Atypical Work Organizations as a Social Phenomenon Occurring throughout the Contemporary Labor World: Current Status of Research and Future Issues

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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 enterprise[7] 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* case[12] and the *Hamakyorex* case[13] 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.