficult for labour inspection to cover them.

3. Platform work poses challenges to unionisation of workers and collective negotiation.

As daily service platforms may don't offer conventional workplace, workers of the same platform may scatter in different places, rather than working side by side as workers in traditional workplace. These make it difficult for workers to unite and negotiate collectively with employers. In addition, platforms possess financial and technical advantages and become dominant in setting up rules. Workers of platforms have no way to express their own voice and have no choice but to accept the rules set up by platforms. However, the lack of democratic participation of worker increases the risk of disputes.

IV. Some considerations

To keep abreast with the development of platform work aiming at solving prominent problems: Daily service platforms are currently at the initial stage of development, and under the dual influences of their own development and regulatory policies, their operational models and labour models are in frequent changes. Hence, we should closely follow changes of the sector and give priority to solving prominent problems in protecting workers' rights, while exploring new approaches to protect workers' rights beyond the scope of traditional labour relations.

To take different approaches to platforms of different operational models: For service-provider platforms, inspection and law enforcement should be strengthened to protect workers' rights. In regard to information-provider platforms, platforms may be encouraged to take advocacy and supervision

responsibilities. As to resource-sharing platforms, innovative approaches should be explored to guarantee labour rights, such as promoting platform associations to set up bottom line of worker utilization by formulating businesses norms, including employment.

To adapt labour laws and regulations to new realities: The definition of labour relationship should be updated in light of changing environment and labour models. It is necessary to review labour standards and explore expanding the coverage of some labour standards beyond employees.

Industrial Relations Situation in India: A Report

Girish BALASUBRAMANIAN¹

Xavier University, Bhubaneswar

Manoranjan DHAL²

Indian Institute of Management, Kozhikode

Introduction

I. Industrial relations in India

II. The historical aspects of the labour policy

III. The current scenario of labour policies

IV. The future

Introduction

Labour forms an important part of any economic activity and since earliest times there has been some sort of competition between labour and capital for superiority. Systematic collectivization was a natural fall out of the struggle between the labour and capital. It was long believed that collectivization of workers followed the business cycle. However, geographical idiosyncrasies have been observed in such patterns of collectivization. For example, Africa has been plagued by serious issues like war, extreme poverty, hunger, AIDS epidemic; political turmoil, colonization and presence of largescale unaccounted informal sector (see Phelan, 2006; Visser, 2003). Unions in Asia have relatively less socio-economic influence in the policy level decisions in comparison to their European counterparts. Asia offers all possible combinations of factors like globalization, structural change in employment, decreasing share of public employment, increasing mobility of both capital and labour, problem of immigration and in general resistance to unions by employers (see Das, 2000; Kuruvilla, Das, Kwon, and Kwon, 2002; Lee, 2005). Europe too has its idiosyncrasies. Common explanations for trade union decline have been the decreasing share of public employment, work force diversity, shift towards the service sector, increasing mobility of labour degeneration of sectoral bargaining, the erosion of Ghent system and change in attitude towards unions (Addison, Bryson, Teixeira, and Pahnke, 2011; Blaschke, 2000; Bockerman and Uusitalo, 2006; Schnabel and Wagner, 2007). Governments and international agencies like the ILO intervene to ensure that minimum standards are maintained. Thus, labour policy is the result of the economic activity, the role played by the respective governments, the legal institutions, the collective bargaining institutions, the historical influences and the cultural influences.

Labour falls under the concurrent list of the seventh entry of the constitution of India. Both the central government and the respective state governments can enact adequate legislations for the welfare of the labour. As far as the labour policies are concerned, India which was following the logic of industrial peace and logic of income protection, leap frogged into the logic of competition (Frenkel and Kuruvilla, 2002) post the economic liberalization. In addition to this distinct shift in the logics, the participation of labour has also undergone manifold change. While India still is predominantly an agrarian country, enough policy level measures are being taken to focus on the development of other sectors. India is also a peculiar case where economy has shifted from agrarian to services and now focus is on the manufacturing contrary to the examples of the developed economies, details of which been dealt with in the section II of this report.

This report is divided into four broad sections. The section I gives a brief understanding Industrial

¹ Assistant Professor, Xavier School of HRM, Xavier University, Bhubaneswar

² Associate Professor, Indian Institute of Management, Kozhikode

Relations scenario in India, followed by some of the historical aspects related to the growth of industrial relations and labour policy (II). The section III highlights the contemporary praxis of the labour policy and the final section (IV) delves into the future aspects of the labour policy in India.

I. Industrial relations in India

Industrial relations in India is mostly tripartite in nature as government plays a vital role in labour administration apart from the workers, trade union and management. Though with the evolution of service sector, particularly the growth of IT industry, the nature of relationship is changing towards bipartite as this sector is not covered by union. The following section describes the changing role of actors of industrial relations.

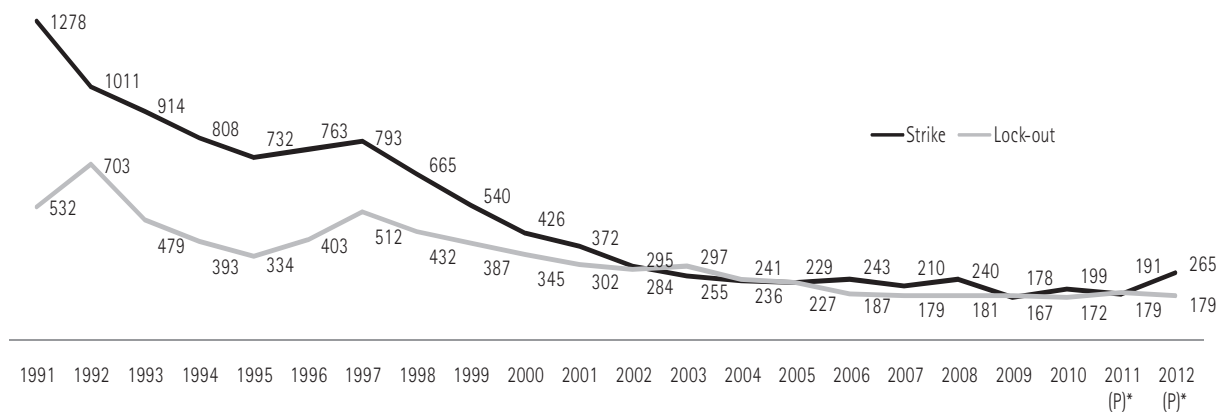
Trade Union

Trade unionism in India developed as a part of the broader nationalist movement and struggle for independence with active support from the political leaders. Millen (1968) predicts that if the trade unions are spawned or assisted by nationalist or other movements — as most unions in the underdeveloped countries have been — they will continue for many years to be associated, in some way or another, with a broad political front or movement, instead of building integrated organizations of their own. Despite the best effort by the colonial rulers, India experienced the impact of Industrial revolution. The first cotton mill was set up at Bombay (now Mumbai) in 1853 followed by the establishment of jute mill in Calcutta (now Kolkata) in 1855. Industrialization led to migration of the people from rural to urban areas. The maximization of production and availability of cheap labour unaware about their rights, combined with *laissez-faire* attitude of government led to exploitation of labour. Long working hours, unhygienic work condition, lack of health and safety measures, and overcrowding made the life of the workers deplorable both inside and outside the factory. Indian workers were required to work continuously, often for 18 hours from 4 AM to 10 PM. Workers united themselves against such exploitation at the Express Mills at Nagpur, which experienced the first organized strike in 1877. The workers demanded a complete day rest every Saturday, half an hour rest interval, working hour from 6:30 AM to sunset, payment of wages not later than 15th of the month and payment to injured workers till recovery. In a comprehensive review of the growth of industrial relations in India Bhattacharjee (2001) categorized the development into four phases. The first phase of post-independence era (1950 to mid-1960s) was the period of state-led industrialization with an impost-substitution strategy leading to the growth of large scale public sector and employment in the organized economy. The government guided and controlled the labour movement with a paternalistic labour relations system. The second phase (mid-1960s to 1979) is associated with the period of industrial stagnation, unequal terms of trade between agriculture and industry, impact of two oil price shocks, reduced employment and lowered labour productivity. The increasing number of inter union rivalry also led to the increase in the number of disputes (strikes and lockouts), the number of workers involved in these disputes, as well as the number of mandays lost due to these disputes, increased phenomenally between 1966 to 1974. The third phase (1980-1991) which experienced the balance of payment crisis and massive IMF loan leading to macroeconomic changes. Proliferation of independent unions shifted their goals from rights to interest. The fourth phase (1992-2000) which led to the economic reforms and structural adjustment helped in improving the employment across sectors. The consequence was also seen in terms of industrial relations reforms particularly leading to greater employment flexibility, a movement towards greater decentralization in bargaining (especially in the public sector enterprises) and lesser governmental intervention in the bargaining process, fewer strikes, and a possible halt to the cleavages within the union movement.

Kuruvilla and Erickson (2002) characterized Indian Industrial relation prior to 1991 (pre-liberalization period) as a regime of highly conflictual labour relations with increased number of strikes, intense inter-union rivalry, greater control of industrial conflict through a plethora of protective legislations. But the

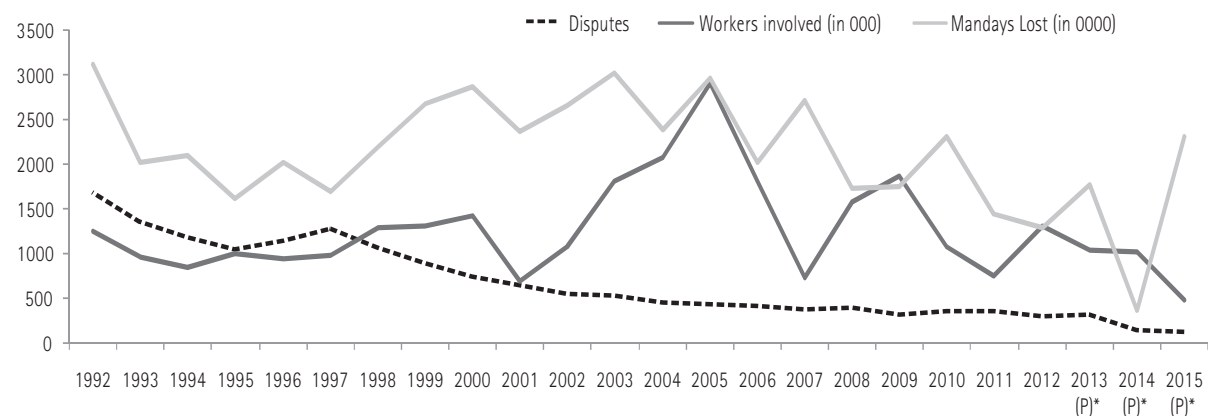
import substitution strategy coupled with the protectionism has resulted in growth of inefficient firms and lack of mechanism to choose sole bargaining agent had constrained the employer to negotiate cost control strategy and workforce reduction. The boon of liberalization also had the bane of shedding of excess labour in the form of voluntary separation schemes (VRS). The liberalization led to the development of government-business coalition compared to the previous government-labour coalition. Post liberalization period experienced a sharp decline in the number of strikes which reflects the fact that unions have shed their image of rivalry and have adopted the path of cooperation (Figure 1) whereas the increase in the number of lock-out indicates the growth of employer militancy. However, the overall disputes follows a declining trend (Figure 2) while the mandays lost and workers involved in the disputes continue to be fluctuating.

Recession in 2008 led to massive job loss among the industrial workers particularly in the tertiary sector. The government was forced to adopt a deregulated system post-liberalization. The recession era has led to a growth of non-standard or precarious employment, downsizing, the decline in trade union power and influence, inequity, deregulation and consequential work intensification. Simultaneously, the need for union was felt even in information technology (IT) industry particularly after the industry was hit by recession and mass downsizing. Majority of the IT professionals are not aware about their rights



Source: Compiled from Indiatats.com.

Figure 1. Trends of strikes and lock-out in India (*Provisional)



Source: Compiled from Indiatats.com.

Figure 2. Trends of disputes, mandays lost and workers involved (*Provisional)

and coverage under the law. A group of IT Enabled Services (ITES) professionals have come forward to form the first trade union in this sector — Union for ITES Professionals (UNITES). Headquartered in Bangalore, this new set-up has founder members drawn from HSBC, ABN AMRO India, Sitel, Wipro Spectramind, and Teledata Informatics working in Bangalore, Hyderabad, Delhi, Tiruvananthapuram, Kochi and Mumbai (The Hindu, Jan. 26, 2006).

Management

Management is said to possess control power (Masialmani, 1992), or ownership power (Finkelstein, 1992), position power (Fielder, 1967), or structural power (Finkelstein, 1992) like right to hire and fire. Management has become more powerful as trade unions have lost the track and pace of growth. The open market system has helped management to get better control over the workforce. Though the straightjacket legal system has not facilitated the free hire and fire of labour, yet management has adopted strategies like downsizing, subcontracting and outsourcing as the tools of restructuring in a liberalized era. Massive casualisation and appointment of more contract labour has not only increased insecurity among workers, but also pushed them away from trade unions and legal benefits. Downsizing the workforce has weakened the trade unions as they lost members, indirectly adding more power to management. Outsourcing the production process to subsidiary units has reduced large-scale mass production, and weakened the organizing capacity of workers. It has helped in the emergence of unionless small production units, and indirectly helped the management to have better control over the workforce. Management in such units is unable to face outside competition, leading to a tradeoff with trade unions. The situation has forced them to work hand in glove with the unions to run the business successfully. But in this process, trade unions have rather sacrificed their demands by accepting wage cuts. This also ensured discipline at the workplace by giving an upper hand to the management. Thus, management is in a better position and acting as the most powerful force in the present industrial relations scenario.

Union management relationship

In India, the nature of the relationship between trade union and management is rooted in adversarialism (Ramaswamy, 1999). Management has followed strategies like sub-contracting, voluntary retirement, and relocation of low-cost sites in continuance of this adversarialism, while labor resisted voluntary retirement, and demanded better retirement packages. It was hypothesized that a cooperative industrial relations climate would lead to better union-management relationship. But it is not always true as expected (Mahadevan, 2001). Even today, the employer's approach to a worker is that of a master to a servant (Mital, 2001). Employers in general are feudalistic, and organizational structures are stratified in nature (Venkata Ratnam, 2001).

Government

During the pre-independence era British government was taking care of the interest of the business while ignoring the labour rights. However, immediately after independence, the government leaving behind its policy of 'laissez faire' approach tried to protect the workers and their union through different legislation. The socialist philosophy of the Indian government led to the growth of the public sector undertakings. Government intervention in labour matters increased the dependence of the private sector on it while in the public sector actually dominated the industrial relations, granting little autonomy for enterprise management (Venkata Ratnam, 2001). However, the current industrial relations situation is mostly a byproduct of liberalisation and the actors approach to adjust to the new market condition which is different from the past. Government, which was playing a dominant role earlier, has sidelined itself, trying to facilitate bipartitism through modification of the legal system. However, the government could not provide a mechanism in the form of labour laws to make collective bargaining mandatory, and there was no method to choose a representative union with which management should bargain except few state laws facilitating the recognition. Taking advantage of the market situation and the apathetic attitude of the government, management has tried its best to bypass the union and streamline their function. Management

Table 1. Summary of role and status of actors in various eras of industrial relations

Actors	Pre-Independence Era	Early Independence Era	Pre-Liberalization Era	Post-Liberalization Era
Worker	Exhausted with exploitation, poor working conditions and long working hours.	Became protected with a pro-labour policy of the government.	Not rights conscious, docile and dependent on unions.	Emergence of knowledge worker at one hand and employment of massive casual and contract labour on the other, increased job insecurity.
Management	The most powerful and exploitative.	Burdened with restrictions of labour laws (chapter V-B of I.D. Act) and forced to adopt tripartism.	Preferred bipartite agreement and simultaneously tried to avoid unions.	Became powerful with free trade regime to get control over labour but lost control over business due to open market system.
Union	Though unionism was declared as criminal activity, got recognition with Trade Union Act-1926. Struggling to prove worth and was dependent on parental attitude of management.	Became powerful with support of government and legal system. Militant, politicized, and dependent on external leadership, and govt. agent.	Union rivalry, lack of mature leadership and professional growth. Leaders seeking personal favour from management.	Lost glory with decreasing membership, lack of support from government and the organizations, question of survival for unions.
Government	Laissez-faire approach towards both labour and management.	The controlling authority of Industrial Relations with state pluralism and promoting tripartism.	Shift of labour law and policy from center to state for sectional interest.	Succumbed to the forces of international trade and unable to continue its pro-labor stand.

takes care of individual needs through better HR policies and practices, and tries to keep workers away from unions. The government continues to try for a consensus between workers, and employers' representatives through the Indian Labour Conference. While workers were driven by the whims and compulsions of employers; governments were unable to deal with grave socio-economic consequences of falling employment levels; unions and workers became the victim of the new economic order (Sheth, 2001). The recent endeavors by the government to ease the process of compliance by proposing several labour codes and employer friendly measure such as increase in the overtime hours, allowing employment of contract labour, ease of hire and fire, relaxing the operations of small scale enterprise. But protection of workers' interest is yet to realize as the growth of informal and non-regular forms of employment which are outside the ambit of legal system poses a challenge to the government. A comparative perspective of the role of actors of industrial relations in different phases is summarized in Table 1.

II. The historical aspects of the labour policy

George Santyana has famously said, "Those who cannot remember the past are condemned to repeat it." This statement is a testimony of the importance of history. India has got a long and illustrious history with respect to the labour policy which includes the aspects of trade unionism, collective bargaining, and the liberalization. There is a complex interconnection between politics and trade unionism in India. India was faced with the challenge of choosing between free collective bargaining and state-controlled collective bargaining and India opted for the latter. As a nation state India was for socialism and the labour readily embraced it, however the unresolved core issue still remained in terms of the conflict between the needs and aspirations of the labour vis a vis that of India as a country. The problem with organized labour which seems to carry on till today is that it is too minuscule part of the total labour, and besides it is fragmented into a lot of unions; the traditional AITUC became fragmented into AITUC, INTUC, HMS and UTUC between 1947-49 (Ornati, 1957). Post-independence, India was faced with improving productivity and attaining self-sufficiency; against this back-drop strife would lead to impediments in achieving this goal.

Hence the emphasis on state-controlled bargaining and avoiding strikes or lock outs to the maximum extent possible. This system had limitations in terms of staggering delays and the opportunistic behaviour of aggrieved parties (Ornati, 1957). Keeping in mind the various short comings and conditions of the labour the government did constitute two national labour commissions. This report would be focusing on the relatively more significant recommendations of the report of the two national commissions of labour and then the liberalization and its effects. The first national labour commission set up in 1966 under the chairmanship of Justice Gajendragadkar, submitted their report in 1969. The commission noted the distinct shift away from agrarian employment to other sectors and this shift to urbanization had thrown up challenges of providing adequate housing, transport, civic amenities and proper distribution of the gains/resources. They also noted the existence of labour legislations sans adequate enforcement for which certain recommendations such as appointment of welfare officers was made. Among other things, they also noted the problem of employment for 'sons of soil' and provision of employment to the individuals whose lands were acquired for development purposes. Almost on similar lines the second national commission on labour was set up under Ravindra Varma as the chairman in 1999, which submitted their report in 2002. Among other things they examined the call for rationalization of labour legislations, provisions for flexibility, to come up with a unified legislation for minimum protection of the workers working in unorganized sector. One of the noteworthy recommendation that they made was to strengthen the collective bargaining institution of India by making provisions for trade union recognition. It is to be noted that till today there is no central legislation which talks about union recognition exceptions being few states namely Maharashtra, Bihar, West Bengal and Gujarat. Liberalization opened the flood gates of globalization for the labour. The governments resorted to soft methods of labour reforms to keep heed to the clamour of labour reforms by disinvesting instead of privatizing from the public sector undertakings, reducing the interest rates of provident funds, liberalizing the labour inspection regime, special concessions to the units in the special economic zones (Sundar, 2010). In addition to the opposition of India to the ILO convention on the right to strike, the philosophical shift in the mindset of judiciary which was much more protective of the labour in the preliberalization era delivered some significant judgements post liberalization related to the contract labour, the right to strike which has hampered the interests of the workers and trade unions in general. The Supreme Court of India has reaffirmed the independence of the executive in case of privatization, been critical of the employees right to protest/strike, imposed restraints on public protests (referred to as bandhs), endorsed the usage of the controversial Essential Services Maintenance Act and also reversing earlier judgements on making the contract labour permanent (Sundar, 2010; Dhal and Venkat Ratnam, 2017).

III. The current scenario of labour policies

Some interesting facts about India — as of 2016, work related migration of an estimated 9 million people has taken place (Economic survey, 2016). It is no secret that India is the second most populated country of the world at a little over 1.2 billion at the same time it is also one of the youngest countries in the world. To elaborate on this, approximately half of the population is under the age of 26, by 2025 an estimated 20% of working age population would be living in India (Thompson Reuters, 2016). Some more interesting statistics are presented in Table 2 in the form of distribution of male and female workers above age of 15 as per National Industry Classification of 2008 per 1000 workers.

It is to be noted that agriculture, manufacturing and education related industries are dominated by women as compared to their male counterparts. The overall labour force participation rate stands at 52.5% marginally improved from 50.9%, as per the latest employment survey. Unemployment situation has deteriorated slightly at 4.9% as of 2014-15 as compared to the earlier 4.7% and 3.8% in the previous employment surveys (source Ministry of labour and employment, GOI). In spite of all of these efforts and statistics, the collectivization or presence of the trade unions is chequered. As of 2012, as per various

Table 2. Distribution of per thousand workers (both male and female) above the age of 15 in the major industries

NIC Classification	Description	Female	Male
A	Agriculture, Forestry and Fishing	604	572
B	Mining and Quarrying	3	5
C	Manufacturing	106	76
D	Electricity, Gas, Steam and Air Conditioning Supply	1	3
E	Water Supply; Sewerage, Waste, Management and Remediation Activities	2	2
F	Construction	88	129
G	Wholesale and Retail Trade; Repair of Motor Vehicles and Motorcycles	40	70
H	Transportation and Storage	4	46
I	Accommodation and Food Service Activities	10	11
J	Information and Communication	6	3
K	Financial and Insurance Activities	6	4
L	Real Estate Activities	0	1
M	Professional, Scientific and Technical Activities	4	3
N	Administrative and Support Service Activities	10	12
O	Public Administration and Defence; Compulsory Social Security	6	11
P	Education	62	27
Q	Human Health and Social Work Activities	18	6
R	Arts, Entertainment and Recreation	1	2
S	Other Service Activities	12	13
T	Activities of Households as Employers; Undifferentiated Goods and Services Producing Activities of Households For Own Use	18	3
U	Activities of Extraterritorial Organizations and Bodies	0	0

government estimates there are about 16,000 registered trade unions in India with a membership of close to 9 million (Ministry of labour and employment, ON678). Historically there have been multiplicities of labour legislations due to the concurrent nature of the subject. Another important historical influence is that unlike in the West or the developed economies, India is characterized by multiplicity of trade unions. The five major trade union federations in India are the Indian National Trade Union Congress (INTUC), the All India Trade Union Congress (AITUC), the Hind Mazdoor Sabha (HMS), Centre of Indian Trade Unions (CITU) and the Bharatiya Mazdoor Sangh (BMS). There are a host of other small and big trade unions. Table 3 presents the membership figures of the major trade union federations and the latest claims. Though we don't have the exact figures on sectoral distribution of unions, per Das (2008) and Sheth (1993) higher levels of unionization were observed among blue collared workers in manufacturing, mining, and railways. While the major national federations have a large presence in manufacturing and PSUs, there was hardly any effort put by them in organizing the workers in the emerging sectors such as Information

Table 3. Membership of major trade union federations

Trade Union Federation	2002 (in million)	2013 (in million)
INTUC	3.954	33.3
BMS	6.216	17.1
AITUC	3.442	14.2
CITU	2.678	5.7
HMS	3.338	9.1

Source: 2002 figures are from Das 2008 and 2013 figures are from Menon 2013.

Technology and Information Technology enabled Services (IT and ITeS) with few exceptions. Apart from these regional and national federations, there is a large-scale presence of the enterprise trade unions.

Official estimates of industrial disputes (both strikes and lockouts) have shown a decreasing trend with the estimate being as low as 46 for the year 2016 which was 154 and 343 in the years 2015 and 2014 respectively (Ministry of labour, 14940), which really raises doubts concerns over the claims of over protective labour legislations of India. The current situation can be summed as increased usage of contract labour, rapid and manifold outsourcing, job freeze in the public sector and the private sector, the reform measures by stealth where the central government is passing on the onus of labour reforms on the respective state governments, illegal closures, prolonged lock outs, reduction in workforce by giving out golden handshakes or voluntary retirement and rapid automation are some of the current trends as far as the labour are concerned in India (Bardhan, 2002; Sundar, 2008, 2010). It is pertinent to mention that the share of contract labour in the employment which was about 14% in 1994-95, was at 26% in 2005, is also showing an increasing trend indicating a distinct shift in informal aspects of employment rather than the formal employments.

From the view point of the social security, legislations for payment of wages, minimum wages, payment of gratuity, payment of bonus have been enacted in India. Owing to the demonetization, the current government has also passed an ordinance to ensure the payment of wages through electronic means. This step reportedly would ensure compliance and tracking the flouting of some of the existing legislations. As far as the welfare of the workers is concerned, the current government has ensured that the individual worker is protected from some of the vagaries irrespective of whether the worker belongs to the organized sector or the unorganized sector. In addition to the employees' state insurance corporation and the employees' provident fund for the former, for the latter the government has come up with the 'Rashtriya Swasthya Bima Yojna' under which an estimated 30 million families have benefitted. Taking cognizance of the increasing number of women workers as a part of the workforce, the current government has also amended the Maternity Benefit Legislation under which the duration of leave has been increased from 12 weeks to 26 weeks, which has been widely appreciated by all the relevant stakeholders.

IV. The future

The recent economic survey talked about a revolutionary concept of a Universal Basic Income. This step is mainly as a redistribution of the wealth. Close to a 1,000 state-sponsored schemes are clearly not effective in poverty alleviation. The UBI has three components namely universality, unconditionality and agency. The idea of UBI is premised on guaranteed minimum income and equated with one of the basic rights for an individual. UBI is aimed at achieving the social justice as well as the poverty alleviation. In spite of some of the arguments against such a concept like disincentivizing work, independence of work

and income and arguments of meritocracy, time is indeed ripe to think and deliberate on such a concept. The complexities in navigating the legal tangle of labour laws of India is an open secret, which is also demonstrated by the 146th rank that India has achieved in the doing business report of world bank. On its part while the government has largely moved away from an inspection regime to a regime of self-certification for many issues, the government also has an ambitious project of codifying existing labour legislations into four broad codes to reduce the complexities. To leverage the demographic dividend, the government is concerned with creating adequate job opportunities. Some of the noteworthy efforts are the “Make In India” campaign, under which many multinational companies such as Apple are being encouraged to set up their facilities in India. In addition the current government is also turning to the entrepreneurial route in order to stimulate the creation of job opportunities under the ‘Stand up India, Start up India’ campaign. The economic survey of 2016-17 also points out the potential of sectors such as the garments and the leather which are labour intensive and have a potential to create huge jobs.

Traditionally, industrial relations were the concern of three principal actors: workers and their unions, managers/employers, and the government. Post-liberalization, consumers and the community have begun to assert themselves and play a significant role. When the rights of consumers and the community are affected, the rights of workers/unions and managers/employers are relegated. The judiciary is also guided by the prioritization of larger public good rather than the narrow self-interest of a minority. Workers and unions, in particular, are asked to assert their rights without impinging on the rights of others, particularly the consumers and the community. Consumer courts have also affirmed the supremacy of consumer rights over the labour rights. Trade unions resorting to industrial action, such as strikes, and bandhs, which disrupt public services are asked to compensate for the loss. Telecom unions in Orissa and Mathadi workers in Maharashtra were asked to pay for the damage for disrupting the public utility services. The government is also in the process of simplifying the labour laws and trying to make it employer friendly. The government has already proposed bills to merge 44 laws into four codes for ensuring ease of doing business in India. The labour code on Industrial Relations Bill 2015 propose to integrate three laws-Trade Unions Act, 1926; Industrial Employment (Standing Orders) Act, 1946; and Industrial Disputes Act, 1947 into a single Labour Code. The employers with up to 300 workmen won't be required to take the permission from the government for retrenchment, lay-off and closure. The union needs to have a minimum support of 30% of the workers for its creation. The labour code on wages would be an amalgamation of the Minimum Wages Act, 1948, the Payment of Wages Act, 1936, the Payment of Bonus Act, 1965 and the Equal Remuneration Act, 1976. The other two codes are on social security and welfare, and safety and working conditions. These reforms will support the much-demanded hire and fire policy, but government must ensure the reform in the social security on a priority before implementation of such changes.

References

- Addison, J. T., Bryson, A., Teixeira, P., and Pahnke, A. (2011). “Slip Sliding Away: Further Union Decline in Germany and Britain.” *Scottish Journal of political economy*, 58(4), 490-518.
- Bardhan, P. (2002). “The Political Economy of Reforms in India.” In R. Mohan (Ed.), *Facets of Indian Economy*. New Delhi: Oxford University Press.
- Bhattacharjee, D. (2001). “The evolution of Indian industrial relations: A comparative perspective.” *Industrial Relations Journal*, 32(3), 244-263.
- Blaschke, S. (2000). “Union Density and European Integration: Diverging Convergence.” *European Journal of Industrial Relations*, 6(2), 217-236.
- Bockerman, P., and Uusitalo, R. (2006). “Erosion of the Ghent System and Union Membership Decline: Lessons from Finland.” *British Journal of Industrial Relations*, 44(2), 283-303.
- Das, S. (2000). *A Note on Trade Union Density in India*. Department of Collective Bargaining. Cornell University.
- Fiedler, F. E. (1967). *A Theory of Leadership Effectiveness*. New York: McGraw-Hill.
- Finkelstein, S. (1992). “Power in top management teams: Dimensions, measurement and validation.” *The Academy of Management Journal*, 35.
- Frenkel, S., and Kuruvilla, S. (2002). “Logics of Action, Globalization and Changing Employment Relations in China, India,

- Malaysia, and the Philippines.” *Industrial and Labour Relations Review*, 55(3), 387-412.
- Kuruvilla, S., Das, S., Kwon, H., and Kwon, S. (2002). Trade Union Growth and Decline.
- Kuruvilla, S., and Erickson, C. L. (2002). *Change and transformation in Asian industrial relations*.
- Lee, C. S. (2005). “International Migration, Deindustrialization and Union Decline in 16 Affluent OECD Countries, 1962-1997.” *Social Forces*, 84(1), 71-88.
- Mahadevan, H. (2001). “The role of trade unions.” *Indian Journal of Industrial Relations*, 37, 160-175.
- Masilamani, S. (1992). *Power game in industrial relations: A study of a south Indian organisations*. Center for Management Development, Modinagar (Mimeo).
- Mital, R. A. (2001). “Role of trade unions: Some random thoughts.” *Indian Journal of Industrial Relations*, 37, 176-180.
- Millen, B. H. (1968). “Report on Trade Unions in India: Examining the Course of Political Unionism in a Developing Country.” *Monthly Labour Review*, 13-17.
- Ornati, O. A. (1957). “Problems of Indian Trade Unionism.” *Annals of American Academy of Political and Social Science*, 310, 151-161.
- Phelan, C. (2006). “The Future of Organized Labour.” In C. Phelan (Ed.), *The Future of Organized Labour: Global Perspective* (pp. 11-36). Bern: Peter Lang.
- Ramaswamy, E. A. (1999). “Changing economic structure and future of trade unions.” *The Indian Journal of Labour Economics*, 42, 785-791.
- Schnabel, C., and Wagner, J. (2007). “The Persistent Decline in Unionization in Western and Eastern Germany, 1980-2004: What Can We Learn from Decomposition Analysis.” *Industrielle Beziehungen*, 14(2), 118-132.
- Sheth, N. R. (2001). “Trade union in word and deed.” *Indian Journal of Industrial Relations*, 37, 280-284.
- Sundar, S. (2008). *Impact of Labour Regulation on Growth, Investment and Employment: A study of Maharashtra India*. New Delhi: Bookwell.
- Sundar, S. (2010). “Emerging Trends in Employment Relations in India.” *Indian Journal of Industrial Relations*, 45(4), 585-595.
- Venkata Ratnam, C. S. (2001). *Globalization and labour-management relations: Dynamics of change*. New Delhi: Response Books.
- Dhal, M. and Venkat Ratnam, C. S (2017). *Industrial Relations*. New Delhi: Oxford University Press.
- Visser, J. (2003). “Unions and unionism around the world.” In J. T. Addison and C. Schnabel (Eds.), *The International Handbook of Trade Unions* (pp. 366-413). Northampton Massachusetts: Edward Elgar Publishing Inc.

The Changes and Development of Collective Bargaining in Taiwan

Yueh-Hung HOU*

National Taipei University

- I. Introduction
- II. The changes in the norm of collective bargaining
- III. Collective bargaining negotiation obligations and good faith bargaining
- IV. The characteristics of the new regulations
- V. Conclusion

I. Introduction

It has been almost five years since Taiwan referred to the legislative examples of Japan and United States to establish the arbitration mechanism for unfair labor practices in May 2011. This arbitration mechanism, which protects labor's right to organize or participate in labor union activities, the right to do collective bargaining with their employer and the right to apply for arbitration of unfair labor practices, plays a crucial role in the collective labor-management relations.

The regulations correlated with the arbitration mechanism are: In Article 35 of Labor Union Act, it sheds lights on the unfair labor practices which may hamper the development of labor unions; In Article 6, Paragraph 1 of Collective Agreement Act, it expresses: "Both the labor and the management shall proceed in good faith when bargaining for a collective agreement; any party without justifiable reasons cannot reject the collective bargaining proposed by the other party." In order to deal with unfair labor practices handle unfair labor practices rapidly and to protect the infringed labor rights, the government amended the Act for Settlement of Labor-Management Disputes, added a new chapter — Decision, which is from Article 39 to 52, to regulate the decision-making system in labor-management dispute. The purpose of the newly amended law, which is identical to the illustration in its draft, is to protect the collective bargaining right and the right to organize or attend labor union, rapidly eliminate unfair labor practice and return labor-management relations to normal. To achieve this purpose, the authority concerned will organize a Board for Decision on the Unfair Labor Practices, recruiting experts and scholars who are familiar with labor-management relations as committee members, to judge and to remedy unfair labor practices.

The biggest change in the collective labor-management relations after the establishment of arbitration mechanism of unfair labor practices is the introduction of "good faith bargaining." According to Article 6, Paragraph 1 in Collective Agreement Act, it is stipulated that both the labor and the management has the duty to respond to the bargaining request from another party, and it shall proceed in good faith. Also, according to Article 32, Paragraph 1 of the same Act "Any party in violation of Paragraph 1 to Article 6 of the Act, after it is decided through related procedures contained in the Settlement of Labor-Management Dispute Act, it shall be punished by an administrative fine of not less than N.T.\$100,000 but not exceeding N.T.\$500,000." And in Article 51, Paragraph 1 of Act for Settlement of Labor-Management Disputes, it regulates that the punishment shall include ordering the parties to take or not to take certain action. Thus, in Article 32, Paragraph 2 of Collective Agreement Act, it further regulates that "any party that has not undertaken any action or inaction within the period as prescribed in the decision rendered in accordance with preceding paragraph shall be punished again by an administrative fine of not less than N.T.\$100,000

* Professor, National Taipei University; PhD., Hitotsubashi University, Japan.

but not exceeding N.T.\$500,000, and may also order to correct within a given period; if the party fails to take corrective action within a given period, the fine may be imposed consecutively.” In the following paragraphs, we are going to illustrate the changes in Taiwan’s labor-management collective bargaining, and the meaning of it.

II. The changes in the norm of collective bargaining

Collective bargaining agreements derive from the motivation to maintain and ameliorate current labor conditions, as well as the purpose of assuring and elevating the social status of labor. Theoretically speaking, collective bargaining agreements come from the fact that labor usually has the lower hands facing dispute with employers individually. Through the power of unity, labor has more chances to bargain with their employers. Collective bargaining has existed in many countries for a long while. However, due to the differences in the influence of labor unions as well as the labor-management relations, the design of the agreements from every country differs. We can bisect the current collective bargaining agreements into the *laissez-faire* style and the *assistance* style.¹ The *laissez-faire* agreements mode, which Germany adopts, protects labor’s right to organize or participate in labor unions and the right to dispute with employers, giving special efficacy to collective bargaining agreements. The agreements only regulate things within the limitations of dispute settlement during the collective bargaining. The *assistance* agreements mode, which Japan and the United States adopt, is an obligation levies on employer that urges them to bargain collectively with employees.

Taiwan’s Collective Agreement Act, which was enacted in 1930, focuses on the restrictions (chapter 2), the effects (chapter 3) and the duration (chapter 4) of the collective agreements. The only regulation related to collective bargaining is in Article 4 of Collective Agreement Act, the rest of the relative regulations are in Notice of the Conclusion of Collective Agreement. This is because the Taiwanese governments in early times presumed that the working conditions are collectively formed by labor-management autonomy. Therefore, we can say that Taiwanese government adopted the *laissez-faire* agreements mode back in the time.² And because of that, the method and the necessity of conducting a collective bargaining depend on the interplay between labor union and employer. However, due to many restrictions on labor unions and many requirements for executing labor’s right to strike and take collective action, labor unions could not form and grow freely. The condition of collective bargaining and the little amount of concluded agreements was therefore being criticized for long.

Due to the malfunctions of the previous act, the new labor acts (Collective Agreement Act, Labor Union Act, and Act for Settlement of Labor-Management Disputes) amended the previous law substantially. Mainly targeted on the formation of labor unions, collective bargaining and the dispute generated from the uneven labor-management relations, the new laws also introduced the unfair labor practices, which has taken effects in Japan and United States for years. To carry out the collective bargaining protections, the new Article 6, Paragraph of Collective Agreement Act stipulates that “both the labor and the management shall proceed in good faith when bargaining for a collective agreement; any party without justifiable reasons cannot reject the collective bargaining proposed by the other party.”

III. Collective bargaining negotiation obligations and good faith bargaining

The negotiation obligations that the new Article 6 of Collective Agreement Act stipulates have had many criticisms in the past. Professor Tong-Shuan Yang criticizes that the previous law has the inclination to infringe the right to organize or participate in labor unions from his “collective bargaining autonomy” point of view. He also points out “The government involves too much and violates the administrative

1 Kazuo Sugeno, *Labor Law* 832-835 (2016) ; Seigo Mori, *Labor Law: Introduction and Relations Law* 278 (2000).

2 Yue-Qin Huang, *New Reviews of the Labor Law* 91-92 (2012).

neutrality when applying administrative sanctions to carry out the negotiation requisition right.”³ Professor Ling-Hwei Kuo also points out “Forcing one party to proceed with the negotiation seems to intervene too much into private autonomy, however, it is the choice of last resort to establish a collective bargaining mechanism under the existing laws.”⁴ These opinions mainly come from the notion of *laissez-faire* agreements mode. But if we view it from assistance agreements mode’s side, in fact, it also makes sense. Article 6 of Collective Agreement Act’s main purpose is to assist labor and management to carry out negotiation, without interfering with the content of the negotiation.

According to Article 6, Paragraph 1 of Collective Agreement Act, without justifiable reasons, both the labor and the management cannot reject the request of collective bargaining proposed by the other party. That is to say, both labor and management have the duty to proceed with collective bargaining, and have the remedies from the Board for Decision on the Unfair Labor Practices as an additional protection. The purpose of levying this obligation on both parties is as what in the legislation reason of Article 32 of the same Act mentions “Employer groups do not want to negotiate with labor unions, and this is the key factor which results in the poor performance in promoting collective bargaining system in the past. Considering the fact that domestic labor unions still cannot rely on its own power to ensure the right of negotiation, on the basis of good faith bargaining, it stipulates clearly in Paragraph 1 that both the labor and the management cannot reject the requisition of collective bargaining proposed by another party without justifiable reasons. Any violation identified by Act for Settlement of Labor-Management Disputes, is punishable by fines.” This part of the regulations is mainly referred to the regulations of United States, Japan and Korea.

Under this condition, this kind of protection to collective bargaining right should be defined as an amendment on the way that labor union and employers conduct collective bargaining freely (The *laissez-faire* agreements mode).⁵ Furthermore, this obligation doesn’t mean that both the labor and the management have to fully accept the requisition from another party or to fully concede. Take the employer’s side as an example; the willingness to accept the labor union’s request and the degree of concession the employer is giving away should be determined by the employer itself by the result of negotiation. Although the negotiation might not reach a consensus, we could not deem employer as a violator to the obligation of collective bargaining base on this result.

Moreover, the obligation of collective bargaining is not only the response to the requisition of collective bargaining; it also encapsulates the obligation to negotiate in good faith. Which is the “Good Faith Bargaining.” Article 6, Paragraph 1 of Collective Agreement Act states that “both the labor and the management shall proceed in good faith when bargaining for a collective agreement.” This is the protection of collective bargaining right. The actual meaning of collective bargaining only makes sense when labor and management carry out the collective bargaining with sincerity and honesty. If the negotiation is conducted without honesty, the guarantee of collective bargaining right is in vain.

Therefore, under the current situation that labor unions are still fostering, and the fact that the condition of collective bargaining and the number of concluded agreements has been criticized for long, we expect the amendment of Article 6 of Collective Agreement Act to protect collective bargaining right and to improve the function and the harmony of labor-management relations in Taiwan.

IV. The characteristics of the new regulations

As described above, the making of the new Article 6 of Collective Agreement Act has referred to

3 Tong-Shuan Yang, *Collective Labor Act: Theory and Practices* 143-144, 195 (2012).

4 Ling-Hwei Kuo, *Collective Agreement and Collective Bargaining*, in Taiwan Law Society (Ed.), *New Lessons in Taiwan Law* (Vol. 4) 98-99 (2006).

5 There are the same discussions in Japan. See Tetsunari Doko, *Good Faith and Fairness in Labor-Management Relations Act* 89-90 (2006).

Japanese and American legislations. Although the references are from Japan and the States, it does carry some characteristics that feature in Taiwan's laws. First of all, on the collective agreement obligations that protected against unfair labor practices, unlike Japan's way of levying this duty only on the management, Taiwan levies this duty on both the labor and the management, the same as the way that United States adopts. The United States of America enacted the National Labor Relations Act of 1935 (NLRA, also known as Wagner Act) in order to define unfair labor practices. Under the assurance of labor's right of organizing and participating in labor union activities, the Act prohibits any unfair labor action taken from employers. The States also established National Labor Relations Board (NLRB) to handle unfair labor practices. The system was amended in 1947 and 1959. Aside from prohibiting employers from taking unfair labor practices, it also added some regulations, which prohibits labor unions from taking unfair labor practices. After the Second World War, due to the effect of NLRA, Japan prohibited employers from any kind of infringement to the labor and labor union by the legislation of Article 7 of Labor Union Act in Japan. The infringement actions include disadvantage treatments, yellow-dog contract, the rejection of collective bargaining and the intervention of labor union's autonomy. These actions above are the unfair labor practices prohibited by law. Japan also regulated that the authority concerned for the remedies of unfair labor practices is the Council of Labor Affairs in Article 27 of the same Act.

Secondly, the negotiation parties that Article 6 of Collective Agreement Act protects, only limits the side that is qualified to do the collective bargaining (in Paragraph 2 and 3 of the Act). It is different to the system United States and Japan adopt. United States adopts the Exclusive Representative System for the collective bargaining. In NLRA Sec.9 (a), "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions of employment." This is the base of "Exclusive Representative System." Under this system, the labor union selected to be the representative has the limit of authority to represent all the employees in the unit, including the employees who do not support the labor union selected.⁶ Since its enactment in 1935, it has become an important symbol of collective bargaining in the United States of America. The labor union, which is selected to be the exclusive representative, carries out collective bargaining with employers. It also develops into the fact that the representative has not only the limit of authority to collective bargaining; it also has the obligation of justice.⁷

Article 28 of the Constitution of Japan regulates "The right of workers to organize and to bargain and act collectively is guaranteed." Under this frame, the current legal system adopts the Plural Unionism. Therefore, there will be many labor unions coexisting in one enterprise. However, although some labor unions have lesser people, their rights are still under the protection of Article 28 of the Constitution and the arbitration mechanism of unfair labor practices. Hence, when they have more than one labor union existing in an enterprise, employer must not only do collective bargaining with each of them, but also respect their right to organize and participate in labor unions. Employer cannot treat them differently by the size or the orientation of different labor unions.⁸

According to the new Article 9 of Labor Union Act, the number of corporate union in an organization shall be no more than one. However, according to the regulations in Article 6, Paragraph 1 of Labor Union Act, corporate union is a labor union organized by employees of the same factory or workplace, of the same business entity, of enterprises with controlling and subordinate relationship between each other in accordance with the Company Act, or of a financial holding company and its subsidiaries in accordance

6 See Hiroya Nakakubo, *American Labor Law* 37-38, 102-121 (2010).

7 See Mich C. Harper & Samuel Estreicher, *Labor Law: Cases, Materials, and Problems* 1057-1102 (2011).

8 See Kazuo Sugeno, *supra* note 1, at 840-843,857-858; Seigo Mori, *supra* note 1, at 282.

with the Financial Holding Company Act. So there might be more than two labor unions coexisting in one enterprise in Taiwan as well. Moreover, the employees hired by the enterprise might not participate in the corporate union, but the industrial union or the professional union. Thus, employers might face the condition that corporate union, industrial union and professional union all demand to have a collective bargaining simultaneously. Hence, the authority concerned amended Article 6, Paragraph 3 of Collective Agreement Act to standardize the labor side with bargaining qualification. It also amended Paragraph 4 of the same Article to regulate the legal way of doing collective bargaining with more than one union. "When more than two labor unions on the labor side, or more than two employers or employer organizations on the management side, propose to bargain, the other party may request them to select bargaining representatives; if they cannot select bargaining representatives, the representatives can be selected in accordance with its percentage in total membership."

V. Conclusion

According to the developments mentioned above, we could understand that Taiwan's collective bargaining system has had a drastic change after 2011. The change of the system was after the Global Financial Crisis in 2008, but it had very little to do with the fluctuant world economy. The main reason of the change was the fact that labor unions had a weak actual power for long, the achievement of collective bargaining are little; which inspired the authority concerned to start to amend the Acts. According to the statistics from the Ministry of Labor, after the amendment of the Acts, there are 30 application cases of unfair labor practices in 2011, 72 in 2012, 62 in 2013, 53 in 2014, and 61 in 2015.⁹ Also, according to the statistics from the Board for Decision on the Unfair Labor Practices, until January 2017, 22 cases out of all the decisions mentioned above are involved with Article 6, Paragraph 1 of Collective Agreement Act.¹⁰ Moreover, according to the statistics from the Ministry of Labor, the number of the conclusion of collective agreement has risen from 43 conclusions in 2010 to 664 conclusions in 2015.¹¹ From these statistics, we could perceive that unfair labor practice disputes in collective bargaining are growing as well as the number of the conclusion of collective agreements. Thus, we could say that the reformation has its preliminary effect already. However, there still exist many challenges and problems that are in desperate need of discussion. This is a part that we should keep on observing and taking care of in the future.

9 The Annual Statistic can be found in the Introduction of Unfair Labor Practices on the website of Ministry of Labor, *available at* <http://www.mol.gov.tw/topic/3073/19167/19185/> (last visited Jan. 15, 2017).

10 The Statistic can be found in the Introduction of Unfair Labor Practices on the website of Ministry of Labor, *available at* <http://uflb.mol.gov.tw/UFLBWeb/wfCaseData.aspx> (last visited Jan. 15, 2017).

11 The Labor Statistic Yearbook (2015) can be found on the website of Ministry of Labor, *available at* <http://statdb.mol.gov.tw/html/year/year04/33070.htm> (last visited Jan. 15, 2017).

Atypical Work Organizations as a Social Phenomenon Occurring throughout the Contemporary Labor World: Current Status of Research and Future Issues

Qi ZHONG

The Japan Institute for Labour Policy and Training

- I. Current status of relevant research in the US and Europe
- II. Current status and significance of relevant research in Japan
- III. Future challenges

I. Current status of relevant research in the US and Europe

Recently, amid frequent organizational restructuring, outsourcing, and offshoring, and with “improving core competency” as a key corporate strategy, various changes have been taking place in traditional labor relations. Although “labor relations” generally refers to contractual relationships based on agreements between “workers” (employees of an enterprise) and employers,¹ some employers have been introducing third parties between workers and employers to match labor demand with supply, and to transfer all or part of employer liability to a third party. Also, as new forms of employment such as mobile work and crowdsourcing emerge with the introduction of new information and communication technology (ICT), workers in these forms of employment are given considerable discretion regarding their work patterns, without restrictions on time and place. Meanwhile, in order to evade employer liability, some persons who finally receive the result of labor shift their liability to a third party by accepting only result of labor made by subcontractors, with the logic that a party that does not have a direct contract with a worker cannot be an employer.

One problematic issue is that of how to cope with “atypical work organizations,” which have a significant influence on labor conditions and the labor market, and have arisen due to enterprises’ shifts in strategy and the introduction of ICT. Another issue is that in traditional two-way relationships between workers and employers, where workers earn wages for their labor and employers pay these wages, conventional concepts of labor law have had the main purpose of protecting economically disadvantaged workers, but it is unclear how applicable they are to the diverse new forms of employment that have emerged. These problems have increasingly become a concern for labor law specialists around the world.

David Weil, an expert in labor markets, labor-management relationships, and structural reform of supply chains, with experience as Director of the Wage & Hour Administration at the Bureau of Labor in the Obama Administration, called this social phenomenon, with complex and varied contracts and worker-organization relationships coexisting in the same workplace “the Fissured Workplace.”² He analyzed the origins of the fissured workplace phenomenon, and the advantages it may bring to employers, from social, judicial, and economic perspectives in his book *The Fissured Workplace*, which drew widespread attention in the field of labor law.³ Although David Weil coined the term Fissured Workplace for the

1 Takashi Araki, *Labor and Employment Law, 3rd Edition*, p. 14, Tokyo: Yuhikaku, 2016.

2 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Cambridge, Massachusetts: Harvard University Press, 2014.

3 For more on the Japanese workplace fissurization phenomena, see Qi Zhong, “The Fissured Workplace in Japan: A Legal Anatomy,” *Comparative Labor Law & Policy Journal*, Vol. 37, No. 1, pp.181-208, 2015; Qi Zhong, “Fissurization in Japan: Overview and Analysis from a Legal Perspective,” JILPT Report No.15, 2016, pp.29-45.

aforementioned social phenomenon, in terms of relevant research Europe has been outpacing the United States. In Europe, the aforementioned fissurization is referred to as “fragmentation” and cited as one of the intrinsic features of “Industry 4.0.”⁴ In the context of these social phenomena, with various new forms of employment emerging in Europe, the organization Eurofound launched a new investigation project in its Annual Work Programme 2013, in order to verify the nature of these forms of employment and how they are implemented, and clarify their influence on labor markets and conditions as well as possibilities for job creation. In this project, European countries collected related information and conducted surveys and interviews with experts for two years, with the research results summarized in *New Forms of Employment* (Eurofound, 2015) (referred to below as Eurofound (2015)). According to Eurofound (2015), the following nine forms of employment have emerged or been recognized as new forms of employment due to their increased practical importance in Europe since 2000.

1. Employee sharing

An individual worker is jointly hired by a group of employers to meet the HR needs of various companies, resulting in permanent full-time employment for the worker.

2. Job sharing

An employer hires two or more workers to jointly fill a specific job, combining two or more part-time jobs into a full-time position.

3. Interim management

Highly skilled experts are hired temporarily for a specific project or to solve a specific problem, thereby integrating external management capacities in the work organization.

4. Casual work

An employer is not obliged to provide work regularly to the employee, but has the flexibility of calling them in on demand.

5. ICT-based mobile work

Workers can do their jobs from any place at any time, supported by modern technologies.

6. Voucher-based work

The employment relationship is based on payment for services with a voucher, purchased from an authorized organization that covers both pay and social security contributions.

7. Portfolio work

A self-employed individual works for a large number of clients, doing small-scale jobs for each of them.

8. Crowd employment

An online platform matches employers and workers, often with larger tasks being split up and divided among a “virtual cloud” of workers.

4 A strategic project pursued by the German government, aimed at heightening the sophistication of the manufacturing industry. “Industry 4.0” refers to innovation in manufacturing through information technology.

9. Collaborative employment

Freelancers, the self-employed, or micro-enterprises cooperate in some way to overcome limitations of size and professional isolation.

II. Current status and significance of relevant research in Japan

1. Why have atypical work organizations not been discussed in Japan thus far

Atypical work organizations have been little discussed in Japan, compared to the United States and Europe, for the following three reasons:

(1) In-house non-standard employees

In Japan, standard employees are carefully protected from abuse of the right of dismissal and disadvantageous changes in labor conditions, ensuring that they have secure positions and stable working conditions. By comparison, non-standard employees, including part-time workers and fixed-term workers, are less rigidly protected and play the role of buffers against economic fluctuations. Furthermore, non-standard employees are paid according to a different wage system from that of standard employees, and have significant disadvantages in terms of working conditions and social safety net. As employers can utilize the established Part-Time Employment Contract and Fixed-Term Contract forms at a relatively low cost, they do not have to consider implementing atypical forms of employment on a large scale.

(2) Subcontracting system

In Japan, a system for utilizing subcontractors from outside organizations has existed since World War II, and has repeatedly played the role of a buffer during a great number of international economic fluctuations. Particularly in manufacturing it has been pointed out that compared to the US, Japan has a low ratio of in-house production.⁵

Under the subcontracting system, in the automobile manufacturing industry, for example, there is division of labor using multiple layers of subcontractors, so as to produce and process parts and materials that enterprises do not handle in-house. In this division-of-labor system, first-, second-, third-, and even fourth-layer subcontractors perform specifically assigned production and processing tasks, while the large enterprise at the top is dedicated mainly to the final assembly process.

The subcontracting system has advantages for parent companies, including savings on fixed capital and labor costs, procurement of components at a lower cost than in the external market, flexible adjustment of in-house and external production ratios, and so forth. However, it subjects subcontractors to intense competition with rivals, and forces them to respond to diverse demands from parent companies, in order to continue doing business, under the constant threat of parent companies moving processes in-house. As a result, when manufacturing is carried out in a multilayered subcontracting system, lower-layer subcontractors have lower wages, and significant wage gaps are inherent in the multilayered structure. Though intensive annual wage negotiations are carried out around the start of most companies' fiscal years in March and April, aiming to narrow the wage gap between parent companies and subcontractors, labor conditions at subcontractors remain poor compared to large companies at the top of the division-of-labor "pyramid." Through this subcontracting system, Japanese companies can be said to have already achieved, to some extent, one of the goals of lowering labor costs by outsourcing tasks, which is one of the objectives of the new forms of employment that have recently emerged in the US and Europe.

(3) Perception of the scope of legal protections under labor laws

Looking back at the status of factory work in Japan before World War II, there was a so-called *oyakata-ukeoi* system (the foreman contracting system), which in practical terms intermingled employment and contracting. The dichotomy between direct employment with its attendant protections under labor law and

5 Solow, M. and John C. Scott, *Made in America*, Cambridge, Massachusetts: MIT Press, 1989.

6 Issued in 1911 and enforced in 1916.

contracted labor lacking these protections was invalid in practice, as both the foreman and his underlings were factory workers deployed by the factory owner. To address this situation, under the Factory Law,⁶ the first labor legislation enacted prior to World War II, both the foremen who were assigned tasks by factory owners and delegated them to workers, and the workers who carried them out, were considered to be, in effect, employees of the factory owner. When factory work was carried out, the workers were considered hired by the factory owner, regardless of whether the employment relationship was direct or mediated by a foreman (contractor). Thus workers who worked in the factory were protected by regulations, including restrictions on employment of minors, restrictions on working hours for minors and women, and mandatory compensation for job-related accidents regardless of their direct employment relationships. The law was applied to all workers at factories regardless of whether they were standard employees or were working under contractors.

After World War II, protection of workers under the Labor Standards Act was extended beyond manufacturing plants to all types of industries and occupations, but whether the labor law applies to a worker or not became to depend on whether the worker is under direct labor contract to the employer strictly. Under this new comprehensive labor protection statutes, the labor inspection offices and the court came to face a difficult task of examining whether a seemingly “independent contractor” falls under “labor contract” considering the de fact supervision rendered by the employer. Similar issues were also discussed in the Labor Commissions as well as the court whether some independent contractors whose terms of contract were unilaterally determined by the employer could be deemed as “workers” protected by the Trade Union Act of 1947.

2. The importance of research on atypical work organizations in Japan

The more crucial the tasks assigned to executives, the more closely connected they must be to the enterprise, and the higher quality of work is required. In the past it was practically impossible to assign core tasks to independent contractors, as it was difficult to direct and supervise the work of contractor in remote areas in real time and to ensure sufficient levels of quality. In recent years, however, it became possible to supervise workers in remote areas in real time, especially with the introduction of ICT and other new technologies and technical improvements in the creation of manuals for business procedures, and in Japan and other countries around the world, there have been an increasing number of cases where tasks related to core competencies of enterprises are delegated to independent contractors.

With the widespread use of independent contractors, problematic issues came to be discussed in judicial practice, regarding whether these individuals, nominally “independent contractors” under contract only to offer the results of labor, should be regarded as “workers” protected under the Labor Standards Act when they are, in practice, working exclusively for specific enterprises. In some cases, the court held that with various factors taken into account, it might be possible to recognize these individuals as “workers” under the Labor Standards Act, but in the case of hired drivers working exclusively for a particular enterprise⁷ and in the case of a single, independent carpentry foreman,⁸ the Supreme Court ruled against recognizing both as “workers” eligible for legal protections under the Labor Standards Act.

On the other hand, there have already been several court cases where “independent contractors” were recognized as “workers” under the Labor Union Act. These have included a technician who performs repair work on plumbing fixtures in kitchens, bathrooms and toilets,⁹ a courier who performs quick home deliveries of documents by bicycle or motorcycle,¹⁰ and a technician who makes house calls to repair audio equipment.¹¹

7 Chief of Yokohama Minami Labor Standards Inspection Office case, Supreme Court First Petty Bench 11/28/1996, 714 Rohan 14.

8 Chief of Fujisawa Labor Standards Inspection Office case, Supreme Court First Petty Bench 6/28/2007, 940 Rohan 11.

9 The State and CLRC (INAX Maintenance) case, Supreme Court Third Petty Bench 4/12/2011, 1026 Rohan 27.

10 The Sokuhai case, Tokyo District Court 4/28/2010, 1010 Rohan 25.

These independent contractors engaged in tasks related to the core competencies of enterprises have been judged under existing, conventional standards, but today the application of new technologies has already drastically altered the traditional work organization, and it is questionable whether these existing criteria are valid when simply applied as it is.

In Japan, non-standard workers, particularly part-time workers and fixed-term contract workers, have mainly been used as a buffer against economic fluctuations as well as a means of reducing personnel costs. To improve the working conditions of non-standard workers, Japan's Plan for Dynamic Engagement of All Citizens, approved by Cabinet resolution on June 2, 2016, has as one of its policy points "improvement in wages of non-standard workers toward achievement of equal pay for equal work." Therefore, significant changes in the roles conventionally played by non-standard workers are predicted.

According to Article 20 of the Labor Contract Act, "if a labor condition of a fixed-term labor contract for a worker is different from the counterpart labor condition of another labor contract, without a fixed term, for another worker with the same employer, due to the existence of a fixed term, it is not to be found unreasonable, considering the content of the duties of the workers and the extent of responsibility accompanying the said duties, the extent of changes in the content of duties and work locations, and other circumstances." Meanwhile, a provision with the same intent has already been enacted in Article 8 of the Part-time Labor Law. In light of these developments, the legal interpretation of Article 20 will be crucial to the achievement of "equal pay for equal work."

Recently, new legal precedents have been set at the high court level over disadvantageous treatment of workers under fixed-term labor contracts, and among them the *Nagasawa Transport* case¹² and the *Hamakyorex* case¹³ have had significant social repercussions. It is predicted that an accumulation of similar court decisions will ultimately lead to implementation of a system in which standard and non-standard workers are equally treated under it.

Laws have also been amended to improve the employment security of non-standard workers, including fixed-term contract workers. The existing employment doctrine that protects workers with repeatedly renewed fixed-term contracts from uncertainty about whether the contract will be renewed was clarified in writing in Article 19 of the Labor Contract Act, and Article 18 of the same Act states that if a worker, whose total contract term of two or more fixed-term labor contracts concluded with the same employer exceeds five years, applies for the conclusion of a labor contract without a fixed term before the date of expiration of the currently effective fixed-term labor contract, it is deemed that the employer accepts the application, providing a route from limited-term to permanent employment.

As we have seen, steps are being taken to improve the employment conditions and employment security of non-standard workers, but these regulations apply strictly to "workers" inside the enterprises, and there is no scope for application of the aforementioned labor protection provisions when workers from outside the enterprise or other external labor sources are utilized. Therefore, as the working conditions and employment security of non-standard workers improves, the disparity of laws and regulations relating to those not classified as "workers" becomes all the more glaring, and employers make increasing use of "atypical work organizations" to evade liability and cut personnel costs. In this sense, research on atypical work organizations is a crucial task that awaits us once the current debate on "equal pay for equal work" in terms of standard vs. non-standard employees of enterprises has been settled, and will be essential in achieving true "equal pay for equal work" in a broader sense.

11 The *State and CLRC (Victor)* case, Supreme Court Third Petty Bench 2/21/2012, 66 *Minshu* 955.

12 The *Nagasawa Transport* case, Tokyo High Court, 11/02/2016, 1144 *Rohan* 16.

13 The *Hamakyorex* case, Osaka High Court, 7/26/2016, 1143 *Rohan* 5.

III. Future challenges

Unlike in Europe and the United States, Japan has long utilized atypical work organizations in the form of systems of multilayered subcontracting relationships, subcontracting alliances, and so forth. Legal restrictions on the use of these organizations are already in place to some extent. However, in Japan as elsewhere, the use of innovative technologies such as artificial intelligence (AI) and the Internet of Things (IoT) will greatly advance in the future, and it is expected that the means of producing goods and providing services will be greatly affected. New forms of employment, as recognized and classified in Europe, could become much more prevalent in Japan.

In atypical work organizations, those engaged in work are not necessarily classified as “workers.” As divisions not related to core competencies are increasingly abolished through organizational restructuring, it is expected that the percentage of the workforce not under the protection of labor laws, such as independent contractors and freelancers, will increase further in the future. It is obvious that a significant portion of existing legal protections will need to be extended to those who take over the tasks formerly carried out by workers (standard or non-standard employees of enterprises), but it is still unclear what specific legal protections or regulations will be required. Also, before considering the specific form of regulations to be explored, it is essential to grasp the actual conditions of new forms of employment and the current circumstances of those engaged in them.

In Japan, where atypical work organizations have been used for a long time, there are precedents for legislation that extends some degree of protection to persons carrying out tasks equivalent to “workers” but belonging to atypical work organizations, and some such regulations are still in effect. For example, protection under labor laws has been partially expanded to apply to those engaged in at-home labor, subcontracting, independent contracting, franchise operation, and so on. Now, in examining laws and regulations that affect workers in new forms of employment, we must examine whether it is necessary to devise legal protection mechanisms entirely different from those of the existing labor laws, or whether it should be considered an issue of expanding the scope of current regulations.

As a new social phenomenon, the growth of atypical work organizations requires analysis from various perspectives such as law, economics, and sociology. In addition to following the progress of events and public debate in Europe and the US, addressing the above-described issues in Japan will be an important task in the future.

The 1st JILPT Tokyo Comparative Labor Policy Seminar 2017

Organizer

The Japan Institute for Labour Policy and Training (JILPT)
with the cooperation of International Society for Labour and Social Law (ISLSSL)

Date

March 27-29, 2017

Venue

The Japan Institute for Labour Policy and Training
(JILPT), Tokyo, Japan

Seminar Theme

Identifying Major Labor Policy Issues in Contemporary
World of Labor—Commonalities and Differences Crossing
Regions and Nations



The topic includes the following four points as facets:

- 1) The changing features of industrial sectors, business organizations and business activities
- 2) The changing features of work relations, work organizations and working styles
- 3) Their background factors; such as progressing globalization, new waves of IT, AI, IoT and the demographic changes, etc.
- 4) Major issues of labor policies arising therefrom; such as tackling with enlarging social inequality, redefining the demarcation of labor law, reforming the labor market, reconstructing the worker representation system and controlling migrant workers, etc.

Seminar Structure

▶▶ ISLSSL Special Asian Executive Meeting March 27, 2017

Welcome and Opening remarks (Professor Kazuo SUGENO, Honorary President, ISLSSL)

Keynote Speech (Professor Takashi ARAKI, Executive member, ISLSSL)

Special Lectures (ISLSSL members) and Discussions

▶▶ JILPT Tokyo Comparative Labor Policy Seminar March 28-29, 2017

Session 1 Lecture and Discussion (Part 1)

*Chairperson: Ryuichi YAMAKAWA, The University of Tokyo (Japan)

Lecture i Andrew STEWART, Professor of Law, University of Adelaide Law School (Australia)

Lecture ii Cynthia ESTLUND, Professor, New York University School of Law (USA)

Lecture iii Rong MO, Director General, Institute of International Labor and Social Security, MoHRSS (China)

Discussion

Session 2 Country Reports (Part 1)

*Tutor: Diego ÁLVAREZ ALONSO, Lecturer/Assistant Professor, University of Oviedo (Spain)

1) Sukhwan CHOI, Associate Professor, Myongji University (Korea)

2) Yu-Fan CHIU, Assistant Professor, School of Law, National Chiao Tung University (Taiwan)

3) Qian WEI, Lecturer, China Institute of Industrial Relations (China)

4) Itaru NISHIMURA, Researcher, JILPT (Japan)

5) Hayati HASIBUAN, Secretary School of Environmental Science, University of Indonesia (Indonesia)

- 6) Maria Catalina TOLENTINO, Assistant Professor, University of the Philippines (Philippines)
- 7) Mary TIONG, Assistant Secretary, Ministry of Human Resources (Malaysia)
- 8) Trang TRAN, Lecturer, Department of Law, Hanoi Law University (Vietnam)
- 9) Ingrid LANDAU, Research Fellow, Melbourne Law School, University of Melbourne (Australia)

Session 3 Lecture and Discussion (Part 2)

*Chairperson: Akiko TAGUCHI, ILO Office for Japan

Lecture iv Chin-Chin CHENG, Professor/Associate Dean/Director College of Law (Taiwan)

Lecture v Keiichiro HAMAGUCHI, Senior Research Director, JILPT (Japan)

Discussion

Session 4 Country Reports (Part 2)

*Tutor: Gabriele GAMBERINI, Labour Lawyer (Italy)

10) Hang TRAN, Lecturer of Law, Hanoi Law University (Vietnam)

11) Eitra MYO, Senior Legal Advisor, SAGA Asia Consulting Company Ltd. (Myanmar)

12) Kanharith NOP, Attorney-at-Law (Head of Legal Department, Vattanac Bank (Cambodia))

13) Hochang ROH, Assistant Professor, Hoseo University (Korea)

14) Manxue YIN, Associate Researcher, Institute for Labour Studies (China)

Biqian ZHAO, Institute for Labour Studies (China)

15) Girish BALASUBRAMANIAN, Assistant Professor, School of HRM, Xavier University Bhubaneswar (India)

Manoranjan DHAL, Indian Institute of Management, Kozhikode (India)

16) Yueh-Hung HOU, Professor, College of Law, National Taipei University (Taiwan)

17) João FERNANDES, Judge, Rio de Janeiro Regional Labor Court (Brazil)

18) Qi ZHONG, Researcher, JILPT (Japan)

Session 5 Closing Session

Concluding Comments (Professor Takashi ARAKI, The University of Tokyo, Japan)

Closing remarks (Professor Kazuo SUGENO, President, JILPT)

Certificate of completion award ceremony

Closure

Participants

President, Honorary President, Secretary-General, Asian executive members of ISLSSL, and several distinguished labor law scholars were invited by JILPT as speakers of the seminar. About 20 young researchers mainly from Asian countries and regions, and about 10 from Japan majoring in labor law and industrial relations were also invited. During the three days, about 100 specialists and researchers in the labor field participated in the seminar.



What's on Next Issue

Japan Labor Issues

Volume 1, Number 4, January 2018

tentative

● Trends

[Key Topic]

▷ Regional Minimum Wage
¥848 per Hour—3% Higher for
the Second Consecutive Year

[News]

▷ Rengo Holds 15th Biennial
Convention, Re-elects President
Kozu: Aims to Establish “2035
Vision” towards 30th Anniversary

● Research

[Report]

▷ Is the Career Counseling
Effective?

● Judgments and Orders

▷ Case of dismissal:

The Kokusai Motorcars Case,
the Supreme Court
(Feb.28, 2017)

● Series: Japan's Employment System and Public Policy

▷ Allocations and Transfers in
Japan

● Statistical Indicators

Sign up for *Japan Labor Issues*

Free of charge

“Japan Labor Issues” is a monthly journal published by the Japan Institute for Labour Policy and Training (first issued in September, 2017).

We send you the latest issue via email. Please register your email address at:

<https://www.jil.go.jp/english/emm/jmj.html>

What is the Japan Institute for Labour Policy and Training (JILPT)?

JILPT, or the Japan Institute for Labour Policy and Training, is a government-related organization. The objective of The Japan Institute for Labour Policy and Training is to contribute to the planning of labor policies and work toward their effective and efficient implementation, as well as to promote the livelihood of workers and develop the national economy by conducting comprehensive research projects on labor issues and policies, both domestically and internationally, and capitalize on the findings of such research by implementing training programs for administrative officials.

Visit our website anytime you need.

JILPT Website: <http://www.jil.go.jp/english/>

Errata for vol.1, no.2 in the printed journal are provided below, which have correctly rendered on the website.

Page	For		Read
11-fig.4	—■—Ratio of persons with jobs	should be	—◆—Ratio of persons with jobs
11-fig.4	—◆—Ratio of persons in employment	should be	—■—Ratio of persons in employment



The Japan Institute for Labour Policy and Training