Realising Workers' Rights beyond Corporate Boundaries in South Korea

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1. Introduction

In Korea, like many other countries, an "employer" under labour regulations is the prime subject who is responsible for securing labour rights. For example, the Supreme Court held "the term 'employer' in individual labour relations means those who enter into an explicit or implicit employment contract, where they are provided labour with direction or supervision over the performance of an employee, and pay the corresponding wages to the employee".[2]

The traditional notion of an employer has implied that four functions that Freedland identified are integrated in a single entity: (1) engaging workers and terminating employment; (2) remunerating and providing them with other benefits; (3) managing the employment relationship and the process of work; and (4) using workers' services in the process of production or service provisions (Freedland 2003).

While increasing precarious employment[3] challenge to this notion, the labour laws liability is still identified in terms of one-to-one relation. In triangular employment relationships such as agency work, for example, a user enterprise contracts out some or all those functions to different legal entities, retaining the right to control over the whole process. Nevertheless, many legal systems have not succeeded in capturing the changing concept of employer, therefore failed in providing effective labour protections. Some regard a "provider" (employment agency) solely as an employer. Others allocate a little liability of employer to a "user employer". In other extreme cases, if the employer's control factors are not identified vis-à-vis a user as well as a provider respectively, neither a user nor a provider is regarded as an "employer", and furthermore, it contributes to the denial of "employee" status of agency workers (Davidov 2004). Weil describes the modern workplace as the "fissured workplace", noting that the basic terms of employment are now

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[2] The Supreme Court, 12 July 1999, 99-ma-628.
[3] Such terms as 'non-standard' or 'atypical' employment relationships that have often been referred to, take 'standard' employment relationships as a definitional starting point but without examining how that norm is deteriorating – what is standard today may be very much worse than what was standard two or three decades ago (Fudge, 2005). By way of contrast, Gerry Rodgers has suggested that there are several elements that make a particular form of employment precarious, including the degree of certainty of continuing work and the number and type of labour protections enjoyed by workers, either by law or as negotiated by a collective organization like a trade union (Rodgers, 1989). I refer to 'precarious workers' as those who are excluded from much labour protection, due to them having either different contractual arrangements or because they lack various institutional protections.

the result of multiple organizations, and consequently responsibility for conditions has become blurred (Weil 2014: 7). To respond to this "fissurization", we should note that the user's control over labour expands beyond corporate boundaries, while the employing entity is divided along the network of firms. To reconsider the concept of 'employer' in this changing world of work, this paper first analyses the structure of employer's power and changing nature of subordinate relations with a case study of triangular employment relationships in Korea. Second, it reviews current legislative and interpretative responses to emerging fissurization of work. In conclusion, I argue that the fissurization of emerging work relationship is the outcome of a cost-and-risks transfer from capital to labour, and thus, the approach of reversing this transfer would be more effective and fair method for labour protection.

2. Current situation of fissurization

2.1. Overview

In the Korean labour law system, triangular employment relationships were prohibited in principle, before 1998. In the principle of elimination of Intermediary exploitation, Article 9 of the *Labour Standards Act* (LSA) states that no person shall intervene in the employment of another person for making a profit or gain benefit as an intermediary, unless otherwise prescribed by any Act. The *Employment Security Act* (ESA) also restricts a 'labour supply business' (Article 33) with the exception where trade unions provided their members to users (Article 33 paragraph 3). Since 1998, however, triangular employment relationships have been legitimated under certain conditions by the *Act on Protections for Temporary Agency Workers (*APTAW).

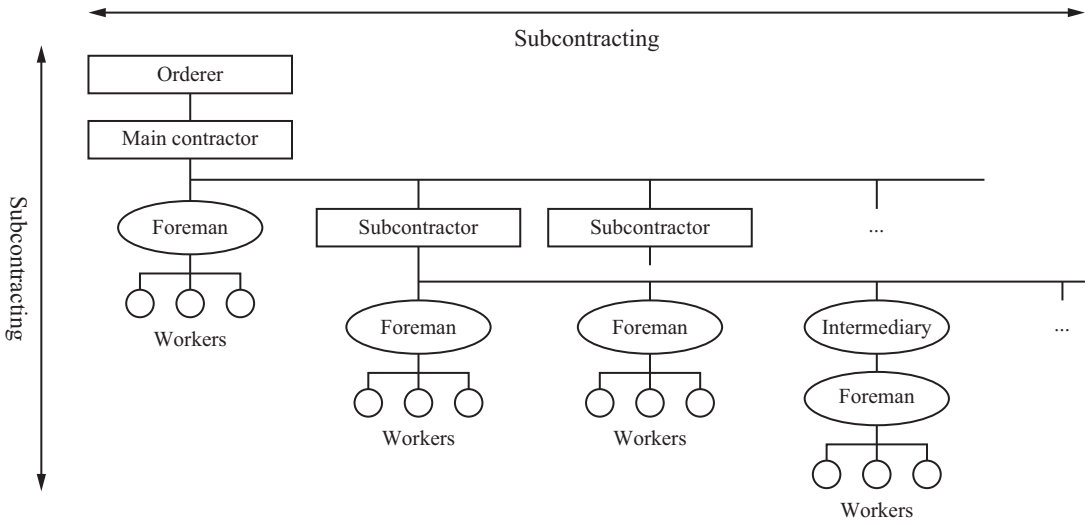
The most contentious types of triangular employment relationship are as follows:

(1) Multi-layered subcontracting

Multi-layered subcontracting is conventional practices, in particular, in such industries as construction and freight road transport. The construction industry, for example, is characterized by a complex pyramid structure that is comprised, at any one site, of one main construction company ("main contractor") and several layers of subcontractors.

Under the *Framework Act on the Construction Industry* (FACI), subcontracting is permitted only in cases where a main contractor subcontracts some tasks to specialized subcontractors. Nevertheless, the predominant practice is multi-layered subcontracting, and construction firms directly employ only a few technicians and skilled workers, and use the bulk of workers via subcontractors or intermediaries, seeking a reduction in costs. Figure 1 below describes this multi-layered industrial and employment structure in construction.

Figure 1: Industrial & employment structure in the construction industry



Source: Author's elaboration

The multi-layered subcontracting has had various effects on the employment relationship in construction. First of all, the prevailing form of employment relationship is informal and indirect employment via intermediaries or foremen. The labour intermediary or foreman is often a skilled craftsman who operates as an independent manager-cum-worker. He/She receives a contract from a subcontractor or a sub-subcontractor and does the construction work by recruiting temporary workers through personal network. A recent survey revealed that over 70 per cent of construction site workers got a job through foremen (Sim et al., 2013). Although foremen recruit and manage workers and distribute the remuneration, they cannot bear employer liability. Construction site workers work under the control of both the main contractor and the upper-level subcontractors who are provided workers via intermediaries or foremen.

Second, about 90 per cent of construction site workers are employed on temporary and short terms 2008 (Ministry of Labour, 2008). Most construction workers are hired only for the period of a certain construction project, and therefore they suffer from repeated unemployment.

Third, the most significant changes in the employment relationship are a massive shedding of labour, particularly amongst construction equipment operators, by construction firms seeking cost-cuts, and an increase of independent workers and dependent self-employment since the late 1990s. For example, over 90 per cent of concrete mixer truck drivers and dump truck drivers provide their labour as an "independent contractor" without employing others (Sin, 2014).

(2) Agency employment

As above mentioned, since 1998, just after Korean economic crisis occurred, temporary agency employment has been legitimated under certain conditions by the APTAW.

Temporary agency employment is allowed in 197 different job categories, including work requiring expert knowledge, technology and experience, for a maximum of two years. Otherwise, temporary agency employment is allowed only where a temporary need for workers arises due to pregnancy, disease or injury of employees, for a maximum of six months. Additionally, no temporary agency employment shall be conducted for jobs such as work performed at a construction site (Article 5 paragraph 3). Any person who intends to engage in temporary agency employment business shall obtain permission from the Minister of Employment and Labour (Article 7).

Under the APTAW, a temporary employment agency is party to the employment contract with a worker. However, it should be noted that most temporary employment agencies are, in practice, merely intermediaries, and are unable to take legal responsibility for workers' rights. For example, the wage of the worker is, in practice, decided by the contract between a temporary employment agency and a user employer. If a user employer demands that a certain worker of a temporary employment agency be replaced, the worker has no choice but to lose that job. According to information provided by the Ministry of Employment & Labour, approximately 80 per cent of employment contracts with temporary employment agencies are only for the period that the worker works for a particular user employer (Yun, 2007:12). The APTAW has no regulation on this type of temporary employment contract between a temporary employment agency and a worker.

Under the APTAW, a user employer shall directly employ a temporary agency worker, where the worker has worked longer than two years or where the user employer uses the temporary agency worker in violation of provisions of the APTAW (Article 6-2). However, the APTAW does not have any equivalent provision in the case where a user employer switches one temporary agency worker for another worker before the two-year deadline. As a result, these protections can have a reverse effect. To avoid their legal responsibility, most user employers replace a temporary agency worker with another worker every two years. Moreover, most temporary employment agencies have an employment contract with a worker, only for the period that the worker works for a user employer, as mentioned above. Consequently, neither a user employer nor an agency holds responsibility for employment security, while a temporary agency worker suffers from periodical job insecurity.

(3) In-house subcontracting

In the Korean manufacturing sector, the most common practice to use precarious employment is 'in-house subcontracting'. In that, a worker having an employment contract with a "subcontractor" is provided for a "subcontracting company" and the worker works under the control of both employers. With in-house subcontracting, the subcontracting companies use the excuse that they are not the user employers under the APTAW and thus do not hold themselves responsible for workers who in fact are working for them.

For instance, Hyundai Motor Company began to use this type of workers when the mass-production process was introduced in the early 1980s (Korean Metalworkers' Federation, 2003: 112). Subcontracted workers provide their labour at a subcontracting company's workplace under supervision of a subcontracting company as well as a subcontractor (Yun, 2011). Whereas both subcontracted workers and the regular employees of Hyundai Motor typically work for ten hours per day on a two-shift basis, in many cases the work intensity of subcontracted workers is much higher than that of regular employees (Korean Metal Workers Union, 2007: 51).

Nevertheless, working conditions of subcontracted workers are much inferior to those of regular employees. For example, it was reported the average monthly wage of subcontracted workers in Hyundai Motor was merely 60-70 per cent of that of regular employees of a same length of service (Korean Metal Workers Union, 2009: 55).

Subcontracted workers usually have an employment contract with a fixed term of 3 or 6 months. Normally the employment contract is repeatedly renewed, but subcontracted workers would be dismissed at any time when their jobs at a subcontracting company are reduced.

Another characteristic of in-house subcontracting exists in the power of a subcontracting company to decide business of subcontractors in practice. According to the result of a survey of in-house subcontracting at Hyundai Motor Company Ulsan plant in 2006, 52 of 95 subcontractors were the former management staffs of Hyundai Motor (Cho, 2006: 81). In-house subcontractors usually recruit workers only after making a contract with Hyundai, and they do not other business but providing and managing workforce for Hyundai exclusively. The most important criterion for selecting subcontractors is their ability in labour management, and Hyundai even limits the volume of personnel of each subcontractor to about 75 persons. While the period of a contract for subcontracting is usually 6 months, the contract would be repeatedly renewed if there would be no problem with labour management. In case one subcontractor is replaced by another subcontractor, normally workers of the former are rehired by the latter (En, 2008: 151).

(4) Procurement/ Contracting-out of public service

It is a noteworthy characteristic that Korean Government itself is a major employer who has abused precarious employment. Since the economic crisis in 1997, the Government has driven the public sectors to reduce personnel and to contract out their services to private enterprise. Particularly, the Government has forced this restructuring through budget mechanisms, that is, imposing financial penalties, when public organizations fail in implementing required restructuring. As a result, hundreds of thousands of public employees have been retrenched and precarious employment has been introduced, which in turn has made budget cuts possible.[4]

In accordance with a Government directive on restructuring, for example, the Korea National Railroad was converted to the Korea Railroad Corporation (KORAIL) in January 2005. At about same time, the management of the KORAIL restructured the labour force, including large scale cut-backs in employee numbers, recruiting workers on precarious employment contracts and contracting out. For instance, the KORAIL has used 370 female attendants provided by its subsidiary (Korea Railroad Distribution) since it started a high-speed railway business (KTX) in 2004. Although female attendants are on fixed-term employment contracts with the Korea Railroad Distribution, they perform work under the instructions and control of the KORAIL. In contrast with male attendants who are directly employed by the KORAIL on permanent employment contracts, female attendants are all precarious workers.

Contracting-out of municipal service is another example. Since the late 1990s, most municipalities have contracted out public service such as street cleaning and garbage

[4] The share of precarious work in public sector including education and health has increased from 37.6 per cent in 2003, when the first survey on precarious work in public service sector was conducted, to 40.1 per cent in 2007 (Korean Public Service Workers Union, 2008: 277-278).

collection to private subcontractors. Nevertheless, local authorities can still control over wages and employment conditions via cost-plus arrangement with subcontractors. Moreover, it can unilaterally terminate the arrangement on the ground of complaints of local residents. As most subcontracted workers are employed only for the period of the arrangement between a local authority and a subcontractor, they suffer from constant insecurity of employment.

(5) Supply chain

With the increasing cost of labour and competition in global market, Korean large conglomerates (*Chaebol*) increased foreign direct investment in the mid-1990s. For example, Samsung Electronics has moved its low value added products such as white goods to production lines in Southeast Asia and China, while high value added products such as semiconductors and core technology are kept in South Korea (Chang 2006).

The domestic production and supply for Samsung Electronics is made up of five layers. The first layer is composed of Samsung Group's subsidiaries, and the second layer is made up of transnational electronics component suppliers such as Qualcomm. The third and fourth layer comprises suppliers to which Samsung Electronics outsources parts production for cost or production capacity reasons. The final layer in the supply chain is composed of small and medium-sized suppliers located in industrial complex. As these companies supply low-cost parts, Samsung Electronics frequently switches among them, exacerbating price competition (Han et al. 2013).

Although the top end of global value chains (GVCs) of Samsung Electronics has been produced in Korea, this does not mean that working conditions of the Korean workers are better off. The important basis of Samsung's management is a risks-and-cost transfer towards workers and the bottom of GVCs as well as its brutal and systematic 'No Union' policy.

At Seoul Digital Complex in the southern Seoul, for example, there are approximately 200,000 workers most of whom work for suppliers of Samsung Electronics, but the union density is less than 1 per cent. In 2009 present, the share of firms with four or less employees amounted to 46.4 per cent, and that of firms of between five and nine employees was 25.6 per cent (Future of Workers et al., 2011).

The result of survey conducted in 2011 by the campaign alliance for rights of workers at Seoul Digital Complex, called 'Future of Workers', revealed poor working conditions: over half of workers were precarious workers (52.0%), and the amount of average monthly wages was 1,923,000 Korean Won, which was less than those of whole workers (2,026,000). The average working hours were 47.1 hours per week, and one in five workers worked for over 52 hours per week. The amount of average hourly wages was 4,391 Korean Won, which was close to the statutory minimum wage in 2011 (4,320 Korean Won). Workers paid less than the minimum wage amounted to 13.8 per cent (Future of Workers et al., 2011).

(6) Others

Private employment agencies are other types of labour intermediaries which compose a triangular employment relationship. Personal care workers in hospitals are such an example. Most of them provide their service to patients through a private employment agency under the supervision of a hospital. However, there are no contracts among them

and therefore personal care workers have been regarded as an 'informal worker' or a 'domestic worker'.

Private employment agencies collect membership fee from job-seekers and offer jobs to them. A private employment agency, which does not have an employment contract with a job-seeker, is regarded as not a "temporary employment agency" under the APTAW but a fee-charging job placement service agency under the ESA. In a case of personal care work, private employment agencies provide job-seekers for hospitals, and care workers provide their service for patients under the supervision of a hospital. The arrangement between an agency and a hospital usually contains requirements of care worker, the standard of service fee, working hours, uniform and appearance rule, evaluation and sanctions upon care workers and so on. Nevertheless, courts have hardly regarded a hospital as an employer.[5]

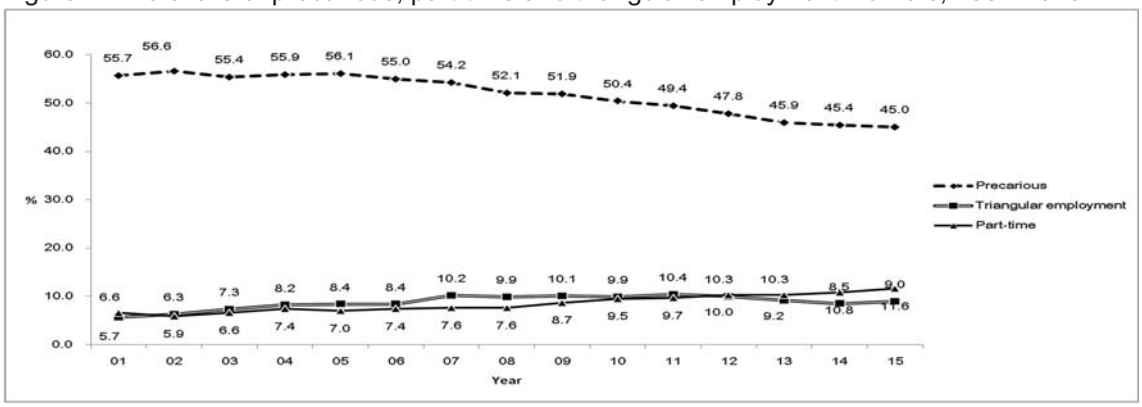
2.2. Motives & Backgrounds

(1) Trends and size of precarious employment

According to the result of analysis by Yoo-Sun Kim (Korea Labour & Society Institute), precarious workers accounted for 45.0 per cent of total wage workers in August 2015. Here, 'precarious workers' are defined as "workers who are not expected to be employed constantly or those with fixed-term contracts, or "workers with shorter contractual working time than normal employees" or "workers with different forms of service from typical employment".

<Figure 2> shows that about half of total wage workers were precarious workers since 2000. The number of part-time workers and triangular employment workers has doubled.

Figure 2: The share of precarious, part-time and triangular employment workers, 2001-2015



Source: Kim (2015)

It is noteworthy that triangular employment relationships have been underrepresented in the statistics. For example, in-house subcontracting is misclassified as regular employees, as they have a permanent employment contract with a subcontractor. According to a result of survey conducted by the Ministry of Labour in August 2010, the

[5] The Supreme Court, 24 November 2009, 2009-du-18448.

number of in-house subcontracted workers was 324,932, which amounted to 24.6 per cent among workers at firms with 300 and more employees.

(2) Factors of the growth of precarious employment

Since widespread labour protests in 1987, a new independent trade union movement with rank-and-file militancy has developed in South Korea, breaking the Government-controlled industrial relations system.[6] It weakened authoritarian industrial relations based on low-wage and barrack-like control (Koo 2000). Faced with mass resistance to low wages, employers of big enterprises began to pay relatively good wages to regular employees while increasing automation and labour flexibilization through the use of precarious employment.

The economic crisis of 1997 was a turning point; there occurred a significant change in the composition of labour market. After the economic crisis, employers have minimized the use of regular employees and replaced their jobs by precarious employment through redundancy, restructuring, outsourcing and so on. Since then, new jobs have been created mostly only in forms of precarious employment and precarious workers have become the core workforce.

In particular, *Chaebol*s have reorganized production networks at home and abroad. *Chaebol*s formed vertically integrated production networks with multi-layered subcontracting in South Korea. Samsung Electronics and Hyundai Motors, for example, moved abroad aggressively and integrated developing countries into their global production networks in the first half of 1990s.

The trends that large corporations have taken the lead in increasing triangular employment relationships are statistically verified; the result of public notice of employment types in 2015 showed that 32.9 per cent workers of firms with 10,000 and more employees were in triangular employment relationships, while the ratio was 7.7 per cent at firms with 500 and less employees (Kim & Yun, 2015).

In particular, segmented system of collective bargaining is other factor with regard to the increasing triangular employment relationships. In Korea enterprise-level industrial relations are still dominant and collective bargaining is limited to trade union members. While a large number of enterprise-level unions have been integrated into industrial unions since 2000, most collective bargaining is still done on an enterprise level. The Korean Metal Workers Union (KMWU), for example, has bargained collectively with an employers' organization in metal industry since 2003, but the actual working conditions including wage and employment rights are still dealt with on enterprise-level negotiations. Moreover, the major automakers, including Hyundai and Kia, that hire over 60 per cent of trade unionists of the KMWU have not joined that industrial collective bargaining so far. This fragmented structure of collective bargaining has vulnerability to deal with triangular employment relationships. Both a subcontracting company and an enterprise-level union

[6] After the military coup in 1961, the military dictatorship repressed labour movement and dominated trade unions via government-controlled confederation (Federation of Korean Trade Unions, FKTU). In 1987, the military dictator called a direct election of the president under the pressure of mass anti-government demonstrations. In this political democratization, workers resistance to inhumane working conditions also erupted. For example, the number of trade unions nearly doubled and the total number of workers who participated in collective actions was estimated to be 1.2 million, equivalent to approximately one-third of the regular employees in enterprises with ten or more workers (Koo, 2000).

are reluctant to deal with triangular employment workers' issues, regarding them as employees of 'other' companies.

On the other hand, the Government has driven forward deregulation of financial markets and corporate activities, and pursued labour market flexibilization. Government policy and regulations for facilitating greater labour flexibility have helped foster a significant increase in labour flexibility. Government legalized redundancy and temporary agency employment in 1998, and legislated law on the fixed-term employment contracts in 2006 (Yun, 2007).

The new *Act on Protections of Fixed-term and Part-time Workers* (APFPW) allows the free use of fixed-term employment for up to two years without any reasons, and creates broad exceptions where fixed-term contracts over two years would be allowed (Article 4, Paragraph 1). The Government argued that this law would introduce some protective measures, such as converting fixed term contracts to contracts of unlimited duration for those workers who have worked for more than two years (Article 4, paragraph 2). In reality, however, it is clear that employers do not hire fixed-term workers for more than two years and instead terminate contracts before the two-year deadline, or switch to another precarious worker such as a subcontracted worker. This reverse effect has already been shown in employers' practices since 2000 under the APTAW, as discussed earlier.

2.3 Overview of the labour law issues

(1) Individual labour relations

In principle, the scope of "employer" in individual labour relations is same as that of an employer on an employment contract. In relation to triangular employment relationships, there are two exceptions. First, an "implied contract of employment" could be established between a user employer and a worker of a supplier. The Supreme Court has found the existence of an implied contract of employment, where a statutory employer is no more than a nominal entity, since the employer lacks independency as a business owner and merely performs a function as a labour management department of a user employer, and; where the statutory employer's worker provides his/her labour for a user employer in a subordinate relation, and the user employer indeed offers remuneration to the worker.[7]

Second, under the APTAW, both an agency and a user employer take the employer's responsibility as to individual labour relation. A temporary employment agency takes responsibility for wages and social insurances contribution, while a user employer takes responsibility for working hours, holidays and occupational health and safety (Article 34 and 35). In particular, a user employer should directly employ an agency worker, in cases of using the worker in breach of regulations under the APTAW (Article 6-2).

The issue of whether or not the in-house subcontracting amounts to an illegal use of temporary agency employment is thus one of the major bones of contention between employers and the unions, and subcontracted workers and trade unions often demand that subcontracted workers be hired as direct employees of a user employer under the APTAW.

(2) Collective labour relations

The Constitution declares that workers shall have the right to association, collective bargaining and collective action (Article 33 paragraph 1). Under the Constitution and the

[7] The Supreme Court, 12 November 1999, 97-nu-19946.

Trade Union and Labour Relations Adjustment Act (TULRAA), an employer has the basic legal obligation to bargain with an eligible trade union, and should not conduct unfair labour practices.

The Supreme Court had decided that only an employer who entered into an employment relationship with an employee should take responsibility under the TULRAA until the mid 2000s. In other words, a user employer did not fall under an employer under the TULRAA.[8]

However, the working conditions of triangular employment workers cannot improved unless a user employer enters into collective bargaining, since the real power in terms of finances and labour management in practice lies with the user employer. Even though unions and temporary employment agencies reach collective agreements about wages and union activity, these in effect cannot be implemented without a user employer's consent. That is the reason triangular employment workers' unions have demanded to bargain with user employers. Nevertheless, even if triangular employment workers form a trade union, the user employers refuse to bargain with the union on the basis that they are not the employer under the TULRAA.

When triangular employment workers form a trade union, in the majority of cases the user employer terminates the contract with the supplier who unionists belong to. The process of changing a supplier or a temporary employment agency involves the dismissal of the entire workforce followed by the arbitrary re-employment of some or most workers except unionists, with the enforcement of extremely poor working conditions as the basis of re-employment.

As triangular employment workers have attempted to form a union, and to bargain vis-a-vis with user employers since the early 2000s, the courts' view has gradually changed. In 2010, the Supreme Court held that a user employer also should take liability for unfair labour practices under the TULRAA, where the user employer would effectively and concretely control or decide the employment and working conditions of a supplier's worker.[9]

3. Current legislative and interpretative responses

3.1. Individual labour relations

(1) Implied contract of employment theory

The LSA provides that the "term 'employment contract' means a contract which is entered into in order that a worker provides labour for which the employer pays its corresponding wages." (Article 2 paragraph 1)

In determining the status of an employer, judicial precedents have consistently required the existence of a subordinate relation, holding that, "the subordinate relation is determined by actual labour relations such as the existence of direction/ supervision relations, wages as a price for labour, the nature and content of labour between the employer and provider of labour regardless of the form of the labour supply contract, be it employment, contractual, delegation or anonymous, as long as there exists a user-subordinate relation between two parties."[10] Therefore, an employment contract and labour

[8] The Supreme Court, 22 December 1995, 95-nu-3565; The Supreme Court, 16 April 2004, 2004-du-1728 etc.
[9] The Supreme Court, 25 March 2010, 2007-du-8881.
[10] The Supreme Court, 25 May 1993, 90-nu-1731.

relation will be recognized as long as a subordinate relation is acknowledged, regardless of the form of the contract.

As mentioned above, the Supreme Court developed the 'implied contract of employment' theory, in order to find who is an employer in triangular employment relationship. The most commonly used factors for determining whether the implied contract of employment exists between a user employer and a supplier's worker are as follow; who has the right to control or supervise concretely and directly the performance of work, who has the right to hire, deploy, discipline and dismiss the worker, who has the right to set wage rates and pays for the worker and so on.[11]

In determining whether the implied contract of employment exists, on one hand, the courts have emphasized whether or not a user employer solely exercises the power to instruct or supervise the performance of work, and determine the levels of remuneration. On the other hand, the courts have not recognized such an implied contract of employment between a user and a supplier's worker, where the supplier somewhat instructed or supervised the performance of work, even though the user employer share the right to control over the performance of work.[12]

In other words, the implied contract of employment theory is applied, only where a supplier is not substantial as an independent entity and merely functions just as the user employer's agent. In this respect, this theory has shortcomings as to providing triangular employment workers with effective protections.

(2) The standard for establishing temporary agency employment

Legalisation of temporary agency employment, which legitimized the bifurcation between employment contracts and the subordinate relation, made the implied contract of employment theory outdated. The APTAW implies that an employment contract is no longer the sole legal basis of subordinate relation. Therefore, the main issue has moved to the standard for establishing temporary agency employment.

① Leading case

As explained earlier, it became the hottest issue on triangular employment relationship, whether or not in-house subcontracting amounts to illegal temporary agency employment. Since the early 2000s, in particular, trade unions representing in-house subcontracted workers have filed a series of suits, demanding user employers must directly hire in-house subcontracted workers according to the APTAW.

On 22th July 2010, the Supreme Court decided that in-house subcontracting at Hyundai Motor Company (HMC) fell under the illegal temporary agency employment, thus employment relationship existed between HMC and subcontracted workers who had worked over two years.[13] The Supreme Court relied on the following factors in reaching such a conclusion;

- work done by subcontracted workers was conducted on conveyor belts at the workplace of HMC;
- subcontracted workers were positioned on the same assembly lines along with regular employees of HMC, and used production facilities, auto parts

[11] The Supreme Court, 10 July 2008, 2005-da-75088.
[12] The Supreme Court, 12 July 1999, 99-ma-628.
[13] The Supreme Court, 22 July 2010, 2008-du-4367.

and supplies provided by HMC, and did work under detailed work directions made by HMC;

- HMC had the right to deploy and redeploy subcontracted workers in general, and decided workload, working methods and workflow;
- HMC gave subcontracted workers directions for the performance of work directly or through subcontractor's supervisors;
- HMC decided working time, break times, the need for overtime, operation of shift work and the pace of work of subcontracted workers;
- HMC ordered subcontracted workers to fill a vacancy on assembly lines; and
- HMC supervised personnel and performance standards of subcontracted workers through subcontractors.

This precedent left some questions such as what differences exist between standards for an implied contract of employment and for a temporary agency employment. In this case, nevertheless, the Supreme Court recognized that a user employer and a supplier could share the right to control over a supplier's worker, while the courts focused on whether or not a user employer solely possess the right to control over a supplier's worker in direct or detailed manner before this precedent. The Supreme Court held that "although subcontractors gave day-to-day directions for performance of work, it was nothing more than communicating directives of HMC, or being controlled by HMC."

② New precedent

After the *HMC* case, the courts maintained a view that in-house subcontracting in manufacturing fell under temporary agency employment.[14] However, In the *KTX* case[15], the Supreme Court established the standard for temporary agency employment in a new and slightly different direction.

For the first time, the Supreme Court provided the following indicators in determining an existence of temporary agency employment[16];

- the user employer directly or indirectly gives the subcontractor's worker binding directives as to performance of work itself;

[14] The Supreme Court, 1 July 2011, 2011-du-6097 (*Kumho Tire* case); The Supreme Court, 23 February 2012, 2011-du-7076 (*HMC Ulsan plant* case); The Supreme Court, 28 February 2013, 2011-do-34 (*GM Korea* case) etc.

[15] The Korea Railroad Corporation (KORAIL) used 370 female attendants provided by Korea Railroad Distribution since it started a high-speed railway business (KTX) in 2004. When female attendants joined in the Korean Railway Workers' Union in 2005, Korea Railroad Distribution refused to renew the contracts of union members and KORAIL terminated the contract with Korea Railroad Distribution. In response to these unfair labour practices, female attendant union members accused KORAIL of the use of illegal temporary agency work, and staged collective action including strike over four years.
In September 2006, The Ministry of Labour ruled that the use of female attendants was not illegal temporary agency work but legitimate subcontracting, although it partly recognized the existence of a subordinate relation between KORAIL and the female attendants. Female attendants filed a series of suit, thereafter, demanding KORAIL must directly hire them. The Seoul High Court ruled that an implied contract of employment existed between KORAIL and female attendants (the Seoul High Court, 19 August 2011, 2010-na-90816), while in another case the Seoul High Court denied an existence of implied contract of employment as well as temporary agency employment between them (the Seoul High Court, 5 December 2012, 2011-na-78974).

[16] The Supreme Court, 26 February 2015, 2012-da-96922.

- the subcontractor's worker was incorporated into the business of the user employer (for example, the subcontractor's worker and the employee of the user employer form an integrated working unit, and work together);
- the subcontractor independently exercises the right to hire a worker, and/or decides the number of workers, training, working time and break times, vacation and performance standard etc.;
- the purpose of the contract between the user employer and the subcontractor is fixed for performance of a limited task; tasks of the subcontractor's workers are distinguished from those of the user employer's employees; and tasks of the subcontractor require expertise and skills; and
- the subcontractor possesses an independent business organization and the equipment for contract fulfilment.

The Supreme Court denied the existence of temporary agency employment between KORAIL and the female attendants on the grounds that KORAIL did not give KTX female attendants "direct and detailed" directives and their tasks could be distinguished from tasks of KORAIL's male attendants.

In the *KTX* case, the Seoul High Court had recognized that KORAIL had the right to control over the female attendants and supervised them through the subcontractor. Further, the Seoul High Court held that tasks of female attendants and that of male attendants could not be separated, and thus, it was impossible to contract out tasks of female attendants alone.

It is still controversial whether or not the Supreme Court provides different standards as to establishing temporary agency employment. Nevertheless, it seems that the Supreme Court again focused on the extent of direction and supervision of a user employer, and required its directives to be binding and detailed.

③ Allocation of employer responsibility etc.

The APTAW allocates employer responsibility, as shown in <Table 1> below (Article 34 and 35).

Table 1: Allocation of employer responsibility

Supplier's responsibility	User employer's responsibility
▪ Clear statement of terms and conditions of employment ▪ Restriction on dismissal, etc. ▪ Advance notice of dismissal ▪ Retirement allowance system ▪ Settlement of payments ▪ Certificate of employment ▪ Payment of wages ▪ Emergency payment ▪ Shutdown allowances ▪ Payment of overtime, night or holiday work ▪ Annual paid leave ▪ Accident compensation etc.	▪ Working hours ▪ Restrictions on overtime work ▪ Break times ▪ Paid holidays ▪ Monthly menstrual leave ▪ Protection of pregnant women and nursing Mothers ▪ Permission for time for medical examination of unborn child ▪ Nursing hours etc.

In addition, the APTAW states that "neither temporary work agency nor user company shall give discriminatory treatment to any temporary agency worker on the ground of his/her employment status compared with other workers engaged in the same or similar kind of duties at the business of the user company."(Article 21 paragraph 1) Any temporary agency worker who has received discriminatory treatment may request a correction thereof to the Labour Relations Commission (Article 21 paragraph 2).

However, most triangular employment workers refrain from appealing to the Commission or courts, for fear of the reprisal of the employer. Use employers effectively decide whether or not a service contract lasts, and in turn, suppliers may easily terminate an employment contract with their worker on the basis of termination of the service contract.

On the other hand, the amended APTAW in 2006 weakened the provisions concerning the legal establishment of an employment relationship between an agency worker and their user employer in cases of illegal temporary agency employment (Article 6-2). Under the previous law, a temporary agency worker was regarded as being employed directly by a user enterprise where the worker has worked longer than two years. Although this provision had a reverse effect as discussed earlier, many trade unions demanded the application of this provision to temporary agency workers and in-house subcontracted workers who had worked for a user enterprise longer than two years. However, under the amended APTAW, an employment relationship between a user employer and a temporary agency worker is not established by law. Even if a user employer does not hire a temporary agency worker who has worked longer than two years, only fines of up to about $30,000 could be imposed for reasons of breach of the APTAW.

(3) Multi-layered subcontracting

According to the *Framework Act on the Construction Industry* (FACI), subcontracting is permitted only in cases where a main contractor subcontracts some tasks to specialized contractors (Article 29). However, labour-only contractors might be allowed to take part in the construction work on the condition that they were supervised by the upper contractor with license. This provision was introduced for the purpose of bringing out into the open the foremen practice in 1996, but it in effect played a role in legitimizing the illegal multi-layered subcontracting. In particular, this was often used for contractors and subcontractors to evade the employer's responsibility by hiding behind intermediaries or foremen.

Since the Korean Federation of Construction Industry Trade Unions (KFCITU) demanded on the abolition of this for past 10 years, this provision was repealed in 2007, and the contractor or the subcontractor may not use intermediaries or foremen as a nominal employer.

Further, the amended LSA in 2007 stipulates if a subcontractor who is not a "constructor" under the FACI, fails to pay wages to a worker he/she has used, the direct upper-tier contractor shall take responsibility for paying wages to the worker of the subcontractor, jointly with the subcontractor (newly inserted Article 44-2). Also, according to the revised LSA, if the main contractor subcontracts the construction project to two or more tiers of contractors, the worker may demand the main contractor to directly pay an amount equivalent to wages the subcontractor should have paid to him or her (newly inserted Article 44-3 paragraph 2). Through this revision, it becomes clear in a legal term

that a main contractor or a subcontractor under the FACI takes responsibility for paying wage to the worker hired by a labour-only contractor or a foreman.

Also, trade unions have struggled to eradicate wage arrears and delayed wages in the industry. For example, the Korean Construction Workers Union has demanded that local authorities take measures to secure wages in the construction project awarded by public organs. As a result, municipal ordinances have been enacted in three provinces and five cities up until 2011. According to municipal ordinances, local authorities should supervise contractors in public procurement to pay workers in a timely manner, and should secure wages in cases wherein contractors do not pay workers. In particular, these ordinances secure the wages of owner-operators as well as construction site workers.

In addition, social security laws have established the responsibility of a main contractor on behalf of construction workers hired by a subcontractor or an intermediary. In a case construction work is subcontracted down several levels from a main contractor, the main contractor should pay into employment insurance and industrial accident compensation insurance fund (*Act on the Collection, etc. of Premiums for Employment Insurance and Industrial Accident Compensation Insurance*, Article 9 paragraph 1).

On the other hand, subcontracted workers' unions have fought in order that the main contractor should take responsibility for safety and health at its premises. [17]

The *Occupational Safety and Health Act* (OSHA) states that "the owner of business specified by Presidential Decree, who conducts projects at the same place, shall take measures to prevent industrial accidents which may occur when those employed by him/her and those employed by his/her subcontractors work together at the same place." (Article 29 paragraph 1)

Accordingly, a business owner should take such measures, including the establishment of safety and health facilities, when employees of his/her subcontractors work at a place with a risk of an industrial accident (Article 29 paragraph 3). Also, a business owner should conduct safety and health inspections at his/her job site regularly or occasionally, together with his/her employees, subcontractors, and employees of subcontractors (Article 29 paragraph 4). A person who outsources any project to another person should cooperate adequately with the subcontractor, such as providing the subcontractor with any place to install sanitary facilities or allowing the subcontractor's employees to use his/her sanitary facilities (Article 29 paragraph 9).

3.2. Collective labour relations

As mentioned above, the Supreme Court held that a user employer also should take liability for unfair labour practices under the TULRAA, where the user employer is in position to control or decide effectively and concretely essential terms and conditions of employment of the worker.[18]

[17] For example, in 2009, the Local Seoul & Gyeonggi of Korean Public Service Union ('*Seogyeongjibu*') launched an organizing campaign targeting subcontracted cleaners at university in Seoul, with various civic group including university student organizations. Cleaners had to bring their lunch and eat it (usually cold rice) in the toilet or the shed, because neither lunch nor an access to a staff lounge was provided for them. One of the campaign slogans, "Right to Warm Lunch" disclosed this inhumane working conditions and demanded that a user-employer (a building owner) should provide cleaners with an access to appropriate staff lounges and safety facilities at workplace. This has borne fruit as a revision of the *Occupational Safety and Health Ac*t in 2011, which obliges a contracting company (a user employer) to provide sanitary facilities for employees of a subcontractor.

[18] The Supreme Court, 25 March 2010, 2007-du-8881.

It is notable that the courts have recognized a user employer who is not the party to an employment contract would be liable for unfair labour practices. Nevertheless, the Supreme Court decided that a user employer is an employer under the TULRAA, as he/she "is in position to control or decide *so effectively and concretely that he/she seems to share the right and the responsibility as an employer*."

Thus, it seems that the courts still hold a view that a user employer would take responsibility in collective labour relations exceptionally. Actually, the case of the Supreme Court decision in 2010 was such an exceptional case, as it could be arguable that an implied contract of employment existed between the user employer and the worker.[19]

Although the courts began to recognize the user employer's liability for unfair labour practice, it is still controversial issue to what extent the user employer must have an legal obligation to bargain with the union. In academic discussions, it is argued that the user employer should enter into collective bargaining to such an extent as he/she has the right to decide (i.e. working time, occupational health and safety). In other words, the user employer may refuse to bargain on subjects such as the level of remunerations and direct hiring.

This argument, however, does not fit into the reality of current industrial relation. As explained above, it is hardly possible to reach effective and meaningful collective agreements, unless the user employer enters into collective bargaining on essential terms and conditions of employment which he/she effectively controls. In practice, more and more collective agreements on those subjects are concluded between the user employer and the union representing triangular employment workers.

On the other hand, triangular employment workers are rarely allowed to conduct collective actions at the contracting company (user employer) workplace, even though this is the actual place of work. The courts, for example, have penalized union members who joined collective actions against a contracting company, ruling that such union activity is an "obstruction of business" under criminal law statutes.[20] While a user company can exert the power to terminate a contract, which results in dismissal of workers, collective actions against the user company are often banned.

For example, since September 2003, the police and prosecuting authorities have begun a series of unjust investigations specifically targeting the organizing efforts of the KFCITU local unions. The police and prosecutors accused these trade union officials of: (i) using force and coercing construction site managers of main contractors to sign collective agreements; (ii) threatening to report Occupational Safety and Health violations if the main contractor did not sign these agreements; and (iii) extorting payments as a result of these collective agreements. Up to 2006, thirteen union organizers were arrested and fined or jailed.

Following a complaint by the KFCITU and international trade union bodies, the ILO Freedom of Association Committee requested the Korean government to recognize that the relevant construction industry trade union should also be able to request negotiations with

[19] In-house subcontracted workers at Hyundai Heavy Industries Co. formed a trade union in August 2003. Shortly after the union was formed openly, all union members were dismissed and subcontractors employing union members closed down their business. Non-union subcontracted workers were rehired by other subcontractors thereafter. The union accused the Hyundai Heavy Industries Co. of unfair labour practices, arguing that the user enterprise had subcontractors closed down on the basis of union activities.

[20] The Busan High Court, 22 July 2015, 2014-no-781; The Cheonan Branch Court, 21 September 2004, 2004-kahap-525 etc.

the employer of its choice, including a main contractor, on a voluntary basis. Especially in cases such as this one, the Committee noted that it would be impossible to negotiate with each and every one of the subcontractors. Also it noted that the arrest of trade unionists may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities, and this intimidating effect is likely to be even stronger in the case of precarious, and therefore particularly vulnerable, workers who had just recently exercised their right to organize and bargain collectively.[21]

Current regulations and the judicial precedents that limit industrial relations into corporate boundaries and associate an employee status with freedom of association have motivated employers to increase triangular employment relationship. In this respect, the ILO also requested that "the Government to develop, in consultation with the social partners concerned, appropriate mechanisms aimed at strengthening the protection of subcontracted workers' rights to freedom of association and collective bargaining, guaranteed to all workers by the TULRAA, and at preventing any abuse of subcontracting as a way to evade in practice the exercise by these workers of their fundamental rights."[22]

4. Evaluation and future prospect

By legalising agency employment, Korean labour laws recognized the bifurcation between employment contracts and the subordinate relation. However, the courts and the Government still focus on whether or not a user enterprise *exercises* directions or control over the performance of work, in order to identify who is responsible for workers' rights.

The "standard employment relationship" was historically formed in the internal labour market of the vertically integrated firms in the early 20th century (Deakin 2002). In the vertically integrated firm, the most common method to control workers was instructing the performance of work 'directly'. Whereas, controlling the performance of work has become less and less important for employers, as technologies have developed and the forms of corporate organisation have changed in the late 20th century (Marchington et al. 2005).

More and more transnational corporations (TNCs), for example, build global value chains and contract out most process of production to other firms. Samsung Electronics, for example, can control workers of the suppliers as effectively as its own employees, through detailed guidelines for service, training, monitoring system and control of its suppliers. As such is the construction industry where subcontracting was traditionally used. A main contractor can secure workforce stably through labour intermediaries or subcontractors that recruit and manage workers.

When we see only individual entities separately, it is difficult to identify who should take responsibility for workers' rights, as a 'function' of the employer is performed by several firms. However, if we look into the whole value chains, it can be found that a lead company *retains* power to control over the whole chains. In this respect, contemporary forms of corporations are referred to 'vertically integrated networks' rather than 'vertically disintegrated firms' (Kim 2009).

Besides changing corporate forms, changing nature of control and dependency should be analysed at the same time, to understand precarious work. The courts normally

[21] Case no. 1865, Freedom of Association Committee, Report No. 340, 2006, paras. 775 and 778.
[22] Case no. 2602. Freedom of Association Committee, Report No.359, 2011, para. 270; Case no. 2602. Freedom of Association Committee, Report No.363, 2012, para.467.

held that a contracting company should take legal responsibility for workers' rights only where the company instruct or supervise the performance of work. Thus, the courts have seldom recognized the employer's responsibility of a contracting company, in cases where it made the subcontractor supervise the performance of work on behalf of the contracting company, or the worker had to obey service guidelines by which the contracting company instructed a standardized process of work.

However, the factor as to whether or not an employer exercises control over the details of work becomes less and less dispositive for identifying an employer and an employee. Instead, the power to decide the period of existence of the contract or the power to provide jobs (that is, opportunities for remunerations) for workers has got a significant meaning. This would be more important to workers who do not have a permanent employment contract with a particular employer, thus who have to find several jobs to make a living. Likewise, an 'independent worker' who provides her labour to several users, does not always have independency. Rather it might imply that the worker has more precarious conditions like a day labourer. In this respect, even workers who are the most deviated from the standard single employment relationship are strongly dependent upon a user, and this should be evaluated as "alienated dependence" rather than "quasi-dependence", which must be viewed from the whole networked firms (Yun 2014).

On the employer's side, using labour in an indirect way might bring out difficulties in recruiting and managing workers. There are some practices to cope with this problem. One is using labour intermediaries such as private employment agencies and exerting control over the labour intermediaries as well as workers. Another is taking advantage of the external labour market with regard to a particular trade or occupation. The more prevalent are precarious forms of employment in the industries, the easier is to recruit experienced workers in the external labour market. The cost of recruiting and training is transferred onto individual worker, and the level of wages is standardized downward at minimum wages.

As such, the unbalanced distribution of cost and risks between employers and workers is ensured over the labour market, even though an employment relationship between individual employer and worker seems indistinct like a dotted line.

Many legal systems such as Korea have limited regulatory interventions into a boundary of separate entities, and this allowed the lead company to transfer their liabilities to others downwards value chains. Nevertheless, workers have attempted to face the one that retains the real power to control over their working conditions, as shown above. To secure labour law liabilities beyond the boundary of the legal entity, right to collective bargaining and collective actions should be secured to the level of the lead company across the whole value chains.

In order to realize this principle, industrial relations institutions need to be reconstructed as follows. Facilitating collective bargaining with the 'user-enterprise' is the most effective way for resolving such questions as who is an employer and what responsibility the employer must take. While employment law could provide some regulatory answers to these questions, employers easily avoid those regulations by transforming the form of contract or corporation. On the other hand, collective bargaining could find tailored approach to improve working conditions and enhance rights at work without falling under a dogmatic boundary. Therefore, realising right to collective representation and right to collective bargaining should be considered essential for

responding to both questions, that is, "who is a worker?" and "who should take responsibility for the worker's rights?".

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