論 説

Labor Law as a Safety Net
—— Towards a New Labor Law Paradigm[1] ——

Makoto ISHIDA[2]

I. Introduction

More than 50 years have passed since labor relations in postwar Japan came to be molded by the modern labor law system. These years have seen big changes in the labor market and labor-management relations, and the labor law system itself has also undergone major changes in response. But this has not been a simple series of changes, because in terms of protecting workers' rights, these changes have in some ways expanded them, and in some ways considerably diminished them.

Overall what we are seeing under these circumstances is change in the preexisting labor law paradigm and the search for a new paradigm. In reality, however, some people in labor economics and labor jurispru-

(1) This article is based on the paper presented at the Fifth Conference of the International Network on Transformative Employment and Labor Law (INTELL), held at the University of Toronto, 22-24 September, 2000.

(2) Professor of Law, School of Law, Waseda University. L. L. M., Waseda University: L. L. D., Waseda University.

dence argue for excessive emphasis on market logic and deregulation (market fundamentalism), and completely ignore the significance of social constraints on the labor market.(3) Their arguments have considerable influence on labor law theory. However, instead of searching for a new paradigm, this trend presents the danger of dismantling labor law itself, so it should not be considered a new paradigm. For something to be called a new paradigm in labor law, it should at least assume social constraints on the labor market.

This article's main purpose is to look for a new paradigm in Japanese labor law by focusing on the safety net theory which, amid the general drift toward deregulation, has in recent years carried on a noteworthy discussion pertaining to social market constraints.

II. Present Circumstances of Labor, and Changes in the Traditional System

Japan's system of modern labor relations law got its full-fledged start with the establishment of the 1946 Constitution, and the passage of the 1947 Labor Standards Act and the 1949 Revised Trade Union Law, and the years from then to the first half of the 1970s can be seen as the period when the system of labor relations law was built and developed. The "traditional system," whose transformation is the subject of discussion these days, was more or less completed during those years. Such systems comprise the following six sub-models.(4)

(3) For example, Naohiro Yashiro, *Koyokaikaku no Jidai* (*The Age of Employment Reform*) (Tokyo, Chuo Koron Sha, 1999)

(4) Wada, H., 'Rodokeiyaku-riron no Gendaiteki Kadai (Contemporary Problems on the Labor Contract Theory)' (2000) 233 *Rodosha no Kenri* (*Workers' Right*), 4-6.

(1) Lifetime employment model
(2) Seniority-based wage model
(3) Manufacturing industry/factory labor model
(4) Male laborer model
(5) Regular employee/full-time worker model
(6) Group autonomy precedence model

This traditional system developed in correlation with the establishment of the labor relations law system while being supported by the Japanese-style labor union movement consisting mainly of company-based unions, and it has played a significant role in improving working conditions, stabilizing employment, shaping modern labor relations, and the like. But in terms of the universal rules of labor relations, there is no doubt that the traditional system consisted of highly limited rules with conditions attached. This is because while the traditional system was adequate in guaranteeing lifetime employment to male regular employees, it discriminated against temporary workers employed under fixed-term contracts, the workers at small and medium-sized companies, which have no labor unions, and marginal women workers. In that sense the traditional system had come to have elements which, as rules for labor relations, called for revision.

From the mid-1970s the traditional system was gradually pressured to make modifications, and beginning in the mid 1980s — especially after entering the 90s — its positive facet was also subjected to severe shocks. Changes during the 1990s that rapidly became apparent across the board consisted especially of increasingly severe mega-competition due to market globalization, and the deregulation policies that were implemented as a way of coping with this.

Factors that triggered these changes are:

A. Changes in industrial structure, shift to tertiary industries, increasing proportion of white-collar workers: transformation of (3)

B. More women in the workforce: transformation of (4) and (5)

C. Increasing individualism of workers, diversification of employment patterns: transformation of (6)

D. Change in company organization, outsourcing: changes in (1) and (5)

E. Rising unemployment: transformation of (1)

F. Enlarged market for job switchers: transformation of (1) and (2)

G. Individualized and more flexible working conditions: changes in (1) and (2)

In this way the traditional system underwent changes, because of which we are now looking for a new labor law paradigm. It appears that three directions are being taken in the search for a new paradigm: self-determination theory, support system theory, and safety net theory.

III. The Search for a New Paradigm

1. Self-Determination Theory

It is the self-determination theory that responded to postwar labor jurisprudence, which developed around the ideas of dependent labor and group precedence, by emphasizing worker self-reliance and human dignity, and quite early on proposing a new paradigm.(5)

(5) Satoshi Nishitani, *Rodoho ni okeru Kojin to Shudan* (*Individual and Group in Labor Law*) (Tokyo, Yuhikaku, 1992), 55-111.

This theory raised important questions by postulating the importance of workers' self-determination and respect for their intentions. It started with its view that workers' self-determination is important, but its argument in fact emphasizes the development of an institutional framework that supports that self-determination. On the other hand, however, this theory has two problems. First, because it overemphasizes self-reliance, it is in danger of being tripped up by the argument for deregulation. And second, no matter how one tries to ascertain the rational intentions of workers, the theory does not pay enough attention to labor law's own relational and organizational aspects, which cannot be reduced to worker intentions.

2. Support System Theory

Support system theory[6], a labor law model that responds to new changes in the labor market, seeks the role of labor law in the preparation of a support system whose purpose is to facilitate the transactions of workers in the labor market. Underlying this thinking is the perception that, as part of major changes occurring in the labor environment and labor market, there should be changes in the worker image that labor law should take into account, and in the way that the government intervenes in the labor market. The former, i. e., change in worker image, signifies the emergence of the self-reliant worker, while the latter, i. e., the way that the government intervenes in the labor market, means we should make the best use of the market mechanism, and curtail government intervention. On that basis the theory specifically

(6) Sugeno, K., Suwa, Y., 'Rodoshijyo no Henka to Rodoho no Kadai (Changes in Labor Markets and Problems of Labor Law)' (1994) 418 *Nihon Rodo Kenkyu Zasshi* (*The Japanese Journal of Labour Studies*), 2-15.

advocates policy measures to expand the external labor market, or the job switch market (using private job placement services, greater use of temporary workers, use of private job training services, etc.) ; in the internal labor market, regulations to deal with the more diversified ways of working (more fixed-term contracts) ; reorganization in response to more individual contracts and the merit system (more flexible working hours, increased use of the discretionary labor system, etc.) ; and the creation of a dispute settlement system to make such reforms work.

While this theory to a considerable extent brings market logic into the field of labor law, it proposes new labor law controls (such as passing a dismissal restriction law and creating a dispute settlement system) to deal with changes in the labor market. In that sense, this theory could be considered different from a simple deregulation argument based on market principle doctrine, but in many respects the deregulation aspect is prominently visible in actual labor law reform, which is strongly influenced by the argument for deregulation. The reason is that this theory sees labor law as the laws of a labor market which assumes self-reliant workers. The issue is whether the workers assumed by this theory are truly self-reliant. If not, then operating under the assumption of strong, self-reliant workers will bring about a great deal of harm. Law revisions and changes in the labor environment during these years created circumstances under which workers must negotiate individually, but there is hardly any support system to assist those negotiations. In the final analysis, labor law reform that enlisted support system theory as a powerful theoretical buttress merely provided its users arbitrarily with a powerful weapon, and in a sense this was the inevitable outcome of this theory.

3. Safety Net Theory

Safety net theory has in recent years drawn attention as a focal point for countervailing the market fundamentalist argument for deregulation. The term safety net originated with the circus, where it signified a net hung below aerial acrobats. This theory conceives the safety net as a social device in discussing the preferable form of social controls on the labor market.

But even safety net theory can be divided roughly into two ways of thinking, depending on how one conceives the safety net in its capacity as a social device.

The first type of this theory conceives the safety net as a safety device that rescues people who have fallen through the cracks of the market owing to coincidental misfortune. Underpinning this conception is a market fundamentalist belief that if society prepares a safety net just for exceptional situations, the rest of the economy can be taken care of by market competition alone. This approach is a safety net for whom we might call "market dropouts," with examples being the approach seen in the final report of the Economic Strategy Council (February 26, 1999) and the report by the Economic Deliberation Council (July 5, 1999). The Economic Strategy Council's report, for instance, conceived the safety net as "a way to 'resurrect losers' for people who had tried very hard but who had unfortunately lost to the competition or whose enterprises had failed."

By contrast, the second type of this theory conceives of a safety net as a safety device essential to maintaining the market itself, instead of as a safety device to rescue people who have fallen through the cracks of the market owing to coincidental misfortune. In this case the safety

net is an institution of trust and cooperation in which society as a whole takes over the risk that individuals cannot completely shoulder by themselves — a safety device that is incorporated deep inside the market economy, which would collapse without the safety net. We must note in particular the following two matters pertaining to this second type of the theory.(7)

First, an essential relationship between the market and the safety net is supposed. Specifically, marketizing the original production factors of labor, land, and currency that make up the market economy involve characteristic limitations for each factor, but leaving that to the market principle engenders a collapse starting at the weak places, ultimately resulting in paralysis of the entire market economy. For that reason we need something to compensate for the limitations in marketizing such original production factors, and that is the safety net. In other words, it is only when we have the safety net that the market economy can be viable.

Second, it is supposed that the safety net will function only when there are "institutions and rules" that are linked to it. The safety net has a mutually complementary relationship with the institutions and rules incorporated into the production factor market, so that the market will not function stably if the institutions and rules are left but the safety net alone is removed, or if the institutions and rules have changed while the safety net retains its old form.

I have focused on the second type of safety net from the perspective a new labor law paradigm that assumes social constraints on the labor market.

---

(7) Masaru Kaneko, *Sefty Net no Seijikeizaigaku* (*Political Economy of Safty Net*) (Tokyo, Chikuma Shobo, 1999)

IV. The Safety Net in Labor Relations

1. Significance of Type Two Safety Net Theory

As noted above, the second type of safety net theory holds that because labor is an original production factor it is always subject to a limit on its own marketization, which means that we must incorporate into the province of labor a system to deal socioeconomically with the limits to marketizing production factors, i. e., the safety net and the institutions and rules that are linked to it. The problem is: What are the safety net and the institutions and rules linked to it in the province of labor? First of all, the safety net is conceived as the ultimate safety devices of employment insurance, pensions, and other social security (insurance) systems. Specifically, these more or less correspond to a safety net covering a diverse array of categories including death, illness, pensions, medical care, and unemployment.(8) Some of the conceivable institutions and rules linked to such a safety net are the labor law system pertaining to labor unions and labor standards, and rules pertaining to employment, wages, dismissal, and the like. An additional implication is that because their relationship is mutually complementary, the breakdown of one of them would destabilize the labor market, while at the same time, even if a new safety net is instituted while leaving the institutions and rules unchanged, the new net would not function well.

But type two safety net theory says that achieving the individual's right of self-determination is possible only within the context of a

(8) Toshiaki Tachibanaki, *Safty Net no Keizaigaku* (*Economics of Safty Net*) (Tokyo, Nihon Keizai Shinbunsha, 2000) 22.

safety net in which people share their risks, and of the institutions and rules linked with that net. Rephrasing that in a way that specifically addresses the workers' right of self-determination, it says that individual workers can practice self-determination free of concerns, while using the safety net as a standard, only when there is a safety net that is supported by social partnership. This theory holds that "people feel they have exercised the individual's right of self-determination only in the context of the norm and code of a "partnership" built by people".(9)

The significance of this theory of the right of self-determination can be found in the following three points. First, it showed that the workers' right of self-determination does not exist as something isolated and disconnected; second, it showed that the workers' right of self-determination is inseparable from the social partnership that is embodied by the safety net; and third, from that perspective it criticized the market fundamentalist "theory of the right of self-determination."

2. A Problem with Type Two Safety Net Theory

But there is also a problem with this type two safety net theory despite its significance as described above. That problem is how one conceives the desirable state of partnership. As noted above, the workers' right of self-determination tends to be governed by the state of the partnership embodied by the safety net of that particular time, which means that when considering the safety net from the perspective of workers' rights, the substance of the partnership embodied by the safety net is of crucial importance.

Viewed from this perspective, in type two safety net theory we find

(9) Masaru Kaneko, *Shijo to Seido no Seijikeizaigaku* (*Political Economy of Market and Institution*) (Tokyo, Tokyo Daigaku Shuppankai, 1997), 3.

trenchant criticism of the "deregulation" and "marketization" that undermine the partnership existing heretofore, but it seems the theory is not necessarily adequate as a critical analysis of the very state of that partnership.

In terms specifically addressing the province of labor, we could describe the state of the partnership up until now as "Japanese-style employment practices." In the corporate society that has been supported by these so-called Japanese-style employment practices, which include lifetime employment, seniority systems, company-based trade unions, and collective labor management, workers have on the one hand had the guarantee of comparatively long-term employment, as well as working conditions of a certain level. As long as they commit no serious blunders, employees of large companies who work under these Japanese -style employment practices won rising wages and positions as their years of service increased, enjoyed employee welfare benefits such as housing, medical care, and recreation facilities, and received retirement pay of considerable sums. But the foundation of those Japanese-style customary employment practices is now being undermined, which is resulting in a variety of human rights violations amid corporate restructuring, primarily among middle-aged and older workers. Of course this is a serious situation, but if one looks for the causes that are undermining the foundation of these practices, one finds complex factors that cannot be reduced to simple economic causes. This is because the kind of partnership expressed as "Japanese-style employment practices" had discriminatory and oppressive aspects from the outset. Specifically, the self and the autonomy guaranteed by these practices are those only for males and regular employees, and the partnership under those practices was built on discrimination against

and oppression of female workers and non-regular workers (part-time and temporary workers)[10]. Of course the kind of partnership under which males and regular employees died of overwork[11] was harsh to these workers, and that too was one of the grave problems of this partnership as it has existed until now. This means in other words that the conventional safety net and certain parts of the institutions and rules linked to it are no longer able to guarantee social fairness in our times, and from that aspect as well the system was bound to be undermined.

Hence, we must heed the fact that even the partnership which serves as the foundation of the safety net will readily become discriminatory and oppressive if it is not linked to a commitment to universal values like human rights[12]. My argument is that the strategy of putting up a new safety net in the province of labor requires that we design a new kind of partnership to serve as the safety net's foundation, and also that we conceive new institutions and rules, but that both these efforts require a consideration of human rights. This is because, without consideration for human rights, it will be impossible to address criticism of the conventional partnership, institutions, and rules based on the market fundamentalist argument for deregulation.

---

(10) Mari Osawa, *Kigyo Chushin Shakai wo Koete* (*Beyond the Coporate-centered Society*) (Tokyo, Jiji Tsushinsha, 1993)

(11) Ishida, M., 'Death and Suicide from Overwork : the Japanese Workplace and Labour Law' Connaghan, J., Fishel, M., Klare, K., *Labour Law in an Era of Globalization* (Oxford, Oxford University Press, 2002), 219-231.

(12) Kaneko, M., Inoue, T., 'Shijyo, Kokyosei, Liberalism (Market, Public Concerns and Liberalism)' (1999) 904 *Shiso* (*Thought*), 25.

V. Quest for a New Paradigm

1. Assumptions

Two problems emerge when developing a blueprint for a new labor law paradigm while focusing on type two safety net theory. First is how we consider the state of the partnership that underlies labor law, the reason being that workers' rights are determined within their mutual relationship with the state of that partnership. Second is the question of what kind of safety net, which embodies that partnership, and what kind of institutions and rules, which are linked to the safety net, we must have.

With regard to the first, what we need as the kind of partnership that would underlie the new paradigm is not heart-and-soul, all-inclusive bonds of the "Japanese-style employment practices" or "corporate society"; instead, we need to envision a contractual partnership of "workers as they are." Indeed the labor contract, which underpins the bonds between companies and their workers, is by nature organizational, continuous, and subordinating. That is why the qualities of organization and personal dependency insinuate their way into labor contracts. But because of that, the institutions and rules that embody partnership in the province of labor must be of a nature that guarantees self-reliance, equity, and fairness for individual workers. Restating this from the perspective of human rights theory, a new partnership must be devised on the basis of the principal of equality in Article 14 of Japan's Constitution, and also with a commitment to respect for the individual and to the right for the pursuit of happiness in Article 13.

With regard to the former, it is most important that the new institu-

tions and rules linked to the safety net in the province of labor must take the place of companies in shouldering workers' risks and concerns, which increase as traditional restrictions break down. What is more, they must support the autonomy of workers while assuring that they are respected as individuals. Here I would like to put the spotlight on the currently most serious problem of dismissal, and show what needs to be done.

2. The Need for a Dismissal Restriction Law

(1) The Problem

Since the bursting of the economic bubble, employee dismissals by Japanese companies ostensibly for the purpose of "restructuring" have been rampant. Some business managers express the view that an employer's greatest mission is to guarantee employment, and that managers who cannot do this should immediately quit, but the logic of economics is without compassion, and many managers single-mindedly work on improving their companies' health by adjusting employment. Under these circumstances, there is a great deal of incipient turmoil in the legal doctrine of abusive dismissal, which has been shaped as precedent theory.[13]

(13) Shortly after the Labour Standards Law went into effect, the theory was advanced that a dismissal required a proper reason to be valid. But this theory was not consistent with the structure of the Labour Standards Law which required only a 30-day notice of dismissal. Attempts were, therefore, made instead to apply the general principle of an abusive exercise of a right. Thus, substantially the same result was reached by an accumulation of a majority of judicial decisions which established the legal principle of the abusive exercise of dismissal rights. The Supreme Court formalized these legal principles by declaring that "even when an employer exercises its right of dismissal, it will be void as an abuse of the right if it is not based on objectively reasonable

As the labor market changes and as companies busily reorganize themselves, more than anything else we need laws that guarantee employment to workers so as to protect their human rights, and create environments where they can work free of concern and practice self-determination. As the final element of the safety net, we need to build a systematic social safety mechanism that includes extending the period of benefits paid by employment insurance, and more substantial vocational training. Following is a somewhat detailed discussion of restricting dismissals.

(2) Dismissal Restriction Law and the Controversy Surrounding Dismissal

The only restrictions on dismissal in Japan's labor laws are restrictions pertaining to advance notice of dismissal (Labor Standards Act, Articles 19 and 20), prohibition of discrimination in dismissal (Labor Standards Act, Article 3 ; Trade Union Law, Article 7 ; Equal Employment Opportunity Law for Men and Women, Article 8), and the prohibition of dismissal as a way to sanction workers for exercising their rights (Labor Standards Act, Article 104 ; Childcare and Nursing Care Law, Articles 10 and 16). However, legal doctrine of abusive dismissal,

---

grounds so that it cannot receive general social approval as a proper act" (Nihon Shokuen Case, Supr. Ct., 2nd Petty Bench, Apr. 25, 1975, 29 Civ. Cases 456.). Thereafter, the Court clarified the "propriety princple" in this legal doctrine by stating that "even where there are normal reasons for a dismissal, an employer does not always have the right to dismissal. If, under the specific circumstances of the case, the dismissal is unduly unreasonable so that it cannot receive general social approval as a proper act, the dismissal will be void as an abuse of the right of dismissal" (Kochi Hoso Case, Supr. Ct., 2nd Petty Bench, Jan. 31, 1977, 1977, 268 Labor Cases 17.). Kazuo Sugeno, *Japanese Labor Law* (Tokyo, University of Tokyo Press,), 401-402.

which is the doctrine that restricts the dismissal of workers, has developed in the form of precedent theory. This doctrine requires an employer "objectively resonable grounds" and "general social approval as a proper act" for worker dismissal and strictly limits it.(14)

Recently there is an argument seeking a reappraisal of this legal doctrine. The argument claims that the doctrine should be relaxed because it is too strict. Its contention is that, at times when the unemployment rate climbs or when it continues at a high level, entrenching a strict legal doctrine of abusive dismissal, such as that existing heretofore, will make companies refrain from hiring, which would in fact be detrimental to employment, and therefore confers no benefits on workers currently employed, who have no idea when they might be dismissed.(15) This is a theory of solidarity between the employed and the unemployed which at present is advocated by few labor law scholars,(16) but it is anticipated that henceforth more people will subscribe to this argument.

In fact, such discussion has already arisen in Europe where the unemployment problem is a serious one. In Germany, for instance, labor economists and a few labor law scholars have espoused such views, and the amendment of the Kundigungsschutzgesetz (Dismissal Restriction Law) under the conservative and centrist former government reflects this thinking. But predominating now is the criticism that this argument is a hypothetical theory, and that in reality there is a rash of

(14) See above, n. 13.

(15) Otake, F., 'Ko Shitsugyo Jida no Koyo Seisaku (Employment Policy under the Age of High Unemployment)' (1999) 466 *Nihon Rodo Kyokai Zasshi* (*The Japanese Journal of Labour Studies*), 14-26.

(16) Ouchi, S., 'Rodo hogo ho no Kadai (Prospects of Labour Protection Laws)' (1999) 470 *Nihon Rodo Kyokai Zassi* (*The Japanese Journal of Labour Studies*), 35.

restructuring-related dismissals that will never lead to an employment increase.[17] In fact it is perhaps better to believe that the situation cited by this criticism actually exists. According to the argument for relaxing the controls that restrict dismissals, employers can indeed adjust employment so as to accommodate business conditions, but our concern is that this will relax the morals of employers pertaining to guaranteeing employment and as a consequence lead to the devastation of labor law, which should consider guaranteeing employment to be important.

Incidentally, people have heretofore tried to use the customary practice of lifetime employment, which is an outmoded partnership, to fine grounds for the development of legal doctrine on restricting dismissals. But the relationship between this doctrine and partnership needs reexamination because even countries that do not have lifetime employment practices like Japan's have dismissal restrictions like those in Japan.

Seen from the doctrine of human rights, dismissal restriction can be elicited from the guarantee of the right to work, found in Article 27 of Japan's Constitution, respect for the individual, found in Article 13, and from the organizational and continuous nature of labor contract relations.

Incidentally, in this connection the best way to achieve solidarity of the employed and unemployed is not to make regular employees into non-regular employees, or to increase the numbers of non-regular employees, but to practice work-sharing by reducing overtime work and giving all employees annual vacations. And with the sum of such efforts, we should perhaps consider creating a new partnership for

(17) Peter Hanau, *Deregulierung des Arbeitsrechts—Ansatzpunkte und verfassungsrechtiche Grenze*, (Berlin, Walter de gruyter, 1997), S. 5-10.

today's guarantee of employment.

Even if such new normative grounds are provided for restricting dismissals, they must become well established as institutions and rules. That is the reason that legislation of a Dismissal Restriction Law is something Japan must do.